REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2012

FRANCE

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State of affairs up to 1st January 2013

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0 INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

Laws are the main source of rights in France. They may be proposed by Government (bills) or Parliament (proposed laws), which is made up of two chambers, the National Assembly and the Senate. Before a law is enacted by the President of the Republic, the Constitutional Council may, at the request of members of Parliament, verify its consistency with the Constitution. The effective implementation of enacted legislation also depends upon the adoption by the Conseil d'Etat (hereafter Administrative Supreme Court) of secondary legislation such as decrees.

International Conventions ratified by France can be directly invoked before the courts who have the duty to control conformity of national legislation. France has ratified all ILO and UN Conventions relating to anti-discrimination, among which the Convention on the Elimination of all Racial Discrimination (28/07/81), the Convention on the Elimination of Discrimination against Women (03/09/81), The Convention on the Rights of the Child (06/09/90), the Convention on the Rights of Persons with Disabilities (18/02/2010), as well as the European Convention of Human Rights and its Protocols, except protocol 12, and the Revised European Charter.

The jurisdictional order is made up of two branches:

- Administrative courts have jurisdiction over all administrative litigation. Their highest court is the Conseil d'Etat (Administrative Supreme Court);
- Judicial courts have jurisdiction over criminal and private law. Their highest court is the Court of Cassation, which is made up of several Chambers among which the Civil Chambers for general private law, the social Chamber for labour law and the Criminal Chamber for criminal law.

France is traditionally a unitary state but it is becoming increasingly decentralised. It is divided into 22 regions, 100 departments and approximately 36 000 parishes:

Constituency:	Executive power:	Assembly:
Region	Regional prefect	Regional council
Department	Prefect	General Council
Commune	Mayor	Local council.

The prefect and regional prefects are appointed high civil servants who coordinate local action of the central state under the supervision of government and the hierarchical control of the Minister of Interior.

The policies relating to the banning of discrimination are implemented above all by the Ministry of social affairs, the Ministry of labour, and the Ministry of Interior since November 2010. Certain local authorities, mostly departmental, also have an important role to play.

In private law, the general legal regime relating to discrimination is to be found in codified law i.e. the Labour Code (LC), the Penal Code (PC), the Civil Code (CC), and the Law no 2008-496 of 27 May, 2008 implementing Community Law in the fight against discrimination (hereafter Law no 2008-496).

Administrative law, on the other end, is mostly jurisprudential, and based on the implementation of a formal theory of equality.

In addition, there is legislation, which includes provisions prohibiting discrimination in specific areas, such as for example article L1110-3 of the Code of public health with respect to the right to medical assistance.

Since the abolition of slavery (1848) and of punishment by "civil death" (1854), French law has, in theory at least, considered all human beings to be equal in legal status and in dignity.

Historically, French legislation first considered racism and discrimination as aspects of freedom of expression and of the necessary legal restrictions thereto. A law of 1 July, 1972 modified the law of 29 July, 1881 on the freedom of the press by introducing aggravated penalties for racist speech or writing. Subsequent legislation has amended and enhanced this framework by clarifying its terms and extending its scope to acts as well as verbal utterances.

The key to the traditional French legal approach to racism and discrimination is a characteristic interpretation of the principle of equality in reference to an abstract universalistic framework, based on the philosophical principles envisaged as an aspect of statehood, nationhood, and citizenship.[1] Since the Second World War, the long-standing abstract principle has been enshrined in a range of instruments, including the Constitutions of 1946[2] and 1958 and the major international human-rights conventions as incorporated into French law,[3] as well as comprehensive criminal penalties against racism and xenophobia. The resulting French approach has developed along two complementary lines: the condemnation of any reference to

[1] As in other European countries, exceptions to this general principle can however be found in the former legal framework of colonialism. Cf. the 1996 report of the Conseil d'État, Sur le principe d'égalité, La Documentation française, 1998, p. 15.
[2] While the Constitution of 1946 has been abrogated, the general principles proclaimed in its preamble were explicitly incorporated into the Constitution of 1958, and remain an important source of constitutional law.
[3] Mireille Delmas-Marty, Libertés et droits fondamentaux, Paris, 1996, p. 9-10.

any concept of "origin" and the refusal to use criteria of "origin" for policy and administrative purposes.[4]

French popular understanding of the repression of discrimination relies heavily on the symbolism of criminal punishment, in which the perpetrators have, above all, violated the principle of human dignity. The emphasis put on criminal law is also related to institutional and procedural factors: the ability of a victim to obtain evidence is facilitated in criminal cases by the inquisitorial powers of the enquiring judge (juge d'instruction), whereas, as will be discussed later on, it may be very narrowly circumscribed in civil cases. Nonetheless, under the influence of European law, there is increasing interest in labour law, civil law and administrative law.

The broader principle of non-discrimination as applicable to administrative, civil and labour law, has been introduced more recently and largely derives from EU law. Initially incorporated in statute in 1982 at the occasion of the transposition of European directives relating to sex discrimination,[5] it has been extended since 1998 to the whole range of labour law.

While equality and non-discrimination are, at a purely abstract and descriptive level, intimately related, the legal principle of non-discrimination is foreign to the French legal tradition and conflicts in some respects with the principle of equality as enshrined in French public law. The universalistic conception of equality is inseparable from the French conception of democracy, which affirms that the law, as the expression of the general will, should be identical for all and solely and exclusively authoritative with regard to the rights and duties of citizens. Such legal uniformity is, on this conception, the only effective bulwark against the despotism of some individual or section of the people. It follows that, with regard to access to public "dignities, positions, and employment", no distinctions other than those of "capacity, virtue, and talent" are relevant.[6]

In French law, as interpreted by both the administrative and constitutional courts, rules are judged to meet the requirement of equality if they are the same for all. In theory, exceptions to the generality of the law are by their very nature illegal, and the principle of equality is exhaustively expressed by equality before the law.

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[4] The phrase "origin" covers what in other countries might be referred to as "identity" or "membership" (of, e.g., an ethnic or racial group) but interprets it in a rather different way. The underlying debate is of considerable sociological and legal significance but cannot be addressed here.

[5] Article 1 of Law n° 82-689 of 4 August 1982 (known as the Auroux Law) inserted in the Labour Code a new article L122-45, which prohibits disciplinary action against or dismissal of an employee on the grounds of "origin or ethnic, national or racial belonging [appartenance]". Article6 of Law n° 83-634 of July 13 1983, which related to the rights and duties of civil servants, restated the prohibition against distinctions between civil servants on the grounds of their "opinions (…) or ethnic belonging". Law n° 83-635 of 13 July 1983 transposed European Council directive 76/207/CEE relating to equal treatment at work of men and women.

[6] Cf. Declaration of the Rights of Man and Citizen, 1789, article VI

Needless to say, French law includes a wide range of rules that define differential treatment for diverse circumstances. In particular, such distinctions are essential to the very nature of the welfare state, and they may also be based on public policy in a number of other areas. The relevant categories are, however, accepted only to the extent that they rely on neutral criteria devoid of identity content such as socio-economic considerations.[7] Specifically, no circumstances are considered to justify differential treatment on grounds of "race" or "origin". In its case law, the Constitutional Council has recognized only the French people, without distinction of origin, "race" or religion, and the law has consistently refused to admit such criteria as legal categories.[8] Thus, no section of the French population may claim to be a "people", a "minority", or a "group", with cultural or other rights attaching to such status, and cannot propose legal frameworks constructing such categories.

The law grants to all individuals, and to their beliefs and allegiances, its uniform and impartial protection, but does so solely to them as individuals. For legal purposes, groups defined by such beliefs or allegiances simply do not exist.[9]

As a consequence, France has systematically rejected clauses in international conventions or declarations that imply that individuals should be granted rights on the basis of their membership to a minority, thus constituting a legal category on the basis of origin.

As regards the Framework Convention for the Protection of National Minorities drawn up by the Council of Europe, which commits signatory states to the recognition of national minorities, the *Conseil d'État* considered, in its advice to the government of 6 July 1995, that the Convention was incompatible with the Constitution.[10] However, on 21 July, 2008, Government has passed a Constitutional Law modernising rules of Parliament and the State[11] that could lead to evolutions. At Article 40 it creates article 75-1 recognising that Regional languages form part of French heritage. It is important to note that the Constitutional Council (DC-99-412 of 15 June, 1992) had refused the ratification by France of the European Charter of regional and minority languages

Since the last ten years, lobby groups have been organising within political parties, publishing reports and holding debates on the paramount necessity of addressing problems of racial discrimination in employment and access to housing, which afflict the population of North African and African origin and pursuing a political shift toward

[7] Gilles Pelissier, Le principe d'égalité en droit public, Paris, LGDJ, 1996 ; Conseil d'État, Sur le principe d'égalité, Paris, La Documentation française, 1996.
[8] C.C. May 9, 1991, no. 91-290.
[9] See the Conseil d'Etat's judgments of July and November 29 2002 voiding a ministerial instruction (circulaire) relating to bilingual Breton-French "immersion" teaching in Diwan schools (suits n° 248192 and 248204 brought by the Conseil national des groupes académiques de l'enseignement public).
[10] CE, Gen. Ass, 6. July, 1995, no. 357-466, http://www.conseil-etat.fr/media/document//avis/357466.pdf.
[11] Loi constitutionnelle de modernisation des institutions de la Ve République (Constitutionnal law modernizing the institutions) http://www.assemblee-nationale.fr/13/ta/ta0-14.asp.

the promotion of diversity. However, resistance to what is perceived as community based analysis of social tensions persists and constitutes the core of very strong ideological orientations within the institutions and political parties.

The refusal to use the criteria of "origin" for legal purposes, on the basis of a "universalistic" conception of equality, naturally does not entail that such criteria are of no social significance. In recognizing and addressing racism and discrimination, French policy must work within the differential categories that are judged to be legally and philosophically acceptable. It is as poor, young or old people, as women, as inhabitants of socially deprived areas, and so on, that the victims of racism and discrimination may benefit indirectly from programs that may, indeed, be defined with their specific concerns in mind. What is both legally impossible and socially unacceptable, on the other hand, is to design policies that explicitly target beneficiaries in terms of their "origin", their "identity" or their "ethnic group".

Much of the practical content of the legal principle of equality is to be found in administrative case law, where it serves to evaluate, in an ongoing and routine way, the full range of delegated legislation and administrative decisions. Administrative jurisprudence has developed historically around three dimensions of equality – with respect to taxation, access to public services, and public burdens and obligations – which, since 1946, have been constitutionalized as "general principles of law".[12]

In France, since most of the legislation is transversal for all grounds of discrimination, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. The Social Chamber of the Court of Cassation began to apply the shift in the burden of proof to discrimination cases related to trade union activities in 1995, and the Administrative Supreme Court adopted a similar framework in administrative law in 2009, in a trade union case as well. Generally speaking, whether or not they apply EU law, they seldom refer to the EU directives.

The Labour Code has been re-codified, i.e. reorganised without modification, by the Law no 2004-1343 of 9 December, 2004 and the reordering of its disposition is effective since 1 May, 2008.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

[12] Preamble of the Constitution of 1946, paragraph 1.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.
This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

Directive 2000/43 was initially transposed by the Law no. 1006-2001 of 16 November, 2001 (hereafter Law of 16 November, 2001), the Law of Social Modernization no 2002-73 of January 17, 2002 (hereafter Law of 17 January, 2002), the Law no 2004-1486 of 30 December, 2004[13] creating the specialised body – High Authority Against Discrimination and for Equality- and completing transposition of directive 2000/43, (hereafter Law HALDE):

Further to the Commission's infringement procedure, the Government has passed the Law no 2008-496 of 27 May 2008,[14] completing transposition of Directives 2000/43, 2000/78, 2002/73, 2004/113 and 2006/54 : this Law amends the Labour Code, the Law of no 83-634 of 3 July, 1983 on the Rights and Obligations of Civil Servants (hereafter Law no 83-634), the Law no 2006-1446 of 30 December 2004 and the Penal Code.

In 2011, the Organic Law no. 2011-333 of 29 March 2011 creating the constitutional authority of the Defender of Rights repealed the Law no 2004-1486 of 30 December, 2004[15] creating the specialised body – High Authority Against Discrimination and for Equality. The French Equality body (HALDE) was merged while keeping similar missions and powers in the Defender of Rights, a single body incorporating the French Ombudsman (Médiateur de la République), the Defender of Children and the National Commission for Ethics in Security Services (CNDS).

13 http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20041231&numTexte=3&pageDebut=22567&pageFin=22570.

14 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783&fastPos=1&fastReqId=780500433&categorieLien=cid&oldAction=rechTexte.

15 http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110330&numTexte=1&pageDebut=05497&pageFin=05504.

The Law no 83-634 regulating employment law in the public service, which was amended to cover discrimination by the above mentioned transposition legislation, states at article 3 that, in conformity with article 64 of the Constitution of 1958, it does not cover the status of Magistrates who are not considered as civil servants. Ordinance no 58-1270 of 22 December, 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench..

Moreover, public agents working within Parliament are as well not subject to the Law no 83-634 and are also governed by application of article 3 of the Law by separate in-house rules of Parliament. Finally, all contractual public agents which hold one of the various status that are excluded from the application of the Law no 84-16 of 11 November, 1984 on the status of contractual agents at article 3 paragraph 5, are also excluded from all protections against discrimination of public agents provided by the Law no 83-634. All these texts have not been amended to implement directive 2000/78 and do not foresee any protection against discrimination on any grounds, and it is important to note that all public agents that are not covered by transposition do not benefit from the right to reasonable accommodation in case of disability. In a matter dealing with discrimination based on union activities, not covered by the EU Directive 2000/78, Petitioners argued the applicability of anti-discrimination law to magistrates by raising direct application of Directive 2000/78. This argument was made in order to further support that, given the protection of magistrates against discrimination in general, the extension of protection against discrimination on the ground union activities that had been decided in favour of civil servants was to be applied.

The Administrative Supreme Court on 30 October, 2009 (infra), reversed previous jurisprudence (CE Assembly, 22 December, 1978, Cohn-Bendit) and concluded that, in the face of the failure of the French government to implement Directive 2000/78 in the legislation applicable to the status of magistrates, Directive 2000/78 was to be directly applied when sufficiently precise, in determining the scope, content and rules of implementation of the legal protection against discrimination applicable to magistrates. It however concluded that in the case at hand it was not applicable while agreeing to extend protection against discrimination to union activities.[16]

With respect to the status of the army, France has availed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability.

The definition of direct discrimination still does not include the possibility to proceed by way of hypothetical comparison. It appears not to comply with the directive.

[16] http://www.conseil-etat.fr/cde/node.php?articleid=1839.

The Law n° 2008-649 completing transposition of the directives extends the definition of discrimination to instructions to discriminate and to harassment without requiring repeated acts (Article 1).

The definition of the burden of proof only requires in defence that defendant establish that the decision is objective and non discriminatory, and does not require that defendant establish proportionality and necessity, which seems to be in breach of the directive.

It extends the protection of the law against discrimination in relation to affiliation and membership in a trade union or professional organisations, to access to employment, to access to the professions, to non-salaried workers, to all grounds prohibited by the directives (article 2 and 5) in the private and public sectors for all article 19 par. 1 TFEU grounds.

It completes the framework of the protection against victimisation for all article 19 par 1. TFEU grounds (article 3). However, this definition provides no indication as to the applicable burden of proof and seems to remain inadequate.

Whereas in former legislation the French State had not prevailed itself of the possibility to provide for exceptions based on professional requirements, except on the ground of age, it adds a paragraph to the Labour Code that allows a characteristic based upon any of the prohibited grounds to be presented by the employer as a professional requirement as long as "*its objective be legitimate and the requirement be proportionate*" (article 6).

In relation to disability, transposition has been completed by the Law no 2005-102 of 11 February, 2005.[17] The law translates the terms "reasonable accommodation" by those of "all necessary measures" (*mesures nécessaires*).

The obligation to provide reasonable accommodations, defined at Article L 5213-6 of the LC does not find application in reference to the situation of a person meeting the general definition of disability at article L114 of the Code of Social Welfare (CSW), but is subject to the additional requirement that the disabled worker form part of the group targeted by the employers' "quota obligation of employment" and be listed in article L5212-13 LC. The scope of the right to reasonable accommodation has not been amended by Law no 2008-496. It therefore benefits only to employees who have received from official institutions, a status of disabled worker, to those who have suffered from an employment accident procuring a disability superior to 10% and who receive compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans. Therefore, non-registered disabled people, non

17 http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20050212&numTexte=1&pageDebut=02353&pageFin=02388.

salaried disabled workers and disabled persons who are members of the professions are still not covered by the obligation of reasonable accommodation.

The age discrimination requirements of directive 2000/78 have been implemented by the general legal regime of the Labour Code and the Penal Code, thus covering salaried workers and non-salaried activities. It is also addressed in Law no 2008-496 discussed above, thereby benefiting from all legislative improvements. In addition, article 6 of Law no 2008-496 introduces precisions as to what are, in the Labour Code, authorized differential treatments based on age, by imposing a requirement of proportionality and by providing a list of examples of what are objective and reasonable objectives, such as the health and safety of workers, unemployment compensation, access to the workforce.

A major reform of all time limitations was adopted by the Law no 2008-561 of 17 June, 2008,[18] reducing the time limit to institute all personal and moveable property actions from 30 years to 5 years (article 2224 Civil Code). This reform entails an important regression on the scope of the protection against discrimination.

The HALDE has adopted two deliberations (2007-372 and 2009-372) addressed to Government in order to denounce the condition of Travellers, who have a derogatory administrative status that submits them to controls and limits their rights, and Foreign Romas, who are denied the rights of other migrants and European Union citizens. These denials of their fundamental political, civil and social rights violate a number of International conventions and of Directive 2000/43 (infra section 7h). The Defender of Rights has followed in 2011, by adopting Decision R 2011-11 reiterating the recommendation of the Halde concerning the status of Travellers in order to modify existing conditions of registration on the voting lists from a condition of designation of administrative residence in the town of three years, to the common law rule of six months applicable to all.

On 5 October 2012, the Constitutional Council decided that the scheme provided at article 7 of the Law no 69-3 of 3 January 1969, requiring persons without domicile to be registered through designated domiciliation and that they hold specific papers as a result, is not unreasonable given it is not based on their origin but their travelling situation and that there is a need for the state to put in place a mechanism to regulate access to rights through domiciliation, and be in a position to reach its population (QPC n° 2012-279 QPC).[19] Moreover, the quota limiting freedom of travellers to elect one's city of domicile to a representation of 3% of the population is not a restriction to freedom to select the place where they choose to live (liberté d'installation) since travellers are not required to live in the city they designate.

[18] http://www.assemblee-nationale.fr/13/dossiers/prescription_civile.asp.
[19] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-279-qpc/decision-n-2012-279-qpc-du-05-octobre-2012.115699.html

However, articles 4 and 5 of the law subjecting travellers without regular employment and mean of income to an obligation to report to the Departmental authorities of the Ministry of Interior, police controls and potential penal sanctions in this regard create a difference in treatment with other travellers who have regular income and a violation of the right to freedom to come and go on the national territory which is contrary to the constitution. In addition, by imposing three years of registration in a city before being registered on electoral listings article 10 par. 3 is contrary to the principle of equality of citizens who have not been declared unable, in access to vote. It declared the abrogation of these provisions to be effective immediately.

The reform on the status of Travellers, further to the decision of the Constitutional Council was announced for the legislative agenda of 2013. Minister of Interior has not manifested its intentions.

At this point the State implements a systematic policy of expulsions from illegal occupation of land and has not put in place the conditions of humanitarian support of the expelled ROMA families proposed in Ministerial Instruction of 28 August 2012.The DIHAL (Inter ministerial Delegate for lodging and access to housing of the Homeless and persons with inadequate housing) was given a mandate to coordinate the State's policy on the integration of Roma without housing and resources, and to put in place for the spring of 2013 the conditions allowing proper implementation of the Ministerial instruction of 28 August 2012.

Overview

Civil society is shocked and helpless in the face of the importance and range of the problem, particularly as regards racial discrimination and assuring a true integration of persons with disabilities. There is a significant evolution of public awareness and a substantial mobilisation of actors in favour of the promotion of equality.

Further to his election in 2007, the former President of the Republic has given mandate to Simone Veil to hold a consultation on the amendment of the Constitution to include the concept of diversity and make recommendations in order to make positive action possible. Her report, dated 17 December, 2008, concluded that the Constitution did not require any evolution and favoured positive action based on indirect territorial and socio economic criteria. On 18 December, 2008, the former President of the Republic nominated Yasid Sabeg High Commissioner on diversity, in order to attempt for the third time to introduce means to further the possibility to put in place positive action measures on the ground of origin (since race and ethnicity do not exist).

After a three months consultation process on the measures to be taken in order to ensure the promotion of diversity on the ground of origin, on 19 June, 2009 Mr Sabeg submitted 76 recommendations for structural actions pursuing equal opportunities for

all, at every stages of life, in order to tackle all discriminations but putting particular emphasis on origin.[20] In order to evaluate the potential use of data and statistics a mandate was given to Mr François Héran, former director of INED (National Demographic Studies Institute), to organise a consultation and submit his recommendations. His report was submitted on 8 February 2010 and recommended the creation of a statistical observatory to be integrated within the French Equality Body.[21]

Further to these recommendations, the HALDE and the French data protection agency, the Commission nationale de l'informatique et des libertés (CNIL), have initiated a working group to elaborate and publish guidelines for human resources managers in relation to diversity management. This project was continued under the Defender of Rights and these guidelines were published and promoted all through 2012 (see section 2.3.1).

As will be discussed in more details in section 7 of this report, there has been a complete institutional reorganisation leading to the absorption of the French Equality Body, the HALDE, in a larger independent Agency, the Defender of Rights, which is operational since May 2011, and cumulates the missions and powers of the HALDE, the Mediator of the Republic, the Defender of Children and the Commission for Ethics in the Security Services.

In the context of this reorganisation, the propositions of Messr Sabeg and Heran to create an observatory were not followed and the position of High Commissioner occupied by Mr Sabeg was not maintained in the Ministerial cabinet since its renewal in November 2010 or by the newly elected socialist majority in the Government of Jean Marc Ayrault.

Moreover, since November 2008, issues relating to discrimination and integration which had always been under the authority of the ministry of social affairs before being attributed to the Minister of Immigration in 2007, have been transferred to the Minister of Interior and since then no longer seem to form part of the governmental political agenda.

More cases reach trial and are successful but they concern mainly direct discrimination in penal or labour cases on the grounds of sex, age, origin and disability[22] relating to access to housing and employment. Indirect discrimination is still a misunderstood concept. The traditional formal theory of equality and the concept of fault in civil matters remain the ultimate reference. Systematic implementation in France is therefore still facing cultural and technical barriers. Anti-

[20] http://www.lesechos.fr/info/france/300348120-le-rapport-sabeg-sur-la-diversite.htm.
[21] http://combatsdroitshomme.blog.lemonde.fr/2010/02/05/halte-a-la-comeddie-communique-du-carsed-et-rapport-heran-du-comedd/rapport_comedd_v-finale_04-02-10-11265292406pdf/.
[22] LANQUETIN, GREVY, Op. Cit. Bilan de la mise en oeuvre de la loi du 16 novembre 2001, rapport final DPM, December 2005

discrimination law is perceived by legal actors as an Anglo-Saxon import undermining traditional civil Law.

Criminal law only sanctions direct discrimination when intent to discriminate is proven. It is not subject to the requirements of EU law.

There are many barriers to systematic implementation in France. Legal action is not considered as a legitimate mean of advocacy. Very few NGOs are knowledgeable in the management of judicial recourses[23] or have the means to pursue judicial cases.

Social scientists who work on discrimination issues are not familiar with legal definitions. Moreover, Trade Unions are not mobilized on discrimination and seldom support workers facing discrimination problems.

Most judicial actors in civil matters do not perceive rules of evidence as a central aspect of the civil judicial process and lack experience in making a systematic use of them. In addition, the traditional formal theory of equality and the concept of fault in civil matters remain the ultimate reference and there is significant resistance at political and judicial level to the concept of indirect discrimination that is perceived as a mean to sanction liability without fault and import Anglo-Saxon communautarism. In this perspective, the Equality body (HALDE and its successor the Defender of Rights) has concentrated important efforts to promoting training for legal actors, but it does not have the resources to implement the required massive formal training for lawyers and professional judges (magistrates).

Finally, the philosophical value of secularism, which is perceived as a strong French Republican value, has seen its impact renewed since consultations on the integral veil and is held to justify a significant resistance to the implementation of the right to express one's religious beliefs in the public sphere, on the part of actors of civil society, the public service and all political parties. The Resolution TA no 692 adopted by Parliament on 31 May 2011 on the principles of secularity and religious freedom,[24] shows the pressure of civil society and the political discourse to increase the right to impose rules of neutrality on the ground of secularity in the non private sphere.

The scrutiny of French politics on the right to express one's religious beliefs is finding echo before national courts in arguments promoting the idea of extending the duty of

[23] In the field covered by all the anti-discrimination directives, including discrimination based on sex, there are only three NGOs specialised in bringing about legal action. The first is acting in the sector of sexual and moral harassment. It's name is Association contre la violence faite aux femmes – Association fighting violence against women - AVFT. The second in the legal rights of foreigners : the GISTI (Groupe d'information et de soutien des immigrés – Information and Support Group for Immigrants). Generalist NGOs mostly intervene in penal actions, but do not focus their activity on legal actions. The third is a Local NGO based in Lyon, that provides legal assistance on selected cases alleging discrimination (Association de lutte contre toute forme de discrimination - ARCAD: http://www.arcad-discrimination.org/).

[24] http://www.assemblee-nationale.fr/13/ta/ta0672.asp.

neutrality of public agents to private sector employees. This tendency is translated in a decision of the Versailles Court of Appeals which concluded that there was a duty of neutrality of employees in a day care centre in reason of the centre's statutes underlining its mission toward disadvantaged children and the social reintegration of women of the neighbourhood. Neutrality was justified as a mean to ensure hospitality to all.[25] This decision is presently pending before the Cour de Cassation (decision expected in March 2013 in the Baby Lou case). Moreover, the refusal to allow a mother wearing the Islamic veil to accompany public school children in out of school excursions maintained by the Montreuil administrative court case, is also pending in appeal.

The Defender of Rights has pursued HALDE's activities in organising seminars for student magistrates at the Magistrates' National School (Ecole nationale de la magistrature) that is responsible for initial training and ongoing professional training, for professional judges and lawyers.

However, effective implementation of discrimination law entails considerable modification of the practice of judicial actors and of the perception by NGOs and Trade Unions of social dialogue and their function in the judicial process. Funding of NGOs and trade unions to pursue test cases and targeted training of judges, lawyers, trade unions and NGOs in this regard seems indispensable. The HALDE had been conceived to answer some of the evidentiary problems resulting from judicial practice in civil matters and to contribute to a more systematic repression of discrimination.[26] It is in this context that the Law on Equal Opportunities of 31 March, 2006 had conferred to the HALDE a power of penal transaction to increase the number of minor acts of discrimination receiving sanctions under criminal law which have been transferred to the Defender of Rights (see section 7).

The HALDE has contributed to the evolution of judicial practice and Appeal Courts have been more effective in implementing discrimination law in the last few years. They have followed HALDE's observations in a majority of cases. To date, the Equality body's observations before the courts are received favourably in 70 % of cases. These activities have been pursued in the Defender of Rights and the rate of success has been maintained.

The Equal project focused on the training in discrimination law of Labour Court non-professional judges in Paris between 2004 and 2008, has impacted on the practice of the courts in terms of providing access to evidence and implementing the shift in the burden of proof. However, there are 271 such courts on the French Territory and a tremendous turn-over of elected judges. Training of these non professional judges is funded on an ongoing basis by the Ministry of Justice (article 513 LC) but managed

[25] Versailles Court of Appeal, 27/11/2011, no. 10/05642, Baby Lou
[26] Law n° 2006-396 of 31 March 31, 2006 for Equal Opportunities, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539&fastPos=1&fastReqId=201891393&categorieLien=cid&oldAction=rechTexte.

by the social partners' local organisations, which have full discretion to determine the content of their training. Since 2004, they have put in place trainings on discrimination law that reach approximately 200 such judges a year, on a total of 15 000.

0.3 Case-law

*Provide a list of any important case-law in **2012** within the national legal system relating to the application and interpretation of the Directives. (The **older case-law mentioned in the previous report should be moved to Annex 3)**. This should take the following format:*

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).
➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law falling under both anti-discrimination Directives (Please note that you may include case-law going beyond discrimination in the employment field for grounds other than racial and ethnic origin)

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

Disability:

Name of the court: TGI Bobigny and Paris Court of Appeal 12/01781
Date of decision: 13 January 2012 (TGI) 5 February 2013 (Paris CA)
Name of the parties: Gianmartini et al vs. Easyjet
Reference number: TGI no 0833980671 and CA no 12/01781 (no weblinks)
Brief summary: Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air forbids, in article 3, Air transport carriers to refuse to embark a disabled person on the ground of disability or reduced mobility. However article 4 provides that an Air carrier may refuse boarding "in order to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned". Easyjet adopted a policy that result in systematically requiring that disabled persons with reduced mobility be accompanied, thereby refusing boarding to unaccompanied disabled persons with reduced mobility. Three disabled persons who were denied the right to embark on the ground that they were not accompanied filed penal complaints against Easyjet.

On 13 January 2012, the Bobigny Correctional Court found that the systematic refusal of the Company to allow unaccompanied disabled persons to board a plane without verifying their concrete capacity to travel alone, in consideration of security requirements constitutes discrimination on the ground of disability. The Court of Appeal of Paris maintained the Bobigny Correctional Court decision and condemned Easyjet to a fine of 70 000 Euros and to the publishing in the journal "Le Monde" of the decision. The subcontracting operating company was condemned to a fine of 25 000 Euros. Both companies were also jointly condemned to compensate Plaintiffs of an amount of 2000€ each in damages and 1 euro to the NGO Association des Paralysés de France. Easyjet lodged recourse before the Cour de cassation.

Name of the court: Conseil d'Etat
Date of decision: 22 June 2012
Name of the parties: Communauté d'agglomération du pays de Voironnais
Reference number:no 343364
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026052824&fastReqId=1584584273&fastPos=1
Brief summary: Article 45 of the Law of 11 February 2005 on the rights of disabled persons provides for complete accessibility of public transportation, except for some railways systems by 12 February 2015, except in case of manifest technical impossibility. Such impossibility must be evaluated on a case by case basis for each works and on the basis of its own characteristics, and should only result from an impossible to overcome technical obstacle or one that would incur a manifestly disproportionate cost. The Community of Voironnais adopted a general implementation scheme that provided for the accessibility of only 40 % of the public transportation network on the ground that accommodation of the network would be too costly without identifying specific technical difficulties or specific obstacles that would entail a disproportionate cost. The Court quashes the implementation scheme as nul and void for manifest error of the administrative authority.

Name of the court: Conseil d'Etat
Date of decision:11 July, 2012
Name of the parties: Volot-Pfiser vs. Ministry of Justice
Reference number: no 347703
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026198987&fastReqId=1524882422&fastPos=1
Brief summary: Plaintiff, a "magistrate" with the public prosecution office, has become deaf which has led to a redefinition of his functions and of those of his colleagues since he cannot pursue any public hearing activity as prosecutor. Therefore, he has been exempted from his functions pleading cases, which have been replaced by administrative duties, and the hearings he would normally have assumed have been redirected to other magistrates. In France, the working conditions of magistrates are seriously impacted by their hearing obligations since the court does not close and the hearings go on until the roll call is finished, often late

into the night. The same year he has seen the variable portion of his remuneration attributed by the General prosecutor significantly lowered, and in fact his premium rate became the lowest of the jurisdiction. The justification offered by the General Prosecutor and accepted by the lower courts is that premiums compensate objective burden of service and that his burden of hearing have been reassigned to others who have seen their burden increased. Therefore, the adjustment in remuneration is objective and reasonable. The Conseil d'Etat reversed the lower courts' decisions and decided that, given the EU Directives have not been transposed in French law regarding the status of magistrates and judges, it pursues its previous decision in the Perreux decision (CE, n°298348, 30 October 2009) to consider Directive 2000/78 as directly applicable. Therefore the right to reasonable accommodation provided at article 5 of the Directive applies to the status of magistrates. This duty of reasonable accommodation on the part of the public employer creates a corresponding right to the benefit of the magistrate guaranteeing that the measures taken will not create a disadvantage as regards remuneration and allow a proper professional progression. The fact of taking into account the disability to set objectives cannot generate unequal treatment as regards remuneration. The fact of comparing respective contributions as a result of the accommodation measures taken in the form of a redefinition of his functions creates a situation by which reasonable accommodation has an adverse impact on remuneration and becomes a factor for indirect discrimination. To prevent discrimination the evaluation of the magistrate's working contribution for the purpose of setting his right to a premium must be made *in concreto* and take into account the task assigned in consideration of the magistrate's disability in application of the obligation of reasonable accommodation. This is the first decision of the Conseil d'Etat concluding to indirect discrimination and sanctioning the universal application of a rule of evaluation and equal treatment of different situations. It gives a clear message as to the necessity to find measures to prevent that reasonable accommodation have a negative impact on the remuneration and professional situation of disabled civil servants.

Origin:

Name of the court: Labour Court of Nanterre
Date of decision: 18 July, 2012
Name of the parties: Manga Ndjomo vs International SOS Assistance
Reference number: n° F10/01701
Brief summary: An employee was refused a five week work assignment as coordinator of a new telephone service platform in Dubai on the ground that she was black. The employer refused to take the risk of sending her in Dubai as black women there were subject to harassment and victimization. This situation lead to the resignation of the employee. The French Equal Opportunities and Anti-discrimination Commission (HALDE) investigated the claim brought by the employee and found that the employer, on whom the burden of proof shifted, was unable to establish the reality or nature of the risk related to the colour of her skin in the context of her professional assignment or living conditions in Dubai. In addition, the function did not entail contact with the public and no evidence was presented as to any burden in

ensuring her protection. The Defender of Rights, which has incorporated the HALDE had taken over the investigation and decided to present its observations before the labour court in support of the Plaintiff's claim. The Court followed the Defender of Right's analysis and concluded that the employer had not established that the decision was based on objective and proportionate grounds unrelated to discriminatory considerations. The employer did not establish the nature or reality of the risk or that the measures necessary in order to insure her protection would have been disproportionate. The Court found further that the employee's resignation in this context qualified as constructive dismissal. The employer was condemned to 7 000 € in damages and 27 000€ (representing 8 months salary) in compensation for constructive dismissal. By this decision the court extended for the first time the application of the principle of non-discrimination to employment situations relating to a French employee's career abroad, by imposing on the French employer the burden of establishing the reality of the unfavourable conditions invoked, but also the disproportionate cost of reasonable measures . This is one of the first cases commenting on defendant's burden of proof in racial discrimination cases. In this case the court did not qualify whether it was reasoning in terms of direct or indirect discrimination, but one could consider that the court holds that refusal to give an assignment on the ground of origin can only be justified by documentation of the reality and proportionality of the menace to be evaluated by justifying the unreasonability of the costs necessary to ensure protection of the employee.

+ See cases relating to Roma and Travellers below

Age:

Name of the court: Court of Cassation,
Date of decision: 9 February, 2012
Name of the parties : X vs. SNCF
Reference number: no 10-28651
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025358367&fastReqId=1204005070&fastPos=1
Brief summary: Plaintiff was notified by his employer, the public train corporation, of the decision to end his working contract by way of mandatory early retirement at age 55, after 27 year of employment, for an annual pension of 7, 619 €. If he was to retire at age 65, he would receive an annual pension of 10, 420€. Called to present its observations before the court, the French Equality Body, Halde, took the position that the fact that the possibility of imposing mandatory early retirement on eligible employees of 55 years of age is provided by decree does not result in automatically depriving such a decision of discriminatory content. It is the justification of this decision by the employer that will determine whether the use of the possibility of mandatory retirement is discriminatory or not. Therefore, the use of this prerogative is subject to the requirements of the law regarding the legality of employment policy decisions in relation to the ground of age, and must be justified by considerations related to health and security or professional insertion of workers as provided by

article 1133-2 of the Labour Code. In this context, the justification invoked by the employer that the decision to impose mandatory early retirement upon this employee is based on economic considerations related to the necessity to reduce personnel given the importance of the financial pressure of the number of agents presently employed by the corporation, does not meet the requirements related to social and political objective as provided by Directive 2000/78. The Court followed Halde's observations adopted in its decision no 2008-262 and declared the employer's decision null and void. It further condemned the employer to reintegrate the employee, to compensate the period where his activity was interrupted retirement by paying retirements contributions and damages for the difference in revenue between the pension received and the salary he would have earned for the entire period in the amount of 130 137 €, and moral damages in the amount of 10 000€. In this case, the Court of cassation recognizes that mandatory early retirement prerogatives provided by the decree regulating the status of agents of the public train corporation must be interpreted in such a way as to meet the requirements of Directive 2000/78 prohibiting discrimination on the ground of age in employment, and therefore are subject to the test set forth in article 6 of the Directive as transposed by article 1133-2 of the Labour Code. In fact, further to Halde's decision, the employer undertook to stop implementing this prerogative regarding employees under retirement age.

Roma and Travellers:

Name of the court: European Committee of Social Rights
Date of decision: 25 January 2012 / published 4 June 2012
Name of the parties: European Roma and Travellers Forum c. France
Reference number: no 64/2011
Address of the webpage:
http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC64Merits_fr.pdf
Brief summary: The complaint maintains that Travellers and Roma of Romanian and Bulgarian origin suffer systematic discrimination in France in breach of Article E (on non-discrimination) of the revised European Social Charter ("the Charter") with regard to the enjoyment of their right to housing (Articles 31 and 16 of the Charter) because of their particularly insecure housing conditions, the way in which they are evicted from their homes and the difficulties they face when they attempt to acquire social housing and claim housing benefits. It also asserts that the conditions of expulsion of Roma of Romanian and Bulgarian origin from France constitutes unequal treatment in the enjoyment of the right to safeguards with regard to expulsion from the French territory (Article 19§8 of the Charter). Lastly, it argues that there is a violation of the right to protection against poverty and social exclusion (under Article 30 of the Charter) because of the conditions in which Travellers are authorised to exercise their right to vote. The comity concludes unanimously against France to a violation of Article E on all counts.

Name of the court: European Committee of Social Rights
Date of decision: 11 September 2012 / published 21 January 2013
Name of the parties: Médecins du Monde c. France

Reference number: no 67/ 2011
Address of the webpage:
http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC67Merits_en.pdf
Brief summary: The Complaint brought by *Médecins du Monde*, concerns migrant Roma, mostly from Romania and Bulgaria, living in France in great poverty, alleging that their rights are not respected by France and that following the announcement of the President of France in July 2010 of a more repressive policy towards the Roma, their situation has deteriorated further. *Médecins du Monde* requests the Committee to find that there has been a violation of several provisions of the Charter (read alone or in conjunction with Article E) with regards to the following rights: right to housing (Articles 16, 30 and 31), right of migrant workers and their families to protection and assistance (Article 19§8), rights of the child (Article 17), right to social protection and health (Articles 11 and 13). According to the French authorities, they are taking major steps to ensure that the Roma have proper access to their rights under the Charter and, in so doing, have shown a constant desire for improvement. It points out that the difficulties faced by the Roma are accounted for primarily by their extremely vulnerable position and on no account by discrimination against them in the sphere of public policy. The Committee underlines that it recognised that special consideration should be given to the needs and different lifestyle of the Roma, which are a specific type of disadvantaged group and a vulnerable minority (§40) and that in matters of discrimination, claimants must benefit from the shift in the burden of proof (§38). It is interesting to note that the reasoning of the Committee follows the shift in the burden of proof instigated by European Law. Moreover, it rejects the defence of Government alleging that it is not responsible if it is a particularly vulnerable group. On the contrary, the Committee imposes on Government a duty to justify specific measures taken in favour of this vulnerable group, thereby imposing on Government the duty to adopt policies that go beyond inclusion and that take specific measure to support Roma as a specifically protected vulnerable group.

Housing:
Under Article 31§1, states parties shall guarantee to everyone the right to housing and promote access to housing of an adequate standard. The Committee recalls that states must take the legal and practical measures which are necessary and adequate with a view of ensuring the effective protection of the right in question (§ 53).The Committee recalls that the wording of Article 31 cannot be interpreted as imposing on states an obligation of “results”. However, it notes that the rights recognised in the Charter must take a practical and effective, rather than purely theoretical, form. (§55). Government has omitted to take into account the differences in situation of the Roma migrants who reside lawfully or work regularly in France, as well as to take measures adapted to ameliorate their housing situation In addition, the legal protection afforded to the Roma under threat of eviction is insufficient. French policy on access of Roma to housing is insufficient since it does not propose a coordinated approach to promoting effective access to housing for these persons who live or risk living in a situation of social exclusion (§106). It considers that this situation does not ensure the respect of human dignity (§79) or meet the requirements of the Charter (§106), and that it has not improved since its last finding of violation (§81)

Withdrawal of family benefits

The Committee decides that if article 16 of the Charter does not apply to Roma who are illegally on the French territory, the duty to protect vulnerable families applies to Roma who are legally on the territory remains. Therefore the suspension of previous benefits to ROMA who were legally residing in France is a violation of Article 16 of the Charter.

Collective expulsion from the French Territory

Article 19§8 of the Charter imposes an obligation of results as regards securing that persons of a member country are not expelled unless their situation has been evaluated to establish if they are legally on the territory or they endanger national security or offend against public interest or morality, government bearing the burden of proof. There is evidence of expulsions without proof of a date of entry on the French territory allowing the conclusion that they have illegally stayed for a period superior to three months (§116);

Access to school

France does not provide effective access to education for Roma children. When registering children for school, families are often faced with unreasonable requirements for documentation, including an administrative certificate of residence, even though the only documents required by law are the child's birth certificate and health record. It also draws attention to unjustified delays in the registration and allocation procedures. Finally, repeated evictions of children from their place of residence inevitably have harmful consequences for their educational opportunities (§119). The legal texts referred to by the Government seem to be in conformity with the requirement of the Charter. The Committee underlines nevertheless that they have not been implemented in a satisfactory manner. It concludes that the French education system is not sufficiently accessible to these children. (§132)

Access to Healthcare

The Committee notes that the allegation of *Médecins du Monde* on the breakdowns in medical care and treatment due to evictions is not contested by the Government and stresses that this situation was previously underlined by the HALDE in its decision No. 2009-372 of 26 October 2009, noting that the state authorities confirm that, during the eviction operations, the personal situation of the individual, from the standpoint of the continuation of their health treatment, is not taken into consideration or monitored (§142). In addition, treating the migrant Roma in the same manner as the rest of the population when they are in a different situation constitutes discrimination. (§162) The universal sickness coverage (*couverture maladie universelle* - CMU) is not applicable to the migrant Roma having resided in France lawfully or worked there regularly for less than three months. The Committee considers that this constitutes an unjustified difference in treatment with nationals. (§176) Meanwhile, the situation in France with regards to emergency assistance for non-residents is in conformity with Article 13§4 because all foreigners present on the French territory, whether lawfully or unlawfully, are entitled to emergency medical assistance (see Conclusions 2009, France, Article 13§4). (§180).

Trends and patterns in cases brought by Roma and Travellers

Litigation in relation to travellers relates mainly to police controls and parking contraventions which result from the deficit of available parking accommodations (see question 5) and to criminal offences related to illegal occupation of land and failure to submit to administrative control of travellers.

The insufficiency of parking space and increased police control has developed a trend of installation of caravans in non constructible land (called family land) which triggers many refusals on the part of cities to issue necessary authorisations for installing water and electricity or register children in school. There are no statistics available, but this litigation is regularly brought before the administrative tribunals.

In addition, litigation is often related to refusal on the part of Mayors to register in school children of Traveller and Roma families parked on the town's territory.

We see on the part of communal authorities a generalised strategy to prevent the long term installation of permanent Traveller population on their territory by way of administrative recourse, delay in creating accommodations required by law, hindrance to access and use of private property, and access to education.

The National Equality Body, HALDE, received few claims from Roma and Travellers (approximately 200 in 6 years, on a total of 45 530 claims). They related mostly to the conditions of parking accommodations, their insufficient number, the connection of family land to water, electricity etc.., access to registration in public school, access to car insurance and refusal of the authorities to issue ordinary identity papers.

On 19 October, 2009 the European Committee of Social Rights has rendered a decision published on 27 February, 2010, further to a claim no 51/2008 submitted by the European Roma Rights Centre[27] regarding the situation of Travellers and Roma in France, alleging a violation of articles 16, 19 par 4c), 30, 31 and E of the Revised Social Charter, in relation to their lack of access to an effective right to housing and ensuing social rights, and the repressive measures adopted in order to limit their capacity to travel. In reply, Government alleged taking all reasonable measures to ensure effective access to housing and social rights. It goes on to consider equal treatment of travellers in access to housing and protection of the family provided at Articles 16 and 31, and concludes that it does not meet the non discrimination requirement of Article E of the Charter, and that therefore their rights are not sufficiently taken in consideration. Further, the provisions of Article 69-3 providing access to voting rights after having elected domicile for a period of three years within a limit of 3% of the electorate of a municipality, is a discriminatory condition to

[27] Comité européen des droits sociaux, Conseil de l'Europe, n° 51/2008, 19/10/2009, Centre européen des droits des Roms (CEDR) c/ France.

access to the vote and a violation of the travellers' housing rights on the ground of Articles 30 and E.

The issue rests upon the definition of the extent of the Government's obligations. Considering that only 32% of the required parking area has been put in place, that the management of existing parking areas is deficient, that the parking areas are not conceived to provide long term accommodations, that there are insufficient programs and means to accompany the travellers' settling process, that expulsion procedures are often brutal and do not respect fundamental rights requirements, the Committee found an insufficiency of governmental action in violation of Article 31 of the Revised Charter.

There has not yet been litigation before Administrative courts challenging the conformity of the Law no 69-3 of 16 July, 1969, regulating the issuance of special identity papers, elective residence for access to social rights and controls imposed on the travelling population, to Directive 2000/43. However, the HALDE has issued recommendations to Government for the abrogation of this special status which have not been followed (see section 7.g).

The conformity of this legislation to the Constitution has been challenged twice in 2012, and on 5 October 2012, the Constitutional Council decided that the scheme provided at article 7 of the Law no 69-3 was partly unconstitutional, as regards undue right to control the travelers, and a delay of three years to have access to voting rights. However the Council held that the scheme requiring elected domicile and quotas to limit the number of travelers registered in a town was reasonable since in France access to social rights is managed through domicile.

Since 2011, active Governmental policy to fight against illegal occupation of land by foreign Roma population and expel these people form the national territory has led to an important mobilisation of NGOs who have massively addressed complaints to the Defender of Rights.

As regards Romanian and Bulgarian Roma, before the accession of Romania and Bulgaria to the European Union, the Minister of Interior issued a ministerial instruction relating to the conditions of entry, residence and expulsion of Romanians and Bulgarians starting 1st January, 2007, that limited rights of entry for a period under three months, for persons without sufficient means of subsistence and state specific financial requirement for the authorisation to reside over a period of six months. Ministerial instructions set out the interpretation of the law to be followed by the public service. This ministerial instruction provoked the indignation of all anti racist NGOs .

The Administrative Supreme Court held that a requirement that persons be in a position to sustain themselves is not contrary to EU and compulsory registration is essentially an administrative requirement that was held not to violate national legislation or regulation. Therefore, this aspect of the instruction was maintained as

well as sections simply reiterating general rules of freedom of circulation relating to public order and or minimal resources requirements.

The transitory regime, denying access to social rights, to employment in jobs accessible to EU citizens and imposing minimal resources requirements has been extended until 1 January 2014 for Romanians and Bulgarians, with a possibility to extend its application to 2016.

The Administrative Supreme Court[28] does not comment on the discriminatory aspect of these provisions, argument that was invoked by the NGOs, as it considers that the non conformity of the ministerial instruction to the requirements of the law is sufficient to justify striking the attacked provisions.

However, the European Committee of Social Rights in its decision of October 2009 also found a violation of Article 19 par 4 c) relating to housing rights of migrant populations in this regard.

On 9 November, 2009 HALDE adopted Deliberation no 2009-372 on the situation of Romanian and Bulgarian Roma in France.

The HALDE concluded that the French government's policy and transitory regime targets Romanian and Bulgarian Roma and is as such discriminatory on the ground of race and origin. Romanian and Bulgarian Roma do not benefit from rights of other citizens of the European Union, and they are denied access to rights granted to other migrant populations. The Roma population is the most controlled, with the least support and is the only migrant population which does not benefit from a policy to ensure its access to rights. In order to put an end to the discriminations of which Bulgarian and Romanian Roma are victims, the HALDE recommended to government to stop the present expulsion policy, to ensure access to social rights by implementing a number of measures among which the end of the transitory regime limiting the right of circulation and installation of Romanians and Bulgarians in France. Government has replied in April 2010 that it did not agree with the HALDE's analysis, by maintaining its right to expel Romanian and Bulgarian Romas by reason of their insufficient resources and pursue the implementation of its expulsion policy.

Minister of Interior published a Ministerial instruction on 5 August 2010, addressed to all Prefects, and Directors of the national police, to evacuate Roma camps illegally occupying private property and property of the State. It instructs prefects and national police directors to specifically engage in the destruction and evacuation of the illegal camps, to mobilise police force in priority towards Roma camps, and to identify measures to be taken for each site among which all necessary cooperation with border police forces and the French Office of immigration, in order to organise the trip

28 http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018839013&fastReqId=300617388&fastPos=3.

back to Romania and Bulgaria and evacuation of all Romas who cannot justify the legality of their presence on the French territory. It further gave instructions to proceed to at least one evacuation of a Roma camp per week. On 13 September 2010, an instruction replaced the instruction dated 5 August, 2010, and eliminates all references to the targeting of Roma. It limits the instructions given by the Minister of Interior to the pursuit of the priority given to the evacuation of illegal camps. SOS Racism petitioned the Administrative Supreme Court to annul both Ministerial instructions as discriminatory. The Administrative Supreme Court decided that the terms of the ministerial instruction, even if they aim at ensuring enforcement of public order and private property, cannot target persons by reason of their ethnic origin without disregarding the principle of equality before the law protected by the Constitution. The first Instruction must therefore, without further inquiry in the policy pursued, be quashed as illegal and annulled. However the following Ministerial instruction of 13 September, 2010, limits its instruction to the dismantling and evacuation of illegally occupied land. Considering it has eliminated all reference to any targeting of land occupied by ethnic groups, and having eliminated all reference to the expulsion of foreigner regardless of their individual situation, the allegation that this 2nd instruction is illegal must be dismissed.

Since the June 2012 elections, the Minster of Interior has intensified the previous policy of enforcement of land occupation restrictions. Since the Ministerial Instruction of 28 August 2012, and before putting in place the conditions to implement the housing and social support proposed in the instruction, expulsions of travellers and Roma from illegal occupation of land have been pursued all over the territory to attain an all time record number.[29] 5 223 during the 3rd trimester of 2012 compared to 3 283 for the 3rd trimester of 2011. The number of persons of Romanian or Bulgarian nationality expelled from the French territory has attained 1728 in 2012 compared to 850 in 2011. Since the Ministerial Instruction of 26 August 2012 people are expelled and their goods destroyed without social support or housing solution. Between June and December 2012 there have been 63 forced evacuations and 34 in the first semester for a total of 9 404 persons expelled from France and 11803 persons evacuated from campsites, on an estimated total number of 15 to 20 000 foreign Roma on the French territory.

These situations are in total conformity with the facts which have given rise to the two European Social Rights Committee decisions rendered in 2012 finding massive discriminations resulting from violation of social rights, housing rights, rights to security, access to health care, education and dignity.

This has led to an unprecedented mobilisation of NGOs on administrative recourses invoking the ESRC and ECHR decision of 24 April 2012 in *Yordanova* on the requirements to be observed by the state in order to respect the social rights and principle of dignity of expelled Roma persons, and following a decision of 16

[29] These statistics are computed on an ongoing basis by Romeurope but are not official.

November, 2009, the High Judicial Court of Lyon issued an injunction to prevent police evacuation of a Romanian Roma group illegally occupying state property on the ground that the prefect did not demonstrate that the conditions of life of the Roma camp were such that they presented particular danger and risks and that the camp constituted their domicile, and as such was protected under article 8 ECHR.[30] The Defender of Rights has intervened in 7 of these cases and except on two occasions the Courts have suspended the expulsion for periods of three months during which the authorities are invited to implement the humanitarian requirements of the Ministerial Instruction of 26 August 2012.

Finally, given the active policy of expulsion from the French Territory, an important number of cases challenge the expulsion procedure which very often does not conform to requirements of the law, as there is no individual evaluation of each situation, there is no verification of the date of entry on the French territory, social rights and personal situations are not investigated and persons are not given the required notice to challenge these orders to leave the French territory.

[30] Sala, Covaci et al vs. State, no 2009 /02850.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

The French tradition derives from the Enlightenment conception of equality enshrined in the 1789 Declaration of the Rights of Man and Citizen. Like the preamble of the Constitution of 1946, the Declaration was constitutionalized by the Constitution of 1958. Both documents express opposition to racism based on an absolute conception of humanity and, inseparably, on respect for human dignity, human rights and the universality of the principle of equality.

The Declaration of the Rights of Man and Citizen, 1789, states at article I : "Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility".

The Preamble of the Constitution of 1946 states: "On the morrow of the victory of the free peoples of the world over those regimes that attempted to enslave and to degrade the human person, the French people reaffirms that each human being, irrespective of race, religion, or belief, possesses inalienable and sacred rights. (…) France constitutes with the peoples of Overseas (*Outre–mer*) a Union based on equality of rights and duties, irrespective of race or religion." And adds: "Each has a duty to work and the right to obtain employment. No one can be attacked in his work or employment by reason of his origins, opinions or beliefs".

Article 1st of the Constitution of 1958 states that: "France guarantees equality before the law to all citizens without distinction based on origin, race or religion. She respects all beliefs". Article 2nd adds: "France is an indivisible, secular, democratic and social Republic." In addition article 10 states: "No one must be questioned on the basis of his opinions, even religious, as long as their manifestations do not constitute a threat to public order as foreseen by law ».

Administrative tribunals have consistently struck down decisions using the criteria of "origin" for purposes of adjudication: for instance, an instruction denying eligibility for leave to a category of civil servants on the grounds of ethnic origin,[31] the denial of school registration to foreign children,[32] or local policies giving preferential treatment to sections of the population on the basis of origin.

[31] Conseil d'État, November 21st 1962, République Malgache c/ Mme Rasafindranaly, recueil Lebon page 618.
[32] TA Bordeaux, June 14th 1988, El Rhazouani, recueil Lebon page 518.

More recently, the Constitutional Council decided that data collection necessary to the pursuit of studies measuring the diversity of the origin of persons, discrimination and integration could be based on objective information, but could not rely on "ethnic origin" or "race" without disregarding Article 1 of the Constitution.[33]

On 21 July, 2008, Government has passed a Constitutional Law modernising Parliament and the State.[34] Article 61-1 allows any defendant to challenge the constitutionality of a provision used against him or her before the Constitutional Council by addressing a request that must be supported by the Court of cassation in judicial matters and the Conseil d'Etat in matters relating to administrative law (see infra 1.b). At Article 40 it creates article 75-1 recognising that Regional languages form part of French heritage. There is no further definition or identification of the regional languages referred to by this expression. It is important to note that the Constitutional Council (DC-99-412 of 15 June, 1992) had refused the ratification by France of the European Charter of regional and minority languages.

The Constitutional reform also creates, at article 71-1, a Defender of Rights with extended powers. This new institution replaces independent state bodies providing recourse against state services and protecting some fundamental rights and the French equality body by a comprehensive independent body, comparable to the Spanish Protector of the People (article 41 creating Title XI Bis of the Constitution). Its powers and jurisdiction have been defined by Organic Law no 2011-333 and ordinary Law no 2011- 334 of 29 March 2011 creating the Defender of Rights that has been adopted on 16 March 2011. It has merged the Médiateur de la République (French Ombudsman), the Defender of the rights of the Child, the Commission for Ethics in the Security Services and the HALDE.

There is no constitutional text prohibiting discrimination on the basis of age, disability or sexual orientation, even if the list of discriminatory grounds in the Constitution has not been deemed to be exhaustive by the Constitutional Council who decided that the list of grounds was open and subject to evolution.[35] In addition, article 55 of the Constitution of 1958 specifies that Treaties and International conventions ratified by France are of superior value to national law, which therefore includes all criteria of discrimination enumerated therein.

b) Are constitutional anti-discrimination provisions directly applicable?

Prior to the Constitutional reform of 2008, constitutional anti-discrimination provisions could not be enforced by private actors before the Constitutional Council. The

}[33] CC no 2007-557 o f 15 November, 2007, http://www.conseil-constitutionnel.fr/decision/2007/2007557/2007557dc.htm.

[34] Loi constitutionnelle de modernisation des institutions de la Ve République http://www.assemblee-nationale.fr/13/ta/ta0-14.asp.

[35] Mélin-Soucramanian, Le principe d'égalité dans la jurisprudence du Conseil constitutionnel, RFDA, Economica, 1997, 92. Conseil d'Etat, Sur le principe d'égalité, La documentation Française, 1998.

constitutional recourse against legislation was reserved to members of Parliament before enactment of the Law by the President of the Republic.

The Constitutional Law modernising the institutions[36] created a direct constitutional recourse against enacted legislation at the request of the Administrative Supreme Court or the Court of Cassation (article 29 of the law and 61-1 of the Constitution).

Further to the adoption of the Law of implementation no 2009-1523 of 10 December, 2009 relating to the application of article 61-1 of the Constitution, any citizen can request that the constitutionality of a legislation invoked against him or her be verified by the Court in judicial and administrative matters, since 1 March, 2010. The adjudicating judge may, if he or she deems it appropriate, address a request to the Court of cassation or the Administrative Supreme Court. This higher instance then decides whether to refer the matter to the Constitutional Council. If so the Constitutional Council hears the parties' lawyers and renders a decision on the constitutionality of the provision. This request is called «Preliminary question of constitutionality /*question prioritaire de constitutionnalité*».

However, private citizens have always been in a capacity to attack secondary legislation on constitutional grounds before the Administrative Supreme Court at the condition that the text attacked was not the mere repetition of a duly enacted law.[37] Moreover, the realm of competence of the Equality body (HALDE/ Defender of Rights) allows it to analyse the conformity of legislation to constitutional requirements when formulating recommendations to government after having challenged the conformity of regulations and legislations to Constitutional anti-discrimination provisions.

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

This does not apply. See answer b).

[36] Op. Cit.
[37] Sect. 23 April, 1997, GISTI AJ 1997, 435 ; Chapus, Droit administratif général, 13e ed. Tome 1, p. 31 et ss.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

Codified texts prohibiting discrimination in national legislation state a comparable list of prohibited grounds without defining them (Article 225-1 and 2 of the P C, Article L1132-1 and following and L1141-1 and following LC, Article 1 of the Law "Mermaz" relating to landlord and tenants no. 89-462 of 6 July, 1989 further to amendments introduced by the Law of 17 January, 2002, Article 6 of the Law no 83-634 of 13 July, 1983 relating to the rights and obligations of civil servants):

> real or assumed origin, appearance of origin, national and ethnical origin, race, sex, pregnancy, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or mystical endeavours however the term belief is not usual).

The Law no 2002-303 of 4 March, 2002 relating to the rights of the sick and to the quality of the medical system has enacted an additional ground of discrimination based on genetic characteristics (article 4). It has been introduced in the Civil Code (article 16-13) and added to the list of prohibited grounds of the Penal Code and the Labour Code.[38]

The Law no 2006-340 of 23 March, 2006, on Equal Opportunities has enacted an additional ground of discrimination based on pregnancy (article 13). It has been introduced in article 225-1 of the Penal Code and L1132-1 LC.

In addition, article L1110-3 of the Code of public health states a general principle of non discrimination in access to health without limiting its scope to a list of prohibited grounds.

Law no 2008-496 completing transposition of the European directives has created specific levels of protection for EU grounds that cover all areas that were not previously covered by codified law:

- The protections for race and ethnic origin extend to areas covered by directive 2000/43 Beyond employment and housing law – social protection, health, social advantages, education, access to and supply of goods and services;

[38] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MESX0100092L

- The protection for article 19 par. 1 TFEU grounds (ethnic origin, race, religion, convictions, disability, age and sexual orientation) extends to areas covered by directive 2000/78 that were not covered by the law on public service or labour law - affiliation and involvement in professional or trade organisation, independent non salaried workers.

However, this legislative evolution has brought about the suppression of national origin in the list of prohibited grounds covered by the law, except in the Labour Code and the Penal Code.

Article 4 of the Law no 2012-954 of 6 August 2012 on sexual harassment has created a new ground of discrimination which is called sexual identity, in order to cover and recognize specific difficulties of transgender persons. It explicitly covers all situations of discrimination, whether direct or indirect, against transgender and transsexual persons It was immediately criticized as semantically inadequate as the targeted concept was that of gender identity.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)

Each ground of discrimination is not defined in anti-discrimination legislation. French law actually refuses to validate the concept of race or to define it. Since the list is very broad, the judge does not approach a case of discrimination by identifying whether or not the complainant conforms to the definition of a group covered, the approach is more oriented toward an appreciation of adverse effect in comparison to a group or of defendant's differential behaviour in relation to a prohibited ground: mores, sexual orientation, sex, pregnancy, sexual identity, origin, appearance of origin, supposed race, physical appearance, last name, religious and philosophical convictions, family situation, union activities, political opinions, age, health, disability and genetic characteristics.

i) *racial or ethnic origin*

No definition.

ii) religion or belief

No definition.

iii) disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as

referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

The Law no 2005-102 of 11 February, 2005 for equal rights and opportunity of persons with disabilities, (hereafter Law on disability)[39] has revised the definition of disability at article L114 of the Code of social welfare (CSW). This definition applies for the purpose of implementing all relevant dispositions relating to equal opportunities for the disabled persons:

> Is deemed to be disabled a person who faces a complete limitation of activity or is restricted in the ability to participate in society in his or her environment by reason of a substantial, lasting or definitive alteration of one or more physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness.[40] (*Our translation*)

This definition is broader than that of the CJEU in *case C-13/05, Chacón Navas*, in that it is not limited to access to professional life and encompasses limitation in all areas of life. The legal regime created by this law intends to be comprehensive and proposes a coherent approach to issues relating to every stages of life, based on the rights to solidarity, equal treatment and full benefit of citizenship.

It is comparable however in that it does not include temporary impairment attributable to a temporary health condition. In France, health is already a distinct prohibited ground of discrimination, which is however not defined in legislation.

The requirement of the CJEU that disability "hinder participation" appears to correspond to the requirement of the French definition that it be substantial, the comparable degree of importance of the impairment being a question of interpretation, on which comparable interpretation will have to wait further judicial decisions.

iv) *Age*

No definition.

v) sexual orientation?

No definition.

[39] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L.

[40] «Art. L 114. – Constitue un handicap, au sens de la présente loi, toute limitation d'activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d'une altération substantielle, durable ou définitive d'une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychiques, d'un poly-handicap ou d'un trouble de santé invalidant. »

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?

i) Origin and "race":

As discussed in section 1 a), since the law prohibits taking these concepts into consideration, they are not defined. The concept of race is interpreted as being referred to in the Constitution as a forbidden concept. Ethnic origin is not interpreted either as it is deemed to be a euphemism of race. That is why "national origin", conceived as objective information on the person's ancestry, seems to be the only objectivable reference to origin admissible as per French reluctances, according to the Constitutional Council is national origin. (see CC 15 November, 2007 no 2007-557 DC).

Given that the law covers appearance of origin and that direct discrimination essentially addresses assumptions made by the discriminating party, evidence of direct discrimination based on origin can be based on the foreign physical appearance or the attributed origin related to the exterior appearance of a person such as of the last name (Airbus case, Court of cassation, n° K 10-15873, 15 December 2011).

ii) Religion and belief:

In French law there is no legal definition of religion or belief. It is the Law of 9 December, 1905 on the separation of Church and State that addresses the concepts of freedom of worship and beliefs. Article 1st of the law states: "*The republic guarantees freedom of belief. It guarantees freedom of worship, the only restrictions being stated therein in the pursuit of the interest of public order*." Freedom of religion is considered as an aspect of freedom of opinion. According to Jean Rivéro, a scholar of reference in Public law, freedom of religion includes on the one hand freedom of belief, hence the freedom to choose between non belief and membership to a religion, and on the other hand freedom of worship, that is the individual or collective practice of a religion.

The Lyon Court of Appeal in its decision of 28 July, 1997, offered the following definition: "a religion can be defined by the convergence of two elements, an objective element, the existence of a community even limited, and a subjective element, a common faith…"

There exists in France however a legislative limitation on religious freedom. Indeed, sects are prohibited in France by article 223-15-2 to 223-15-4 of the Penal Code.

Moreover, Law no. 2001-504 of 12 June, 2001 allows the dissolution of any legal entity considered as a sect. Those can also incur penal sanctions.[41]

For example the church of scientology and Witnesses of Jehovah are considered as sects in France[42] (the Minister of Interior and the Protestant Church disagree with the committee of the National Assembly's on sects as to the status of the Witnesses of Jehovah).[43] However, the report of the Commission of enquiry on sects concluded that French law offered no definition of "sects".

This law does not prohibit worship but outlaws such sectarian organisation; therefore it does not appear to us to have any impact on employment and therefore does not infringe upon the material scope of the directives. Persons who are discriminated in employment because of their belief, unrelated to their behaviour at work, will be protected regardless of the beliefs they follow.

iii) Disability

Disability is defined in the Law no 2005-102 of 11 February, 2005, (cf. answer to question 2.1.1a). However, the concept of reasonable accommodations has been translated by that of reasonable measures in article L5213-6 LC, and as mentioned in section 2.6, its protection does not extend to all persons targeted by the definition of disability at article L114 of the Code of Social Welfare (CSW). It is subject to the additional requirement that the disabled worker form part of the group targeted by the employers' "quota obligation of employment", and be listed in article 5212-13 LC.

These reasonable accommodation obligations therefore benefit only to employees who benefit from official recognition, have a status of disabled workers, to those who have suffered from an employment accident procuring a disability superior to 10% and who benefit from compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans.

The definition of reasonable measures has therefore a direct impact on the definition of the disabled persons targeted by this positive obligation on the part of employers, and therefore has an impact on the operationality of the definition of disability in the workplace. It has not yet been interpreted by the courts.

iv) Age

The concept of age itself has not been defined by jurisprudence.

[41] http://www.admi.net/jo/20010613/JUSX9903887L.html.
[42] For the official list of sects, see: http://www.cftf.com/french/Les_Sectes_en_France/sectes.html.
[43] See Le Monde 19, October, 2006 : Querelles autour du statut des témoins de Jéhovah http://www.lemonde.fr/web/article/0,1-0@2-3226,36-825305,0.html.

It has been used to question age limitation in access to employment, retirement age, age barriers to social policies and support mechanisms in access to social protection or employment.

v) Sexual orientation

In a decision of 19 December,1980, the Constitutional Council refused to include in the definition of discrimination based on sex, discrimination based on sexuality.[44] The protection against discrimination based on sexual orientation has been introduced in French law under the term "mores", first in the Penal Code in 1985 (Law 85-772 of 25 July, 1985) then in the Labour Code in 1986 (Law 86-76 of 17 January,1986 and Law 92-1446 of 31 December, 1992).

The term "sexual orientation" was added to the Labour Code and the Penal Code by the Law of 16 November, 2001. Henceforth, the terms "mores" and "sexual orientation" co-exist, although the term "mores" previously referred to homosexuality, and "sexual orientation" was not defined in the law and has not yet been defined by the jurisprudence.

Sexual orientation has not however been interpreted to cover discriminations suffered by transgender persons. In the past, transsexuals have argued the use of the concept of discrimination based on "sex" or discrimination based on "mores" or physical appearance.

c) *Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

There is no restriction per se related to the scope of age other then exceptions discussed in section 4.7.

2.1.2 Multiple discrimination

a) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*

Would, in your view, national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?

There is no legal rule addressing multiple grounds of discrimination. However, courts have allowed claimants to claim that they are cumulatively discriminated for a number of grounds, for example in cases where access to university education or

[44] 80-125 RJC I-88.

employment is based on the appreciation of a candidate which could be influenced by cumulative conditions of age and nationality, age and sex. Therefore no additional legislation is required in order to address this issue.

The HALDE raised the issue of multiple discrimination in its deliberations, whenever evidence resulting from its investigation revealed facts indicating differential treatment based on a combination of grounds of discrimination. The ground that triggered such findings was often that of age, which became an accelerating factor leading to managerial practices aiming at laying off employees perceived as being underproductive by reasons of sex, union activities, health or disability, all prohibited ground of discrimination in French law. However, multiple discriminations on the ground of sex and origin never emerged from HALDE's investigations (deliberation no 2007-357; no 2008-195). This may be related to the type of situation that triggers a claim and the profile of persons who are susceptible of presenting a claim before the French equality body. For example, working conditions of immigrant women working in the office cleaning industry or sexual harassment and abuse of very vulnerable workers that is presented by social research as very prevalent in women immigrant working environment, are not issues that can be found in the claims received by the Defender of Rights, because this public seldom presents a claim before the equality body. In the decision of the Cour de cassation of 3 November 2011 in Dos Santos, supra in Annex 3, the Court concluded to indirect discrimination on the ground of origin in the case of abusive working conditions of an illegal foreign house worker, but could as well have concluded to the presence of a situation typical of multiple discriminations. However, event if most of these workers are women, the multiple discrimination analysis did not contribute to the unfavourable treatment legal analysis that compared legal workers with illegal workers and triggered indirect discrimination on the ground of origin.

In its Deliberation no. 2006-03 of 23 January, 2006, the HALDE held that the erroneous refusal to admit plaintiff on the ground of her origin was influenced by a refusal to treat her situation on the basis of a subjective discrimination on the basis of her age, over 30, and the fact that she had young children. The same could be found in the refusal of a social housing administrator to take in consideration the priority situation of a disabled person, on the basis of her origin (Deliberation no n° 2007-162) or discrimination in hiring, the employer having evaluated the claimant, a woman of 48, as very efficient while she was a temporary employees, but not dynamic enough when she applied to be hired in competition with young inexperienced persons (Deliberation n° 2006-20).

However, there was no method developed for each case in order to apprehend the specificity of multiple ground claims. It essentially impacts on evidence strategy, facts to be put in evidence and the identification of relevant solutions. There is still too little research on intersectional discrimination and multiple grounds of discrimination in France to allow the development of a fact analysis methodology susceptible of being transposed in a legal approach.

The possibility to argue multiple discriminations revealed itself after the judicial enquiry or the HALDE's investigation and was always conditional upon finding the most efficient legal framework for the victim. In a case brought before the Administrative Tribunal of Paris (Saïd vs. Greta, 27 April, 2009, no 0905233/9), Plaintiff was denied access to an adult education program managed by a public Secondary school on the ground that she was wearing an Islamic Headscarf.

An injunction ordering her immediate re-integration was granted. HALDE presented observations based on arguments based on secularity principles which had been advanced in the course of its investigation. The court held that her personal project could not be challenged and that the prohibition of religious signs in public schools did not apply to adult education programs. However, the issue and evidence that this case could be discussed on the basis of multiple grounds emerged as a result of the defence of the public school authorities before the administrative tribunal, which raised as an additional argument questioning her personal education project that it was not serious because she was pregnant and her husband had substantial resources. This defence was held to be discriminatory and dismissed by the court, but did not contribute to evidence of discrimination per se determining the outcome of the case.

b) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

Plaintiffs can claim to be cumulatively discriminated for a number of grounds. There have however been very few multiple ground cases because most of the cases adjudicated lead to an analysis by the judge on the basis of the determining ground of discrimination, evacuating the impact of the secondary ground, and very often gender, from the facts of the case. For example, interpretations of facts that can be discussed in sociological studies on gender impact of discrimination based on other grounds, have not found a place in the framework of evidence and legal presentation.

The multiplicity of grounds can have no bearing on the evaluation of damages which are strictly compensatory.

2.1.3 Assumed and associated discrimination

a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

The wording of the prohibition to discriminate in the Penal Code, the Labour Code and the Civil Code expressly includes the concept of assumed characteristics for the

grounds of origin, race and religion: “the belonging or non belonging, real or assumed, to an ethnic group, a nation, a race or a determined religion”.

The systematic reference to physical appearance in the list of prohibited grounds of discrimination is also a way to cover assumed characteristics such as origin and sexual orientation.

Moreover, since the wording of all the legislation prohibits not only discrimination on the basis of one’s characteristics but also the sheer fact of taking into account such characteristics, regardless of whether it is an attribute of the victim, we can consider that the definition of discrimination systematically integrates assumed characteristics.

The definition of the prohibition to discriminate on the basis of disability is based on the employer’s perception of the employee coupled with the duty to accommodate.[45]

It can thus be considered to include assumed characteristics as well and covers discrimination on the ground that, although a person does not now have a disability and is not perceived to have one, they have had one in the past or are thought likely to acquire one in the future.

b) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?

There is no specific provision in this regard.

In Articles L 1132-1 LC and 225-1 PC and Article 2 of the Law no 2008-496 of 27 May 2008 prohibited ground refers to a person’s own real or perceived characteristics, the Equality Body (HALDE) has deemed that it excluded discrimination by association and has therefore recommended to government to extend the protection of the law to discrimination by association (Deliberation no 2007-75). It has furthermore intervened in the case. The court followed the arguments presented by the HALDE and concluded that differential treatment inflicted upon an employee by reason of her relationship with a person protected by the prohibition of discrimination on the ground of trade union activities, is protected by the prohibition of discrimination (CAEN Appeals Court, Enault vs. SAS ED, 17 September, 2010).

This interpretation seems to correspond to the definition of protection against discrimination in the Coleman case.

[45] Stated in the following terms at article L5213-6 LC LC: “employers take, in relation to need dictated by a concrete situation, all necessary measures “

However, paragraph 2 of Article 225-1 PC and Law no 2008-496 Article 5 prohibit discrimination inflicted to legal persons, and in this regard, these can only be considered in terms of discrimination by association. In addition, Article L3122-26 LC provides for a right to request adaptation of work hours to the benefit of family members and care takers of a disabled person.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

Direct discrimination is covered by all legislation covering all prohibited grounds of discrimination[46] (articles 225-1 and 2 PC, Article 1132-1 LC and following and L1141-1 LC, article 1 of the Law "Mermaz" relating to landlord and tenants no. 89-462 of 6 July, 1989 further to amendments introduced by the Law of 17 January, 2002, article 6 of the Law no 83-634 of 13 July,1983 relating to the rights and obligations of civil servants,.These texts list the grounds and the prohibited discriminatory behaviours.

The Penal Code and the Law on the Press of 1881 refer to direct discrimination and provide the following definition: "Constitutes discrimination any distinction by reason of origin, real or presumed belonging to an ethnic national or racial origin and religion."[47]

Since the Law of 16 November, 2001 implementing the directive 2000/78 and Law HALDE (which has since been repealed), other texts prohibiting discrimination expressly refer to direct and indirect discrimination without providing a definition.

Law no 2008-496 of 27 May 2008 introduces at Article 1 paragraph 1 a definition of direct discrimination, which provides as follows.[48]

"Constitutes a direct discrimination the situation in which, on the basis of the belonging or non belonging, real or assumed, to an ethnic group, a nation, a race or of his or her religion, convictions, age, disability, sexual orientation or sex, a person is

[46] The list of grounds is enumerated in section 2.1. It covers all grounds prohibited by Article 13 EC and a number of other grounds: origin, appearance of origin, race, sex, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or mystical endeavours).

[47] « constitue une discrimination toute distinction ... en raison de leur origine... de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race, une religion déterminée. ».

[48] Constitue une discrimination directe la situation dans laquelle, sur le fondement de son appartenance ou de sa non appartenance, vraie ou supposée, à une ethnie ou une race, sa religion, ses convictions, son âge, son handicap, son orientation sexuelle ou son sexe, une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable.

treated less favourably then another is, has been or will have been, in a comparable situation."

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).

Yes, they constitute the offence of subordination of an employment offer to a discriminatory condition according to article 225-2 par 5 of the Penal Code.[49]

c) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

Since transposition of Directives 2000/78 and 2000/43 in 2001, the French legal regime did not allow justifications to direct discrimination except in limited cases on the ground of age. In completing transposition of the directives, Law no 2008-496 created a general regime of justification applicable to all grounds in all situations, at article 2 paragraph 2.[50]

This principle does not forbid difference of treatment, which is based on a characteristic related to any of the grounds referred to in the above paragraph where such a characteristic constitutes a genuine and determining occupational requirement, if the objective is legitimate and the requirement is proportionate.

In addition, the law permits justification of direct discrimination generally, or in relation to a particular ground, since in the context of defining the burden of proof, it provides for a uniform legal regime for all grounds of discrimination direct or indirect, that allows defendant to rebut apparent discrimination established by way of presumption (article L1134-1 and article 4 of the Law of 28 May 2008:

> "In the face of theses elements, Defendant must establish that the measure or decision is justified by objective elements which are denied of any discriminatory component"

The Law no 2005-102 on disability, which defines the unjustified failure to make reasonable accommodation as a form of discrimination, continues to limit the duty of reasonable accommodation to persons who are officially recognized as disabled workers (see section 2.6 in answer to question B).

[49] Court of Cassation, Criminal Chamber, 23 June, 2009, Adecco, Districom and Garnier, no 07-85109, supra.

[50] Ce principe ne fait pas obstacle aux différences de traitement fondées sur les motifs visés à l'alinéa précédent lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée.

d) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?

No, at Article 6 the Law no 2008 496 reiterates the possibility to provide for exceptions on the ground of age in private employment covered by article 1133-2 of the Labour Code, and extends the basis for justification to working conditions in relation to health, safety, professional insertion, maintaining employment, reclassification and indemnification in case of termination of employment, always subject to a justification that the said measures are necessary and appropriate. Law no 2008-496 does not modify the comparison mechanisms in matters related to age.

2.2.1 Situation Testing

a) Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.

Situation testing has been held admissible as evidence before criminal courts by the jurisprudence of the Court of Cassation, based on the principle of complete freedom of evidence in criminal cases: evidence is admissible whether or not it has been obtained by legal and fair methods. In France, the illegality of the mean of access to evidence has no bearing on its admissibility in criminal cases. Under this principle, it would be admissible for any prohibited ground of discrimination.

It has not yet been used as evidence in civil cases. However, considering the inadmissibility of evidence obtained illegally in civil cases and the strict requirements of fairness enforced in civil procedure, it is doubtful that situation testing would be held admissible based on general rules of evidence. In 1991, the Court of Cassation decided that video or sound recording, and even photocopies, obtained out of the knowledge of a party, was not admissible in civil matters.[51]

In the landmark cases establishing admissibility of situation testing as evidence, the Court of Cassation does not provide any commentary or explanation on the methodology to be followed in order to conduct a situation test with decisive evidentiary value. The jurisprudence in this respect results from subsequent trial and appellate court decisions.

In September 2000,[52] the Criminal Chamber of the Court of Cassation recognised that a situation test on limitations to access to goods and services, carried out by prospective clients (so-called 'testers'), can be admitted as evidence of discrimination

[51] Cass.soc. 20 November, 1991.
[52] Court of Cassation, Criminal Chamber, 12 September, 2000 no. 99-87.251, Fardeau www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2000X09X06X00872X051.

in the entry to night clubs in violation of articles 225-1 and 225-2 of the Penal Code. In its decision of 11 June, 2002, the Court of Cassation further declared that the alleged unfairness and/or illegality of this mean of access to evidence had no bearing on its admissibility.[53] In these cases, the results of the situation tests were established in court by the testimony of the prospective clients or third party witnesses (June 2000) and the filing of Police or Bailiffs reports (September 2002) on the situation test.

Although admissible as evidence of discrimination in criminal matters, the trial judge is not bound to attribute any value to this evidence unless he is satisfied of its reliability that is often challenged by defendants.

The courts of appeal have set out clear criteria for evaluating the evidence since the first decision of the Court of Cassation of September 2000. The results of the situation testing must be certified by third party witnesses, preferably bailiffs and police officers, and the participants must not be members of the structure (NGO, Union etc...) organising the testing and appearing as a civil party before the court.[54]

In its decision of 7 June, 2005 no. 04-87354,, the Criminal Chamber of the Court of Cassation admitted in evidence a telephone testing, established by way of the testimony of a third party and the filing of the recording of the tape of the telephone conversation, in order to support criminal charges of discrimination in access to rental accommodation on the basis of article 225-1 and 225-2 of the Penal Code. The Court declared admissible recordings of telephone conversations, which established that a real estate agent informed prospective clients that apartments were still available or not according to whether or not their surnames sounded “French”. The weight to be attributed to this evidence however is a matter for the trial judge.

Article 45 of the Law no 2006-396 on Equal Opportunities of 31 March, 2006,[55] created article 225-3-1 PC that codifies the higher court’s jurisprudence on the admissibility of situation testing for all prohibited grounds of discrimination under article 225-1 PC. It legally recognises its admissibility to prove the criminal offence of discrimination.

b) Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc.).

Situation testing is a mean of evidence developed by anti-racist NGOs that is mostly used by them, but as well by individual plaintiffs. It has been used in racial and

[53] Court of Cassation, Criminal Chamber, 11 June, 2002 no W01-85.560 F-D.
[54] See C.A. , Grenoble, 18 April, 2001, no. 00/00657.
[55] http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20060402&numTexte=1&pageDebut=04950&pageFin=04964.

disability discrimination cases. Some associations have recently used it in age discrimination cases in access to employment.

It has been used to trap discriminating parties in situations leaving no trace of discriminatory behaviour, such as pre-contractual relation leading to refusal of access to goods and services (night clubs, rental housing) or access to employment.

It offers the record of an objective situation of which discrimination can be inferred in the absence of evidence by way of witnesses or written documents relating to the discriminatory basis for the decision.

The recognition of the admissibility of recordings of telephone testing and the simplicity of the process has opened access to this mean of evidence to a greater number of victims.

The HALDE has used situation testing by pursuing two types of approaches: in access to employment, it sponsored a study, to evaluate candidates selection in order to denounce publicly discriminatory practices; in access to rental housing, it had proceeded in the fall 2008 to a testing in the prospect of generating penal proceedings, attempting to meet evidence requirements required by criminal courts, in a context where testimonial evidence was in itself insufficient to trigger condemnation.

For this testing, a person with an African accent and last name called first to answer an apartment vacancy advertisement, and was followed a few minutes later by the call of a person with a French accent and name. The telephone conversations and calls were recorded and attested by a sworn statement of a HALDE agent. 76 rental advertisements were tested, which gave rise to apparent differential treatment in 35 cases. For these 35 cases, the landlords and their agents were invited to an interrogation by HALDE in order to verify potential justifications. In the end, 15 cases were transmitted to the criminal prosecutor. They were all dismissed[56] or filed without prosecution for insufficiency of evidence in 2010 and 2011. The court, and then the prosecution, held that evidence created by the HALDE through testing had to be corroborated by evidence independent from the testing procedure. HALDE has pursued experimentation of testing procedures in 2009, but stopped since 2010, considering the inconclusive results of this very costly procedure.

12 cases have been prosecuted by the State and all of them have been dismissed on the ground that cumulating testing by fictitious candidates, investigating and transmission to the State prosecution, puts the Equality body in a position where accumulation of functions of the HALDE in the procedure alters the value of the evidence. If after investigation by the public prosecution the only remaining evidence of discrimination is the transcription of the answers given to false candidates/agents

[56] TGI Paris, no. 0907108445, 31 January, 2011, Baranes.

of the HALDE, who were fictitiously endorsing the role of candidates, the comparability between answers given to solicitations occurring in non identical circumstances is sufficient to dismiss the value of the evidence of the intentional dimension of the criminal offence of discrimination (High Judicial Court Paris, 7 January 2011, no.0907108445).

c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There is no reference to foreign legal practice in the French court's approach to situation testing. Further to the adoption of Article 225-3-1 PC the Ministry of Justice issued a ministerial instruction CRIM 2006-16 E8/26-06-2006 to public prosecutors and the President of each court in order to present the legislative amendment and provide indications as to its conditions of enforcement. It explains that evidence of discrimination is admissible even when it results from action perpetrated by the victim with the intention of provoking the differential treatment and with the intention to collect evidence of discriminatory behaviour. The intention of the victim has no bearing on the offence if the discriminator intentionally committed the discriminatory act. However, it cannot be used in the context of a fictitious offer or with persons acting under a false identity pursuing a false scenario. The victim has to act under his or her identity, be a truly unequally treated person. If the refusal was given to a false reality, the Ministry holds there is no offence and the situation cannot lead to condemnation.

HALDE has organised an International seminar on the practice of situation testing in the fight against discrimination on 11 December, 2009, that was concluded by raising the legal possibility of using situation testing in civil matters in France, as it is used in other European countries. This could foster attempts by NGO's to expand the use of situation testing beyond criminal law in the near future. However, to date, we are not aware of such an attempt.

d) *Outline <u>important</u> case law within the national legal system on this issue.*

Cf. answer a).
The Paris Court of Appeals, 11th Chamber A, has rendered the first Court of Appeal decision since the adoption of article 225-3-1 of the Penal Code providing for the admissibility of testing evidence in criminal cases of discrimination in Billau vs SOS Racism, 17 March, 2008, n° 07/04974.

SOS racism has organised a vast testing operation in a number of disco in Paris by presenting two couples of north African or African origin, that were followed by two couples of European origin when they were denied access. They were all photographed to show that they all wore comparable outfits. A third party witness who could attest as to the pretexts given to the couples who were denied access accompanied these teams.

Only one test was made for each disco and some of the participants were not available to testify, even though for each test some of them were present.
A penal complaint was immediately filed at police quarters against four discos after the European couples were admitted.

The door attendants testified that many clients African or north African origin were admitted.

SOS Racism's third party witness precisely testified as to the terms used by the door attendants denying access but confirmed that she saw clients of North African or African origin who were admitted.

In evaluating whether the tests were conclusive and sufficient to establish discrimination, the court held that in the context of evidence by way of testing:

- the refusal opposed to only one person or one group of foreign origin was insufficient to establish that the behavior of the doormen was triggered by a discriminating criteria;
- if one takes in consideration the way discos operate, the time lapse between the "foreign" group and the following group is too important, it may justify different responses;
- one independent witness is insufficient to conclusively testify as to what occurred;
- there were persons of foreign origin that were admitted;
- the date the testers' photograph was taken is insufficiently established;
- the testimony relates discriminatory discourses to deny access.

Considering the testimony of defendants alleging the admission of clients of foreign origin, the testing concluding that the refusal to admit a small number of persons is insufficient in itself to establish discrimination and should have been corroborated by other sources of evidence.

2.3 Indirect discrimination (Article 2(2)(b))

a) How is indirect discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

Indirect discrimination and shift in the burden of proof in discrimination cases have been introduced into French Law, first by the courts,[57] then by legislation: first it was introduced in the Labour Code (section L. 1132-1 LC, added by the Law of 16 November, 2001) and then by the Law no 2008-496 of 27 May 2008 at article 1. All

[57] Cass. Soc. 9 April 1996, no. 1727 P, RJS 5/96 no. 550; Cass. Soc. 23 November 1999 no. 4290, RJS 5/00 no. 498.

article 19 par.1 TFEU grounds are covered plus other grounds covered by French law.[58]

Further to the Commission's procedure of infringement, Parliament has adopted Law no 2008-496 that introduces at article 1 paragraph 2 a definition of indirect discrimination, which provides as follows.[59]

> *Constitutes an indirect discrimination a provision, criterion or practice, neutral in appearance, that is likely to give rise, for one of the grounds mentioned at paragraph one, to a particular disadvantage for persons in comparison with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*

It is important to note that indirect discrimination does not apply in criminal matters or to the Law on the Press of 1881, which deals with criminal offences related to insults and penal racist and homophobic discourse, since the principles of criminal law require evidence of intentional discrimination.[60]

b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?

Most cases referring to indirect discrimination resulted from the application of Directive 76/207 concerning equal treatment between men and women in national law.[61] Most of them were the result of decisions of the Court of Justice of the European Union and preceded implementation of the directives.

However, in matters of discrimination based on trade union activities, the Social Chamber of the Court of Cassation has applied a comparative situation approach inspired by the case law of the CJEU in order to establish direct discrimination, thereby making way to the implementation of the methodology underlying indirect discrimination.

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[58] For the list of grounds covered see section 2.
[59] Constitue une discrimination indirecte une disposition, un critère ou une pratique neutre en apparence, mais entraînant, pour l'un des motifs mentionnés au premier alinéa, un désavantage particulier pour des personnes par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens pour réaliser ce but ne soient nécessaires et appropriés.
[60] Art. 121-3 of the Penal Code: 'Il n'y a point de crime ou de délit sans intention de le commettre'.
[61] see USAI Champignons Annex 3.

In January 2007, the Social Chamber of the Court of Cassation adopted its first decision implementing the principle of indirect discrimination and clarifying the conditions of its applicability. The High Judicial Court has chosen to do so in relation to the sanction of discrimination on the basis of health in relation to the interpretation of a collective agreement relating to the modulation of the computation of work time which foresaw that employment could vary between 44 hours per week of employment, in "high working periods", and 21 hours per week in "low working periods" for an annual average of 35 hours. The agreement also provided that a uniform weekly salary would be calculated on the basis of the employee's annual average hours, i.e. on the basis of the average 35 hours week, independently of the real number of hours worked in a given week, with an adjustment determined at the end of the year on the basis of the calculation of the employee's real working time. In this context the labour code provides at Article L212-8 that health related absence is calculated as time worked for the purpose of the calculation of the annual working time. An employee had been in health related leave of absence during the "high working periods" over a period of two years. The issue was how to calculate the year end adjustment.

In the absence of an argument on the part of Claimant's Counsel, the court itself raised *ex officio* an analysis based on the principle of indirect discrimination. While the Court had discussed the concept in previous cases relating to sex discrimination cases, it had always refused to make findings of indirect discrimination (Soc.9 April, 1996, Bull. Civ.V, no 146). It concluded that the chosen method of calculation is apparently neutral and is not in itself discriminatory, but that "it constitutes a measure with an adverse indirect impact by reason of the health of the employee". The Court did not limit itself to the consideration of the intention of the parties but also looked at the resulting effect of the chosen interpretation of the agreement.

The Court refused to seek a possible justification of the measure under scrutiny and declared it discriminating, stating that collective agreements cannot be implemented when their provisions have discriminatory effects on the basis of prohibited grounds of discrimination, and thereby implying that no legitimate aim can justify the discriminatory impact of collective agreements.

This decision is considered to send a strong signal to the social partners on the necessity of a thorough review of collective agreements presently in force, in order to rectify provisions which could be indirectly discriminatory.

The Court of Cassation has commented however on arguments that could justify unequal remuneration. It must be based on the justification of an objective difference proportional to the differential payment (Cass. Soc., no 03-40465, 16 February, 2006, M. Gabriel Aguera et al c/ Société M2PCI et al), and therefore defeats the argument of unequal treatment.

In Cass. Soc., no 05-45601, 20 February, 2008 it decided that difference in status alone (staff and employees) could not justify having access to lunch vouchers or not,

that such difference had to be objective and relevant: a cut out date of employment cannot justify differences in salaries (Cass. Soc., no 03-42641, 31 October, 2006, Sodemp, Le Méridien Paris Etoile); the failure to analyse the justification of the difference underlying differential treatment deserves to be quashed.

However, we can observe the evaluation of a legitimate aim to justify differential remuneration on economic grounds in Cass. Soc., no 03-47720, 09 November, 2005, Soc ESRF c/ M. X., confirmed in another matter against ESRF on 17 April, 2008 (Soc. 819 FS-P+B). In this case, the collective agreement foresaw since 1993 that employees of foreign nationality received a yearly bonus, even after having been in place for a number of years (in some cases 20 years). In this situation, the Court was faced with unequal financial benefits that could not be justified by the specifics of the work performed by the employee. First, the Court decided that Article 18 TFEU did not target the situation. On the argument of indirect discrimination on the ground of origin, it further held that, in a high technology research installation, the business necessity to attract talented scientists from abroad and the compensation of trouble related to the expatriation of their family were acceptable justifications of unequal remuneration based on nationality: attraction of workforce, when proportionate and objectively justified.

In a decision of 17 November, 2010 in Banque Finaref, the Court of cassation concluded that the limitation of compensation for redundancy because an employee is two years from full retirement was a practice using an apparently neutral criterion that could constitute an indirect discrimination on the ground of age. However, the Court decided that it met the requirement of reasonability and proportionality provided by the exception authorised by Article 6 of Directive 2000/78 implemented by Article L1133-1 of the Labour Code and therefore concluded that this compensation scheme was not discriminatory.

In 2012, the Conseil d'Etat first used the concept of indirect discrimination in relation to a case related to discrimination on the ground of disability and a decrease in the variable portion of the salary of a magistrate with the public prosecution office who had become deaf. Plaintiff had seen his functions redefined in order to allow him to maintain his professional activity, his pleading duties having been replaced by administrative duties. The Conseil decided that the universal application of a rule defining the scope of variable salary in reference to hearing duties was unfavourable to plaintiff and considering his functions were the result of accommodation of disability the decision was not reasonable and proportionate. Therefore, the rule applicable to appreciate variable salary had to be redefined by taking in consideration plaintiff's performance in carrying his redefined duties. (CE, no 34770311, July, 2012, Volot-Pfiser vs. Ministry of Justice). This decision gives a clear message as to the prevention of indirect discrimination resulting from reasonable accommodation's negative impact on the remuneration and professional situation of disabled civil servants.

c) Is this compatible with the Directives?

Yes. However, the transposition of the shift of the burden of proof resulting from Law no 2008-496 creates ambiguity. It is less favourable than the former drafting of the burden of proof which was based on the presentation of “elements of facts” from which it may be presumed…”

At this stage, there are very few higher court decisions and the decisions of lower courts remain inconsistent. Effective implementation by trial judges and non-professional Labour courts judges will require time and training.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

No. See 2.2 C).

e) Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?

There is no protection of foreign languages since in France there is one official language. Nevertheless, unjustified language requirements used to exclude candidates to employment have been held to be direct discriminations punishable under the penal code, allowing therefore no justification.

Meanwhile, the positive value attributed to competence in foreign languages could be considered as a legitimate aim and reasonable justification to a requirement that would indirectly favour persons of foreign origin. However, in its Deliberations n° 2007-114, 14 May, 2007, n° 2007-31, 12 February, 2007 and n° 2006-252, 27 November, 2006, the HALDE has decided that employment offers could not be drafted using language such as “mother tongue” requirements without committing direct discrimination, and should refer to the level of competence required in descriptive neutral terms such as native speaker level.

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?

General principles of evidence in criminal cases allow the proof to be made by all means and consider means of evidence to be unlimited. Therefore, admissible means of evidence should include the use of statistics. Situation testing is representative of the sort of statistics which the criminal courts regularly admit into evidence.

In labour law, the constant jurisprudence of the Social Chamber of the Court of Cassation in matters of discrimination has favoured an approach based on access to evidence in order to allow, when necessary, the comparative analysis of the situation of the Plaintiff against that of allegedly non-discriminated parties. This comparative

approach necessarily allows plaintiff to establish a statistically significant discrepancy based on the analysis of evidence emanating from the employer on the respective situations of employees based on the prohibited grounds of discrimination including ethnic origin, race, religion, age, sexual orientation and disability.

General rules of civil and criminal procedure and the provisions transposing directives 2000/43 and 2000/78 do not refer expressly to the use of statistical evidence.

However, general principles of interpretation allow the national judge to refer to the directives in order to interpret national law and their explicit reference to the use of statistics as a legal mean of evidence of discrimination should be sufficient to justify admissibility of statistics in evidence.

Finally, article 8 II paragraph 5 of the Law 78-17 of 6 January, 1978[62] states that personal data can be used in the context of any administrative and judicial proceeding pursuant to the defence or the exercise of a legal right. However, the national data protection agency (CNIL) is reluctant to allow the French Equality body (Defender of Rights) to prevail itself of this exception to classify data based on origin resulting from its investigations and systematically requires that it request authorisations.

b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

Statistics resulting from the comparative situation of employees of a common employer are now commonly used in labour law based on the comparative approach developed by the CJEU in discrimination cases, and repeatedly recognized by the Court of Cassation in anti-trade union discrimination and other grounds of discrimination.[63]

Statistics resulting from research reports have however not been used in civil and administrative procedures.[64] Its admissibility would be subject to an issue of relevance to the case at bar but does not raise per se ethical or methodological problems. The concepts of race, origin and ethnicity are not defined by French law, as they are not legal categories. Sensitive data and data based on origin are admissible before the courts (Cass. Soc. 15/12/2011, n° K 10-15873 Airbus). It is

[62] Law n° 78-17 of 6 January, 1978 relating to information systems, data and the protection of freedom: www.cnil.fr/index.php?id=301.
[63] Court of Cassation, Social Chamber, 28 March, 2000, no. 1027 P+B Fluchère, Dick and CFDT c./ SNCF ; CA Paris 17/10/2003 / appel de TGI Paris 22/11/2002, DO juillet 2003 p.284, Affaire « Moulin Rouge » SOS Racisme et Marega c/ Beuzit et Association du Moulin.
[64] LANQUETIN, GREVY, Op. Cit.

empirically constructed and without technical constraints, its value being essentially subject to the appreciation of the judge. It is however used regularly by the national equality body (HALDE and Defender of Rights).

There is no indication that foreign law would have been argued in order to justify the use of statistical evidence before the French courts. However, decisions of the CJEU have been at the foundation of all arguments supporting the comparative approach to evidence of discrimination.

In essence, the difficulty in adducing statistical evidence relates to the availability of data that can be relied upon in relation to issues raised in a specific case. For instance, the HALDE reviewed all available studies and statistics relating to age and employment and this review revealed that on the matter of age the national indicators have not been constructed to sustain anti discrimination policy or legal action. Therefore, they are either too old or incomplete and do not allow an analysis ascertaining national trends or analysis on age discrimination in access to employment.

As regards the use of statistics in cases relating to the ground of origin, the problem is amplified by the absence of a recognised methodological framework to produce statistics on the ground of origin, and more generally the unavailability of data on origin in France.

In this context, though authorized by law, the use of statistics is rare and therefore risky and burdensome. It has essentially been based on deductions made from list of employees on the basis of their last names and/or nationality.

c) Please illustrate the most important case law in this area.

With respect to situation testing in criminal matters, see 2.2.1.

In its decision of 14 June, 2001,[65] the Court of Cassation decided that in matters related to discrimination on the ground of trade union activities, the offence of discrimination may be established by comparative evidence and the judge has the obligation to investigate the comparative situation of the employee with that of others and to actively request production of the necessary evidence by defendant.

Failure to proceed to such a comparative analysis is the equivalent of refusing plaintiff access to enforcement of his/her rights to protection against discrimination.

The use of quantitative analysis of the results of hiring procedures excluding candidates on the ground of origin and age was expressly recognised by the Courts

[65] Court of Cassation, Criminal Chamber**,** 14 June, 2000, no. 2792, 99-108, CFDT Interco; see above footnote no 41 as well.

of appeal of Paris, Toulouse and Poitiers as a valid approach to establish a presumption of discrimination.[66]

In the Airbus case, the Toulouse Court of appeal referred to the HALDE's investigation to reach a finding of discrimination on the ground of origin further to a claim alleging that persons of North African origin were hired for short terms contracts at Airbus but practically never for undetermined term contracts. Plaintiff was employed as a specialised worker by Airbus for a short term contract from October 2000 to September 2001. He was contacted directly by Airbus in October 2004 for a second contract from January 2005 to July 2006 for an employment at level 190. In the fall of 2005, he applied for an indefinite term contract for an opening relating to an undetermined post. Another short term employee of French descent was selected. He held a post at the same level with the same company but this was his first short term contract, he operated in another work site of the same employer, and he was only in activity since January 2005. In addition, the interviews were not very favourable for the hired candidate of French origin, but his application nevertheless received a better rating. The evidence was based on the HALDE's enquiries as regards the list of persons employed, which indicated that among recruited staff between 2000 and 2006, all were of French citizenship, and only two had a last name of North African origin. Moreover, for the period between January 2005 and July 2006, on the 43 employees hired under indefinite term contracts, none had a last name of North African origin. His evidence was sufficient to trigger a presumption of discrimination (Toulouse Court of Appeal, no R 08/06630, 19 February 2010). This decision was confirmed by the Court of Cassation (Cass. Soc.15/12/2011, no K 10-15873 Airbus).

As discussed in section 2.3.1 a), the HALDE's approach to investigation in matters of employment, and other matters when applicable, is the investigation of the comparative situation of the employee with the appropriate comparator, on the model of the Court of Cassation's jurisprudence in trade union representatives' discrimination cases. However, the French case law is opening up a new line of reasoning concluding that comparative evidence is not always necessary in order to establish a presumption of discrimination that can be inferred from the circumstances, and in such cases other elements may trigger a presumption of discrimination, such as the chronology of events, (see supra Court of Cassation, Social Chamber, 20 May, 2008, Judgment No 06-45556); the objective vulnerable situation of Plaintiff related to abusive treatment (see supra in Annex 3, Court of cassation, 03/11/2011, n° 10-20765 Dos Santos), the objective consequence of the neutral rule (Court of Cassation, Social Chamber, 9 January 2007, *Sport fabrics* no 05-43962) and in a case of discrimination for union activities when the employee's evaluation explicitly refers to the employee's unavailability in reason of his trade

[66] C.A. Paris, L'Oreal vs SOS Racism, 6 July 2007, no 06/ 07900 ; C.A. Poitiers, Mont-Louis Bonnaire vs Crédit Agricole, 17 February, 2009 no. 08/00461); Cass. Soc. 15/12/2011, no. n° K 10-15873 Airbus.

union mandate (Court of cassation, Social Chamber, 20 February 2013, CPAM, No 10-30028).

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

Data collection is governed by the Law 78-17 of 6 January, 1978 relating to information systems, data and the protection of freedom[67] and covers collection and manipulation personal information relating to both computerised and non-computerised information and files. This legislation is enforced by The *Commission nationale informatique et liberté* (CNIL/National Commission for data protection).

Personal information is defined at article 2 of the Law as any information relating to an identified physical person or to a person, directly or indirectly identifiable in reference to a number of identification or personal attributes.

Data collection and treatment activities are subject to a declaration for authorisation by the CNIL pursuant to articles 22 and following of the Law. Violation of the obligation to declare or obtain an authorisation for collecting and treating data is subject to penal and administrative sanctions.

Article 8 I defines sensitive data for which collection is forbidden except as provided in Article 8 II. Article 8 II paragraph 5 of the Law states that personal data can be used to adduce and present evidence in the context of any administrative and judicial proceeding pursuant to the defence or the exercise of a legal right without declaration or authorization. Thus, Plaintiffs alleging racial discrimination are not required to obtain an authorisation from the CNIL in order to request a court order to collect personal data from an employer. The CNIL is not legally competent to interfere in the judicial process.

Article 8 II paragraph 7 of the Law authorises the statistical treatment of personal data by the governmental national statistics institutes, under the supervision of the Commission. There is no general principle forbidding the collection of data based on ethnic origin, religion, age, disability or sexual orientation. However, all collection and treatment is subject to authorisation - including for the purpose of research - except, as discussed above, for presenting evidence in judicial and administrative proceedings.

[67] Op. Cit.

National governmental statistical agencies (INSEE, DARES, DRESS, INED)[68] refuse to collect data on race and ethnic origin in the national census except regarding nationality and the origin of first degree ascendants for limited secondary studies. Therefore, racial and ethnic statistical indicators allowing impact evaluation of policies, or created for monitoring purposes, do not exist.

However, such data can be collected in small scale multi-criteria surveys and studies under the supervision of National statistical agencies (based on a maximum representative sample of 5000 selected people).

It is not collected in institutional or corporate records, for example employers' records. The treatment of such data must be confidential, anonymous and reserved to the outside group monitoring the implementation of the program.

After production of the study, the data collection program must be destroyed immediately. For studies conducted by survey, the answers must be anonymous and their use exclusively reserved to exploitation in the context of the study by the persons responsible for the study.

Recently many studies and reports, as well as public policy on racial discrimination, have launched a debate on the opportunity to revisit the position of the French institutions managing the national policy on statistics and data protection that prohibits the collection of data on national, ethnic and racial origin.

With a particular focus on the field of employment, the CNIL decided to create a working group with the mandate to consult national statistics institutions, to audit existing research projects and prepare recommendations on possible orientation of future developments on this issue. It issued a recommendation on 5 July, 2005,[69]on the collection of data by employers in order to monitor discrimination in the work place. It concluded that the use of data to induce ethno-racial profiles was not authorised by law and considered abusive. However, since there was no general methodology and indicators for ethno-racial indicators constructed by national institutions managing statistics in France, the relevance of such indicators remains controversial and contested. In this context, there is no reliable methodological framework to collect data or to allow comparative analysis based on origin or race. Therefore, such studies cannot be improvised and are to be allowed on a case by case basis, until such time as the legislator authorises them and.

The CNIL has initiated a follow up working group, for which it had invited the HALDE as observer. After auditioning all actors and experts on the subject between November 2006 and September 2007, it issued recommendations favouring the

[68] INSEE (Institut national de la statistique et des études économiques) ; DARES (Direction de l'animation de la recherche, des études et des statistiques) ; DRESS (Direction de la recherche, de l'évaluation, des études et des statistiques) ; INED (Institut national des études démographiques).
[69] CNIL recommendation on national, racial and ethnic data of 5 July, 2005.

creation of a legislative framework in order to allow research on origin.[70] Further to these recommendations, Government introduced legislation to regulate data collection in research relating to the measure of discrimination and origin. It did so by way of an amendment to the bill relating to the control of Immigration and Asylum. Article 63 of the law amended article 8 section II and article 25 section I of the law of 6 January, 1978 on data collection in order to allow the collection of personal data "showing, directly or indirectly, the racial or ethnic origin" of persons, for the purpose of studies under the supervision of the CNIL (Commission on Data collection and the Protection of Personal Data).This provision was adopted and challenged by the opposition before the Constitutional Council. The Constitutional Council struck down the provision on the technical ground that it was a legislative rider, i.e. an amendment unrelated to the subject matter of the legislation under discussion.

However, it further declared that studies relating to the diversity of origin, discrimination and integration could be based on objective information but that ethnic origin and race are not objective concepts and are contrary to Article 1 of the Constitution.[71]

In the context of a large project relating to the "integration of immigrants, the future of second generations and discrimination", INED has initiated a number of inter-related projects aiming at proposing a deepened exploitation of data obtained in a number of previous studies of the INSEE, INED and the CEREQ and developing a theoretical framework for the concept of "integration indicators".

The CNIL authorised that groups be constituted on the basis of surname and last names identified ethnically. It reiterated however that such procedure is forbidden unless it is intended for research purposes and expressly authorised by the CNIL on a ground of public interest. However, it considered that this study met requirements of public interest because it would contribute to compensate the present deficit in statistical data necessary to pursue and define policies for the integration of these populations, at a National and European level. The CNIL imposed a procedure of information of each person contacted in the context of this study, imposing that they receive explanations in relation to the method and procedure of selection of their phone number, to the fact that cooperating to the study is not compulsory and to each participant's right to consult and rectify data gathered further to their participation to the study. In addition, the interview organised to complete the study's questionnaire requires that a written authorisation of each participant be obtained.

The decree of the Ministry of Education dated 3 September, 2006, expressly stated that the INED and its partners were to be the exclusive receivers of the information collected. SOS Racism and the MRAP (Mouvement contre le racisme et pour l'amitié

70 http://www.cnil.fr/fileadmin/documents/Communications/communicationVD15.052_vu_parADEBET.pdf

71 Constitutional Council no 2007-557 DC, 15 November, 2007, http://www.conseil-constitutionnel.fr/decision/2007/2007557/2007557dc.htm.

entre les peuples) have publicly stated their opposition to this investigation process maintaining their opposition to ethno-racial data.

The Commission of experts on the measure and evaluation of diversity and discrimination (COMEDD), presided by the former Director of the National Demographic Institute (INED), François Hérand, was mandated in March 2009 by Yasid Sabeg, who was then Commissioner for diversity and Equal Opportunity, in order to undertake a massive consultation in order to submit recommendations on the opportunity to develop statistics in order to monitor ethnic discrimination. It received 54 memoirs, preceded to 12 days of plenary hearings and consultations. Its report was submitted on 5 February, 2010.[72]

The report first went over all previous discussions over the last 20 years, all existing methodological possibilities and summarises the relevance and place of statistics in public action and the fight against discrimination in order to control and ensure the efficiency of public policy and law enforcement. In order to formulate propositions that conformed to the requirements of the decisions of the Constitutional Council of 15 November 2007, it discussed all available indications of origin that can be considered to contribute to objective evaluation.

It however underlined the necessity to question subjective parameters in research pursuing more scientific goals.

Although it concluded to the necessity to overcome present reservations and develop tools and approaches to monitoring, it went on to underline that the necessary statistical approach be built by taking in consideration not only indications of origin but also the combined impact of social origin.

The report went on to propose the development of three types of studies. First, it recommended to add data on nationality and language of citizens and their parents to the census, and to create a follow up national study on discrimination every five years in order to allow further exploitation of data resulting from the census – this did not require any modification to existing legislation. Second, it discussed classical studies by public research followed up by special authorizations of the HALDE and CNIL, under the existing derogation scheme under the data protection legislation. The report expressly rejected any amendment of the law to include a specific derogation on data related to origin. In this context, it further proposed that the HALDE be designated as an observatory on discrimination in order to develop the exploitation of indicators and coordinate studies and receive a mandate to publish an annual report on the national situation on discrimination. The law creating the Defender of Rights has not taken up this recommendation.

[72] http://medias.lemonde.fr/mmpub/edt/doc/20100205/1301477_b8e9_rapportcomedd.pdf.

As regards employment management, the COMED report proposed that each employer who hired over 250 employees, be required to submit annual indicators as a legal requirement of control of HR processes, administered by authorized third party consultants directly with employees, and the results of which would be monitored by the HALDE.

Further to these recommendations, the HALDE and CNIL have initiated a working group to elaborate guidelines for human resources managers in order to allow them to elaborate a methodology to produce quantitative management indicators in relation to promotion of diversity in compliance with the present requirements of the law. This work was continued by the Defender of Rights and the CNIL. These guidelines have been published in April 2012 and their dissemination was financed through a Progress project. They essentially develop the practical implication of CNIL's recommendations of 2007 and define procedures of compliance to be implemented by the CNIL.

2.4 Harassment (Article 2(3))

a) *How is harassment defined in national law? Does this definition comply with those of the directives? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

In French Law, harassment takes both the form of sexual harassment and moral harassment and is not defined in relation to a list of prohibited grounds of discrimination, but a regime applicable to any relevant employment situation. It is sanctioned by criminal law (Article 222-33 and 222-33-2 PC) and labour law (Articles L1152-1, L1153-1 and Article 6 of Law no 83 634 of 13 July, 1983 concerning civil servants).

Prohibition of harassment is applicable to both the private and public sectors and its definition covers acts of superiors as well as acts perpetrated by colleagues. The Labour Code specifically states that no employee must be the victim of such behaviour or be sanctioned for having testified or complained in relation thereof (article L1152-2 LC).

According to the Law of 17 January, 2002, moral harassment covers *«repeated acts which result in a degradation of working conditions such as to alter ones benefit of ones rights or dignity, to alter one's physical or psychological health or to jeopardise one's professional future*."

Further to the decision of the Constitutional Council no 2012-240 QPC of 4 May 2012 declaring the provisions of the Penal Code (article 222-33) unconstitutional on the ground that the prohibited behaviour was defined as "Harassment is the fact of harassing", and did not provide sufficient details regarding the acts that were the target of criminal sanction, in violation of the requirements of criminal law that the

behaviour sanctioned must be precisely defined, Government adopted Law no 2012-954 of 6 August 2012 to amend the definition of sexual harassment. Article L1153-1 LC now defines sexual harassment as "statements or acts" repeated or not" with a sexual connotation that violate a person's dignity because of their humiliating or degrading content or because they generate an intimidating, hostile or offensive environment" as well as pressure that *aims, whether for real or only for appearances sake, at obtaining sexual favours for one's own benefit or that of a third party*." The courts have decided that homosexual sexual advances were covered by the prohibition of sexual harassment.[73]

Article L1154-1 LC provides in labour law for the shift in the burden of proof in the same terms as those used in directives 2000/43 and 2000/78.

In addition, Law no 2008 496 includes at article 1, harassment as a form of discrimination, providing a distinct definition which does not require repetitious acts:

> *"Any behaviour related to one of the grounds mentioned at paragraph one and any sexually connoted behaviour, to which a person is subjected and pursuing the purpose or having the effect of violating his or her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment*".[74]

b) Is harassment prohibited as a form of discrimination?

At article 1 par 3, Law no 2008-496 provides that harassment based on a ground of discrimination and sexual harassment are forms of discrimination.

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

No.

d) What is the scope of liability for discrimination)? Specifically, can employers or (in the case of racial or ethnic origin, but please also look at the other grounds of discrimination) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

[73] Cour d'Appel Paris, 18e Ch., section C, 8 October1992, Ste Euro Disney c. Vallinas, Juris Data no 023467.
[74] 1° Tout agissement lié à l'un des motifs mentionnés au premier alinéa et tout agissement à connotation sexuelle, subis par une personne et ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.

French principles of civil liability and French Labour law provide that legal persons are responsible for actions of their employees and legal representatives, which covers employees and managers of employers, trade unions and NGOs. In addition, the definition of harassment as prohibited by French labour law covers actions of persons in authority but that of colleagues as well (articles 1151-1, 1152-1 and 1153-1 LC) and provides for an obligation on the part of the employer to guarantee a safe work environment free of harassment behaviour (art. 1152-4 LC). This obligation creates a duty to intervene in the case of third party harassment towards one of its employees.

2.5 Instructions to discriminate (Article 2(4))

a) *Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

Instructions to discriminate are not covered as such by the Labour Code, the Civil Code or the Penal Code. Law no 2008-496 which provides the definition of discrimination applicable to all legal provisions, includes at article 1 par. 4, instructions to discriminate as a form of discrimination, providing the following definition:

> The fact of instructing anyone of adopting behaviour defined at article 2.

In addition, incitement and instructions to discriminate correspond to the notion of complicity of articles 121-6 and 121-7 PC and general principles of liability in civil law.

Thus in labour law an employee's superior and the employer will support liability for actions of their subordinates covered by L1132-1 LC which covers all article 19 par.1 TFEU grounds plus those listed in section 2.1 above, in situations of discrimination and by L 1152-1 LC in situations of harassment. In addition, L 1152-4 LC creates an obligation on the part of the employer to take all necessary measures to put an end to harassment in the workplace. In public service, the same principles apply.

In very few cases, instructions to discriminate were presumed in criminal cases and the corporation was held liable for the discrimination perpetrated by its employees. However, criminal prosecutions against corporate entities remain extremely rare, as do prosecution arguments for penalties against employers when specific employees are prosecuted. In few isolated cases however, the exacting burden of proof with regard to the liability of senior management was met deductively because the court was persuaded of its active involvement in what was a discriminatory policy.[75] In fact,

[75] TGI Versailles, 2 April, 2001. CA Paris 20 mars 1997, Sté NIDEK Europarc, n° 4835/96.

it is the manager giving instructions who is targeted by the procedure in penal cases; the court is looking for evidence of the involvement of the decision maker.[76]

The Law on the Press prohibits provocation to racial, religious, sex, disability and sexual orientation discrimination, as well as complicity (article 23 and 24 of the Law on the Press of 1881 in case of public provocation and article R625-7 PC in case of non public provocation). The Court of Cassation has clearly established that the prohibited provocation refers to discriminations defined by article 225-1 and 225-2 PC.[77]

b) Does national law go beyond the Directives' requirement? (e.g. including incitement)

No. There is no specific provision adopted regarding incitement to discriminate, but it results from application of general principles of liability as mentioned above.

c) What is the scope of liability for discrimination)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

French principles of civil liability and French labour law provide that legal persons are responsible for actions of their employees and legal representatives, which covers employees and managers of employers, trade unions and NGOs. In addition, the definition of harassment as prohibited by French labour law covers liability of the employer for harassment by persons in authority but also for harassment of colleagues (articles 1151-1, 1152-1 and 1153-1 LC) and provides for an obligation on the part of the employer to guarantee a safe work environment free of harassment behaviour (art. 1152-4 LC). This last obligation creates a duty on the part of the employer to intervene in order to put an end to a situation of harassment in the workplace towards one of its employees that is the result of the behaviour of a third party, for example a subcontractor or a client.

As regards instructions to discriminate, the person executing the instruction as well as the instructor is responsible, whether or not the instruction comes from the employer or a third party.

[76] CA Paris 17/10/2003 / appel de TGI Paris 22/11/2002, DO juillet 2003 p.284, Affaire « Moulin Rouge » SOS Racisme et Marega c/ Beuzit et Association du Moulin ; TGI November 14, 2002 no. 0019304084 Cantuel Horbette (Hotel La Villa), Essindi et al.
[77] Cass. crim. 12 April, 1976, Cass. crim. 22 May, 1989.

In all cases the perpetrator its employer and the employee's employer will be held responsible.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

Article L5212-2 LC creates an obligation of employment for the State and private employers employing 20 or more full time salaried workers, of 6% of disabled employees as defined under article L5212-13 LC.

Article L1131-1 L C provides: "No salaried employee can be sanctioned, dismissed or be subject to a discriminatory measure by reason of his or her disability as the law guarantees the principle of equal treatment towards disabled workers" and, at paragraph 2, that in the case of litigation relating to the application of this principle, the shift in the burden of proof provided for in Article L1134-1 LC, and resulting from the transposition of Directive 2000/78, is applicable.

In addition, the law creates Article L 5213-6 LC in order to ensure respect for the principle of equal treatment towards the employees with disabilities in the workplace, as defined in Article L114 of the CSW, and reasonable accommodation. It provides that "(…) towards the disabled workers mentioned in article 5212-13 LC, the employers are to take, in relation to the need dictated by a concrete situation, all necessary measures to allow disabled workers to have access to or to keep a position of employment that corresponds to their qualifications, to execute the work, progress therein or to have access to adapted professional training"[78] (*our translation*).

This obligation does not find application in reference to the situation of a person meeting the general definition of disability at article L114 of the Code of Social Welfare (CSW). It is subject to the additional requirement that the disabled worker form part of the group targeted by the employers' "quota obligation of employment", and be listed in article 5212-13 LC.

[78] Art. 323-9-1 LC « (…) les employeurs prennent, en fonction des besoins dans une situation concrète, les mesures appropriées pour permettre aux travailleurs handicapés d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée ».

These reasonable accommodation obligations therefore benefit only to employees who benefit from official recognition, have a status of disabled workers, to those who have suffered from an employment accident procuring a disability superior to 10% and who benefit from compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans.

Therefore, non-registered disabled people, non salaried disabled workers and disabled persons who are members of the professions and self employed are not covered by the positive obligation to proceed to reasonable accommodations of article 5121-13 LC.

They can however rely on the general protection against discrimination of article L1132-1 ET ss. LC and of article 2 of the law no 2008-496 of 27 May, 2008.

The only applicable limitation to this obligation is “disproportionate costs”, as defined by Article 5213-6 par 2 LC, by taking into account any financial support available to the employer (cf. Article 37 of the law no 2005-102 on disability concerning Article L5213-10 LC on financial subsidies for the adaptation of the work environment awarded by the departmental director of labour). They are provided by article R5213-52 LC.

There is no provision for disproportionate burden and it has not yet been decided by courts in a context not involving the issue of the financial aspect of the situation.

This law is supplemented by two decrees, one ministerial order and one ministerial instruction:

- decree no 2006-134 of 9 February, 2006 relating to the recognition of the importance of disability;
- decree no 2006-501 of 3 May, 2006 relating to the fund for professional integration of disabled persons;
- ministerial order of 9 February, 2006 determining the amount of the annual support to employment;
- ministerial instruction of the General delegation for employment and vocational training DGEF[79] 2006/07 of 22 February, 2006 relating to the recognition of the importance of disability to determine the contribution of the Fund for professional integration of disabled persons.

They set criteria for the determination of the financial support given to the employer. They are based on the level of impairment and the corresponding additional functional cost of employment resulting from the implementation of reasonable accommodation.

[79] Délégation générale à l’emploi et à la formation professionnelle.

Similar provisions are integrated into the Law 83-634 of 13 July,1983 relating to the rights and obligations of civil servants; Law 84-16 of 11 January, 1984 concerning the civil service of the State; Law 84-53 of 26 January, 1984 civil service for local and regional levels of government and Law 86-33 of 9 January, 1986 concerning the hospital civil service.

Article L3122-26 LC provides for a right to request adaptation of work hours not only for the disabled person but also to the benefit of family members and caretakers of persons with disabilities.

In the Volot Pfiser case (11 July 2012), Plaintiff was a magistrate with the public prosecution office who had become deaf. His impairment lead to a redefinition of his functions and of those of his colleagues since he could not pursue any public hearing activity as prosecutor. He was therefore exempted of hearing attributions, which have been replaced by administrative duties. The hearings he would normally have assumed were redirected to other magistrates. In France, the working conditions of magistrates are seriously impacted by their hearing obligations since the court does not close and the hearings go on until the roll call is finished, often late into the night. The same year he saw the variable portion of his remuneration significantly lowered, and in fact his premium rate became the lowest of the jurisdiction. The justification was that premiums compensate objective burden of service and that his burden of hearing had been reassigned to others who have seen their burden increased. Therefore, the adjustment in remuneration was objective and reasonable. The Conseil d'Etat reversed the lower courts' decisions and decided that, pursuant to Directive 2000/78, the duty of reasonable accommodation on the part of the public employer creates a corresponding right to the benefit of the magistrate guaranteeing that the measures taken will not create a disadvantage as regards remuneration and allow a proper professional progression. The fact of taking into account the disability to set objectives cannot generate unequal treatment as regards remuneration. The fact of comparing respective contributions as a result of the accommodation measures taken creates a situation by which reasonable accommodation has an adverse impact on remuneration and becomes a factor for indirect discrimination. Evaluation must be *made in function of objectives set out by taking into account reasonable accommodation.*

The Law no 2008-496 has not extended the obligation of reasonable accommodation to non salaried and independent workers. However, in the Bleitrach case (30 October 2010) the Conseil d'Etat has recognized a duty upon the state to take positive measures to provide access to court houses for persons with a disability working as auxiliaries of justice (a liberal profession). In this case, the issue was the duty of the ministry of justice to provide for access to court houses to disabled persons auxiliary of justice which are practising as liberal professions. The same issue could be raised as regards access to many public places where non employees come to perform their work such as town halls, public clinics etc.…

In addition, the Law no 83-634 states at article 3 that, in conformity with article 64 of the Constitution of 1958, it does not cover the status of Magistrates who are not considered as civil servants. Ordinance no 58-1270 of 22 December, 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench.

Public agents working within Parliament are as well not subject to the Law no 83-634 and are governed by application of article 3 of the Law by separate in-house rules of Parliament. Finally, all contractual public agents which hold on of the various status that are excluded from the application of the Law no 84-16 of 11 November, 1984 on the status of contractual agents at article 3 paragraph 5, are also excluded from all protections against discrimination of public agents provided by the Law no 83-634.

All these texts have not been amended to implement directive 2000/78 and do not foresee any protection against discrimination on any grounds. The scope of the duty of reasonable accommodation therefore remains incomplete.

However, all public agents that are not covered by transposition, can argue the right to reasonable accommodation on the basis of the principle of direct application of Directive 2000/78 pursuant to the jurisprudence of the Administrative Supreme Court in three cases against the Ministry of Justice: the Perreux case (30 October 2009) and Bleitrach case (30 October 2010). Volot Pfiser (11 July, 2012)

Finally the labour code provides for extension of parental leave after having a disabled child (article L1225-61 LC) and adaptation of work hours for caring for disabled family members (article L3122-26 LC).

With respect to the status of the army, France has prevailed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability.

b) Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The obligation created by Article L 5213-6 LC does not find application in reference to the situation of a person meeting the general definition of disability at article L114 of the Code of Social Welfare (CSW). It is subject to the additional requirement that the disabled worker form part of the group targeted by the employers' "quota obligation of employment", and be listed in article 5212-13 LC.

These reasonable accommodation obligations therefore benefit only to employees who benefit from official recognition, have a status of disabled workers, to those who have suffered from an employment accident procuring a disability superior to 10%

and who benefit from compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans.

Therefore, non-registered disabled people, non salaried disabled workers and disabled persons who are members of the professions and self employed are not covered by the positive obligation to proceed to reasonable accommodations of article 5121-13 LC.

They can however rely on the general protection against discrimination of article L1132-1 ET ss. LC and of article 2 of the law no 2008-496 of 27 May, 2008.

c) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

Education:

The Law on Disability provides for a duty to integrate disabled children in the mainstream school system. The Law no 2005-102 of 11 February, 2005 was adopted after the Autism Europe case before the Committee of Ministers of the Council of Europe[80] and completely reforms assistance and education of disabled children.[81] The right to education and to reasonable accommodation within education of disabled children is affirmed in articles 19 to 22 of the Law on disability.

Article 11 affirms a right of access to local mainstream schools and the right to a personalised educational project.[82] (For more detail, see section 3.2.8)

The Administrative Supreme Court, in a decision of 15 December, 2010 **(**no 344729) concluded that adapted access to education for disabled children at preschool level is a fundamental freedom, and failure of the school authorities to maintain the accommodation determined by the personal education project, in this case a school auxiliary, violates this freedom. The Council went even further and decided in a landmark case of 20 April 2011 (n° 345434 and 345442) that all modalities of the personal education project at the charge of state authorities covered needs related to activities outside of school and created an obligation of result that could suffer no delay of implementation regardless of budgetary and logistic considerations.

[80] Resolution ResChS(2004)1, collective claim n° 13/2002.
[81] As regards autism and access to facilities, education and support, a national plan was initiated in 2004 to provide resources at the regional level, and followed by a plan for 2005/ 2006 to provide resources at the local level.
http://autisme.france.free.fr/fichiers/Dossier%20de%20Presse%20Autisme%202005.pdf.
[82] Ministerial instruction (Circulaire) no 2006-126 of August 17, 2006 relating to the implementation of the personalized education project.

Therefore, the parents can benefit from injunctive relief provided by article L 521-2 of the Code of administrative justice, ordering that all required measures be taken by education authorities in order to satisfy the requirements of implementation of this right.

The Law no 2005-102 on Disability further creates at Article L112-4 of the Code of Education an express obligation to adapt examination processes to the benefit of disabled students.

Access to goods and services – (excluding buildings and infrastructures - see question f)):

Article 53 of the Law on Disability specifically provides for the right to be accompanied anywhere by a guide animal and article 65 creates a special card delivered to disabled persons providing priority of access for the persons and accompanying persons in public transport, public places, waiting areas and queues.

The prohibition of discrimination on the ground of disability in access to goods and services provided by article 225-1 and 225-2 PC has been interpreted to impose an absolute duty to comply with accessibility obligations.

The Halde decided that this obligation was violated by a bank's requirement to visualy impaired persons to have a mandator to manage their accounts (deliberation 2007-296), by an insurer's abusive refusal to insure a person with a disability that was not health threatening (deliberation 2007-234).

Except as regards access to ordinary schools, all these provisions create positive obligation without reference to alleviations or limitations related to a notion of disproportionate burden.

d) Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

The second paragraph of Article L5212-6 par 2 LC provides that "the refusal to take such measures (*reasonable accommodation*) may constitute discrimination according to Article L1133-2 LC". The claimant thus benefits from the legal regime of discrimination covering both direct and indirect discrimination, which gives him, or her, the benefit of the right to obtain access to evidence and of the shift in the burden of proof.

The law gives no precision as to when it will deem a refusal to make "accommodation" (or take "necessary measures") to be discrimination. Moreover, the concept of reasonable accommodation has never been interpreted and is foreign to French law. Therefore, the specific content of this obligation will have to be defined by

the courts before we can further comment with respect to the scope of the burden it imposes on employers.

The HALDE has repeatedly imposed on respondents the burden of establishing measures undertaken to meet the duty of reasonable accommodation. Moreover, in Deliberation 2007-294 of 13 November, 2007, it was called upon to evaluate whether all necessary measures had been taken in a situation where the employer ended the trial period of a disabled worker candidate to a postman position on the ground that he could not adapt the working conditions to allow claimant to execute the job in conditions in which he could be considered to meet medical requirements of ability. The HALDE concluded that when the disabled person is unable to perform most of the essential functions inherent to the job he or she is hired for, the required accommodations are thus to be considered too difficult, and are thus to be held to exceed the concept of accommodation and put an excessive burden upon the employer. Claimant's employment was conditional upon a finding of medical ability to perform the essential functions of the job description after having effected reasonable accommodations.

The only decision relating to the conditions of evaluation of the requirements of reasonable accommodations relates to the refusal of a request for an adapted automobile to get to work by a civil servant on the basis of disproportionate costs, considering that the required adaptations were not covered by available public financing.

The parties agreed that without this vehicle petitioner could not get to work and that no other measure could be put in place in substitution. The Administrative Tribunal of Caen decided that the obligation of the employer to take "necessary measures to provide access to work" covered measures allowing the person to get to work, and granted the request. It refused to discuss the defence of disproportionate costs on the ground that the employer did not establish that he had applied for financing to the fund for the integration of disabled persons and could not therefore support an argument related to the resulting unreasonable costs of implementing this measure.[83]

A case of the Conseil d'Etat of 11 July 2012 discussed conditions of justification in case of adverse impact of the reasonable accommodation measures on evaluation of the performance of a magistrate, but it did not approach the case in terms of failure to provide reasonable accommodation. However, it concluded that automatic adverse impact on remuneration, regardless of the performance of the redefined duties, amounted to discrimination (Cf. 0.3 Case Law p. 18– CE 11 July 2012, Volot-Pfiser) .

e) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)

[83] T.A. Caen, 1st October 2009, n° 0802480.

On other grounds of discrimination there is no express provision providing for a duty of reasonable accommodation.

i) race or ethnic origin

The educational system provides for special classes to integrate newly arrived foreign migrant children.[84]

The Law 2000-614 of 5 July, 2000 provides for a duty to implement parking space for Travelling Roma, failing which the local authorities must tolerate parking in the area, and Decree 2001- 569 of 29 June, 2001 (see 3.2.10 infra) provides the technical requirements of these areas. This law also provides for a duty to integrate occasional attendance to school of travelling Roma children.[85]

In addition, in implementing the shift in the burden of proof provided by article 1134-1 LC, and applying the test of proportionality to the justifications invoked by Defendants, the courts have started to discuss whether reasonable measures could be taken to prevent discrimination. In a decision of the Labour Court of Nanterre of 18 July 2012 (Manga Ndjomo), the court followed the arguments presented by the Defender of Rights and decided that the refusal to give an assignment in a given country on the ground of origin, alleging arguments of safety, could only be justified by documentation of the reality and proportionality of the menace to be evaluated by justifying the unreasonability of the costs necessary to ensure the protection of the employee. (Cf. 0.3 Case Law p. 18- Nanterre Labour Court, 19 July 2012)

ii) religion or belief

The jurisprudence of the Administrative Supreme Court clearly provides for a duty of reasonable accommodation on religious grounds of the duty of children to attend school (see section 3.2.8 and Annex 3 CE April 14 April, 1995, Consistoire central des Israelites de France).

Limitations are imposed by law however and recognized by the ECHR (c.f. 30 June 2009, supra), such as the prohibition of religious signs in public school.

In addition, the HALDE Deliberation 2007-210 (supra) has dismissed the claim of a mother who was refused access to a children's hospital reanimation ward because she was wearing a Niqab on the ground that her presence might disturb waking sick young children, such limitation was considered to be reasonable considering that she was offered the possibility to assist her child in a separate room.

[84] FRANCHI, Vijé, Raxen 4 EUMC French national report on education. Policy document n° 2002-102 issued on the 25/04/2002, Circulaire n° 2012-141 du 2-10-2012.

[85] http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20000706&numTexte=1&pageDebut=10189&pageFin=10191.

In the public service, ministerial instruction of the Ministry of Public Service no 2106 of 14 November, 2005 regarding authorisations of absence on religious grounds, reiterates ministerial instruction no 901 of 29 September, 1967 allowing immediate superiors in the public service to authorise requests for religious holidays not foreseen by the French legal holiday calendar. This instruction provides indicative information and lists the principal Orthodox, Armenian, Muslim, Jewish and Buddhist holidays.

iii) Age

None.

iv) sexual orientation

None

f) Please specify whether this is within the employment field or in areas outside employment

i) race or ethnic origin :

Outside employment, travelling accommodation for Travellers, in Education, special classes for non French speaking children.

ii) religion or belief:

In employment for holidays, outside employment in education for holidays.

iii) Age:

None.

iv) sexual orientation:

None.

g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?

No except as regards religion for Holidays in the private and public sectors.

h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

Yes, in case of the rules relating to the implementation of reasonable measures in relation to the integration of disabled persons in the workplace at Article L5212-5 LC . See answer to a).

i) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

According to the law no 2005-102 of 11 February, 2005, the mobility chain including sidewalks, buildings, streets, public facilities, must allow total accessibility for disabled persons within ten years of publication of the Law on disability. The law provides that public transport must offer complete accessibility within three years (2015), or offer substitute transport services to disabled persons. Decrees of application of the law, programming adaptation of public infrastructures, were adopted in the course of 2006.[86]

The regulation of building and infrastructure accessibility existed before the Law on Disability, but the obligation to modify existing buildings and reasonable accommodation requirements result from this law. All existing buildings must be accessible by 2015.

These provisions give rise to administrative remedies. In addition, they create a duty to insure accessibility to the built environment. The failure to provide accessibility could give rise to remedies for discrimination in access to housing based on the Law no 2002-73 of Social Modernisation of 17 January, 2002.

Inaccessible premises could also give rise to a recourse in discrimination in access to employment, which this time could be based on indirect discrimination pursuant to article L1132-1 LC and article 2 of the Law no 2008-496 of 27 May, 2008, or, if facing an unreasonable refusal to implement the necessary adaptations allowing access to a building, inaccessibility could result in failure to provide reasonable accommodation on the basis of article 5213-6 of the Labour Code.

A building which does not conform to requirements of accessibility could be shut down by administrative order (article 111-8-3 of the Code of construction). Access to public subsidies to building construction and renovation projects are conditional upon respecting accessibility requirements (article 111-26 par IV of the Code of construction).

[86] Decree no 2006-1658 of 21 December, 2006 concerning technical prescription for accessibility of sidewalks, streets and public spaces, J.O. no 297, 23/12/2006; Decree no 2006-138 of 9 February, 2006 relating to accessibility of mortised public transport material, J.O. no 35, 10/02/2006; Decree no 2006-1657 of 21 December, 2006 relating to accessibility of streets and public space, http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20061223&numTexte=45&pageDebut=19445&pageFin=19446.

Moreover, the prohibition of discrimination on the ground of disability in access to goods and services provided by article 225-1 and 225-2 PC has been interpreted to impose a duty to comply with accessibility obligations.

The Courts have held that the burden of establishing a defence of disproportionate costs of installing necessary equipment falls upon defendant (CA Poitiers, 1 September, 2005).

As regards applicable limitations to the obligation of accessibility, Article R111-19-6 and R111-18-3 of the Construction and Housing Code 5CHC) provides for the possibility to request from the prefect of the department derogation on the following basis: technical considerations, historical characteristics of the building and specific topographical context of the property. They are to be exceptional and specific to each aspect of the works and are not evaluated globally. In addition, Article R111-18-10 CHC allows for derogation in reason of the disproportionate costs of the works in view of the benefits.

These requests are to be studied within two months by the Departmental Safety and Accessibility Consultative Commission (CCDSA).

In the Case Communauté d'agglomération du pays de Voironnais, the Conseil d'Etat in a decision of 22 June 2012, decided that Article 45 of the Law of 11 February 2005 on the rights of disabled persons, which provides for complete accessibility of public transportation, except in case of manifest technical impossibility, requires that such impossibility be evaluated on a case by case basis for each works and on the basis of its own characteristics. Therefore it should only result from an technical obstacle impossible to overcome or one that would incur a manifestly disproportionate cost. The Community of Voironnais adopted a general implementation scheme that provided for the accessibility of only 40 % of the public transportation network on the ground that accommodation of the network would ne too costly without identifying specific technical difficulties or specific obstacles that would entail a disproportionate cost. The Court quashed the implementation scheme as nul and void for manifest error of the administrative authority.

j) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?

Title IV of the Law on Disability, entitled "Accessibility", requires that access be provided to persons with disabilities as regards education in chapter I, access to employment and sheltered employment in chapter II, Built environment, transport and new technologies in chapter III.

Article L111-7 of the Code of construction requires public and residential buildings to be designed and built in such a way as to be accessible to disabled persons. The conditions of enforceability of this principle and the regulation of any delay in proceeding to necessary adaptations were adopted by decree in 2006.[87] The regulation of building and infrastructure accessibility existed before the Law on disability of 2005, but the obligation to modify existing buildings and reasonable accommodation requirements result from this law. In addition, the law of 11 February 2005 provides that all existing building must be made accessible by 2015.

These provisions give rise to administrative remedies. In addition, they create a duty of anticipatory reasonable accommodation in access to housing and employment in as much as the legal obligation requires that the built environment meet general accessibility requirements. Inaccessibility could give rise to remedies in discrimination in access to housing based on the law no 2002-73 of Social Modernisation of 17 January, 2002 and recourse in discrimination in access to employment based on article L1132-1 LC.

According to the Law no 2005-102 of 11 February, 2005, the mobility chain including sidewalks, buildings, streets, public facilities, must allow total accessibility for disabled persons within ten years of publication of the Law on Disability, and public transport must offer complete accessibility within three years, or offer substitute transport services to disabled persons. Decrees of application of the law, programming adaptation of public infrastructures, were adopted in the course of 2006.[88]

The prohibition of discrimination on the ground of disability in access to goods and services provided by article 225-1 and 225-2 PC has been interpreted to impose a duty to comply with accessibility obligations.

The Courts have held that the burden of establishing a defence of disproportionate costs of installing necessary equipment falls upon defendant.[89]

In the action in damages case of Mrs Bleitrach against the State, the Administrative Supreme Court on 22 October, 2010 (no 301572) found liability without fault on the part of the State on the basis of Directive 2000/78/CE, for failure to provide access to the Court house to a disabled judicial official who used a wheel chair - Mrs Bleitrach is a qualified lawyer - who requires this access in order to exercise her profession. The first instance courts had held that, since the deadline for implementation of

[87] Decree no 2006-555 of 17 May, 2006 relating to accessibility of buildings receiving the public and residential buildings et modifying the Code of construction, J.O. no 115, 18/05/2006.
[88] Decree no 2006-1658 of 21 December, 2006 concerning technical prescription for accessibility of sidewalks, streets and public spaces, J.O. no 297, 23/12/2006; Decree no 2006-138 of 9 February, 2006 relating to accessibility of mortised public transport material, J.O. no 35, 10/02/2006; Decree no 2006-1657 of 21 December, 2006 relating to accessibility of streets and public space, http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20061223&numTexte=45&pageDebut=19445&pageFin=19446.
[89] CA Poitiers, 1September, 2005, n° 419/05, 01/09/2005, APF: access to a cinema.

works of accessibility according to the Law of 11 February, 2005 was running until 2015, there could be no liability of the State for lack of access to Court Houses and that there was no specific obligation towards lawyers in this respect. Considering the importance of required investments through out France, the delay for implementing accessibility was held to be reasonable. The Administrative Supreme Court decided however that it could not dismiss liability in damages of the State solely by relying on the sole deadline for insuring accessibility provided by the Decree of 17 May 2006 that runs until 2015. Directive 2000/78 imposes a specific obligation towards lawyers in access to Court Houses and the Court must evaluate in this particular case, whether the State met its duties in this respect. The *de facto* inequality before "public charges" (i.e. burdens imposed on citizens by the State) of lawyers who use a wheel chair is such as to engage liability without fault on the part of the State and the Administrative Supreme Court awards 20 000 € in non-material damages, Plaintiff having failed to establish her financial damages.

k) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

The Law no 2005-102 on Disability reforms the legal scheme concerning assistance to the people with disabilities and revised their rights as well as all support and administrative schemes in the light of the principles of non-discrimination and of integration to society. It completes transposition of Directive 2000/78.

It modifies the definition of "Disability" by articulating the rights of the person with disability around the principles of non-discrimination, access to the built and urban environment and integration in society. It proposes a timetable for the implementation of all necessary measures to ensure a right of access to local schools and higher education, access to public buildings and housing, access to public transport and urban mobility. The law also requires adaptations to be made in order to facilitate access to new technology of information, voting and television.

Please note that, as discussed above , the Law no 2005-102 on Disability translates the terms "reasonable accommodation" by those of "all necessary measures" (*mesures nécessaires*).

The definition of Disability at article L114-1 of the Code of Social Welfare (CSW) is immediately followed by the affirmation of the corresponding right to solidarity, equal treatment and the full benefit of citizenship, at article L114-1-1 of the same Code.

It is followed by article L114-1-1 which lays down the right to access local schools, the labour market, public institutions and financial support, including compensation for additional costs related to one's disability as well as an allowance for each adult with disability (article 11 of the Law) and a similar compensation for children with disabilities before 2008 (article 13).

Title IV of the Law, entitled “Accessibility”, covers access to education in chapter I, employment, adapted employment and protected employment in chapter II, and structural modifications necessary to ensure accessibility to buildings and infrastructures in chapter III.

Social security and healthcare:

The adoption of decrees necessary to implement institutional reforms pursuant to the adoption of the Law on Disability has been completed in 2006.[90] Decree no 2005-1589 of 19 December, 2005 has been adopted to enforce the administrative simplification of the management of the various rights of the disabled person, enacted at article L1465-9 CSW by the Law 2005-102 of 11 February, 2005 on disability which provides for a complete scheme of compensation of disability in its Title III. It substitutes to the many commissions, which managed the various governmental schemes intervening in the life of a disabled person and educational orientation, a single body for each department, the Commission for the rights and the autonomy of disabled persons.[91]

Title V of the Law on disability specifically provides for the reception and information of disabled persons by social and public service, including healthcare. This scheme provides for positive obligations on the part of the State including financial support for homecare and equipment, and disability pension rights.[92]

French law has created a general prohibition to discriminate in access to healthcare (art L1110-3 of the Code of public health). In addition, Title II of the Law 2005-102 of 11 February, 2005, provides for a specific regime of support for access to healthcare.

This scheme provides for positive obligations on the part of the State.

The Law also provides for social rights of parents assuming the charge of disabled persons.[93]

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?

[90] Decree no 2006-583 of 23 May, 2006 relating to regulatory provisions of Book II of the Code of Education J.O. no 120, 24/05/2006.
[91] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524617D.
[92] Decree 2005-1714 of 29 December, 2005 on the invalidity and priority card of disabled persons.
[93] Decree no 2005-1761 of 29 December, 2005 on the rights of isolated parents of disabled children; Decree no 2005-1760 of 29 December, 2005 of old age pension of non working parent of disabled children.

Title IV Chapter II section 4 of the Law no 2005-102 on Disability reforms the provisions of the Labour Code on sheltered and semi-sheltered workers provided in articles L5213-13 and articles 313-23 and following CSW.

The Labour Code provisions provide for subsidized employments with a minimum wage determined by decree (article 5213-15 LC), in adapted businesses and sheltered employment centres for disabled person selected by a commission.

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?

Such activities are considered as employment and as such are covered by the Labour Code (article L1111-1 and following, L5213-18 LC) and subject to the principle of non discrimination.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

No. The general protection against discrimination covers all and the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment based on conditions of public interest.[94] However, the law conditions the access to certain rights, such as the right to work and some social benefits, to the status of legal foreign resident. In addition, as it was documented by a report prepared by the GELD (Groupe d'Etude et de lutte contre les discriminations) - first French anti-discrimination body created in 2000 that prepared the creation of the HALDE - the law creates some legal discrimination in access to specific professions and jobs (about 7000 named jobs), subjecting them to conditions of citizenship, whether national, from bilateral partner Countries, such as some African countries, or from the European Union.[95]

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

a) Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

No. Physical and legal persons, whether public or private, are bound to uphold the prohibition to discriminate in penal Law (article 121-2 PC for legal persons and 432-7 PC for public authority), private law and public law. In addition, article 5 of Law no 2008-496 expressly provides that the law is applicable to all public and private persons, but does mention or distinguish between natural or legal persons.

b) Is national law applicable to both private and public sector including public bodies?

National law resulting from transposition of Directives 2000/43 and 2000/78 by the Law of 16 November 2001 and the Law of 28 May 2008 applies to both private and public sector including public bodies, except as regards areas for which the transposition has not taken place and for which jurisprudential interpretation as regards the direct effect of the directives must be invoked i.e. magistrates, agents of

[94] Constitutional Council, 22 January, 1990, 89-296 DC, R.F.D.C. no. 2 1990, obs Favoreu.
[95] GELD publication no. 1 on legal discriminations and employments inaccessible to foreigners.

parliament and contractual agents outside the scope of the law of 1984 are excluded by application of Article 3 of the Law no 83-634 on civil servants.

3.1.3 Scope of liability

Are there any liability provisions than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)

See answers to questions 2.5 and 3.1.2. All direct or indirect perpetrators of discrimination or harassment can be held liable, whether public or private, natural or legal persons.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

Further to the adoption of Law no 2008-496, all employees, civil servants and civil agents are protected against discrimination with respect to all the grounds covered by article 19 TFEU. The extent of the protection and the legal regimes vary according to whether the situation is covered by the Penal Code, the Labour Code or administrative law and according to the ground of discrimination.

However, the Law of 3 July, 1983 no 83-634 on the rights and obligations of civil servants states at article 3 that, in conformity with article 64 of the Constitution of 1958, it does not cover the status of Magistrates who are not considered as civil servants. Ordinance no 58-1270 of 22 December, 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench. Public agents working within parliament are as well not subject to the Law no 83-634 and are governed by application of article 3 of the Law by separate in-house rules of Parliament. These texts have not been amended to implement directive 2000/78 and do not foresee any protection against discrimination on any grounds.

However, in its decision of 30 October, 2009, the Administrative Supreme Court has decided that, given the failure of Government to transpose directive 2000/78, it could be invoked directly by magistrates before administrative tribunals.

Article L1132-1 LC covers, on all grounds, hiring practices, remuneration, appointment, promotion, transfer, qualification, classification, renewal of contract and redeployment. In addition, the Labour Code forbids discriminatory provisions (L1121-1 LC) in the in house regulations (L1321-3 LC) and collective bargaining agreements (L2251-1 LC). The right of alert of the employees' representative (the ER) in case of

violations of human rights and freedoms in the workplace stipulated at article L2313-2 LC, entitles the ER to file an emergency recourse for injunctive relief before the Labour Court and applies to cases of discrimination.[96]

With respect to labour court judges' elections, lists presented by a political party or an organisation favouring discrimination are illegal (L1441-23 LC).

The prohibition of discrimination applies to salaried workers as well as temporary employees and vocational apprenticeship.

With respect to the status of the army, France has prevailed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability.
At article 2, Law no 2008-496 has extended the same uniform protection to independent and non salaried workers and to both the private and public sector.

In the public sector, article 6 quinquies of Law no 83-634 of 13 July, 1983 as modified by the Law of 29 May, 2008 no 2008-496, forbids distinctions between civil servants in reason of their political, philosophical or religious opinions, union activities, sex, health, disability, race or origin.

The penal regime (as provided by articles 225-1 and 225-2 PC and article 4 of Law no 2008-496) does not provide for a shift in the burden of proof and covers only direct discrimination. It protects against discrimination in recruiting, vocational apprenticeship and training, as well as sanctions and dismissal. It offers the only possible recourse in case of refusal of the benefit of a right granted by law and of hindrance to economic activity.

Article 226-19 PC further incriminates anyone who collects nominative data- i.e. information linked to a person's name- concerning race, political or religious opinions, union membership as well as a person's mores. Therefore, neither can the employer nor anyone, in the course of business, gather this information except in certain regulated circumstances related to specific small scale studies or in arguing a case before the courts (cf. article 8 II of Law CNIL).

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

[96] Cass. soc. 26 May, 1999, Bull. Civ. V no. 238.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

Access to employment is specifically covered with respect to all Article 19 par.1 TFEU grounds and other grounds listed in section 2.1 by article 225-2 PC, article L1132-1 LC and article 6 of the Law no 83-634 of July 13, 1983 on the rights and obligations of civil servants. Access to self employment or occupation is covered by article 2 of Law no 2008-496 with respect to all Article 19 par.1 TFEU grounds.

In addition, the Penal Code (article 225-2) specifically targets the refusal of the benefit of a right granted by law and of hindrance to economic activity.

However, as discussed above (section 3.1.1), the law conditions the access to certain rights, such as the right to work, to the status of legal foreign resident and creates some legal discrimination in access to specific professions and jobs (about 7000 named jobs), subjecting them to conditions of citizenship, whether national or from the European Union (see GELD publication no 1. on Legal discriminations and employments inaccessible to foreigners, supra).

In France, access to the civil service is conditional upon being admitted further to a competitive entry examination. The Law no 2005-102 on disability creates at article 19, an express obligation to adapt the examination processes to the benefit of disabled students.

Government has adopted the decrees required to implement the Law no 2005-102 on Disability, and adopted on 21 December, 2005, decree no. 2005-1617[97] concerning accommodation for disabled candidates in competitive examinations for entry in the public service.(see section 2.6 a)).

Furthermore, in France, access to careers in the public service and to competitive entry examinations were subject to limitations based on maximum age requirements, most of which have been repealed (see 4.6 b), but are in all cases not opposable to disabled candidates (see sections 2.6 a) and 4.7.1 b)).

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-

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http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20051223&numTexte=35&pageDebut=19817&pageFin=19818.

267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

As discussed in section 3.2.1, employment and working conditions, including pay and dismissals, are covered by Article L1132-1 LC, article 6 quinquies of Law no 83-634 of 13 July, 1983 and Law no 2008-496 of 27 May, 2008.

The Administrative Supreme Court, applying the principles set-out by the CJEU in the GRIESMAR case (CJEU 21 November, 2001), considers that occupational pensions form part of remuneration and constitute a debt subject to article 14 and Protocol 11 of the European Convention of Human Rights (ECHR) guaranteeing protection of property rights, and that the non occupational pensions constitute social security protected as such by the same dispositions of the ECHR (CE, 18 December, 2002, CE 30 November, 2001 DIOP, no 212179 and 212211).

The Court of Cassation has further interpreted the Labour Code, at article 3221-2, to set a general principle of equality of remuneration,[98] and the Administrative Supreme Court has decided that it applied to professional pension rights.[99]

Despite the creation of the PACS (community of life partnerships), which procures similar rights to those of married couples in many areas (access to social security, rights of residence etc…) and are accessible to couples of same sex, there remains some form of legal indirect discrimination against couples of same sex resulting from the present inaccessibility of marriage.[100]

Partners to a PACS cannot benefit from widowers' pensions, transfer of pension rights, rights accessible to spouses in employments benefits or parental rights after the decease of the spouse holding the parental rights.[101]

As regards reasonable accommodation regarding implementation of pension rights towards disabled persons, see section 4.7.4 b).

[98] Cass.soc. 29 October, 1996, Delzongle c. Ponsolle, Dr.ouv. 1997, 149 comments Pascal Moussy.
[99] Conseil d'État 13 December 2006 N° 291595 (9ème et 10ème sous-sections réunies), http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008251152&fastReqId=1335878264&fastPos=2.
[100] QPC no 2010-92 28 January 2011 Corinne C. & other.
[101] See Borrillo et Fassin, 2003. Parliament has recently opposed adoption of amendments to the law proposed by the communist parliamentary group extending to partners of a PACS and to common law spouses benefits from pensions rights and from widowers pensions.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

Vocational training and guidance is covered by article 225-2 PC, L1132-1 LC and Article 6 quinquies of Law no 83-634 of 13 July, 1983 as modified by the Law of 16 November, 2001 with respect to all Article 19 par.1 TFEU grounds and other grounds listed in section 2.1. In addition, Law no 2008-496 article 2 completes implementation of directives 2000/43 and 2000/78 by creating a general principle prohibiting direct and indirect discrimination on the basis of "race" and origin (article 2 par. 1.) and a protection against direct and indirect discrimination for independent and non salaried workers on all article 19 par.1 TFEU grounds (article 2 par. 2).

More generally, public schools are subject to the prohibition of discrimination based on origin, provided at article 1 of Law no 2008-496, to an obligation of integration of disabled children, provided by the Law no 2005-102 of 11 February, 2005 (see section 3.2.8), and to general principles of administrative law which include general principles of non discrimination.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

Further to the adoption of Law no 2008-496 article 6, Article 2141-1 LC states that « Any salaried employee, can freely become member of the union of his or her choice and cannot be excluded on grounds prohibited by article 1133-1" - that is all article 19 par.1 TFEU grounds and more - and article 2131-5 LC provides that any member of French or foreign citizenship can participate to its administration. Article 2314-16 LC provides that all salaried employees are eligible to become employees' representative if they are 18 years of age and have been employee in said business since at least one year.

With respect to labour court judges' elections, lists presented by a political party or an organisation favouring discrimination are illegal (L1441-23 LC). However, to be eligible, the candidate must have French citizenship.

Article 6 paragraph 2 and article 8 paragraph 1 of Law no 83-634 of July 13, 1983 as modified by the Law of 16 November, 2001 provides that in the public sector "Union rights are guaranteed to civil servants. The persons concerned can freely create unions, become members and be elected as representatives ».

Law no 2008-496 creates a specific protection of affiliation and involvement in a professional or trade organisation at article 2 par 2 for all grounds protected by directive 2000/78 as well as real or assumed ethnic origin and race.

Some professions are subject to a condition of nationality. The GELD (see above) in March 2000 and then the Halde in a deliberation of 2008 and 2009 (deliberations 2008-189 and 2009-139) have drawn the attention of Government on these legal discriminations, requesting that an evaluation be made of the legality of the conditions of nationality in access to certain professions, which is conditional upon exercise of prerogatives of public authority (prerogatives de puissance publique).

France was condemned by the CJEU in a decision of 25 May 2011 relating to the conditions of access to the profession of Notary, and decided that even if notarial activities pursued objective of public interest, they did not correspond to activities relating to public authority in the sense of the EU Treaty. Therefore the condition of nationality attached to access to the profession of Notary is a discrimination on the ground of nationality prohibited by community law (CJEU, n° C50/08, 24/05/2011, Commission européenne c/ République française).

Finally, the trade unions, employers associations and all other organisations have to abide by article 225-2 of the Penal Code prohibiting discrimination in access to goods and services, including services offered by the Union to its members. The list of prohibited grounds listed at article 225-1 includes health, age, disability, sexual orientation, racial and ethnic origin, convictions, religion, political opinions and sex.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

Law no 2008-496 completes implementation of directive 2000/43 by integrating at article 2, a prohibition of direct and indirect discrimination on the basis of "race" and origin benefiting from the shift in the burden of proof as regards social protection, including social security and healthcare.

For the other grounds of discrimination, general principles of public law are based on a general principle of equality towards the public service (see section 0.1 and section 1 - article 1st of the Constitution of 1958, the preamble of the Constitution of 1946, the declaration of human rights and of the citizen of 1789) and a universal principle of non discrimination in access to health care that is not restricted to any prohibited ground of discrimination (article 1110-3 SWC). These principles apply as well to civil servants. In addition, all residents benefit from the same social rights regardless of nationality.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

Law no 2008-496 of 27 May 2008 completes implementation of directive 2000/43 by integrating to the completion of transposition at article 2, a prohibition of direct and indirect discrimination on the basis of "race" and origin benefiting from the shift in the burden of proof as regards social advantages.

For the other grounds of discrimination, benefits provided by either public or private actors to people because of their employment that form part of remuneration are covered by the prohibitions of discrimination relating to equal pay, and are covered by the Law no 2008-496 of 27 May 2008

For non contributory benefits, general principles of public law are based on a general principle of equality towards the public service (see Article 1st of the Constitution of 1958, the preamble of the Constitution of 1946, the declaration of human rights and of the citizen of 1789). These principles apply as well to civil servants. In addition, all residents benefit from the same social rights regardless of nationality. The price paid for access to municipal services for instance and social support can only be based on socio-economic considerations.[102]

Otherwise, public agents taking into account a criteria based on a prohibited ground of discrimination, such as religion, have been held to violate article 225-1 and 432-7 PC and been sanctioned accordingly by the courts.

Despite the creation of the PACS (community of life partnerships), which procures similar rights to those of married couples in many areas (access to social security,

[102] See section 0.1 and section 1.

rights of residence etc…) and are accessible to couples of same sex, there remains some form of legal indirect discrimination against couples of same sex resulting from the present inaccessibility of marriage.[103]

Partners to a PACS cannot benefit from widowers' pensions, transfer of pension rights, rights accessible to spouses in employments benefits or parental rights after the decease of the spouse holding the parental rights.[104]

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

Origin

National education is considered as a public service accessible to all and subject to the respect of the general principle of equality, applicable to the public service.

As explained in section 1, it is a general principle of administrative law of constitutional value that origin cannot be taken in consideration whether by legal texts or managing practices. Not only is the criteria of nationality not taken into account, but until university, the illegality of the presence of parents on the national territory cannot be taken into account to deny access to school or kinder garden.[105] The Grenoble Court of appeal has condemned a mayor for refusing to register children of North African origin in schools and school cafeterias.[106]

In this context, Roma children from other member states can, theoretically attend school if the conditions of their stay *de facto* allows for school registration.

Legal segregation on ethnic grounds is prohibited at all levels of the legal order and ethnic origin cannot form the basis of educational policy in France (see section 1).

[103] QPC no 2010-92 28 January 2011 Corinne C. & other.
[104] See Borrillo et Fassin, 2003. Parliament has recently opposed adoption of amendments to the law proposed by the communist parliamentary group extending to partners of a PACS and to common law spouses benefits from pensions rights and from widowers pensions.
[105] Ministerial instructions of national education, n° 84-246 dated 16 July, 1984 and n° 86-120 dated 13 March, 1986.
[106] Grenoble Court of Appeal, 13 November, 1991. TA Bordeaux, 14 June, 1988, El Rhazouari recueil Lebon, p. 518.

The identification of the child's public school is legally determined by his or her address. Geographical zoning has no impact on the educational program that is national and identical throughout the territory, except that some areas have an increased budget when they deal with socially underprivileged children.

No official monitoring device takes in consideration origin. It is known however, that due to geographical zoning there is a concentration of migrant children and children of foreign origin in specific schools, where overall educational achievements are lower than that of other schools.

The Law no 2008-496 completes implementation of directive 2000/43 by creating a general principle prohibiting direct and indirect discrimination on the basis of "race" and origin and judicial and administrative recourses in discrimination benefiting from the shift in the burden of proof as regards education. Any evidence of a segregative practice or a management taking origin in consideration, directly or indirectly, would give rise to a right of action before the administrative courts and the penal courts.

However, claims of discrimination in education involving the private sector, whether it be a private school or discrimination perpetrated by a private party in the context of internship, are covered by general principles of administrative law and therefore benefit from no means of recourse other then general private law civil liability recourses on the basis of article 1 of the Law of 27 May, 2008 and criminal recourses based on article 225-2 of the Penal Code.

The educational system provides for special classes to integrate newly arrived foreign migrant children and travelling children[107], and the Law no 2000-614 of 5 July, 2000, on the accommodation of travelling people (euphemism that covers all travelling populations) provides for a duty to integrate occasional attendance to school of travelling Roma children.[108] Again, some mayors fail to respect the law. When they are brought before the courts they are sanctioned, but Traveller parents on the road will often leave without seeking enforcement. Moreover, as recognized in the ESRC decisions of 25 January 2012 European Roma and Travellers Forum c. France, and the decision rendered further to the complaint of Médecins du Monde c. France, published 21 January 2013, ongoing expulsion of Travelling and Foreign Roma population resulting from government policy against unauthorized occupation of private and public property, significantly hinders de facto access to education of children.

[107] RANCHI, Vijé, Raxen 4 EUMC French national report on education. http://fra.europa.eu/sites/default/files/fra_uploads/186-CS-Education-en.pdf; Policy document n° 2002-102 issued on the 25 April 2002.

[108] http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20000706&numTexte=1&pageDebut=10189&pageFin=10191.

4000 Children, a number which has remained stable for years, are not registered in the formal system and attend between 10 and 50 half days of school in mobile school buses in 13 departments. Social Affairs Governmental authorities stress that since the abolition of the military service, the degree of illiteracy is dramatically increasing since this period served as a means to teach every young man to read and write.

The CNED (Distance schooling system available to home schooled children) registers 750 travelling children in primary school and 5000 in secondary school, of which 1300 follow classical education and 3700 follow classes destined to combat illiteracy.

The national parking accommodation scheme aims at stabilising residence and favours school attendance for the children, as all mayors are obliged to accept registration of children in school even for a few days, followed by registration by the school principal (article L131-10 and 131-11 of the Code of Education and 227-17-2 of the penal code). However, when they have been implemented they tend to generate concentration and in some cities (Dijon- Nancy- Toulouse) there are schools that count a majority of children from the travelling community.

In 2009, the Defender of the children and the National Consultative Commission on Human Rights[109] have drawn Government and public attention on the difficult situation of Travelling and Roma children due to lack of adequate accommodations, and the impact of the precarious means of life of the parents on the quality and means of access to education school of the children. This has not yet given rise to general measures, although the above mentioned local initiatives are maintained on the basis of these reports. However, for the school year 2009-2010, the Rectorate of Montpellier appointed an Academic inspector dedicated to Roma children, who are estimated to account for many thousand students throughout Languedoc Roussillon.

The Ministry of Education has issued several directives in order to facilitate attendance to school of travelling children: Ministerial instruction (circulaire) no. 91-220 of 30 July, 1991 has instructed school principals to admit children in class, even for a few days, without requirements as to formal registration with the city authorities. In 2002, the ministry of education has rationalised and put in place a formal notice instructing all education administrations and school principals as to the organisation of support to the education of Roma Children (notice no 2002-101 of 25 April, 2002). Notice 2002-102 creates a coordinating training and documentation structure at the Rectorate level (local administrative unit of the national education) called the CASNAV (Centre Académique pour la Scolarisation des enfants allophones Nouvellement Arrivés et des enfants issus de familles itinérantes et de Voyageurs/ Center for the education of newly arrived foreign language speaking children and Travelling children), which is supposed to provide support to integration classes and

[109] http://www.cncdh.fr/fr/publications/avis-sur-le-respect-des-droits-des-gens-du-voyage-et-des-roms-migrants.

local initiatives. 34 such missions coordinate 104 local networks. Their efficiency depends upon political orientations at the local level.

Ministerial instruction NOR-REDE 1236611C no 2012-142 of 2 October 2012 regarding School Integration of Travelling Children reiterates the duty to integrate travelling and Roma children regardless of their nationality, conditions of housing and status on the territory.[110] This instruction was completed by another instruction (circulaire n°2012-143 of 2-10-2012 BOEN special n°37 of 11 October 2012)[111] providing for the generalisation to all the Rectorates of the CASNAV scheme, to facilitate integration, children can register for attendance in school directly with the CASNAV.

With respect to vocational training and access to apprenticeship, legal protections appear in the Labour Code and the Penal Code as well, as discussed in section 3.2.4.

Religion

The same principle of equality has been used to adjudicate on the applicability of the obligation to attend school to children whose religion enjoins worship on a day other than Sunday.

In this case, the *Conseil d'État* has given priority to the protection of freedom of worship, arguing that compulsory school attendance is not intended to, and may not lawfully, deny to pupils who request it, such individual leave of absence as may be necessary for worship or celebration of a religious festival, at least in so far as their absence is compatible with performance of the tasks entailed by their studies and with the maintenance of good order *(ordre public)* in the school."[112]

Nonetheless, years after the first judgments of the Administrative Supreme Court relating to the expression of faith within schools, there remains a debate about the limits of the principle of neutrality of the public sector and the prerogatives of private life, in application of the constitutional principle of religious neutrality, which is regarded as constitutive of French Republican identity.[113] Previous parameters of secularity (*laïcité*) restricted to a universal rule of religious neutrality are brought into question by the practices and political demands of some groups, who claim that it must take into account the right to the public expression of faith.

[110] http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61529.
[111] http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61527.
[112] CE 14 April 1995, Consistoire central des israélites de France, Mr Koen, (2 arrêts), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.
[113] Charlier-Dagras, M-D, La laïcité française à l'épreuve de l'intégration européenne. Pluralisme et convergences, L'Harmattan – Coll. Logiques Juridiques, Paris, 2002, 452p.

The Law on the application of the principle of secularity in public schools was adopted on 15 March, 2004 and published on 17 March, 2004 (Law of 15 March, 2004 no 2004-228).[114] It forbids "…in public elementary, secondary and high schools, the wearing of signs or clothes by which a student ostensibly manifests his or her religious beliefs" (our translation). Discreet religious signs remain authorized. The law further instructs each school to adopt in-house regulations for the school year 2004-2005 in order to put in place a procedure of enforcement by disciplinary decision preceded by a mediation and dialogue process with the student.

The administrative instruction of 18 May, 2004 on the conditions of enforcement of the above-mentioned law, which was redrafted three times, was published on 25 May, 2004 (Ministerial instruction N°2004-084 of 18 May, 2004).[115] It states that "the prohibited signs and clothes are those by which one is immediately identified by his or her religious beliefs such as the Islamic Veil, whichever is the word by which it is designated, the Kippa or a cross of manifestly excessive dimension" (our translation). However, it emphasises the necessity of organising a true dialogue between the student, his parents or legal representatives and the head of school in order to limit disciplinary sanctions to cases of deliberate refusal by the student to abide by the law.

In view of the debates raised by this new law, the text itself foresaw an evaluation of the results of its enforcement in September 2005. Ms Hanifa Cherif handed a report to the Minister of Education in July 2005.[116] Her report counts 639 cases (two big crosses, eleven Sikh Turbans and 226 Islamic veils) which represent a 50% decrease in comparison to the 2004-2005 academic year. She stresses that they are concentrated in specific districts, with more than 82% in six of them, (Strasbourg, Lyon, Caen and Creteil), where they reach 12 cases per districts with a peak in Strasbourg, where 208 cases were counted. There were 15 cases in elementary school, 337 in Secondary school and 287 in High School. Among educational solutions the report indicates that 97 students registered in religious private schools, 77 most registered to the national home schooling system (CNED), and the rest submitted. As a result, 47 students were excluded and there were 28 judicial recourses.

In 2006, unsolved cases were limited to boys of the Sikh community, and a few cases related to the Islamic Veil. Their recourse before administrative courts and, ultimately the ECHR have been denied (supra, Administrative Supreme Court 05 December, 2007; ECHR, no. 25463/08, 30 June, 2009).

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[114] Internet link: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20040317&numTexte=1&pageDebut=05190&pageFin=.

[115] Internet link: www.education.gouv.fr/bo/2004/21/MENG0401138C.htm.

[116] Rapport sur l'application de la loi du 15 mars 2005 sur le port des signes religieux ostensibles dans les établissements d'enseignement publics. ftp://trf.education.gouv.fr/pub/edutel/rapport/rapport_cherifi.pdf.

Since these decisions , which decided to maintain the interpretation of French authorities (ECHR no supra), most problems appear to get solved, since those students who will not submit to garment requirements do not maintain their request and register with the public home schooling system called the CNED (Centre national d'enseignement à distance). There has been no official report on this matter since 2005. However, if commentators note that the number of cases of children who end up pursuing their studies through homeschooling is stable (around 200 new cases per year), more then 10 Islamic private schools have opened since 2005.

In the meantime, on 1st November 2012, the UN Human Rights Committee has contradicted the European court of human rights in relation to the complaint filed by Mr Singh alleging that expulsion from school pursuant to the law of 15 March 2004 for wearing Sikh religious symbols is a violation of his right to freedom of religion pursuant to articles 2, 17, 18 and 26 of the International Covenant on Civil and Political Rights.[117] The Committee decided that it must evaluate whether this restriction to freedom of religion complies with requirements of being necessary and proportionate in accordance with par 3 of Article 18 of the Covenant. To be legitimate the exercise of freedom of religion must be detrimental to a stated aim protecting public safety, order, health, morals or fundamental rights and freedoms of others. Even if secularity meets these requirements, given the importance of the male religious outfit in the Sikh religion, which forms part of the identity of a person, and the scope of the penalty on the pupil expelled from school, the state has not established that wearing such a garments would present a menace on order or present a threat to the fundamental rights and freedoms of others and that the sanction was not disproportionate. The Committee orders the state to correct the individual situation and prevent further violations of the covenant.

In addition, the Law of 31 December, 1959 recognises religious private schools and provides for the financial support of the state towards those of these schools that follow the national education program.

In the meantime, some national education local authorities have held that parents wearing religious signs could not accompany their children's classes in school activities. The HALDE received a number of complaints from individual parents and NGOs and rendered a Deliberation no 2007-117 on 14 May, 2007. The local educational authorities argued that since parents accompanying children were acting under delegation of public service, they are bound to uphold the obligation of neutrality of civil servants. This reasoning was confirmed by the Montreuil administrative tribunal on 22 November 2011 (Recteur de l'Académie de Créteil n° 1012015). The decision is under appeal.

In 2008 and 2009, HALDE has received a number of claims from women who were denied access to adult education delivered by the public school system on the

[117] http://unitedsikhs.org/rtt/doc/BikramjitSinghDecision.pdf.

ground that they were wearing the Islamic Veil. HALDE systematically recommended reintegration of the women and, in Deliberation 2009-236 it requested that the Minister of education issue Ministerial Instructions in order to reiterate the fact that the Law on Secularity of 2004 was not applicable to adult education.

In a case brought before the Administrative Tribunal of Paris (Saïd vs. Greta, 27 April, 2009, no 0905233/9), an injunction ordering her immediate re-integration was granted. HALDE presented observations. The court held that her reintegration was urgent given her personal projects, which could not be challenged on the basis of her family responsibilities. In addition, the court decided that the ground of her exclusion was prima facie null and void considering that the prohibition of religious signs in public schools did not apply to adult education programs. The decision was confirmed on the merits by the Paris Administrative Appeal Court (5 November 2011, no 0905232).

In addition, in a criminal case alleging discrimination on the ground of religion further to the exclusion of a student from an adult higher education apprenticeship program because she was wearing the Islamic veil, which was deemed contrary to the internal regulations of the school, the Paris Court of appeal on 8 June, 2010 condemned the education centre to a fine of 3 275€, its Director to a fine of 1250 €, and both are condemned to damages in the amount of 10 500€ (Mme Boutaina Benkirane c/ Centre universitaire de formation par l'apprentissage Sup 2000 (no 08/08286)).

Disability

The Law on Disability no 2005-102 of 11 February, 2005 was adopted after the Autism Europe case was heard before the Committee of Ministers of the Council of Europe.[118] It completely reforms assistance and education of disabled children.[119]

This vast reform of the organisation of assistance to disabled persons provides an express obligation on the State to insure education of all disabled children.
The right to education and to reasonable accommodation within education of disabled children is affirmed in articles 19 to 22 of the Law on Disability. Article 11 affirms a right of access to local mainstream schools and the right to a personalised educational project.

Title IV of the Law on Disability, entitled “Accessibility”, covers access to education in chapter I. It creates a commission which will assess the child and propose to his or her parents’ a personalised program of education that will also be taken into consideration when subsequently determining the rights of the child under the

[118] Resolution ResChS(2004)1, collective claim n° 13/2002.
[119] As regards autism and access to facilities, education and support, a national plan was initiated in 2004 to provide resources at the regional level, and followed by a plan for 2005/ 2006 to provide resources at the local level.
http://autisme.france.free.fr/fichiers/Dossier%20de%20Presse%20Autisme%202005.pdf.

general compensation scheme for all disabled people established by the law and conditions of access to special support.

Article 19 III creates an obligation to provide education to each child at every level of education and a right to have access to mainstream school is conferred by article L112-1 of the Code of Education. The adoption of decrees necessary to implement institutional reforms pursuant to the adoption of the Law on Disability has been completed in 2006.[120] Decree no 2005-1589 of 19 December, 2005 has been adopted to enforce the administrative simplification of the management of the various rights of the disabled person.

It substitutes to the many commissions that managed the various governmental schemes intervening in the life of a disabled person and educational orientation, a single body for each department, the Commission for the Rights and the Autonomy of Disabled Persons.[121]

Since 2005, amongst other missions, the Commission for the Rights and the Autonomy of Disabled Persons must determine whether a child, in accordance with his or her personal life project, should be placed in the mainstream educational system, in some cases with special support, in specialised classes (CLIS) or in specialised institutions.[122] The Regional administration of National Education (Académie) participates in this commission, in coordination with all persons involved in the support and the education of the child. Parents' remedies when they are opposed to the conclusions of the orientation process are dealt with in section 6.1 of this report.

The parents cannot require a schooling orientation that differs from that proposed by the Commission for the Rights and the Autonomy of Disabled Persons.

If access to the local ordinary school is not possible because of the physical condition of the premises, the extra cost of transportation to another school are met by the municipal authorities (article L112-1 par 8 of the Code of Education).

At article 75, the Law on Disability introduces Article L 312-9-1 to the Code of Education in order to officially recognise the French sign language for persons with impaired hearing.

[120] Decree no 2006-583 of 23 May, 2006 relating to regulatory provisions of Book II of the Code of education J.O. no 120, 24/05/2006.
[121] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524617D.
[122] Decree no 2005-1587 of 19 December, 2005 relating to the departmental house for the disabled, J.O. no 295, 20/12/2005; Decree no 2005-1752 of 20 December, 2005 relating to the schooling path of disabled students J.O. no 304, 31/12/2005.

The Law on Disability no 2005-102 further creates at article L112-4 of the Code of Education an express obligation to adapt examination processes to the benefit of the children with disabilities.

In September 2005, the Administrative Tribunal of Lyon decided that the failure of the State to provide access to school to a disabled child because of insufficient available adapted facilities gave rise to the liability of the State in damages regardless of whether or not it is at fault, the additional burden on the family being unreasonable.[123] The Administrative Supreme Court has decided that this program imposes an obligation of result upon all authorities of the state to provide the necessary resources (supra, decision of 20 April 2011).

According to the report of the Ministry of Education, the progression of children attending ordinary school represent 10 000 children more each year, for an overall increase of 60 %: in 2011 35 000 disabled children were integrated in kindergarten, 91 000 in elementary school, 63 000 in secondary school and 5600 in General high school and 6 400 in professional high school, plus 4194 specially adapted classes of around 12 children in local schools (CLIS) and 2120 specialised education classes in secondary school (ULIS). 62 000 children would have benefitted by a personal education assistant in 2010-2011 i.e. 46% of the disabled children attending ordinary school have the benefit of their support. Since 2005, the number of disabled children integrated in the school system has increased by 28 % in elementary school and 80 % in secondary and high school. However, in reality, the enforcement of personal accommodation measures in the ordinary school environment, which often takes the form of a personal education assistant, depends upon available budgets. The evolution of the number of disabled children attending ordinary school is as follows:

2003-2004: 106 897
2004-2005: 133 838
2005-2006: 151 523
2010-2011: 201 400

In 2011, school directors from elementary schools and kindergartens, parents of children with disabilities, and students themselves participated in a survey held by the HALDE and National Education, relating to access to education for disabled children.

97% of College school directors and 88 % of elementary school directors are now favourable to the integration of children with disabilities in mainstream ordinary schools, 90% of college school directors receive at least one disabled child in their school, for an average of 9 students per school and 54% of kindergarten or elementary school directors receive at least one student for an average of 2 students per school. 73% of the school directors consider that the education of these children

[123] T.A. Lyon , 29 September, 2005, no. 0403829, M. & Mme Hebri, AJDA, 2005, 1874.

is satisfying, and 83% of students share this conviction but only 28% of children with intellectual disabilities share this point of view.. Regarding the Law no 2005 -102 of 11 February, 2005, although 90% of school directors and 76% of elected local officials feel that they are knowledgeable about it but they don't know what are their exact responsibilities.

Parents witness a feeling of isolation and burden as regards the procedures to follow in order to access support. They remain critical regarding the management of the new Departmental Bureau of Disabled Persons created by the decree no 2005-1587 of 19 December, 2005 to manage the orientation of disabled persons to all the public schemes of support and financing relating to all aspects of life.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The Penal Code (article 225-2) covers all Article 19 par.1 TFEU grounds and other grounds listed in section 2.1 and punish discrimination in access to goods and services in the private sector without distinguishing whether the offer is private or available to the public. In the public sector, the same disposition punishes any public agent who refuses to any person the benefit of a right afforded by law or hinders the free exercise of an economic activity. The Perben Law of 9 March, 2004 adapting justice to the evolutions of criminality creates an aggravated sanction in case of discriminatory refusal to sell or to provide access to public places.

In addition, the Law HALDE (incorporated in Law no 2008-496 at article 2) completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of "race" and origin, as well as administrative and jurisdictional recourses benefiting from the shift in the burden of proof. This prohibition of discrimination covers access and supply of goods and services, there again without distinction between goods available to the public or privately. This legislation has been repealed and replaced by the Law of 27 Mai 2008 completing transposition of anti discrimination directives.

There have not yet been judicial decisions based on these provisions except in housing.

However, as regards the Travellers population, administrative courts regularly render decisions forcing reluctant mayors to register children in school (Deliberation 2007-30 of 12 February, 2007), as well as decisions relating to the right to park caravans on private and public property (for example Administrative Supreme Court, 26 February, 2004 no 264907; Versailles Administrative Court of Appeal of 21 September, 2006,

no 04LE01586; Douai Administrative Court of Appeal of 3 August, 2006 no 05DA01139; Bordeaux Administrative Court of Appeal of 25 July, 2006 no 03BX01608).

b) Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?

No. Financial services are not a legal category. The only limit to the prohibition of discrimination in access to goods and services provided by article 225-2 CP is provided at article 225-3 CP and allows to life and health insurance policy subscribers to the take in consideration the health condition of a person.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The Law of 17 January, 2002 amends article 1 paragraph 2 of Law no 89-462 of 6 July, 1989 on relations between landlords and tenants, and forbids discrimination in access to rental housing, whether private or public, on all grounds of discrimination prohibited by French law, i.e. all grounds covered by the two directives, and provides for civil remedy and shift in the burden of proof, except as regards the ground of age for which a specific protection scheme has been put in place by law (see section 5b)).

In addition, at article 162, it forbids landlords to request copy of photographs, social insurance card, copy of statements of bank accounts and banking certification of good conduct and, creates an article 22-1 to the Law of 6 July, 1989, preventing landlords to refuse security on the basis that the warrantor is in a foreign country or of foreign nationality.

Furthermore, the Penal Code's prohibition of discrimination on all covered grounds in access to goods and services has been interpreted to cover housing whether in relation to rental or sale. The penal code covers the ground of age.

There can be no exception to the prohibition of racial discrimination in French law, and the law provides no exception to the principle of non discrimination in housing.

Even safety considerations cannot justify discriminating in renting an apartment to a disabled person (see Annex 3).[124]

However, social housing institutions have interpreted the concept of social mix, which must govern attribution as including a reference to origin in order to prevent concentration that would lead to segregation. In a context where the concentration of persons of foreign origin and migrants in social housing is a characteristic of the suburbs, the prohibition to consider origin *de facto* conflicts with desegregation policies and management practices. However, for the first time, SOS Racism obtained condemnation of the St-Etienne Social housing corporation on the basis of their ethnic management of access to housing (High Judicial Court of St-Etienne, 3 February, 2009, supra). In this case, the inter-ministerial mission for housing reported in July 2005 that the file of each tenant contained an indication of their racial/ethnic origin.

The social housing corporation argued that this information was necessary in order to monitor the legal requirement of "social mix" provided by article L302-1 of the Code of Construction and Housing, and improve access of families of immigrant origin to social housing. Moreover, it pleaded that no specific occurrence of discrimination or intention to discriminate was established.

The prosecution presented evidence that showed that the manager of rentals had established a strategic social housing plan for each housing building, for which it had instructed an employee to complete data on the racial/ethnic origin of each tenant, and that lodging was attributed in function of the African, North African or Asian origin of the surname.

The Hamida case[125] is an illustration of penal sanction in a racial discrimination case. The owner refused to complete the transaction arguing that she was afraid of provoking problems with the neighbours because the buyer was "Arab", some of the neighbours being her own children. The basis for the refusal of the owner was also established by the testimony of the real estate agent.

On 14 September, 2004, the Grenoble criminal court condemned a discriminating owner to important pecuniary sanctions, marking a turning point in the penal treatment of discrimination. The landowner was condemned to a 10 000€ fine, a four months imprisonment suspended sentence, 15000€ damages to the buyer and 500€ to his wife. The Court also ordered the publication of the condemnation in the professional bulletin of the federation of real estate brokers and awarded 1500€ in damages to the two NGOs supporting the victims, MRAP and SOS Racism.

[124] T.G.I Paris, 17th Chamber, 28 June, 2005, no. 0402608235, Poncelet c. Lassailly.
[125] No 3122 MP 32 AM.

This decision has been appealed and the Court of Appeal of Grenoble increased the suspended imprisonment sentence to six months, while lowering the fine to 6 000€, on 27 October, 2005.[126]

However, Criminal Chamber of the Court of Cassation, in a decision of 17 June, 2008, decided that a Mayor using his right to prevent acquisition of housing, in order to prevent a purchase by Roma buyers did not commit the offence of refusal of access to rights on discriminatory grounds under article 437-2 of the Criminal Code, on the ground that the Mayor had no power to provide access to a right to purchase but had exercised a right of his own and as such could not be held to have interfered with the exercise of a right. This position was confirmed by the Court of cassation in a decision of its Criminal chamber of 21 June 2011, N° 10-85.641, 3106**.**

As regards discrimination on religious grounds, on 13 June, 2002 the Administrative Court of Poitiers decided that a municipality could not refuse to rent a municipal room to Jehovah Witnesses on the basis that a Parliamentary Enquiry considered their cult as a sect. This refusal was held to constitute a violation of the principle of equality of all citizens before the law and has been reiterated a number of times since, and again in 2011 (Administrative Supreme Court, n° 1106560, 26/08/2011, Commune de Saint-Gratien c/ Association Franco-musulmane de Saint-Gratien).

The travelling population is subject to specific rules of accommodation. Municipalities of more than 5000 inhabitants have the obligation to accommodate travelling populations by providing settlement areas provided by Law no 2000-614 of 5 July, 2000, and the technical requirements of these areas are provided by decree 2001-569 of 29,June, 2001[127] reviewing legislation that was fist adopted in 1990 (Law no 90-449 of 31 May, 1990).

The installation of motor homes on unauthorized parking space is sanctioned by administrative expelling measures created by the Law no 2003-239 of 18 March, 2003. Even if the law provides that a municipality that has not satisfied its legal obligation cannot expel illegally parked Roma travellers, the concentration of travellers and the insufficiency of available space is a major problem.

An audit of the implementation of these parking accommodations over more than 15 years by the Ministry of Equipment indicates that only 25 % of the required accommodations have been completed. Their manifest insufficiency therefore increases illegal parking, their control by the police and the criminalisation of their way of life, since they concentrate in areas that have satisfied their legal obligation while offering an insufficient number of available spaces.

[126] CA Grenoble, 27 October 2005, no 04/01355.

[127] http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20010701&numTexte=6&pageDebut=10540&pageFin=10540.

When a municipality fails to put in place specific parking lots for the travelling population, it is barred from seeking removal of the travellers' trailers and from prohibiting parking **(**TGI de Montauban, 3 May, 2002)[128] and can be attacked for this failure before the administrative courts. The Administrative Supreme Court decided in 2000 that the failure of a mayor to implement regulations and accommodations for the travellers could incur its liability. In addition, it also decided that unless he or she complied with accommodation requirements, a mayor could not forbid their presence on the territory for less than a period necessary for their transit until identifying a new destination.

In March 2007, the Government has decided to encourage municipalities to conform to their legal obligation by creating an incentive by way of financing and a special authorization for a period of two years to expel illegally parked Roma travellers on the condition that they manifest their desire to conform to parking requirements and initiate preparatory work. This policy has lead to a progression of parking facilities which had attained 21, 165 in 2009. However, Government admits a need for 41 840 parking spaces and NGOs considers that this amount corresponds to 25% of the space needed.

In this context of insufficient parking accommodation, there is no wide spread policy to facilitate settlement of Travellers.

Some families attempt to purchase land, which for economic reasons is often situated in non constructible areas, and they thereby enter into complicated legal conflicts with municipalities with respect to their conditions of occupation of these lands. Many Mayors adopt decrees to forbid motor home parking on the entire territory in order to prevent authorised parking on private lands. Even if such decrees have systematically been found illegal, it sustains control, eviction and an overall atmosphere of denial of access to rights (Bordeaux Appellate administrative Court, 1 December, 2005, no 03BX00379).

The reluctance of the central government to insure enforcement of parking provisions in a context of increased repression could be deemed to be a *de facto* non compliance with respect to the 2000/43 Directive as regards housing rights.

On 19 October, 2009 the European Committee of Social Rights[129] has rendered a decision further to a claim no 51/2008 submitted by the European Roma rights Centre regarding the situation of Travellers and Roma in France, alleging a violation of articles 16, 19 par 4c) 30, 31 and E of the Revised Social Charter, in relation to their lack of access to an effective right to housing and ensuing social rights, and the repressive measures adopted in order to limit their capacity to travel. In reply

[128] www.rajf.org/article.php3?id_article=1043.
[129] Comité européen des droits sociaux, Conseil de l'Europe, n° 51/2008, 19/10/2009, Centre européen des droits des Roms (CEDR) c/ France: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC51Merits_fr.pdf.

government alleged taking all necessary measures to insure effective access to social rights. Considering that only 32% of the required parking area has been put in place, that the management of existing parking areas is deficient, that the parking areas are not conceived to provide long term accommodations, that there are insufficient programs and means to accompany the travellers' settling process, that expulsion procedures are often brutal and do not respect fundamental rights requirements, the Committee concludes to the insufficiency of governmental action in violation of article 31 of the Revised Charter. The Committee goes on to consider that equal treatment of travellers in access to housing and protection of the family provided at Articles 16 and 31 and concludes that it does not meet the non discrimination requirement of Article E of the Charter, and that therefore their rights are not sufficiently taken in consideration.

Further, the ECSR has held that the provisions of article 69-3 providing access to voting rights after having elected domicile for a period of three years within a limit of 3% of the electorate of a municipality, is a discrimination and a violation of the travellers' housing rights on the ground of Articles 30 and E. The Constitutional Council, in a decision of 5 October 2012 has decided that the three year delay to be registered on the electoral list was discriminatory but that the 3% quota to election of domicile in a specific municipality was not a violation of Travellers housing rights since this was strictly an administrative requirement that did not prevent Traveller of choosing where they wish to live.

As regards the foreign Roma population and the limitations provided by the transitory period on their social rights the Committee concludes to a violation of Article 19 par 4 c) relating to housing rights of migrant populations.

Finally, on 16 November, 2009, the High Judicial Court of Lyon issued an injunction to prevent police evacuation of a Romanian Roma group illegally occupying state property on the ground that the prefect did not demonstrate that the conditions of life of the Roma camp were such that they presented particular danger and risks and that the camp constituted their domicile, and as such was protected under article 8 ECHR.[130] Since property of the state was not jeopardized by this occupation, and in the absence of damage and immediate need for the use of the plot, expulsion was not deemed appropriate.

Disability

Article L111-7 of the Code of construction requires public and residential buildings to be designed and built in a way accessible to persons with disabilities. The conditions of enforceability of this principle and the regulation of any delay in proceeding to necessary adaptations were adopted by decree in 2006.[131] Decree 2006-555 of 17

[130] Sala, Covaci et al vs. State, no 2009 /02850.
[131] Decree no 2006-555 of 17 May, 2006 relating to accessibility of buildings receiving the public and residential buildings et modifying the Code of construction, J.O. no 115, 18/05/2006.

May, 2007, specifies that the obligation concern common areas, interior and exterior, part of the parking space for automobiles, housing elevators, collective premises and equipment.

The Law of 11 February 2005 imposes that all building receiving the public conform to requirements of accessibility by 2015. A building, which does not conform to requirements of accessibility, could be shut down by administrative order (article 111-8-3 of the Code of construction). Public subsidies to building construction and renovation projects are conditional upon respecting accessibility requirements (article 111-26 par IV of the Code of construction).

Articles L441-1 and 441-5, 441-3 of the Construction and Housing Code provides for a priority in attribution of social housing to disabled persons and their family. However, Government has not adopted the application decree necessary for the enforcement of the right, and the HALDE has recommended their adoption in its deliberation 2006-150. To date, Government has not acted on HALDE's recommendation.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Law no 2008-496 has created the general possibility to raise an exception based on genuine and determining occupational requirement at article 2 par. 3 and article 6 par. 3. It appears to be a regression compared to the absence of such exception prior to the adoption of this law. In addition, it is framed in too broad terms, leaving open the possibility to justify occupational requirements in each individual case. Article 6 par 3 of the Law provides:

> "The prohibition of discrimination does not forbid difference in treatment when they constitute a genuine and determining occupational requirement, as long as the objective pursued is legitimate and the requirement proportionate."

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

No.

b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).*

For a time, the Court of Cassation considered that, although members of a religious community were considered by law to be party to an employment contract, this fact did not entail the applicability of all the dispositions of the Labour Code. Thus, it excluded for some time the application of former article L122-45 LC to dismissal or sanctions resulting from behaviour contravening prescriptions related to the requirements of the faith of the employer.

However, ever since the decision of the Court of Cassation on 17 April, 1991 in Fraternité Ste Pie, the religious orientation of the employer does not justify an exception to the application of article L122-45 LC (now article L1132-1 and following LC). In this landmark case, which preceded the directive, the court decided that the sexual orientation of the employee was not in and of itself sufficient to justify dismissal. At the time, it considered that the employer was required to establish that the behaviour of the employee had, considering his function and his objective

behaviour, generated substantial disruption ("*trouble caractérisé*") within the community.[132] In 1993, the Court of appeal of Montpellier concluded that provocative distasteful behaviour could justify dismissal.[133]

However, in transposing Directive 2000/78 by adopting the Law of 16 November, 2001, the legislator did not foresee any exception to the principle of non discrimination based on faith or opinions, and since 2001, the courts have not adjudicated on this issue.

The possibility to justify difference in treatment provided by article 2 of Law no 2008-496 and article 1133-1 LC might bring about attempts to argue ethos and belief in the future.

As regards exterior signs of one's religion such as the veil, they are forbidden to all members of the public service who must respect a principle of neutrality[134] whether or not they are in contact with the public.

c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

In an isolated case which focused lots of media attention, the labour tribunal of Mantes-la-Jolie decided that a community day-care could dismiss its former deputy director on the ground that coming back from maternity leave, she refused to take off her Islamic veil on the workplace in contradiction with the in-house rules adopted by the board. In the absence of any legal text allowing exception to anti-discrimination related to the ethos and beliefs of an employer, these in-houses rules were deemed to reflect the secular ethos and beliefs of the institution which was in effect pursuing missions of public interest partly financed through public subsidies. The public interest of these missions and the public financing authorised the NGO operating the day-care to impose a duty of neutrality upon its personnel (Baby lou, CPH Mantes-la –Jolie, 13 December 2010). In appeal, the Versailles Court of Appeal decided on 25 October 2011 (no 10/05642) that since neutral garments have been required since the adoption of an in house regulation in 1990 and that considering the centre's statutes underlining its mission as developing an action toward disadvantaged children and social reinsertion of the women of the neighbourhood, neutrality was justified in order to insure hospitality to all. The principle of freedom of religion protected by article L1121-1 of the Labour Code cannot undermine the respect of the principle of secularity and neutrality that is to be applied by personnel in all its

[132] Court of Cassation, chambre sociale, 17 April, 1991, Droit Social 1991, 485.
[133] CA Montpelier, 28 January, 1993.
[134] Conseil d'Etat 3 May, 2000 Mlle Marteaux N° 217017, Conseil d'État 15/10/2003 n°244428.

mission and duties. These restrictions are therefore justified by the nature of the function of the personnel and the Centre's in-house regulation therefore complies with the requirements of article L1121-1 and L1321-3 of the Labour Code. The decision of the Court of cassation in this case is expected shortly.

This decision echoes recent widespread legal and political debates aiming at extending the duty of neutrality of public agents to private law employees, in situations were the employer executes missions of service to the public or where a commercial actor wishes to present a neutral figure in its contacts with the public.

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

With respect to the status of the army, France has prevailed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability. However, the formal job requirements for career under-officers do not contain requirements based on age or physical aptitude.

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

The Law of Orientation and Program in Relation to Security of 21 January, 1995 creates a specific derogatory status for the police by application of article 19, which clearly states: « By reason of the peculiar character of their missions and exceptional nature of their responsibilities, active personnel of the national police force constitute a special category of the public service. The special status of these personnel may derogate from the general status of public service. In compensation for their obligations and the constraints of their missions they are classified out of chart for the determination of their remuneration."

Meanwhile, article 5 of the Law no 83-634 of 13 July, 1984, states that the civil servant must have the physical aptitude to execute the assigned function. However, the French State has not manifested its intention to invoke derogations with respect to police officers that therefore benefit from the general legal regime.

4.4 Nationality discrimination (Art. 3(2)

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

a) How does national law treat nationality discrimination? Does this include stateless status?

What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well)?

The principle of non discrimination bears no exception because of Nationality.

In relation to discrimination based on race or ethnic origin, whether it is direct or indirect, nationality and nationality of origin is regularly treated as an acceptable indication to constitute the comparable group in order to establish unequal treatment. Nationality is often assimilated to origin when the law does not provide for restrictions based on nationality.

In many penal cases the criteria of nationality has been held to be a form of direct discrimination based on origin, as the penal code refers to discrimination based on the link with a nation.

However, in civil cases the Court of Cassation has treated discrimination based on nationality as a source of apparent indirect discrimination that allows for justification on the part of the employer: in Cass. Soc., n° 03-47720, 09/11/2005, Soc ESRF c/ M. X., confirmed in another matter against ESRF on 17 April, 2008 (Soc. 819 FS-P+B). In this case, the collective agreement foresaw since 1993 that employees of foreign nationality received a yearly bonus, even after having been in place for a number of years (in some cases 20 years). In this situation, the court was faced with unequal financial benefits that could not be justified by the specifics of the work performed by the employee. First, the Court decided that Article 12 of the EU Treaty did not target the situation. On the argument of indirect discrimination on the ground of origin, it further held that, in a high technology research installation, the business necessity to attract talented scientists from abroad, and the necessary compensation of trouble related to the expatriation of their family, were a sufficient justifications of the adverse effect on the basis of origin to allow unequal remuneration based on nationality: attraction of workforce when proportionate is objectively justified.

The definition of the scope of the protection against discrimination at Article 2 of the Law no 2008-496, eliminates the larger definition that appeared at Article 19 of the Law no 2004-1496 (Law creating the HALDE) and the first law of transposition of the Directives, Law of 16 November 2001, that included national origin. The resulting protection regarding the scope of Directive 2000/43 does not explicitly cover national origin except in Article 225-1 of the Penal Code and Article 1132-1 of the Labour Code.

The only exception provided by law would be the legislations that set conditions of nationality for access to specifically denied employment, such as public service, certain professions, etc.… see section 4.2).

French law provides for a differentiated regime for stateless persons, subject to their legal presence on French territory. They are protected by law once their asylum application has been processed.

As regards research and statistical data, most French studies on discrimination based on origin use the parameter of nationality of origin for monitoring purposes, and no other sign is generally admitted.

Although it will have limited impact on the interpretation of legal residents' rights, Law no 2008-496 expressly states for the first time that the law prohibiting discrimination applies without prejudice to provisions governing the entry and residence of third-country nationals (article 5 par. 2).

b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?

There are no exceptions as such. However, the public service (article 5 Law no 83-634 of 13 July, 1983) and some professions and careers are not accessible by law to non nationals or non European nationals.

Further to a report published by the GELD in March 2000, supra section 3.1, commenting on the extent and incoherence of the regime of legal discrimination in employment against non nationals, some of these professions have been made accessible to non nationals but the list is exhaustive and addressed piecemeal.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

Marriage is a legal source of rights and the law creates some rights to the exclusive benefit of married couples, whether they are patrimonial rights, (inheritance) or work related benefits created by law or collective agreements. The Labour Code awards holidays for getting married (article L3142-1 LC).

Meanwhile, the Civil Pact of Solidarity (PACS) created by the Law no 99-944 of 15 November, 1999 is a registered partnership open to couples of same sex to organize the patrimonial aspect of their relationship which provides them with a status and

rights in terms of access to a right of residence for the foreign partner, right of transfer in the public service, of days away from work in case of death or family matters, and a patrimonial partnership based on joint-ownership, common liability towards creditors and common taxation (article 6 of the General Tax Code) and, as a spouse, a right to be maintained on the premises of rented lodgings (article 515-1 et s Civil Code) .

Parties to the Pact benefit from the social security rights of the eligible spouse (article L. 161-14 of the Social Security Code); they have priority, before children and parents, towards access to life insurance benefits.

However, the partners are considered as alien with respect to each other's Estates and they therefore must provide for succession benefits by way of a will, although they may benefit from taxation exemptions that are more favourable than the regime applicable to third parties (article 777 bis of the General Tax Code).

They have similar rights to those of the spouse in term of priority in sharing the estate (article 515-8 CC). Since the PACS entered into force, there has been no discrimination in the law between concubines of same sex and heterosexual concubines.[135]

In case of work related benefits reserved to married couples and granted by collective agreements, they could be argued to constitute indirect discrimination in employment for homosexual couples since they cannot have access to marriage. Such cases have not yet been brought before the courts.

In its Deliberation no 2007-366 of 11 February, 2008, the HALDE concluded that the fact of reserving some extra days of vacation for family events to men and women who were married, and creates a premium for employees' weddings in a collective agreement constituted direct discrimination based on the family status and indirect discrimination based on sexual orientation. Government took the position that the PACS was a civil contract that was not aimed at creating a family status, and that therefore this reasoning did not apply. The Court of cassation has referred a preliminary ruling on this issue to the CJEU on 23 May 2012, in a case attacking the provisions of a collective agreement of the Crédit Agricole.

In addition, some rights, such as access to pension by the surviving spouse in case of death are not accessible to couples who have underwritten a PACS, and thus to homosexual couples. Their exclusion from such benefits could as well be argued to constitute indirect discrimination, but since the PACS is open to both heterosexual and homosexual couples, the French prohibited ground of discrimination related to "family status", applicable to private employment, has been substituted in this

[135] Art. 515-8 du code civil : 'Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple'.

argument, preventing the successful construction of arguments of indirect discrimination based on sexual orientation (HALDE deliberation 2007-366, 11 February, 2007).[136]

A Plaintiff claimed before the Administrative Supreme Court that the condition of marriage in order to have access to surviving spouse pension rights for civil servants violated the constitutional principle of equality towards non married couples (i.e. concubines and partners registered in a civil partnership). The Administrative Supreme Court referred the question of the constitutionality of this provision to the Constitutional Council. In a decision of 29 July 2011 (QPC-2011-155), the Council decided that the purpose of the surviving spouse's pension is to provide for the loss of revenue supported by the spouse further to the death of a civil servant. Therefore, considering that the institution of marriage is the only one to provide for obligations after its dissolution by death or other legal means, to give a right to the patrimony after death and to institute legal duties for the financial security of a family, the difference in treatment provided by the law between marriage, cohabitation and civil partnership does not violate the principle of equality which allows the legislator to institute different rules for different situations. The Council decided that the legislator had recognised three different legal regimes for couples – i.e. cohabitation, registered partnership and marriage - instituting various rights and obligations that each respects the principle of equality. This decision follows two previous decisions theorizing the exclusive role of the legislator in defining the specificity of the conditions of access to the legal institution of marriage and of its legal status in terms of rights and obligations, pursuant to Parliament's exclusive prerogative in defining a national conception of family: one was a case where it concluded to the exclusive jurisdiction of the legislator in defining conditions of access to marriage and its competence in denying access to marriage to couples of same sex (QPC 2010-39 of 6 October 2010) and one, a case confirming the constitutionality of the difference between the right to simple adoption of a spouse's child between members of a married couple, and the denial of said right to civil partners of same sex (QPC 2010-92 of 28 January 2011). In its discussion, the Constitutional Council chooses not to address the issue of the discrimination on the ground of sexual orientation resulting from the condition of marriage. Sexual orientation is not an explicitly prohibited ground of discrimination provided by the Constitution and the Council maintains an approach based on the exclusive prerogatives of the legislator in determining rights and obligations attached to marriage.

b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?

[136] http://www.halde.fr/spip.php?page=article&id_article=12194&liens=ok.

Yes, Article L1132-1 LC covers the ground of sexual orientation and remuneration. This would be held to constitute direct discrimination but has not yet been brought before the courts.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

a) Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

On 11 February 2005, Parliament adopted the Law on Disability that provides at Articles 111-1 and following of the Code of construction for a program to implement general access to new buildings, buildings open to the public, public transports as well as to the outdoors mobility chain, by 2015.

An amendment to the Bill concerning various measures relating to disability policy (Article 19) was adopted by Members of the National Assembly in first reading and confirmed by the Senate in May 2011, in order to create a derogation to the obligation to provide for systematic accessibility measures and to allow for the adoption of a decree of implementation. The Constitutional Council decided that the legislator has the possibility to create technical exceptions to the implementation of the obligation to insure accessibility of buildings and infrastructures, but that their requirements had to be circumscribed by the legislator who must insure that they meet the constitutional guarantee of equality and access to employment (CC, 28/07/2011, n° 2011-639 DC).

Nevertheless, the Law has always provided for exceptions. Article L111-7-2 of the Code of construction imposes that limitations to accessibility in housing be determined by decree with a duty to relocate occupants with disabilities.

Article L111-7-3 of the Code of construction provides the same for buildings accessible to the public. The technical impossibility to proceed to required modifications is subject to the decision of a commission and in this case, the owner must propose alternative measures to compensate the disabled persons concerned.

The technical impossibility to proceed to required modifications in order to ensure accessibility of public buildings are subject to the decision of a commission and in this case, the owner must propose alternative measures to compensate the disabled persons concerned.

Article 225-3 PC enumerates a list of admissible exceptions to the principle of non discrimination set out in article 225-1 and 225-2 PC: in relation to health, operations related to life, invalidity and incapacity insurance (paragraph 1); refusal to hire related to health or disability when it results from a certificate of incapacity delivered by the employment medicine (paragraph 2).

b) Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc.)?

Constitutional texts exclude inequality of treatment due to origin. Thus, no application of the exception of article 7(2) of the Directive on the ground of origin has been enacted.

With respect to dress codes, the general principle is that they must conform to the requirements of one's duty.[137] Law, collective agreements, in house regulation or the labour contract (article L 3121-1 LC) may impose dress requirements.

In the private sector, safety occupational requirements are deemed to allow reasonable restrictions (article L1121-1LC, L1321-3 par 2LC) otherwise, the courts have decided until now that freedom of religion was to prevail.[138] There is however, an attempt further to the decision of the Court of Appeal of Versailles (25/10/2011, Supra), to allow employers to limit dress codes related to freedom of religion on the ground of neutrality requirements related to one's function towards the public. This decision is subject to a recourse to quash the decision presently pending before the Cour de Cassation.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 *Kucukdeveci?*

Article L1133-2 LC, which was amended by Article 6 of Law no 2008-496, allows the recognition of a legitimate reference to age in the following circumstances:

Differences in treatment on the basis of age are not discriminatory when they are reasonably and objectively justified by a legitimate objective, such as those specified in the law, namely health requirements and worker's safety, professional insertion, maintaining employment, reclassification or compensation in case of loss of employment, and when the means to attain these objectives are appropriate and necessary. These differences may consist of the following:

[137] Cass.Soc. 17 April, 1986.
[138] CA Paris 19/06/2003, Dallila Tahri c/ Téléperformance France – appeal Conseil de Prud'hommes of Paris 17/12/2002, RG n°0203547 ; Savatier Jean « Conditions de licéité d'un licenciement pour port du voile islamique » Droit social n°4 avril 2004, Paris.

- restriction on access to employment or special working conditions in order to ensure the protection of young and old workers;
- the determination of special rates of compensation over certain age limits.

However, the possibility for each employer to create and justify exceptions to the prohibition of discrimination on the ground of age seems too wide and appears to delegate to individual employers the possibility given to government to create legitimate differences in treatment aimed at the protection of employees who are victims of their age. Therefore, it would appear not to satisfy the requirements of the Mangold case and the Kucukdeveci *case*.

a) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

See Article L1133-2 LC above. In fact, national law takes into account age in limited circumstances: hiring conditions in the public service and the rules to determine the number of salaried workers relevant to the implementation of legal requirements relating to representation of personnel.

Article 3141-9 LC provides for additional vacation days for working mothers under 21 years of age. Further to an investigation by the HALDE concluding that there was apparent discrimination both on the ground of sex and age, Government has been called upon to justify its position. It replied that it would amend this provision in order to extend its benefit to young men workers with children but that it would maintain the age limit since it considered this benefit to be justified given the specific difficulties of integration on the labour market of very young parents.

The HALDE has held in deliberation 2010-83 of 1st March 2010 that the justifications advanced by the Government were reasonable, non discriminatory and proportionate.

In the public sector, article 6 par. 4 of the Law no 83-634 of 13 July, 1983 imposed conditions of age to the access of civil service. It was amended in July 2005 to eliminate the possibility of challenging age limitation for access to the civil service to parents of three children and more and to single parents of one or more children (article 1 of the Law no 2005-843 of 27 July, 2005 transposing community law to the civil service). Remaining restrictions were eliminated in the Law no. 2009-972 of 3 August 2009.

On 26 July, 2005, the Law no 2005-841 of 26 July, 2005 was adopted in order to enable Government to adopt emergency measures for employment by way of Governmental Decree,[139] and followed by many Executive orders: The first one, no 2005-901 of 2nd August, 2005 revisits conditions of access to public employment. The

[139] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L.

second one no 2005-893 of 2nd August, 2005, creates a new labour contract to facilitate hiring by small business as a means to fight unemployment.

Article 1 of Executive Order 2005-901 eliminates previous age limitations in access to public service except in the following cases:

- Agents in active armed service subject to early retirement (army, police, etc…).
- Conditions related to minimum age requirements in view of the experience called for by the function, for example to take on higher management responsibilities.
- Entry examination conditions for admission to a specialised school to follow an education programme of duration of two years or more financed by the State. In this case, Government should raise the age limitations to 15 years from retirement.

In application of Executive order 2005-901, Government adopted decree n° 2005-1722 of 30 December, 2005 modifying conditions of age to access the entry examination for the School of the higher civil service, Ecole nationale d'administration (ENA), to a minimum of 28 years of age and a maximum of forty years of age.[140] The minimum age requirement corresponds to the level of responsibility of the employment undertaken by graduates of the school. On the other hand, education at the ENA is financed by the State which also pays a salary to the student who becomes a civil servant upon entry to the school. It is a very costly education in terms of salary paid and educational cost per student. The maximum age requirement corresponds to the number of years of services left before retirement required for the state to obtain a return on its three years investment.

Article 2 of the Executive Order provides new means of access to certain functions in the Public Service without entry examination, by combining formal training with internships, for people between 16 and 25 years of age who have left school without recognised diplomas or with an insufficient level of education to obtain level C employment in the Public Service (lowest level). In addition, article 27-1 of the Law 84-16, article 35 par 3 of the Law 84-53, Article 27 (1) eliminate all age limits for the access to public service of disabled persons.

The considerations based on age in the public sector appear to meet the requirements of the Mangold case and the *Kucukdeveci* case as they pursue legitimate objectives and an effort has been made to meet the test of proportionality.

The evaluation of an argument based on the non compliance of the age limitations in access to ENA, or other similar Public service training, would first require an expert opinion for a reasonable ratio of years of service to cost of training and cannot be commented upon in this context. The age requirement set by decree no 2004-313 of

[140] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=FPPA0500152D.

29 March, 2004 for the entry examination at the National School of administration, offering the exclusive required training for access to a career in high level civil service, has been challenged before the Administrative Supreme Court**.**

The Court decided that this age limitation met the requirements of the exception provided by article 6 of the Law no 83-684 regarding rights and obligations of public agents of 13 July, 1983 which provides that conditions of age can be determined in order to insure that training is followed by sufficient years of service and career perspectives in senior functions requiring sufficient experience.[141]

Meanwhile, employees of most public utility corporations (RATP, GDF, EDF, SNCF) have also been subject to specific employment status setting a maximum age limitation for entering employment set at 29 years of age, with benefits calculated for an early retirement scheme that is calculated on the basis of employment before the age of 30 years old. The HALDE has adopted deliberations (no 2006-62) recommending the abrogation of these age limits and mandatory retirement age, which have given rise to negotiations with social partners aimed at their abolition, except in the case of SNCF (National Railway Corporation) where negotiations are still underway.

b) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2)?

Rights to retirement benefits are subject to conditions both of age and number of years of contribution.[142]

The general rule stated at articles 17 and 18 of the Law no 2010-1330 of 9 November 2010 is that age increasing by four months each year from 2010 until it reaches a maximum of 62 years in 2018, given he or she has contributed 42 years (the number of years may vary according to the retirement regime). Exceptions to the general rule, identified in section 4.7.4 b) are also subject to age requirements. Article L1133-2LC provides for the possibility to derogate from the prohibition of discrimination on the basis of employment policy.

[141] Conseil d'Etat, n° 268130, 01/03/2006, Syndicat parisien des administrations centrales économiques et financiers, http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2006X03X000000268130. Law 2003-775 of 21 August, 2003 reforming old age pensions: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20030822&numTexte=1&pageDebut=14310&pageFin=14343.

[142] Article 2 of the law on equal opportunities of 31 March, 2006, http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENE0601527D, Decree n° 2006-764 of June 30 2006, J.O n° 151 of 1st July 2006 page 9881.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

General principles concerning retirement are stated in section 4.7.1.

Article L3141-9 LC provides for additional vacation days for working mothers under 21 years of age. The Government has undertaken to extend this benefit to young fathers (see 4.7.1 b)).

For younger workers articles L6325-1 et s. LC set a special regime for apprenticeship embodied in the apprenticeship-qualification contract for candidates under 25 years of age.

Article L1233-5 LC forces the employer to take into account age and disability as protecting factors in establishing the list of targeted employees in case of economic redundancy and article L1233-61 LC requires the employer to establish a plan to organise in priority the reclassification and reemployment of older workers. Article R5123-9 et s. LC sets a special regime to indemnify workers over 57 years of age until retirement age in case of dismissal.

Some provisions provide the possibility for caring parents to obtain leave of absence to take care of sick children (article L1225-62 LC), to accompany the end of life (article L3142-16 LC), an extension of parental leave after having a disabled child (article L1225-61 LC) and a right to adaptation of work hours for caring for family members with a disability (article L3122-26 LC) (see section 2.6 a)).

Article 2 of the governmental decree 2005-901 of 2nd August, 2005 provides new means of access to certain functions in the Public Service without entry examination, by combining formal training with internships, for people between 16 and 25 years of age who have left school without recognised diplomas, or with an insufficient level of education to obtain level C employment in the Public Service (lowest level).

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

The permissible age to enter the workforce is regulated by article L4153-1 LC which sets 16 years of age as the general norm, without prejudice to specific regimes

(qualification and apprenticeship contracts L6325-1 LC et s. at 15)[143] and summer employment after the age of 14.

There is no maximum age in the private sector. Moreover, article L5331-2 LC forbids making an offer of employment containing a limitation of age that would not otherwise be imposed by law. The legal protection against dismissal is applicable to all workers regardless of age.

However, as mentioned above, article L1133-1 Par 2° LC allows for a maximum age requirement "for recruiting, based on the required training for the function or the requirement of pursuing a reasonable period of employment before retirement."

The general age limitation in public service is 67 years of age (article 28 of the Law of 9 November 2010, supra) with specific derogations for specific corps (article 1, Law no 84-834 of 13 September, 1984)

With respect to maximum age requirements see section 4.7.1 b).

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

An employee can collect his or her pension at age 60 (an age which will progressively increase to 62 by 2018), at which time the amount will depend on the number of years of contribution, in accordance with the Law no 2003-775 of 21 August, 2003. Article 351-8 of the Social Security Code establishes at 65 (an age which will progressively increase to 67 by 2023) the age at which minimum full retirement is accessible independently of the number of years of contribution. Further to the adoption of Law no 2008-1330 of 17 December, 2008, Article 1237-5 of the Labour Code refers to Article 351-8 of the Social Security Code to determine the age

[143] Law 2003-775 of August 21, 2003 reform: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20030822&numTexte=1&pageDebut=14310&pageFin=14343.

at which an employer can force retirement of an employee on the ground of age. The employer can propose forced retirement to the employee at age 65, and each year thereafter. The employee may however defer such a forced retirement until he or she reaches the age of 70.

There exists a forced retirement age in the public sector (67 years of age subject to some derogations (article 28 Law of 9 November 2010).

Employees are never otherwise forced to retire and, if they collect their state pension, they can continue to work at all times. However, from the time they start collecting their state pension, employees cannot collect unemployment benefits.[144]

b) Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?

Rights to retirement benefits are subject to both conditions of age and number of years of contribution.[145] The general rule is that a salaried worker can claim rights to retirement benefits from 60 years of age (going on 62) given he or she has contributed 41,5 years (the number of years may vary according to the retirement regime).

However, people who began to work before 18 years of age can claim rights to retirement at 58 years of age given he or she contributed for 41,5 years plus 2 years. Disabled employees and employees caring for a disabled child can benefit from full retirement at age 65 even if they have not contributed the required number of years (article L351-8 of the Social Security Code). Article 18 of the Law of 9 November 2010 lowers retirement age giving right to a full pension from 65 to 60 years of age, in the private sector for disabled persons with a recognized disability rate of 80%.

On 27 June, 2006, Law no 2006-737 adopted increasing retirement benefits for disabled public agents, and decree no 2006-1687 was adopted on 12 December, 2006 to increase retirement benefits of 30% for each year of disability during service and lowering retirement age accordingly.

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[144] Accord National Interprofessionnel de sécurisation de la convention de reclassement personalisé, 23 December, 2008.

[145] Law 2003-775 of 21 August, 2003 reforming old age pensions: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20030822&numTexte=1&pageDebut=14310&pageFin=14343. Article 2 of the law on equal opportunities of March 31, 2006, http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENE0601527D; Decree n° 2006-764 of 30 June, 2006, J.O n° 151 of July 1st 2006 page 9881 Law 2003-775 of 21 August, 2003 reforming old age pensions: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20060701&numTexte=23&pageDebut=09881&pageFin=09882.

Employees caring for a disabled child can benefit as well from the possibility for early retirement.[146]

Since 1984, in order to receive a pension, a salaried worker must resign from his or her current employment, but he can thereafter find another employment in the private sector.

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

There is no state-imposed retirement age in the private sector. However, articles L1237-5-1 and 1237-8 LC provide for the right of the employer to put an end to the employment contract on the basis of rights to retirement with respect to individuals who have acquired rights to full retirement pension according to article L351-1 of the Social security Code and are 70 years of age. Nevertheless, as indicated above, retired persons can pursue employment after receiving their pension.

There exists a compulsory retirement age in the public sector (67 years of age subject to some derogations (article 28 Law of 9 November 2010).

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

Article L1237-5-1 LC states that conditions of retirement in collective agreements and labour contracts are applicable as long as they do not contradict legal principles. Thus, all provisions of collective agreements and other labour contracts are null and void which would provide for the automatic interruption of the labour contract by reason of the age of the employee or because he or she would be entitled to benefit from old age pension.

e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

The legal protection against dismissal is applicable to all workers regardless of age.

[146] Decree n° 2005-1774 of 30 December, 2005 Journal officiel, n° 304, 31/12/2005, p. 20856 http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524551D; Decree n° 2005-1761of 29 December, 2005 Journal officiel, n° 303, 30/12/2005, p. 20444, http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524152D.

Until recently, difference in treatment as regards retirement between men and women did not consist of age requirements but the number of years of required contributions before being fully pensioned. Women could avail themselves of early retirement if they had three children or more. In such case, they are credited 24 months of retirement contribution for each child they have educated until 16 years of age.

This scheme was held to be discriminatory on the ground of sex in 2002 by the Administrative Supreme Court in the Giesmar case.[147]

Therefore, the right to retire at an earlier age and the rebate on the number of year of contribution required to obtain full pension must benefit to both men and women who are parent of three children or more. Further to the reform of pensions, these benefits will continue to apply to all civil servants hired prior to 1989, but they have been repealed for those who started their activity in 1990 and after.

Litigation over application to men of these special retirement benefits account for 40% of the HALDE's complaints in discrimination based upon sex.

f) Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009], C-45/09, Rosenbladt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011] regarding compulsory retirement.

The possibility provided by article 6 of the Law 2008-496 (article L1133-2 LC) allowing each employer to create and justify exceptions to the prohibition of discrimination on the ground of age seems too wide and appears to delegate to individual employers the possibility given to government to create legitimate differences in treatment aimed at the protection of employees who are victims of their age. Therefore, it would appear not to satisfy the requirements of CJEU case law on age.

Some professions are still subject to statutory age limitations, but they are systematically challenged and the Conseil d'Etat systematically holds them to be contrary to Directive 2000/78 (CE, 25 April 2006 no 278105, Avenir Naviguant; *Court of Cassation, Social Chamber,* 12 December 2006, no 05-4486; CE, 24 January 2011, n° 308753, Conseil d'Etat - n° 326742 - 08/12/2010) . Therefore, one cannot say that all legislation is in conformity with the requirement set out in the Prigge case, but judicial challenges are efficient and uphold CJEU Case law.

[147] Conseil d'Etat, July 29, 2002, n° 141112, M. Griesmar.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

Article L1233-61 LC provides that in case of redundancy by an employer hiring 50 employees or more, rights to dismissal are limited and conditions of dismissal are complicated towards employees beyond 50 years of age.

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

The legal protection against dismissal is applicable to all workers regardless of age. Article R5123-9 et s. LC sets a special regime to indemnify workers over 57 years of age until retirement age in case of dismissal after a certain age.

As regards conventional compensation for redundancy, the Court of cassation, Social Chamber, has decided that the limitation of compensation for redundancy because of age on the ground that an employee is two years from full retirement meets the requirements of reasonableness and proportionality provided by the exception authorized by Article 6 of Directive 2000/78 implemented by Article L1133-1 of the Labour Code (Banque Finaref**,** 17 November, 2010 n° 09-42071).

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

No.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

None.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

French positive action, as it has been conceived by the jurisprudence of the Administrative Supreme Court, is based on neutral and general grounds of distinction such as sex, disability, territory or socio-economic condition.[148] France does not enforce such programs in terms of "race" or origin. Nevertheless, the criteria of socio-economic condition and territory are means to indirectly target discriminations based on origin. In this context, some specialists regard some recent equal opportunity policies as promoting a "differentialist" approach, leading to indirectly implementing quota or targeting systems that are deliberately designed in formally neutral terms but in such a way as to take account of the social reality of "origin".[149]

In its opening disposition, the Law on Disability no 2005-102 affirms the right of disabled persons to the support of all members of the nation and at article 11 the right to the compensation of one's disability (article L114-1 1 CSW).

Art. 1133-3 LC states that positive action measures taken to promote equal opportunity to the benefit of disabled persons are not to be construed as discriminations. Moreover, article L1133-2 LC allows for differential treatment on the ground of age that is objectively and reasonably justified by a legitimate aim, in order to maintain health, support professional insertion, maintain employment of workers, if the means to pursue theses objectives are reasonable and necessary.

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

Origin

The territorial policy specific to disadvantaged suburbs, called « politique de la ville », concentrates a number of actions targeting populations of immigrant origin encouraging integration and fighting discrimination.

[148] Conseil d'Etat, 1996, public report n° 48, p. 86 et 91).
[149] Maisonneuve, M., Les discriminations positives ethniques ou raciales en droit public interne : vers la fin de la discrimination positive à la française, AFDA, May-June 2002, 561.

The major instruments of this policy are municipality contracts -"Contrats de Ville"- including thematic agreements addressing issues of discrimination, Great City projects - Grands Projets de Ville – Urban stimulation zones - Zones de redynamisation urbaine (ZRU) and Priority educational measure zone – les Zones d'éducation prioritaires (ZEP).

However, there is no policy targeting ethnic groups or groups designated in term of their origin, whether they are North African, African or Roma.

The only policies targeting the Travellers – who are not designated by their ethnic group – are framed as an administrative category aimed at accommodating their travelling way of life in terms of controls, social rights, housing (see section 3.2.10) and education (see section 3.2.8). They are represented and consulted in a national governmental commission, The National Consultative Commission for the Travellers. This Commission is consulted and kept informed of policy measures and difficulties facing the travelling population.

In order to accommodate the travelling way of life, Travellers are administratively linked to a municipality of binding (Law no 69-3 of 3 January, 1969, followed by the Law of 10 July, 1985 and the Law of 31 May, 1990). Their whereabouts are managed by a specific bureau of the prefect's office where they are bound to report upon their arrival in any local district (department). The HALDE had issued a recommendation to government for the abrogation of this special status (HALDE deliberation 2007-372 of 17 December, 2007, discussed in section 7g)).

This status which submits access to some legal rights, such as the right to vote in local elections, to specific modalities and reporting duties, has been held partly unconstitutional by the Constitutional Council in a decision QPC n° 2012-279 QPC of 5 October 2012. It decided that the scheme provided at article 7 of the Law no 69-3 of 3 January 1969, requiring persons without domicile to be registered through designated domiciliation and that they hold specific papers as a result, is not unreasonable given it is not based on their origin but their travelling situation and that there is a need for the state to put in place a mechanism to regulate access to rights through domiciliation, and be in a position to reach its population (QPC n° 2012-279 QPC).[150] However, articles 4 and 5 of the law subjecting travellers without regular employment and mean of income to an obligation to report to the Departmental authorities of the Ministry of Interior, police controls and potential penal sanctions in this regard create a difference in treatment with other travellers who have regular income and a violation of the right to freedom to come and go on the national territory which is contrary to the constitution.

[150] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-279-qpc/decision-n-2012-279-qpc-du-05-octobre-2012.115699.html.

In addition, conditions of access to being registered on electoral listings article 10 par. 3 have also been quashed

As a result, these provisions have been abrogated, but for the time being Government has been promising a reform but has not started working on the subject. NGOs consider that this inaction of the Minister of Interior is influenced by the popularity of his active policy to evacuate and expel Foreign Roma and forthcoming local elections.

Meanwhile, the decision did not quash the aspect of the law relating to elective residence, and all social rights are managed through this notion of residence. Since this elected municipality of residence is seldom that where they are actually living, it continues to marginalise them, and their relations with the local authorities are often difficult. It impacts upon their access to social housing, to parking grounds and health care. The issue of the specific administrative status of the travelling population has constantly been denounced by anti-racist NGOs.[151]

The issue is whether this reform will address problems related to their daily lives as regards occupation of private land (terrains familiaux) with their caravans. Urban planning regulations are the systematic justification for expulsion procedures, refusal to register their children in school and refusal to link their facilities to water and electricity.

As regards Foreign Roma, the integration and humanitarian policy announced in the Ministerial Instruction of August 26, 2012, has not been pursued and not given rise to any positive action measure.

The cases brought in matters of access to social protection on behalf of the Traveller population have been initiated by NGOs. None has based its arguments on Directive 2000/43. A recent case was brought in 2002 by NGOs attacking a ministerial instruction of August 3, 1999 relating to conditions of evidence of domicile for travelling people and the principle of being linked to a municipality of binding in accessing a next scheme of universal health insurance (Universal medical coverage – CMU). Arguments raised were based on the classical French theory of equality alleging a violation of equality. The Administrative Supreme Court dismissed the case because the ministerial instruction was merely repeating the Law of 1969, and therefore recourse in excess of power against the minister of social affairs could not be used to attack the Law (Administrative Supreme Court of 6 December, 2002 no 223570).

Meanwhile, as regards racial discrimination, governmental services have also initiated projects in the context of their general attributions. In 2002, the DGEFP (General delegation to employment and vocational training), DPM (Direction of

[151] http://www.gisti.org/doc/plein-droit/46/voyage.html.

population and migration), and ANPE (National Employment Agency now called Pôle Emploi) and the FASILD (National fund for the support of immigration and actions against discrimination now ACCSES) have concluded a general agreement to construct the State's policy to fight racial discrimination and favour access of theses populations to vocational training and employment.

A sponsoring program following youngsters towards employment since 1993, mainly targets youth of immigrant origin, with low levels of qualification or from disadvantaged neighbourhoods. Their results have been conclusive, leading to a professional insertion rate of 60%. Its actions have been largely developed since 1999, leading to a rate of insertion exceeding 15000 a year and its extension to an adult public and the development of regional conventions with representatives of employers and business development actors.

2004 marks a turning point in terms of National focus on the issue of racial discrimination and positive action. Lobbying groups are organizing within the political parties, publishing reports[152] and organizing debates. In this context, the Minister of Social Cohesion has adopted an ambitious program set out in the Executive order no 2005-901 of 2nd August, 2005 relative to conditions of age for access to the public service and new means of access to public service. It outlines a vast system of vocational training and support to integrate some 800 000 unemployed to the work force in non-commercial activities and promote equal chances, at a cost of 13 billion € over five years. Title III of the Law expressly addresses "equality of chances" with one chapter on tax support to disadvantaged municipalities (Chapter III), one on reception and integration of immigrants. It creates a National agency for the welcome of foreigners and migrants dedicated to the support of immigrants with a first legal authorization to reside on the National territory and the management of the Immigration contracts (article 61).

The employment aspect of this program intends to create 300 regional centres of employment concentrating all reintegration programs and services to the benefit of the long term unemployed (L5313-1), reinforces the missions of the offices dedicated to youth professional insertion (L5314-1). It further implements two substantial measures: the first one intends to put an end to the fatalism of unemployment and creates a contract of professional activity of two or three years paid at minimum wage up to twenty six hours a week. It has been offered to one million of the persons receiving social benefits over a period of four years, for a cost of 5.2 billion euro.

The second measure targets disadvantaged youth and intends to offer a professional future to persons under 25 through apprenticeship and vocational training, in both the private sector and the public sector.

[152] Circulaire du 30 janvier 2008 : www.juri-logement.org/les_textes/2008/C-30janv2008ConstructionLogtsSociaux.htm.

The objective is to give them access to employment without the traditional entrance competitive examination. The Minister of the Public Service added that this program would be opened to long term unemployed persons over fifty years of age.

The second aspect of this social cohesion program is to face the national housing crisis by investing massively in public housing in order to construct 120 000 social homes per year and 600 000 in five years, to create 12 000 more place in emergency housing and a special fund of 600 million Euros for disadvantaged neighbourhoods. Government has pursued this long term project throughout its mandate.[153]

In terms of education, the effort has been reoriented towards the integration of after school support within the educational structure.

The Ministry of immigration, which was since integrated to the Ministry of Interior, has created a scholarship to support higher education, for 4 800€, for 100 students of immigrant families who have achieved higher distinctions at the Baccalaureate level.

Except for actions directed at new migrants - which are managed by the French Office of Immigration and Integration (OFII- Office français de l'immigration et de l'intégration), the FASILD and urban policy institutions have been integrated in a new structure called Agence nationale pour la cohésion sociale et l'égalité des chances (ANCSEC) by Article 36 of the Law of 31 March, 2006 on Equal Opportunities. This agency acts jointly with the institutions managing urban renovation, the Agence nationale de rénovation urbaine (ANRU).-

All initiatives targeting publics of foreign origin had been regrouped under the authority of a new governmental portfolio, the Ministry of Immigration, Integration, National Identity and Development (Ministère de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire), which was merged into the Ministry of Interior further to the renewal of the Governmental cabinet in November 2010.

Meanwhile, on 22 October, 2004, at the initiative of the Montaigne Institute, 35 important French businesses were signing a Charter against discrimination in the workplace. Among the signing parties were, PSA Peugeot-Citroën, Adecco, Adia, France-Télévision, Accor, Casino or Axa. As well: Sodexho, Lafarge, Schneider Pinault-Printemps-Redoute, Total, Carrefour, Air Liquide. They all undertake to abstain from any discriminatory hiring policy and to combat discrimination in their promotion system. This iniative has evolved towards a trend to sign the Charter of promotion of diversity and now, more than 1700 French businesses, including most

[153] Sabeg, Y., Les oubliés de l'égalité des chances, Institut Montaigne 2004 ; Sabeg, Y., Discrimination positive, Calman-Lévy 2004 ; Blivet, L. L'entreprise et l'égalité positive, 2004, http://www.institutmontaigne.org/fr/publications/les-oublies-de-legalite-des-chances.

of those present on the stock exchange, have signed the Charter of diversity and undertake actions to improve equal chances in the work place.[154]

In addition, it has lead to the adoption of the NFX50-784 AFNOR standard on diversity that could form the basis of a certification on management processes.

Finally, in the face of the *de facto* inaccessibility to children of disadvantaged neighbourhoods of higher specialized education bodies – elite schools specific to the French system- in reason of the eliminatory aspect of their recruiting system, the Institut d'Etudes Politiques (one of these schools) has entered into partnerships with Schools of these neighbourhoods in order to select their best students and create a parallel recruiting system.[155] This program is spreading to other similar "Grandes Ecoles" and has lead to the adoption of Article 11 of the Law on equal opportunities of 31 March, 2006 that provides for special admission mechanisms for the underprivileged.

Disability

Disabled persons enjoy special protection in the field of employment under articles L.5211-1 to L.5215-1and R.5212-1 to R.5215-1 LC. They can work in a mainstream environment or a sheltered environment, including work aid centres (CAT), sheltered workshops and outwork distribution centres. CATs keep their classification as sheltered environment, but sheltered workshops become adapted businesses and are included in the mainstream environment. (In French, the law uses the following terms "ordinary environment for employment and school").

Article 27-1 of Law no 84-16, article 35 par 3 of Law 84-53 and article 27 (1) of Law 86-33 eliminate all age limits for the access to public service of disabled persons. In addition, disabled persons are not subject to the competition process by examination specific to recruitment of civil servants and benefit from a special recruitment procedure by way of contract and probation period leading to full civil servant status (Decree no 95-979 for State civil service, Decree no 2006-565 for hospital civil service and Decree 2006-148 for territorial civil service).

Art. L3122-26 LC provides that disabled employees have a right to request flexible work hours in order to facilitate their professional integration or their continued employment.

Finally, disabled workers enjoy special protection in the event of dismissal, with an extension of the period of notice if it does not amount to at least three months (art.

[154] www.charte-diversite.com.
[155] This program was challenged unsuccessfully on the basis of the principle of formal equality: CAA Paris 6 novembre 2003, UNI (Union nationale inter-universitaire) c/ résolutions du 3 septembre 2001 du conseil de direction de l'institut d'études politiques de Paris (IEP), N° 02PA02821.

5213-9 LC) and, since March 2004, they can take early retirement[156] on advantageous terms.

The Disabled Persons Employment Act 87-157 instituted a quota system. Despite the cost of the employment obligation, the Court of Cassation decided in May 2003 that disabled workers were not obliged to disclose their status to their employer.

The provisions relating to the employment of disabled persons are designed solely for their protection.[157]The Law no 2005-102 on disability creates a fund for the integration of disabled persons in both private and public employment as well as sanctions if the employment quota of 6% set forth in the Law is not respected (article 36 creating article 5212-12 LC). Article 36 of the Law maintains the possibility to comply with the obligation to employ a minimal quota of 6% of disabled salaried workers provided by Article 5212-2 LC by making a financial contribution to the AGEFIPH, which finances the integration of disabled workers. However, it increases the maximum penalty for not complying with the quota obligation of employing 6% of disabled workers, to 1500 times the minimum wage, and creates a similar obligation for the public sector. (See section 2.6 for reasonable accommodation financing).

Article 26 of the Law no 2005-102 on Disability creates an additional reporting obligation on the employer in Article L2241-5 LC by imposing an annual evaluation of measures taken to integrate the disabled employee into the workplace.

In addition, a number of positive action measures have been taken in order to improve access to education of disabled children. The Law no 2005-102 on Disability provides for a duty to integrate disabled children in the mainstream school system. It was adopted after the Autism Europe case brought before the Committee of Ministers of the Council of Europe[158] -which condemned France for violation of the rights of disabled children under the Article 9 of the additional protocol to the European Social Charter - and completely reforms assistance and education of disabled children.[159]

The right to education and to reasonable accommodation within education of disabled children is affirmed in articles 19 to 22 of the Law. Article 11 affirms a right of access to local mainstream schools and the right to a personalised educational project.[160]

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[156] J.O no. 66 of 18 March, 2004 page 5253, Decree no. 2004-232 of 17 March, 2004, relating to a reduction in the retirement age for disabled persons who pay social security contributions.
[157] Cass. Soc. no. 1083, 6 May, 2003, Revue de jurisprudence sociale 8-9/03 p. 733.
[158] Resolution ResChS(2004)1, collective complaint n° 13/2002.
[159] As regards autism and access to facilities, education and support, a national plan was initiated in 2004 to provide resources at the regional level, and followed by a plan for 2005/ 2006 to provide resources at the local level.
http://autisme.france.free.fr/fichiers/Dossier%20de%20Presse%20Autisme%202005.pdf.
[160] Ministerial instruction (Circulaire) no 2006-126 of 17 August, 2006 relating to the implementation of the personalized education project.

It creates a commission, which will assess the child and propose to his or her parents a personalised program of education that will also be taken into consideration when subsequently determining rights of the child in application under the general compensation scheme for all disabled people established by the law.

Article 19 III creates an obligation to provide education to each child at every level of education and a right to have access to mainstream school is conferred by article L112-1 of the Code of Education.

Orientation towards a specialised structure is made only with the consent of the child's parents in the context of the child's personalised program (article L112-2 of the same Code).

If access to the local ordinary school is not possible because of the physical condition of the premises, the extra cost of transportation to another school are met by the municipal authorities (article L112-1 par 8 of the Code of Education).

At article 75, the Law introduces Article L 312-9-1 to the Code of Education in order to recognise officially the French sign language for persons with impaired hearing.

Sexual orientation

No, affirmative action measures have been put in place with respect to sexual orientation. The NGOs have historically denounced the absence of political and governmental authorities responsible for any policy addressing LGBT issues. However, since November 2012, the minister for women's rights has initiated a large consultation to develop a wide program for the protection of the fundamental rights and against discrimination of LGBT persons.

Religion

In School, the principle of equality has been used to adjudicate on the applicability of the obligation to attend school to children whose religion enjoins worship on a day other than Sunday (see the decision of the Administrative Supreme Court jurisprudence p. 13).[161]

In addition, in reviewing their practices accommodating diversity, a number of businesses, and business counselling firms, have adopted good practice codes relating to the management of religious freedom at work, such as the Casino group or the Institut Montaigne, an independent think tank.

[161] CE l4th April 1995, Consistoire central des israélites de France, Mr Koen, (2 arrêts), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.

Age

Decree no 2009-560 of 20 May, 2009[162] imposing minimum quotas of employees over 50 creates Article R138-25 et ss. of the Social Security Code, which provide that by the end of 2009, businesses employing 50 persons or more must either be bound by branch collective agreements in respect to employment of senior employees, or must negotiate an agreement or engage in an action plan in favour of the employment of workers over 50. The agreements must set quantitative objectives and employers are to provide the employee's representation institutions quantitative annual data on their results in regard to these objectives, which must be reported back the collective agreement or labour authorities.

They must cover the employment of older workers, the projection of their career evolution, improvement of working conditions and prevention related to the physical burden of work, access to training and skill development, accommodation of working conditions at the end of the older worker's career and transition towards retirement, as well as development of tutor and knowledge transfer programs.

Report of these agreements must be submitted to Labour departmental authorities. The sanction of not undertaking such an agreement and of not following its objectives is to be taxed a special retirement contribution amounting to 1% of the total gross salaries of all employees paid by the employer.

Government has adopted the Law n° 2012-1189 of 26 October 2012 to put in place in 2012 a scheme to promote employment of young workers under 25 years of age, called Contrats emplois d'avenir (Contract of employment for the future).It creates articles L5134-110 and following of the Labour Code, creating a specific employment contract of 1 to 3 years, benefiting from a special social contribution regime and financing by the state in order to facilitate access to employment and professional training of workers between 16 and 25 , and 30 in the case of disabled persons, who have low levels of qualifications in sectors with high employment development potential and sectors of social and environmental utility identified by the regional state (Conseil régional) . Decree n° 2012-1210 of 31 October 2012 sets the specific requirements and conditions of regional state financing.

The Law of 17 January, 2002 amends article 1 paragraph 2 of Law no 89-462 of 6 July, 1989 on relations between landlords and tenants forbids discrimination in access to rental housing, whether private or public, on all grounds of discrimination prohibited by French law except as regards the ground of age for which a specific protection scheme has been put in place by law by article 15–III par 1 which creates an obligation upon the landlord to provide similar housing, at a comparable price in

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http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020639752&dateTexte=&categorieLien=id.

the same area if it wants to recuperate lodgings rented to someone over 70 years of age.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

As regards recourses to a specialised Equality body, including mediation and penal transaction, see section 7.

There are in France judicial and non-judicial recourses. Both the private and public employer initiates the latter when the victim of harassment calls upon his attention or if he suspects discrimination, as he must warrant a work environment exempt from such practices. In addition, the personnel representative, the human resources manager or the business comity (Comité d'entreprise) have power to request social dialogue on integration of disabled workers (L2241-5, L2242-13 and L2242-14), and working conditions (L2241-3, L2241-44) .

All recourses alleging discrimination against a private party - employer, service provider, landlord etc… - must be brought before the civil courts. In matters related to employment, the salaried employee in the private sector or contractual agent of an industrial or commercial public service will bring his recourse before the Labour Court (Conseil de Prud'hommes). In all other cases, recourses will be brought before the District court (Tribunal d'instance) or High district court (Tribunal de grande instance) depending upon the amounts involved or claimed.

All claims against the public service, in matters related to employment of public agents and to access to public service (such as access to school and social rights), whether in application the Law no. 2008-496 completing implementation of Directives 2000/43 and 2000/78 in all matters dealing with the public service including education, or of general principles of administrative law that also provide recourses against discrimination, must be brought before the administrative courts. The administrative court may correct the situation and/or award damages.

There are no specific recourse or sanctions in matters related to education and or housing. For instance, in case of harassment in education related to internship programs with a private employer, there is no foreseen recourse. Plaintiffs must put their claim before the civil courts or, when attacking the state in case of public housing and public education, the administrative court, as any other claimant.

Concerning the existence of desegregation recourse, since segregation is forbidden by law, there cannot be recourse in desegregation.

Recourses in discrimination before the civil courts created by explicit statute (Law of 16 November, 2001, Law of 17 January, 2002 and Law no 2008-496) benefit from the shift in the burden of proof (see section 6.3) but remain difficult to enforce. The judicial tradition is to go to civil court with the elements of evidence readily available to the party, which explains why plaintiffs often go to criminal court to obtain access to evidence. In addition, in cases of discrimination, the evidence is very often in the hands of the defendant and not accessible to plaintiff without intervention of a judge. Moreover, in France, making copy of the documents of the employer is considered as theft. The rules of civil procedure make access to evidence in the hands of the other party or a third party, by way of what is called “measures of instruction”, very difficult as it is considered as an exceptional measure and it is conditional upon having already brought sufficient evidence before the Court. It is not in the legal culture of judicial actors, judges and lawyers, to use these procedural means of access to evidence, as the judge in civil matters is seen as not inquisitive and not taking part to the process leading to the introduction of evidence before the court.

In cases of discrimination in employment, article L1133-3 LC provides for a recourse in damages as well as the possibility to request annulment of a discriminatory measure before the Labour Court.

It is important to stress however, that there has been a reversal of jurisprudence and on 12 December, 2006, the Court of Cassation has decided that the Labour Courts had jurisdiction over pre-contractual matters and were competent in cases related to access to employment and apprenticeship (Cass soc. 20 December, 2006, no 06-40662, 06-40799 and 06-40.864). Moreover, the Court of Cassation has decided to put in place a specialised chamber of the social chamber to deal with the enforcement of discrimination Law in Labour cases and that its annual thematic report on law enforcement in 2008 would be dedicated to discrimination Law.

Since the Law of 16 November, 2001, Labour Inspectors have reinforced investigation means. They can enter all premises (article L8113-5 LC), obtain communication of any document or information supporting evidence of the facts, whatever their material support (L8113-4. LC). They may as well draft a contravention report certifying their observations (L8113-7 LC) and transmit this report to the Public Prosecutor (article 40 Code of Penal Procedure - CPP).

However, the limited numbers of inspectors who have the burden of pursuing all violations to the Labour Code diminish the efficiency of this corps, whose members are entirely free to choose the situations they investigate. In addition, their enquiry exclusively leads to a penal recourse and they do not transmit the result of their investigations to the parties or to the civil judge.

Articles 121-1 and 121-2 PC provide for the penal responsibility of physical and legal persons. 225-2 and 432-7 PC provide for a penal complaint to the police or Public Prosecutor. The prosecution acts based on police enquiries (article 15-3 CPP) after

the victim's complaint or further to notice given by any public agent (article 40 CPP). Victims and NGOs can as well directly notify the public prosecution.

The main reason so many people resort to the penal courts is that it gives them access to evidence through the judge's enquiry. Otherwise, in civil cases, rules of civil procedure as judicial actors interpret them give little access to evidence to the plaintiff. In addition, in the context of the penal recourse, they do not have to get involved or need a lawyer; the prosecution takes charge of the enquiry and of the prosecution. The public prosecutor has nevertheless the choice to investigate and pursue the matter or not in the name of the state. For a long period, very few discrimination complaints were prosecuted.

On 11 July, 2007, Justice Minister has put in place a policy of specialisation instituting a dedicated service to treat discrimination penal complaints at the public prosecutor's office with the objective of increasing the rate of penal prosecution.[163] When the public prosecutor fails to pursue the matter, the civil party may bring action on its own before the penal courts (article 85 CPP), but will then require the assistance of a lawyer and will be obliged to bring about evidence of the penal discrimination without the support of the instructing judge.

Civil servants and contractual employees of the public sector must bring their recourse before the administrative courts (article 6 et. s. of the Law no 83-634 of 13 July, 1983 relating to the rights and obligations of civil servants). So must any citizen bringing action against the state or questioning the decision of a state representative. In addition, Art. 6 quinquies states the principle of disciplinary sanction against any agent proceeding to discriminatory actions. Meanwhile, civil servants remain liable before the penal courts.

Representation by an attorney is not mandatory before the Labour Court, the lower courts (TI) and the correctional court, or before the Appeals Court when appealing from the latter jurisdictions. Representation by an attorney is mandatory before the High Court (TGI), the Commerce Tribunal (Law no 71-1130 of 31 December, 1974), the Administrative Courts (regulation of 4 May, 2000) and the Court of Cassation (article 974 and s. of the New Code of Civil procedure - NCCP).

Legal aid is available to low income individuals (Law no 91-647 of July, 1991 regarding Legal aid ; Decree n° 91-1266 of 19 November, 1991, Decree n° 2003-300 of 2 April, 2003).

As regards mediation, articles 21 and 131 NCCP expressly refer to the duty of the judge to favour mediation and to designate a third party mediator upon obtaining the consent of the parties to that end. Conciliation is the first stage of any recourse

[163] http://www.textes.justice.gouv.fr/index.php?rubrique=10182&article=14410.

before the Labour Court in application of Article L1423-13 LC. The Labour Inspector (L611-1 and ss.) can also initiate these non-judicial means of action.

The Law no 2005-102 on Disability recognises a right of persons with impaired hearing to an interpreter in sign language before the civil and penal courts, and the right of the visually impaired to the reading in Braille of civil and penal court records at article 76, all these measures being ensured at the cost of the State.

Public buildings and courts must be accessible to the public (article L111-7 of the Code of construction) unless they have obtained a special authorisation of the prefect (Ministerial Instruction no 94-55 of 7 July, 1994, R111.19.3 CCH /Code of construction). Article L152-4 of the Code of construction foresees enforcement of this principle through penal fines and injunctive relief.

Article 64 of the Law no 2005-102 on Disability creates a Departmental House (Maison départmentale) for the disabled that is intended to centralise all administrative procedures to enforce the rights of disabled persons. It further creates a claim referee within these Departmental Houses at article 146-13 CSW, who will transmit the disabled person's claim to the competent authority or jurisdiction. The decree implementing this House of Disabled Persons has been adopted on 19 December, 2005 (Decree no 2005-1587).[164]

Article 76 of the Law no 2005-102 on Disability recognises a right of persons with impaired hearing to a sign language interpreter before the civil and penal courts, and the right of the visually impaired to the reading aloud of civil and penal court records, all these measures being ensured at the cost of the State.

With respect to claims against public service, mediation is the prerogative of the Médiateur de la République and is initiated by formal application through a Member of Parliament. This mediation is pursued without prejudice to the administrative recourse, which must be pursued independently.

Many administrations have their own mediator (ombudsman) such as the Ministry of Education, the postal service and public transports.

As discussed in section 3.2.10, when a municipality fails to put in place specific parking lots for the travelling population, it is barred from seeking removal of the travellers' trailers and from prohibiting parking **(**TGI de Montauban of 3rd May, 2002)[165] and can be attacked for this failure before the administrative courts.

There are no statistics regarding the number of civil and administrative complaints relating to discrimination law that are filed, and their results. All quantitative studies

[164] www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524615D.
[165] www.rajf.org/article.php3?id_article=1043.

must be done by going to each district and evaluating archives. In addition, the only statistics available concern judgment of condemnation based on Article 225-2 of the Penal Code and relate only to condemnations registered in the individual's criminal records. Therefore there are no statistics concerning the number of complaints lodged or the treatment they receive. Since 1998, the statistics show an average of 10 condemnations per year for an approximate number of complaints evaluated at about 7000.

b) Are these binding or non-binding?

Decisions of Penal, civil and administrative courts are binding.

Decisions of labour inspectors are as well, and failure to abide by them may lead to penal prosecution.

However, the Equality body's deliberations, whether the Halde's or the Defender of Rights', are not binding. If respondent does not follow them, they can be publicized. In addition, in case of recourse by the claimant, the equality body can file its investigation file in the court record and present legal arguments before the court.

Since discrimination law is subject to the jurisdiction of the Courts, the issuance of a binding decision is the prerogative of courts.

c) What is the time limit within which a procedure must be initiated?

In 2005, the Court of Cassation has decided that claims for discrimination related to execution of the contract were subject to a time limitation of 30 years (article 2262 CC).[166]

A major reform of all time limitations was adopted by the Law no 2008-561 of 17 June, 2008,[167] reducing the time limit to institute all personal and moveable property actions to 5 years (article 2224 Civil Code).

Moreover, further to complaints on the part of employers as to the unmanageable scope of their risk and their lobby, time limitation to institute action lowered to 5 years, as is the case for claims for salaries (article L1134-5 of the Labour Code). This reform entails an important regression on the scope of the protection against discrimination. Article L1134-5 LC provides:

"The action in compensation of the prejudice resulting from discrimination is prescribed after five years from the knowledge of the discrimination.

[166] Court of Cassation, Social Chamber, 15 March, 2005, no- 02-43.616, Renault c. Morange, Dictionnaire permanent social, 4114, Bulletin 814.
[167] http://www.assemblee-nationale.fr/13/dossiers/prescription_civile.asp.

Damages compensate the entire prejudice resulting from the discrimination for its entire duration."

In a decision of 4 February, 2009 (no 07-42697), the Court of Cassation has decided that prescription had no impact on the relevance of comparative evidence going beyond the prescribed period. It has further decided that the concept of "knowledge" of article 1134-5 of the Labour Code meant that the delay starts only when the victim has exact knowledge of the necessary comparative elements and their evidence (Soc. 22 March, 2007 no 05-45163). The only time limitation therefore results from another rule, provided at article 2232 of the Civil code, which limits the suspension of prescription by "ignorance" of the facts, in all cases, to 20 years.

The penal courts are competent in matters related to hiring, sanction and dismissal in the workplace, access to goods and services (including all public service such as public housing, education, social rights etc…).

They may condemn to penal sanctions (i.e. fines, prison, privation of civil rights) and to damages if plaintiff has lodged a civil complaint before the penal court. The time limits to prosecute the penal action for discrimination is three years (article 8 CPP).

d) Can a person bring a case after the employment relationship has ended?

In matters related to discrimination in the workplace, the Labour Code, the Law no 83-843 of 13 July, 1983 relating to the Rights and Obligations of Civil Servants and the Law no 2004-14 of 30 December, 2004 cover discrimination leading to loss of employment. The Labour Court, the Administrative Court and the High Judicial Court have jurisdiction to adjudicate a case after the termination of employment and may even annul the dismissal measure and order reintegration in the workplace with full compensation and retroactive pay.

As regards termination of employment, the recourse before administrative and civil courts is subject to the five years limitation applicable to all claims for personal rights (Article 2224 Civil Code).

However, under all legislation governing public agents, the delay to present a claim to challenge the decision taken by the public employer must be preceded by a written request to have the decision reconsidered that must be submitted within two months of the dismissal and followed by a formal administrative recourse filed not earlier than two months after this written request. The claim in damages against the state must as well be preceded by a written request which is not subject to time limitations, but the administrative recourse must be filed not earlier than two months after the written request.

e) In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other

factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)

As regards discrimination claims before the courts, Plaintiffs are eligible to financial support in accordance with their means.

However, since the equality Body cannot initiate judicial proceedings, victims have the burden of instituting action and finding financing for their own litigations costs.

f) Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

No, the Ministry of Justice does not publish such statistics.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organisation, trade union, etc.).

The Law of November 16, 2001 gives the possibility to representative trade unions and NGOs, which have been in existence for over five years to act on behalf or in support of victims of discrimination. They can intervene in the action for any apprentice, trainee, employment candidate or employee who alleges to have been victim of discrimination (article L1132-1 LC et seq., Law no 83-634 of 13 July, 1983 in the public sector article 8 par. 1 and 2). In addition, the Labour Code has been amended by the Law no 2005-102 on Disability and article L1134-3 was created in order to provide standing to NGOs acting for the rights of disabled persons before the Courts in matters of discrimination.

b) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?

The standing of physical and legal persons who have a legitimate interest in the dismissal or granting of the action in all civil cases pursuant to Article 31 NCCP, has

been created in order to award standing to NGOs or organisations when they established that the facts in issue were violating the collective interest they represented as declared in their constituting associative purpose pursuant to the Law 1 July no 1901. (Civ. 2e, 21 July, 1986: Bull. Civ. II no. 119).

In all cases, it must have been regularly created and have declared anti-discrimination, employment, a prohibited ground of discrimination or area of activity as one of its purposes for over five years and must obtain consent of the victim when it represents an individual victim.

Law no 2008-496 of 27 May, 2008 has not modified the regime defining the legal standing of associations.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

When the discrimination will have been perpetrated against individual persons, the NGO or the trade union (L1134-2 LC) will have to establish having received the consent of each person in writing (also article 6 of the Law no 83-634 of 13 July, 1983 on the rights and obligations of civil servants). If the victim is a minor, written consents from his or her responsible parent or tutor.

d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

It is always discretionary.

e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

Article 31 NCCP recognises the standing of any person who has a legitimate interest in the dismissal or granting of the action in all civil cases.

The Public prosecutor initiates penal actions. Victims and NGO's can join as civil parties. Article 2-1 CPP further foresees the possibility of NGOs combating discrimination on the ground of origin, race and religion to become civil party to penal actions pursuant to a violation of article 225-2 CP. Article 2-6 CPP foresees the same possibility for discrimination on the basis of sex or mores, and article 2-8 CPP provides for this possibility in matters of discrimination based on health and disability.

In case of discrimination in housing, the Law of 17 January, 2002 extends the right of action of NGOs to collective and individual recourses (article 24-1 Law of 6 July, 1989).

Article 48-1 of the Law on the Press of 29 July, 1881 provides for the action of victims and NGOs defending the rights of victims of racial discrimination that can establish an existence of five years, in matters of provocation to discrimination, incitement to hatred and violence, defamation (articles 24, 32, 33).

The Code of Administrative Justice does not define standing before the courts. However, NGOs interventions are common practice: administrative courts systematically hold that NGOs have standing to intervene if their associative purpose, as defined in their constitutive statutes, corresponds to the subject matter of the case.

f) What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.

Article 2 of the Code of penal procedure allows an NGO to pursue before the penal court a civil action for damages caused by the offence. They often claim non pecuniary damages for the victims they represent. In addition they can claim legal costs not compensated by the State under article 475.1 CPP.

They can as well claim damages before the civil courts, costs and legal costs not compensated by the State under article 700 CPC, and before the administrative courts against the State pursuant to general principles of administrative law and article R312-14 of the Code of Administrative Justice.

g) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?

No.

*h) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

The standing of any person who has a legitimate interest in the dismissal or granting of the action in all civil cases pursuant to Article 31 NCCP, has been created in order to award standing to NGOs when they established that the facts in issue were violating the collective interest they represented as declared in their constituting associative purpose pursuant to the Law 1 July no 1901. (Civ. 2e, 21 July, 1986: Bull. Civ.II no.119).

*i) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please*

describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.

Civil action does not allow for class action. Each Plaintiff must initiate a civil action that may be joined for the purpose of simplifying the hearing. However, this will not allow joining the court records. Therefore, legally, each record will be treated separately and evidence adduced in one action will not benefit the others.

In case of discrimination in housing, the Law of 17 January, 2002 extends the right of action of NGOs to collective and individual recourses (article 24-1 Law of 6 July, 1989).

There are no other collective mechanisms of complaints in internal law other then the collective complaint mechanism of the European Social Charter.

A bill no 3430 to create a class action was presented for discussion before Parliament on 6 November, 2006, but has still not been pursued by the new government. However, it continues to be discussed by civil society and political actors.[168]

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The shift in the burden of proof has expressly been transposed in all matters that concern Directives 2000/43 and Directive 2000/78 by Law no 2008-496 at article 4 and article 158 of the Law of 17 January, 2002 in matters of Housing (modifying article 1 par. 3 of Law 89-462 of 6 July, 1989).

- The plaintiff must present facts leading to a presumption of direct or indirect discrimination. In the former text, plaintiff had a lesser burden and was only required to present facts.
- Upon having satisfied this burden, the defendant must establish that his or her decision was justified by objective elements, which have nothing to do with discrimination. It does not require that defendant justify proportionality and necessity. Since this requirement is not intrinsically included in the definition of direct discrimination at article 7, the burden of proof ends up being lighter for

[168] http://www.assemblee-nationale.fr/12/dossiers/information_protection_consommateurs.asp.

defendant in direct discrimination cases then in indirect discrimination cases. This does not appear to comply with the requirements of the directive.

- The judge forms his inner conviction after having ordered, if necessary, all enquiry orders it considers useful.

This shift in the burden of proof is thus applicable in all non penal recourses (in the case of self employed workers and the liberal profession, private and public employees, access to goods and services in the private and public sector, claims against state services).

For claims relating to the public sector that are brought before the administrative court, the administrative procedure is inquisitive and is covered by the derogation provided in article 8 par 5 of directive 2000/43 and article 10 paragraph 5 of directive 2000/78.

Article R411-1 of the Code of administrative justice provides that "the procedure alleges the facts, arguments and conclusions submitted to the judge". Thus, the plaintiff is deemed not to have the burden of proof. However, in a plenary decision of 30 October, 2009, the Administrative Supreme Court has spelled out indications to lower administrative courts as regards implementation of the burden of proof in discrimination cases:

> "If it is to the Petitioner to submit to the judge elements of fact that could lead the judge to presume a violation of the principle of non discrimination, respondent must adduce in evidence all elements that can justify that the decision attacked is based on objective elements devoid of discriminatory objectives. The decision of the judge is based on this exchange of contradictory elements. In case of doubt, the judge must complete the investigation by ordering any investigation measure (or the filing of any element) that he or she deems necessary."

In fact this definition of the shift in the burden of proof is very close to the definition implemented in article L1134-1 of the Labour Code.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Law no 2008-496 has created at article 3 a specific protection against victimisation applicable to the entire scope of civil recourses alleging direct or indirect discrimination covered by the directives, which provides:

No person, having testified in good faith about discriminatory behaviour can be treated unfavourably on such a ground. No decision can be taken against a person

because he or she was a victim of discrimination or because of his or her refusal to submit to a discrimination prohibited at article 2.

This protection clarifies that it extends to victims and non-victims but does not provide any indication as to the applicable burden of proof applicable to claims of victimisation.

Finally, the Penal Code protects victims and witnesses. Article 434-15 CP sanctions treats and intimidation towards a witness, and article 434-5 CP towards a victim, by a maximum penalty of three years imprisonment.

It is important to note that in reaction to actions for discrimination and sexual harassment, there have been an ever-growing defence strategy leading to filing a penal complaint for slanderous complaint (226-10 PC) in order to intimidate complainants. They have sometimes given rise to investigation.

As for other grounds of criminal complaints, there are no statistics or studies as to the number of such complaints and their results, since they are integrated in global statistics relating to slanderous complaints.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

The general principle in French civil Law is to remedy the prejudice by the award of compensatory pecuniary damages, indemnifying the financial and non-pecuniary damage, without further pecuniary sanction or punitive damages.

The legislator has foreseen in the Labour Code the possibility to request the annulment of the discriminatory measure, allowing for reintegration in case of dismissal, retroactive indemnity (financial compensation of the loss in wages for the entire period of discrimination) and legal modification of the employee's status in his working environment (articles L1134-4).

The Court of Cassation has many times ordered the reconstitution of the career of the employee with retroactive indemnification plus reinstating plaintiff in his rights for the future, the ensuing cost to the employer being substantial.

However, other recourses, in matters of housing or non salaried employees (Law no 2008-496) do not benefit from this possibility and remedy is limited to damages which are often symbolic.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

No.

c) Is there any information available concerning:
i) the average amount of compensation available to victims?No.
ii) the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?No.

There is no statutory upper limit but the French legal practice is still very conservative in calculating pecuniary loss, and amounts awarded remain rather low.

The first civil case against a private real estate agent has successfully been brought before the civil courts in 2008, before the Montpellier judicial Court (Tribunal d'instance).

The court awarded 3 000€ in non-pecuniary damages, stating for the first time that suffering discrimination deserved specific compensation for non-pecuniary damages, that ought to be significant.[169] Since then, we have observed that when Plaintiff fails to quantify financial loss by concrete evidence, in situations such as discrimination in access to employment, or loss of business for failure to have access to the Court House, the Courts in 2010 have awarded 20 000€ in non pecuniary damages, an award that stand has a substitute in the face of difficulties to establish damages (Airbus case, supra and Bleitrach case, supra)

The Law Perben II for the Adaptation of Justice to the Evolutions of Criminality has been adopted on 16 March, 2004.[170] Sanctions incurred in relation to the offence of discrimination are increased to a maximum of three year imprisonment and a 45 000 € fine (article 225-2 PC).

The Law creates an aggravating factor in relation to discriminatory refusal to sell or give access to a public place (discos, shops, public services etc…), sanctioned by a maximum of 5 years imprisonment and a 75 000 € fine. In addition, the Penal Code allows accessory sanctions at article 225-19 PC: posting or publication of the judgement, closing down of a public place, exclusion from procurement contracts, confiscation of a business, suspension of civil rights, and a list of further penalties that are seldom ordered. The same sentence is applicable to discriminations by public services (article 432-7 PC).

[169] Tribunal d'Instance de Montpellier, 3 April, 2008, Drucker c. Galerie Gregoire RG no. 11-07-001540.
[170] Law n° 2004-204 9 March, 2004 (JORF n°59 du 10 mars 2004 page 4567), http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0300028L.

Legal persons, including the state and all public services, can be condemned as well, and this liability does not exclude that of the physical person. Since 2000, the level of penal fines and the number of prison sentences has evolved from insignificant amounts to amounts of 3000€ to 15 000€ and suspended prison sentences. In addition, publication of sentences in local papers has been ordered in a number of cases. However, beyond bad publicity, in case of a business strategy based on a discriminatory practice, the amount of these condemnations is not yet a significant deterrent unless assorted to a suspended sentence that entails substantial consequences in case of relapse.

In non-penal matters involving the public service, the recourse must be brought before the administrative tribunal. Two recourses are available: one for excess of power to annul the decision attacked or the full jurisdiction recourse, in order to obtain not only annulment of the decision but damages as well.

In addition to penal and administrative recourses, a civil servant can as well be the object of disciplinary sanctions in application of article 66 of the Law no 84-16 of 11 January, 1984, article 89 of Law no 84-53 of 26 January, 1984, and article 81 of Law no 86-33 of 9 January, 1986.

In order to facilitate enforcement and encourage systematic sanction of penal discrimination, the Law no 2006-396 on Equal Opportunities of 31 March, 2006 has given to the HALDE a power of penal transaction that had been pursued in the Defender of Rights (see section 7). It empowers the Defender of Rights to propose fines in the amount of 3000€ for a physical person and 15 000€ for legal persons together with compensation of the victim, posting of announcements (article 28 of the Organic Law).

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

Yes, the Haute autorité de lutte contre les discriminations et pour l'égalite (HALDE – High Authority to Fight Againt Discrimnation and for Equality). It has been merged on the 1st of May 2011 with other specialized bodies in a new constitutionnal authority called the Defender of Rights by the Organic Law no 2011-333 of 29 March 2011 creating the Defender of Rights.

b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

The Law creating the High Authority against Discrimination and for Equality (HALDE) was adopted on 30 December, 2004, and was in force from 1st February, 2005 until 30 April 2011.[171] A commission of eleven members acted as decisional body. On 4 March, 2005, the decree of enforcement of the Law creating the High Authority was published,[172] and the High Authority formally started its activities in June 2005. Since its opening, Parliament voted a constant budget over 10 Million Euros. It attained 80 staff members, 130 voluntary correspondents in the field, 28 interns, and a budget of 11, 643 300 million Euros in 2010.

The Organic Law no 2011-333 creating the Defender of Rights has integrated the HALDE in a new constitutional independant authority (article 2) that merged a number of pre existing specialized bodies, since 1st May 2011.

171 http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20041231&numTexte=3&pageDebut=22567&pageFin=22570.

172 Decree 2005-215 of 4 March, 2005 : http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20050306&numTexte=2&pageDebut=03862&pageFin=03865.

It provides for the centralisation of all powers within the control of the person of the Defender of Rights, who is designated by the President of the Republic through a decision taken in meeting of the Cabinet after consultation of both Assemblies of Parliament (Article 1). He cannot be revoked except for reasons related to his ability to perform his functions definied at articles 3 to 5 of Decree no 2011-905 of 29 July 2011.

On 23 June 2011, Dominique Baudis, former Mayor of the City of Toulouse, European MP and President of the Broadcasting Regulatory Council, was named Defender of Rights.

The Defender of Rights nominates three deputies to assist him, one for each of its field of action (article 11 of the Organic Law). The deputy competent in the field of discrimination is Maryvonne Lyazid. Moreover, the Defender can consult a commission dedicated to discrimination on new matters (article 15 of the Organic Law) made of 8 members named by various institutions (3 by the Senate, 3 by the National Assembly, one by the Administrative Supreme Court and one by the Cour de cassation).

The Defender has however the power to decide in opportunity what claims to pursue (article 24 of the Organic Law).

The reform integrating the HALDE in the Defender of Rights modifies the nomination and decisional process presiding the empowerment of the equality body. The Defender of Rights takes no instructions but he or she is designated by the Government.

The Defender of Rights is not bound by any internal counter powers: he or she is not bound to follow the position of the collegial body and he is only required to consult it on new matters submitted to his decision. Furthermore, the process of appointment of the members of the collegial body of the Defender of Rights continues to be influenced strongly by political forces of society (7 members out of 9 of the Council are designated directly by political authorities).

The administrative status of the High Authority and of the Defender of Rights is not subject to the hierarchical authority of Government and it has free disposition of its budget. Their financial means are however limited and completely assured through public funds, which are voted by Parliament every year as part of the Prime Minister's budget, and thereby could be subject to budgetary compressions.

Whereas the HALDE's president functions were cumulative with an elective or public employment or any other professional activity, the Defender of Rights and his deputies must resign from all other positions (article 3 of the Organic Law).

In addition, as a result of the competence of the former Mediator of the Republic, he is competent in matters relating to illegal and inequitable decision of governmental

services, which extends its competence to human rights and public policy and public services. It is also competent as regards the rights of children covered by the UN Convention of the Rights of Children, and ethics in activities of public and private security forces.

c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The Defender of Rights has been given the same field of competence as the HALDE on all forms of discriminations, direct and indirect, forbidden by the laws of the Republic, therefore readily adaptable to any future legal evolutions. It covers discrimination by reason of real or imputed race or origin, sex, disability, age, health, religion, sexual orientation, opinions, appearance, and trade union activities in all domains regulated by law. Its realm of power goes beyond the requirements of Directives 2000/43 and 2002/73.

d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

The Defender of Rights has been given powers similar to those of the Halde, and the drafting of the Organic Law in matters of discrimination is modelled on the Law creating the HALDE. In addition to investigative powers, the High Authority and the Defender of Rights ensure the promotion of equal treatment, have the power to make recommendations on all issues relating to discrimination, to identify and promote good professional practices and to coordinate and conduct studies and research.

The Defender of Rights has competence to investigate individual and collective complaints, whether the investigation is initiated of its own accord or by written demand of the claimant.

His investigative powers allow him to request explanations from any public or private person, including the communication of documents and the hearing of relevant witnesses. In case of non-cooperation with the investigation services of the High Authority, it could request a court order, when the Defender of Rights can also pursue the respondent for contempt. The Defender of Rights may also ask that all required investigations be carried out by any service of the state and proceed to visits in all non-private premises after due notice and consent of the owner. Finally, the Law has given its investigators authority to issue a sworn statement concluding to discrimination, which can only be contradicted by way of substantial evidence before the courts.

In the case of a criminal offence, the Defender of Rights may transmit the claim to the penal courts or proceed with a penal transaction.

In 2006, Section 2 (Articles 41 to 44) of the Law on Equal Opportunities was adopted to reinforce the powers of the HALDE. By virtue of Articles 11-1, 11-2 and 11-3 of Law no 2004-1486, as amended by the Law on Equal Opportunities, and Article D.1-1 of the Code of Criminal Procedure as amended by Decree 2006-641 of 1 June, 2006, a new power was conferred upon the HALDE: that of proposing a so-called "*transaction pénale*". This is a kind of negotiated criminal sanction proposed to perpetrators of direct discrimination.

This power was pursued in the Defender of Rights at article 28 of the Organic Law. It entails that the Defender of Rights, following an investigation of a complaint resulting in a finding of direct intentional discrimination by the person or entity investigated, is authorised to propose a specific criminal sanction to the perpetrator, which he can either accept or reject. This could be a fine (see section 6.5) or publication (for instance in a press release) of the fact that discrimination has taken place and, if relevant, an award of compensation to the victim. In case of rejection of the proposed negotiated criminal sanction or of a subsequent failure to comply with it, the Defender of Rights could initiate a criminal prosecution, in place of the public prosecutor, before the criminal court. This system has much in common with the procedures followed by other administrative authorities that have the power to propose on-the-spot fines for an infringement of the criminal law, such as the tax, customs, and water or woodland authorities.

Otherwise, the Defender of Rights can deal with any case by pursuing a solution in equity, which in French law consists of a solution in all fairness despite the absence of effective recourse (article 25 of the Organic Law creating the Defender of Rights), and he may propose mediation to the parties. If they complete the investigation, they will issue conclusions and recommendations to the parties who will have a certain amount of time to comply.

In case of non-compliance, they have the power to call public attention to their recommendations. In addition, they may alert the relevant authorities in cases they require disciplinary sanctions against the respondent.

In 2011, the HALDE and the Defender of Rights have jointly received 8200 complaints based on all grounds and areas of discrimination, a decrease of 25% that can be explained by two reasons. First the impact on the general public of the disappearance of the HALDE and an absence of identification of the Defender of Rights as being competent in matters of discrimination which would have diminished the number of claims filed. In addition, we know that claims on which one or many of the initial structures were competent have been re-oriented to other units that are not identified with a code registering discrimination. For example, cases related to disabled children in the field of education are no longer treated by the goods and service discrimination unit but by the former services of the Defender of Children and are not classified as discrimination claims but as Children's claims.

Due to integration of software for file management and integration of the file management systems of the four former bodies, Starting in 2012 statistics will no longer account for claims alleging discrimination, but will only take into account claims within the scope of competence of the Defender of Rights in the field of anti discrimination transferred to its legal services for treatment. Although final data is not yet available, tentative evaluations assess claims transferred to the legal service for investigation on the merits to 1761 for 2012.

In 2012, the Defender of Rights has investigated 1400 files in the area of anti-discrimination and rendered 172 decisions. It has presented observations before the courts in 76 cases, proceeded to mediations, given 6 opinions to Public prosecutors and transmitted 7 cases for investigation and prosecution.

In 2012, 47,5 % of the complaints were lodged by men and 52,5 % by women.

22,5 % of the claims allege discrimination based on origin (including race) on all grounds and 51,6 % of all claims concern employment, both private and public. Claims based on origin in employment have fallen from 9% to 4,6 % Health and disability concerns 26 % of the claims and deals mainly with access to the public service and goods and services, or reclassification of disabled employees.

Discrimination in access to housing represents 8,9 % of the claims, and alleges mostly discrimination based on origin or disability. Education, including primary, secondary school, university and other types of training, covers 5,2 % of the claims, that allege as grounds of discrimination, origin first and disability in second. Age represents 5,5 % of claims and concentrates mainly on the issue of access to employment.

Sexual orientation represents 1,7 % of the claims and concerns mainly access to goods and services and access to the public service. Religion represents 2,2 % of the claims that concentrate on access to the public service and raise issues related to dress codes. Finally, discrimination based on sex represents 11% of the claims and half of them have been brought by men in order to claim benefits similar to those of women in relation to pension rights after having raised three children or more. Very few women raise discrimination based on sex in employment.

The High Authority has presented its reports to the President of the Republic and the Parliament in the spring of each year since its creation, and the Defender of Rights is subject to the same obligation.

e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

The Defender of Rights carries its tasks independently (see sub section b)). It provides independent assistance to victims of discrimination in pursuing their complaints about discrimination (articles 18 to 36 of the Organic Law), it conducts independent surveys concerning discrimination and publishes independent reports (article 34).

f) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

The High Authority and the Defender of Rights have also been conceived as 'Judicial officials' (article 33 of the Organic Law): the law creates the possibility for the criminal, civil and administrative courts to seek its observations in cases under adjudication. In addition, the Law on Equal Opportunities has extended its power to the submission of observations of its own accord before the criminal, civil and administrative courts.

g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).

The Defender of Rights is not a quasi judicial institutions and does not render binding decisions. It can take decisions making recommendations and can publish a special report if they are not followed (Article 25). It can further request that administrative (article 30), penal (Article 33) or disciplinary sanction (Article 29) be pursued or present observations before the courts (Article 33).

i) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

As regards the Roma and traveller population, the HALDE had the opportunity to adopt a number of recommendations regarding access to education, to housing, derogatory administrative conditions relating to travelling in relation to driving licence, identity card, occupation of non constructible land, access to commodities etc.…

However, in 2006, observing insufficient claims by this population, the HALDE decided to constitute a working group to look into their specific status and its conformity to community law in order to submit recommendations to the Government in order to insure the pursuit of all necessary reforms. The conclusions of the working group were adopted by the HALDE in December 2007.

There have been Romany populations (Tisanes, Giants, Sinai, and Romany) on the French territory since the 15th century and they have always been the subject of specific status and obligations. In 1912, their status was defined in accordance to their way of life, and ever since the laws regulating the specific obligations to which

they are subject have been based on the necessity to keep a certain control over the travelling population by reason of its way of life.

The Law no 69-3 still creates an obligation on the part of citizens without permanent domicile who are travelling on the National territory, to hold special travelling identity papers that must be validated at the Ministry of Interior local office within 48 hours of arriving in the department (préfecture) and can be controlled by the police at any time. The HALDE has concluded that this was a violation of their rights to free circulation and to privacy.

It has recommended a reform of the status of travelling persons in order to eliminate all specific identity papers and all measure resulting in increased police control. (HALDE Deliberation no 2007- 372 of 17 December, 2007, recommending to reform the legal regime applicable to national Romany population under the name of travellers (gens du voyage).

In addition, these citizens must specify a designated city where they are to be domiciliated, but do not have the right to vote before 3 years, were the general population, as well as homeless, are only required to have been registered for a period of 6 months in order to acquire the right to vote.

Further to the HALDE's deliberation, government had first announced that it intended to reform the Law no 69-3 to eliminate special circulation papers, facilitate access to the National Identity card and reform conditions for registration on the voting lists, but this has not lead to any substantial reform other then addressing to all departmental authorities a ministerial instruction stating the right of Travellers to the issuance of a National Identity Card, which was previously denied to them. (NOR/INT/D/08/00179/C dated 27 November, 2008, relating to the issuance of national Identity Cards to travellers). The Defender of Rights has reiterated Halde's position and requested a reform of the legislation as regards access to voting rights in a decision no 2011-11 addressed to the Minister of interior who replied in February 2012 by referring to the project of an overall reform of the status of Travellers after the elections in the fall of 2012. On 5 October 2012, the Constitutional Council quashed this aspect of the legislation and a legislative reform is expected in 2013.

In 2008, HALDE further decided to pursue the working group in order to report on implementation of targeted policies relating to access to camping space, housing and education and the situation of Eastern European Roma populations that are being denied access to social rights and are being driven back to Romania and Bulgaria. On 9 November, 2009, HALDE adopted Deliberation no 2009-372 on the situation of Romanian and Bulgarian Roma in France. In 2008 and 2009 the working group undertook hearings of NGOs supporting foreign Roma in France and of governmental authorities responsible of administering public policies relating to immigration and social support to this population. Their conditions of poverty and precariousness in France were especially pointed out in the European human rights commissioner's report on France for 2006 and 2008 and decision of the ESRC of 21

January 2013. NGOs consider that their precarious situations give rise to denial of adults' and children's' elementary rights to access to health services, education, housing and work, as well as abusive police controls and conditions of expulsion resulting in a violation of their dignity and fundamental rights.

The HALDE also pointed out in this report that Government adopted a system of humanitarian expulsion to send European persons in precarious situations back to their country with a 300 € check for adults and 100€ for children (for non European migrants the aid is called "aid to voluntary return" and amounts to 2000€ per adult and 500€ to 1000€ per child) adopted in December 2006 by the Ministry of Immigration, now integrated in the Ministry of Interior. In fact this scheme has been used to put Romanian Roma living on illegal camp sites on buses back to their country at the time of their expulsion from the camp sites by the police. Since then, these expulsions on buses continue to be deprived of formalism and made without an explicit investigation procedure for each individual case, often without even a clear identification of the persons concerned or consideration of their personal situation.

The Ministry of Immigration admitted at the time that this system of "humanitarian expulsion" in Europe had been used mainly to send Romanian Roma back to Romania and had allowed government to increase its statistics on return of illegal aliens. It confirmed having escorted 8470 Romanian Roma back to Romania in 2008, as opposed to 1 600 in 2007. At the end of each year however, the number of Romanian Roma on the French territory remains constant year after year, they are estimated to be 12 000 and the same groups seem to keep coming back after they are sent back to Romania.

All testimonies, whether from NGOs or governmental and local authorities, confirm a policy of pursuing illegal installation of Roma and Travellers on precarious camp sites. This results in constant expulsions and controls which creates anguish and insecurity in the population. The Commission for Ethics in the Security Services (CNDS) (which has been merged with the HALDE as of 1st May 2011 in the Defender of Rights) has reported disproportionately violent expulsions which gave rise to unjustified violence by police forces. Romanian and Bulgarian Roma in France are victims of collective expulsions contrary to article 4 of the 4th Protocol to the European Convention of Human Rights.

In 2009, the HALDE concluded that the French government's policy and transitory regime targets Romanian and Bulgarian Roma and is as such discriminatory on the ground of race and origin. Romanian and Bulgarian Roma do not benefit from rights of other citizens of the European Union, and they are denied access to rights granted to other migrant populations, some of which are protected under Directive 2000/43 (social security, social protection, education, access to goods and services). The Roma population is the most controlled, with the less support and is the only migrant population which does not benefit from a policy to insure its access to rights. In order to put an end to the discriminations of which Bulgarian and Romanian Roma are victims, the HALDE recommended to government to stop the present expulsion

policy, to insure access to social rights implement a number of measures among which the end of the transitory regime limiting the right of circulation and installation of Romanians and Bulgarians in France.

On 1st December 2011, the Defender of Rights addressed a new proposal to the Minister of Interior and all Mayors of France in order to request that all proceedings to cut access to electricity and water by reason of illegal use of land be interrupted in the winter period for humanitarian considerations and the public duty to take in consideration in all matters the higher interest of the Child. This recommendation has been followed by some municipal authorities.

The situation regarding ROMA in 2012 has lead to many NGO complaints addressed to the Defender of Rights under all its capacities, whether relating to the defence of children, Ethics in security, fight against discrimination or inequity and illegal acts of public service. We estimate 20 claims concerning 14 Departments, 25 landsite, concerning approximately 1625 persons in all plus 1000 person for Seine St-Denis (Department 93). The Defender of Rights has presented observations before the courts in support the suspension of three expulsions in order to require that the prefect implement conditions of humanitarian support defined in Ministerial instruction of 26 August 2012, and has systematically addressed to prefects questionnaires concerning each expulsions asking them to report on measures taken to implement humanitarian measures of expulsion. A report on the implementation of this Ministerial Instruction since September 2012 should be published in June 2013, in order to alert Government on insufficient respect of humanitarian requirements.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Over the years, the public service had developed at a national level a number of information and awareness programs, and mainly the Ministry of Employment (DGEFP, DPM, ANPE, which has become Pôle emploi, and the FASILD now Agence Nationale pour la cohésion sociale et l'égalité des chances (ANCSEC), contributing as well to its dissemination at a regional and departmental level. The main financing operator of these policies had been the ANCSEC, but its mission have been thwarted to concentrate on urban renovation actions, and delegated to the Agency managing the immigration policy, the ANAEM, Agence nationale de l'accueil et des migrations – which has become Office français de l'immigration et de l'intégration (OFII). Further to the creation of the Ministry of Immigration, Integration, National Identity and Development, all policies relating to racial discrimination and integration had been transferred from the Ministry of Labour to this Ministry, which has since been merged in 2010 with the ministry of Interior. NGOs complain that their financing have been considerably jeopardized and diminished through these reforms.

In 2002, racial discrimination was elected Great National cause that provided to NGOs acting in this field, a global subsidy of over 1 million Euros and cheaper TV diffusion costs. In 2004, Disability was elected Great National cause and again, a TV advertisement campaign was produced and aired. All these campaigns were adapted for the visually and hearing impaired.

The GELD, public structure created in 1999 to study and, in 2001, to combat discrimination by managing the 114 hotline, created in 2001 a website dedicated to racial discrimination and legal information tools, for all intervening actors, experts and victims: www.le114.com. The resources of its website were transferred to the High Authority against Discrimination and for Equality (HALDE). The HALDE launched its own website in February 2006: www.halde.fr. The Defender of Rights, has merged this website into its own: www.defenseurdesdroits.fr/.

In addition, most NGOs, whether anti-racist or promoting the rights of disabled persons, of gays, of the sick, of the aged (amongst which MRAP, SOS RACISM, LICRA, LDH, SIDA Info services, AIDES, LGBT, APF etc…)[173] are subsidized by the State and pursue dissemination activities among which, the diffusion of their own website presenting legal precedents and legal tools, many of which are adapted for the visually impaired, as well as seminars and events.

In November 2002, the MRAP and APAHF[174] have published legal guides for victims of discrimination, for rights in matters related to access of disabled children to schools, etc…

All these structures, as well as trade unions and the FASILD (now ANCSEC), organise seminars and training for actors and the general public.

In 2007 and 2008, the HALDE has coordinated dissemination actions in France financed through the European Year to raise awareness of travellers and their representatives on discrimination law.

In August 2012, Government has given a specific mandate to the DIHAL (Délégation interministérielle à l'hébergement et à l'accès au logement / Interministerial Delegation to Emergency Shelter and Access to Housing) to undertake the mission to put in place the conditions to deploy a program to accompany the access to rights (including health, education, employment, shelter and housing) and integration of foreign Roma and Travellers. It should publish a program including good practices for local authorities and coordination of public policy for the spring of 2013.

The Defender of Rights pursues communication actions through its website, the publication of leaflets, of posters in all public services, through its network of local delegates and through its media strategy.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

The major reforms undertaken with respect to the entire indemnification and support structure towards disabled persons, the creation of the National Specialised Body (HALDE), the creation of the National Museum on the History of Immigration, the plan of social cohesion, and the legal reforms with respect to criminalisation of hateful speech based on sexism and homophobia, have all followed a similar approach. These reforms were based on consultation and dialogue with NGOs,

[173] MRAP(Mouvement contre le racisme et pour l'amitié entre les peuples), SOS RACISM, LICRA(Ligue internationale contre le racisme et l'antisémitisme), LDH(Ligue des droits de l'homme), SIDA Info services(Aids Service hot line), AIDES (Rights of persons suffering from Aids), LGBT(Gay , lesbian, Trans and Bi coalition), APH (Associatipon des paralysés de France).
[174] Accompagner, Protéger,Aider, Harmoniser France.

social actors, representatives of the public service by way of mandates given to prominent personalities by the prime minister.

Meanwhile, the CNCDH (National Human Rights Consultative Commission), counsel to the Prime Minister, is composed of delegates of all major human rights and anti-racist NGOs, representative trade unions and branches of the public sector. It is consulted on all legislative reforms affecting human rights and provides counsel and recommendations to the government. It is organised in six sub-commissions, one of which is responsible for the annual publication of a report on racism and anti-Semitism.

The High Authority benefited from a consultative body (*Comité consultatif*) composed of representatives of civil society i.e. NGOs, Trade Union and experts, which has been very active in pursuing the working group on Travellers' rights which has lead to the adoption of deliberation no 2007- 372 of 17 December, 2007 (see section 7). However, this consultative body no longer exists in the HALDE's successor, the Defender of Rights.

At the departmental level, the CODAC (Departmental Commission of Access to Citizenship) – which used to be dedicated to racial discrimination – has been re-baptised COPEC (Commission for the promotion of equality) and seen its mission redefined in September 2004.[175] It gathers all local actors under the authority of the representative of the State in the department, the Prefect.

It is intended to generate cooperation and dialogue for the promotion of equality addressing all grounds of discrimination.

Even if it was covered by existing legislation regulating the exercise of faith in France,[176] Islam, second national faith with four to five million followers, was the only major religion that did not have a national representative organisation. The Ministry of Interior in 2002 organised a consultation with all the Islamic faiths' institutions under the supervision of the COMOR (Commission of Organisation of the Consultation of French Muslims). A preliminary agreement for the creation of a French Council of Muslim Worship (Conseil français du culte musulman- CFCM) was signed on 9 December, 2002 by the three main component of the Muslim community in France (FNMF, GMP, UOIF). In February 2003, the COMOR reached a final agreement on the organisation of the CFCM, the organisation of their 17 regional councils (CRCM) for the management and animation of Muslim Worship and the organisation of

[175] Circulaire COPEC NOR/INT/K/04/00117/C, 20 / 09 /2004, Missions nouvelles des commissions départementales d'accès à la citoyenneté (CODAC), commissions pour la promotion de l'égalité des chances et la citoyenneté" (COPEC) http://i.ville.gouv.fr/index.php/reference/3016/circulaire-nor-int-k-04-00117-c-du-20-septembre-2004-relative-aux-missions-nouvelles-des-commissions-departementales-d-acces-a-la.

[176] Marongui O. et D'un monde à l'autre, Droit français des cultes appliqués à l'Islam, 2002 ; Open society Institute of Budapest, La situation des musulmans en France, 2002.

elections to these regional councils in April 2003. The CFCM is a federation of associations governed by the Law of,1st July, 1901.

Its general assembly reunites the elected representatives of the CRCMs (regional councils) which represent 995 communities, and elects a president and two vice-presidents.

The Law no 2005-102 on Disability structures all the national and local commissions involved in establishing policies concerning disabled people and enforcing their rights, such as the National consultative council of disabled persons and its local counterpart, on the participation of NGOs representing disabled people (Article 1 of the Law creating article L146-1 A CSW). It further creates a Departmental Commission for the Rights and the Autonomy of Disabled Persons competent for all decisions relating to the orientation of the disabled person (see section 6.1). Its members are representatives of public service, NGOs, trade unions and social partners and at least 30% of representatives of disabled persons (Article 66 of the Law relating to Title 1V of the Code of social welfare). Its organisation is determined by decree (not yet adopted). NGOs, who in France have traditionally been delegated the task of the public sector in terms of support to disabled persons and their families.

Since November 2012, the minister for women's rights has initiated a large consultation to develop a wide program for the protection of the fundamental rights and against discrimination of LGBT persons. It covers the fight against violence, training of public education teachers, the fight against discrimination in daily life and international action for the promotion and the extension of the protection of the rights of LGBT persons.

c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

On Paper, dialogue between social partners is a golden rule:

Article 4 of the Law of 16 November, 2001, integrates the fight against discriminations as an objective in collective bargaining, in branch (sub-sections of the labour force) negotiations and national negotiations dealt at the level of the National commission of collective bargaining.

Article L2261-22 LC was modified in order to extend the equality objective not only in terms of access to employment but in terms of training and the employees' career as well. However, it limits this objective to the criteria of race and ethnic origin.

In addition, the Commission responsible for monitoring professional equality between men and women has seen its competence extended to discrimination based on race and origin (article L2271-1 par. 8 LC). Elements concerning racial and sex

discrimination have become a mandatory provision in all branches collective agreements. However, beyond informal affirmation, these undertakings have not generated any specific negotiation in relation to equality.

In the public service, social dialogue is a basic organisational principle since all levels of human resources management are dealt with in a joint decisional system were representative of the State and unions are equally represented (Law no 83-634 of 1st July, 1983, article 9 par.1).

Article 25 of the Law no 2005-102 on Disability modifies articles L2241-1 and L2242-1 LC, which concern mandatory annual negotiations among social partners, to create the obligation to hold annual negotiations concerning measures necessary for the professional integration of disabled persons. In addition, as discussed in section b), social partners participate to the Departmental Commission for the Rights and Autonomy of Disabled Persons.

In 2006, government has given mandate to the High Authority to organise a "Consensus Conference" in order to present recommendations as regards necessary evolutions to the management of social housing in order to take into account discrimination.

This consensus conference process involves consultation and hearing of field representatives by designated experts, leading to a report to government in 2007.

In reality, social partners are not sufficiently involved: they seldom represent employees against the employer before the Courts in discrimination cases and are reluctant to submit to mandatory negotiation obligations with respect to discrimination: discrimination is perceived as a side issue, that conflicts with the social agenda in the employer's premises and more generally, in global negotiation objectives. Discrimination is considered as an approach that protects target groups, whereas Trade Unions represent the interests of all employees.

d) to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?

There is a national consultative body, reuniting representatives of NGOs of Governmental services, of Parliament, to discuss draft legislation and policy that concerns the travelling population (Commission nationale consultative des gens du voyage). Such a commission also exists at the departmental level and is used by the prefect (head of local state services) to coordinate implementation of local parking accommodations, local action and interventions and organise large travelling movements for important annual reunions. This National Consultative Commission of the Travellers has been reactivated to follow up on implementation of HALDE's recommendations in 2009

The service dealing with exclusion in the department of social affairs is responsible for policies relating to Roma and works together with NGOs, and particularly one NGO federating the others: FNASAT.

In 2000, the Besson Law no 2000-614 relating to the accommodation of the travelling population imposed on all departments the adoption of accommodation schemes for travellers and an obligation on all towns of 5000 people and more to put in place short term and long term parking accommodation for travellers. After many extensions, in 2005 there were 93 departmental schemes adopted but only 25% of the required parking accommodation (8000 parking areas), where the authorities recognise that 20 000 are needed (NGOs consider that 60 000 are needed). There has been a two year extension (2007) and an ultimate proposition for funding for 2008, in order to encourage compliance with the obligation to provide for the required parking space. There has not yet been an evaluation of the results of this program.

The scheme aims at stabilising residence and favour school attendance for the children , as all mayors are obliged to register children in school even for a few days (article L131-10 and 131-11 of the Code of Education and 227-17-2 of the penal code). However, they tend to generate concentration and in some cities (Dijon-Nancy- Toulouse) there are schools that count a majority of Roma children.

In the meantime, access to private property and the acquisition of land faces many administrative barriers that are amplified by most mayors' and MPs reluctance to see Roma family units get settled on their territory.

In pursuance of dissemination activities initiated during the European year, the HALDE has been working together with the FNASAT (national travellers NGO) on the production of training and informative material for the travelling population on Directive 2000/43 and discrimination based on origin dissemination, by way of a DVD and a training guide. It has been presented to travellers in 2008, throughout the territory, by training sessions organized by the FNASAT.

Further to the action of the the HALDE between 2006 and 2009 investigating cases and following working groups relating to Travellers and Roma issues, two deliberations were addressed to government in order to denounce their respective conditions and denial of their fundamental political, civil and social rights in violation of a number of International conventions and of Directive 2000/43. These deliberations further recommended, for travellers, the modification of the administrative status of travellers and of housing and education policies, and for Foreign Roma, the end of the transitory regime especially adopted further to the integration of Bulgaria and Romania in the European Union, and denying them access to social rights and a status equivalent to that of other citizens of the European Union (see section 7 h)). Recommendations on access to voting rights have been reiterated by the Defender of Rights in its decision n°2011-11 and they have lead to promises on the part of Government that the status of Travellers would be reviewed.

A Report on the information mission of the National Assembly's Commission of Legislation regarding legislative adjustments relating to housing conditions of Travellers, presided by Didier QUENTIN, and presented on 9 March 2011. This report details all measures which must be taken in order to improve the living conditions of Travellers and their status as regards parking rights, access to vote, and citizenship, It was followed by formal propositions to the Prime Minister made by the Senator Hérisson, President of the National Consultative Commission of the Travellers, which led to formal undertakings on the part of the Minister of Interior to implement these recommendations in the fall of 2012, after the next elections.

In August 2012, Government has given a specific mandate to the DIHAL (Délégation interministérielle à l'hébergement et à l'accès au logement / Interministerial Delegation to Emergency Shelter and Access to Housing) to undertake the mission to put in place the conditions to deploy a program to accompany the access to rights (including health, education, employment, shelter and housing) and integration of foreign Roma and Travellers. It should publish a program including good practices for local authorities and coordination of public policy for the Spring of 2013.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

French law does not require that express legislation be introduced in order to insure the superiority of the principle of equality to other sources of rights. Equal treatment between persons is a constitutional principle and a rule of public order sanctioned by the Penal Code. Article 6 of the Civil Code further expresses the following general principle: "One cannot derogate to public order by way of a particular convention", this type of agreement being null and void. Articles 1382 et s. and 1146 et s. of the Civil Code implement a general regime of civil and contractual liability which adapts to the evolution of custom and of superior rules of law thereby adapting to directives 2000/43 and 2000/78. Article L1134-4 LC further expressly state that any such act is null and void.

Articles 6 and 6 quinquines of Law no 83-634 of 1st July, 1983 are rules of general application and public order. They must be respected in all regulatory acts or decision regarding a public agent.

Finally the general principle *lex posterior derogate loge priori* applies to human rights and therefore implies the inapplicability of all non-conforming legislation and conventions.

b) Are any laws, regulations or rules that are contrary to the principle of equality still in force?

There is no process of periodical legislative audit or restatement in France and the State has not undertaken an audit in order to verify compliance of all texts in force with the directives. Such legislation must be attacked before the Administrative Supreme Court or the European Court on a case by case basis. The HALDE regularly raised problems related to the non conformity of specific legislation or regulation with European anti-discrimination law.

In some cases, though rarely, Government openly refuses to follow the equality body's recommendation: for instance the minister of education disagrees with the Halde recommendation regarding the refusal of public elementary schools to allow women wearing the Islamic veil to accompany their children in school field trips on the ground that since they are contributing to the public service as accompanying adults, they are subject to the obligation of neutrality of public servants. The Montreuil administrative court concluded that the position of the public school authorities respected the principle of secularity of the public service and represented a justified restriction to the free expression of one's religion (Recteur de l'Académie de Créteil, 22/11/2011, n° 1012015). This decision is pending before the Paris Appeal Administrative Court.

The same applies to national collective agreements and contractual undertakings, which could be questioned by way of social dialogue but otherwise must be challenged before the Courts.

9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

The National Action Plan against racism 2012-2014 was presented before Cabinet by the Minister of Interior on 15 February 2012.[177] It focuses on the fight against racism and anti-semitism as a priority of governmental action and foresees the creation of an Inter-ministerial delegate against racism and anti-semitism (délégué interministériel à la lutte contre le racisme et l'antisémitisme) reporting to the Prime Minister and the Minister of interior, to initiate, coordinate and evaluate governmental action (Decree n° 2012-221 of 16 February 2012). Regis Guyot was nominated Inter-ministerial delegate. The plan detailed a governmental action plan reviewing the governmental policy on the fight against racism and discrimination and proposing an action based on the function of State institutions and NGOs. It proposed to improve police and justice statistics on racist and anti-semitic acts, but also studies on the diversity of the population. It has not been reviewed since election of the new Government.

Government:

Ministry of Interior -Ministry of Education - Ministry of Justice- Ministry of Social affairs- Minister for Women's Rights (LGBT)

Governmental departments:

Women's Rights Service (SdFe) has become a simple service of the General Direction of Social Cohesion DGCS infra) within the Ministry of Social Affairs, under the control of the Minister for the Rights of Women - Direction of Population and Migration (DPM) was replaced by the Direction of reception, integration and citizenship depending from the Ministry of Interior (Direction de l'accueil, de l'intégration et de la citoyenneté DAIC)- Direction of Labour Relations (DRT) - General Direction of Social Cohesion (DGCS) - General Direction for Health (DGS) - General Delegation for Employment and Professional Training (DGEFP) - DARESS (Direction of the coordination of Research, studies and statistics) - DRESS (Direction of research, evaluation and statistics), Direction of public liberties, Ministry of Interior (Roma and Travellers); General Direction of the Management of the Public Service (DGAFP);

[177] http://www.interieur.gouv.fr/sections/a_la_une/toute_l_actualite/ministere/plan-national-d-action-contre-racisme/downloadFile/attachedFile/Plan_national_d_action_contre_le_racisme_et_l_antisemitisme_2012_2014_-_version_definitive.pdf?nocache=1329321988.61.

National Research Institutes:

INSEE (National Statistical Institute)
INED (National Demographics Institute)
CAS (Centre d'analyse stratégique)

Interministerial Delegations:

Interministerial Delegation to Emergency Shelter and Access to Housing (DIHAL)
(Interministerial Delegation for Equal Opportunity of French from overseas territories
Interministerial Delegation for the Rights of Persons with Disabilities
Interministerial Delegation for accessibility for Disabled persons
Interministerial Delegation to the City and urban development
Interministerial Delegation against racism and anti-semitism
Interministerial comity for integration
Interministerial comity for Disability (CIH)

Public bodies:

Agence nationale pour la cohésion sociale et l'égalité des chances (ANCSEC)
Agence nationale de rénovation urbaine (ANRU)
Agence nationale de l'accueil et des migrations (ANAEM) – has become Office français de l'immigration et de l'intégration (OFII)

Consultative bodies:

National consultative commission of the Travellers
National consultative commission of Human Rights
National consultative commission of the retired and older people
National consultative commission for Persons with Disabilities
National Council for Social Inclusion
High Council for Integration
Higher Council for professional equality between men and women
Commission for political equality between men and women

Specialised administrative bodies:

Merged in the Defender of Rights:

Médiateur de la République (Ombudsman for the public sector)
CNDS Commission nationale de déonthologie de la sécurité (National Commission for Ethics and Security)
Défenseur des enfants (Defender of Children)
HALDE (High Authority against Discrimination and for Equality/ Haute autorité de lutte contre les discriminations et pour l'égalité)

CNIL (National Commission for IT and Liberty)
CSA (Higher Council for Radio and Television)
CADA (Commission for Access to Administrative Documents)

Justice:

Anti-discrimination section (in all Public prosecution bureau).

ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the main transposition and Anti-discrimination legislation at both Federal and federated/provincial level

Name of Country: France **Date: 1 January 2013**

Title of Legislation (including amending legislation)	**Date of adoption: Day/month/year**	**Date of entry in force from: Day/month/year**	**Grounds covered**	**Civil/Administrative/ Criminal Law**	**Material Scope**	**Principal content**
Title of the law: Abbreviation: Date of adoption: Latest amendments; Entry into force: Where the legislation is available electronically, provide the webpage address.			**Please specify**	**Please specify**	e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Law on the press of 1881 Date of adoption: 29 July 1881 Date of entry into	Date of adoption: 29 July 1881	29 July 1881	All grounds sex, origin, appearance of	Criminal law	Discriminatory discourse in all situations	Provocation to discrimination as defined by article 225-1 and 225-2

force: 29 July 1881 Latest amendments; Law 2006-1498 of 30 December 2004 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119&fastPos=35&fastReqId=519176632&categorieLien=cid&oldAction=rechTexte			origin, race, ethnic and national origin, sexual orientation, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, religion, political and religious convictions			The Law on the HALDE incorporates prohibition of provocation to discrimination on the basis of sex and sexual orientation and disability
Law no. 2001- 1066 of 16 November 2001 relating to the fight against discriminations Date of adoption and entry into force: 16 November 2001 Latest amendments: Law of 28 May 2008 http://www.legifrance.gouv.fr/affichTexte.do	16/11/2001	16/11/2001	Grounds: sex, origin, appearance of origin, race, ethnic and national origin, sexual orientation, age, family situation, genetic characteristics, physical	Civil, administrative, criminal law	Salaried employment, civil service and criminal law(goods and services) However, it does not cover the status of Magistrates and public agents working within	prohibition of direct and indirect discrimination, harassment in employment and in criminal law extension of the grounds and powers of the Labour inspector

?cidTexte=JORFTEXT000000588617&fastPos=1&fastReqId=328272779&categorieLien=cid&oldAction=rechTexte			appearance, last name, health, disability, union activities, religion, political and religious convictions		parliament .	
Law of social modernisation n°2002-73 Date of adoption and entry into force: 17 January, 2002 Latest amendments; Law of 27 May 2008 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617&fastPos=1&fastReqId=328272779&categorieLien=cid&oldAction=rechTexte	17/01/2002	17/01/2002	All grounds: Grounds: sex, pregnancy, origin, appearance of origin, race, ethnic and national origin, sexual orientation, sexual identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, religion, political and religious convictions	Civil. Administrative and criminal law	Private and public housing, Harassment	prohibition of direct and indirect discrimination in public and private housing Harassment in public and private employment Harassment in the Penal Code

Law no. 2001-434 of recognition of slavery and human trade as crime against humanity Date of adoption: 23 May 2001 Entry into force: 23 May 2001 Latest amendments: none http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369&dateTexte=&categorieLien=id	23/05/ 2001	23/05/ 2001	Racial	Criminal	All forms of activity and employment	Recognize that slavery as it was practised in Africa and the Indian Ocean was a crime against humanity and support research and education on this part of French history
Law no 2005-102 of February 11, 2005 for the equality of rights and chances and the social participation of persons with disabilities Date of adoption: 11 February 2005 Entry into force: 11 February 2005	11/02/ 2005	11/02/ 2005	Disability	Civil. Administrative law	Employment, education, goods and services, social rights, access to health	Completes transposition vs. reasonable accommodation duties and positive action

Latest amendments: none http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L						
Law no 2005-32 of social cohesion Date of adoption: 20 December 2004 Entry into force: 18 January 2005 Latest amendments: 31 July 2011 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000806166&fastPos=4&fastReqId=1246606751&categorieLien=cid&oldAction=rechTexte	20/ 12/ 2004	18/01/2005	Origin, race, religion	Administrative law	Employment housing in public and private sector	Program promoting access to employment and housing
Law no 2005-841 of July 26, 2005 habilitating the Government to adopt emergency measures for employment by	13 /07/ 2005	27/ 07/ 2005	Age	Administrative law	Employment public sector	Remove age limits for recruitment in the public sector

way of Governmental Decree: Date of adoption: 13July 2005 Entry into force: 27 July 2005 Latest amendments: 7 March 2007 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000632799&fastPos=1&fastReqId=1716068736&categorieLien=cid&oldAction=rechTexte *Governmental Decree 2005-901 of August 2nd, 2005* *Governmental Decree 2005-901 of August 2nd, 2005:*						
Law no 2006-396 of March 31, 2006 on Equal opportunities Date of adoption: and entry into force:	31/03 2006	31/03 2006	Grounds: sex, pregnancy, origin, appearance of origin, race,	Administrative law	All fields: public employment, private employment,	Increased power for the HALDEHALDE Creation of ANCSEC

31 March 2006 Latest amendments: 1 January 2013 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539&fastPos=1&fastReqId=831645971&categorieLien=cid&oldAction=rechTexte			ethnic and national origin, sexual orientation, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, religion, political and religious convictions		access to goods or services (including housing), social protection, social advantages, education	Education and employment provisions for integration of the youth
Law no 2008-496 of May 27 2008 relating to the adaptation of National Law to Community Law in matters of discrimination Date of adoption and entry into force: 27 May 2008 http://www.legifrance.gouv.fr/./affichTexte.do?cidTexte=JORFTE	27/ 05/ 2008	27/ 05/ 2008	Article 19 TFEU Grounds: Sex,origin, race, ethnic origin, religion, convictions, age, disability, sexual orientation	Civil. Administrative and criminal law	All fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	Correcting implementation of directives 2000/43 and 2000/78 by providing definitions of direct and indirect discrimination, including harassment and

XT000018877783&fastPos=1&fastReqId=1882290962&categorieLien=cid&oldAction=rechTexte Latest amendments; None						instructions to discriminate to the definition o discrimination, completing prohibition of retorsion and creating new exceptions.
Organic Law no 2011-333 of 29 March 2011 creating the Defender of Rights Date of adoption: 16 March 2001 Date of entry into force: 29 March 2011 Latest amendments; None http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110330&numTexte=1&pageDebut=05497&pageFin=05504	16/03/ 2011	29/03/ 2011	All grounds: sex, pregnancy, origin, appearance of origin, race, ethnic and national origin, sexual orientation,sexual identity age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, religion, political and	Civil. Administrative and criminal law	All fields: public employment, private employment, access to goods or services (including housing), access to public service, social protection, social advantages, education, civil rights	Integrates HALDE with other human rights administrative body in a unique Constitutional Independent Authority

			religious convictions			
Law n° 2012-954 of 6 August 2012 relating to Sexual Harassment Date of adoption and entry into force: 6 August 2012 Latest amendments: none http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte&categorieLien=id	06/08/2012	06/08/2012	Sexual identity	Civil. Administrative and criminal law	Public employment, private employment, access to goods or services (including housing)	Creating the ground of sexual identity at Article 4.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: **France** **Date 1 January 2013**

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4 /11/1950	03/05/1974	No	Yes	Yes
Protocol 12, ECHR	4/11/2004	No	No	No	No
Revised European Social Charter	03/05/1996	07/05/1999	No	Ratified collective complaints protocol? Yes	No
International Covenant on Civil and Political Rights	16/12/1966	04/11/1980	Yes, article 13 towards rights relating to the expulsion of foreigners	No	No
Framework Convention for the Protection of National	No	No	N/A		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Minorities					
International Convention on Economic, Social and Cultural Rights	16/12/1966	04/11/1980	Yes, articles 6, 9, 11 and 13 must not be interpreted as limiting sovereignty over access to work and social rights of foreigners	No	No
Convention on the Elimination of All Forms of Racial Discrimination	07/03/1966	28/07/1981	No	No	No
Convention on the Elimination of Discrimination Against Women	18/12/1979	03/09/1981	No	Yes	Yes
ILO Convention No. 111 on Discrimination	25/06/1958	15/06/1960	No	No	No
Convention on the Rights of the	26/01/1990	06/09/1990	Yes, article 6 cannot be interpreted to limit the	No	Yes, some dispositions have

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Child			application of French law on abortion; Article 30 cannot apply because of article 2 of The French constitution; Article 40 par 2b)V shall be interpreted as a general principle to which limited exception can be opposed by way of legislation, such as for certain criminal infractions.		been interpreted by the Conseil d'Etat as directly opposable to the State. CE, September 22, 1997, GISTI,
Convention on the Rights of Persons with Disabilities	30/03/2007	18/02/2010	No	Yes	Yes, some dispositions Could be interpreted as directly opposable to the State.

ANNEX 3: PREVIOUS CASE-LAW

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).

General principles:

Name of the court: Court of Cassation, Social Chamber
Date of decision: 28 March 2000
Name of the parties: Dick and CFDT c./ SNCF
Reference number: no. 1027 P+B Fluchère
Brief summary: Evidence revealed a significant adverse impact on the progression of remuneration over thirty years of an employee after his nomination as trade union representative. After having established unequal treatment, the employer has the burden to establish that the difference in situation is attributable to objective elements unrelated to any discrimination.

The court has the burden of verifying the conditions of the alleged discrimination by analysing the comparative career evolution of plaintiff and other comparable workers and the burden of proof is not entirely attributable to the employee.

Name of the court: Court of Cassation, Criminal Chamber
Date of decision: 14 June 2000
Name of the parties: CFDT Interco
Reference number: no 2792, 99-108
Address of the webpage:
www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2000X06X06X00226X000
Brief summary: In matters related to discrimination on the ground of trade union activities, the offence of discrimination may be established by comparative evidence and the judge must investigate the comparative situation of the employee with that of others. In addition, the burden of proof may be discharged even if discrimination is not the only motive of the decision taken against an employee.

Name of the court: Court of Appeal, Montpellier
Date of decision: 25 March 2003
Name of the parties: IBM c. Buscail
Reference number: no 0200504
Brief summary: The Court decided that the Defendant could not argue the insufficiency of the Plaintiff's evidence if he didn't communicate the documents ordered by the Court. The corollary consequence of the right to have access to the

evidence between the hands of the opposing party is that failure to comply transfers the burden of proof on the Defendant.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 28 November 2000
Name of the parties: Harba
Reference number: NO 97-43715
Address of the webpage:
www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2000X11X05X00395X000
Brief summary: First case implementing the protection of witnesses against employer victimization further to taking action for discrimination, on the basis of article L123-5 LC (new Article L1144-3 LC) protecting against victimization in cases related to discrimination on the ground of sex.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 16 February 2005
Reference number: no 02-43402
Address of the webpage:
www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X02X05X00434X002
Brief summary: In France during the probation period, the decision to interrupt the labour contract is discretionary and does not require justifying cause.
However, this discretionary power does not obviate the obligation of the employer to abide by the non-discrimination principle. Therefore, Article L122-45 LC (new Article 1132-1LC) prohibiting dismissal for discriminatory reasons is applicable to the probation period.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 9 January 2007
Reference number: no 05-43962
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1
Brief summary: The Court of Cassation found for the first and only time since transposition of the directives a situation of indirect discrimination. Neither Plaintiff nor Defendant argued indirect discrimination. This case related to the calculation of wages in a situation of annualised working time, where the employee was on sick leave for the period during which employees were called upon to work more. The Court concluded that defendant's interpretation of the collective agreement constituted indirect discrimination on the ground of health: the Court concluded that the chosen method of calculation which was apparently neutral, was not in itself discriminatory, but that "it constitutes a measure with an adverse indirect impact by reason of the health of the employee". The Court did not limit itself to the consideration of the intention of the parties but also looked at the resulting effect of the chosen interpretation of the agreement.

Name of the court: Constitutional Council
Date of decision: 15 November 2007
Reference number: no 2007-557 DC
Address of the webpage:
http://www.conseil-constitutionnel.fr/decision/2007/2007557/2007557dc.htm
Brief summary: Government introduced legislation to regulate data collection in research relating to the measure of discrimination and origin. It did so by way of an amendment to the Bill relating to the control of Immigration and Asylum. Article 63 of the law amended article 8 section II and article 25 section I of the Law of January 6, 1978 on Data Collection in order to allow the collection of personal data "showing, directly or indirectly, the racial or ethnic origin" of persons, for the purpose of studies under the supervision of the CNIL (Commission on Data Collection and the Protection of Personal Data). This provision was adopted and, challenged by the opposition before the Constitutional Council. The Council strikes the provision on the technical ground that it is a legislative rider, i.e. an amendment unrelated to the subject matter of the legislation under discussion. However, it further declares that studies relating to the diversity of origin, discrimination and integration could be based on objective information but that ethnic origin and race are not objective concepts and are contrary to Article 1 of the Constitution.

This case is considered to prohibit the subjectivity of the concept of ethnic origin but does not close the door to studies which are currently being carried out on the basis of the parents' nationality or native language.

Name of the court: Administrative Supreme Court
Date of decision: 18 December 2007
Reference number: no 310837
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018259598&fastReqId=2019204792&fastPos=1
Brief summary: By ministerial instruction of September 28, 2007, the Minister of Foreign Affairs gave the faculty to Consulate and Diplomatic Authorities to refuse to register community of life partnerships (PACS) between French and foreigners, thereby preventing these couples from prevailing themselves of attached spousal residential rights in France, on the ground that same sex couples were prohibited by law in certain countries and the fact that the registration of the PACS would put the concerned persons at risk. The Administrative Supreme Court quashed this ministerial instruction on the ground that the alleged risks were more related to community of life then to the registration of the partnership and that the institution of a differential practice according to whether the two spouse were of French nationality or one was of foreign nationality, would be contrary to the principle of equality.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 19 December 2007
Reference number: Judgment no 06-44795

Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017741246&fastReqId=1749762952&fastPos=1
Brief summary: The plaintiff filed a claim for unpaid salaries, on the ground of an argument of illegal unequal pay based on the comparison with the salaries of his colleagues, alleging that this unequal treatment was related to his union activities. The Court ruled that the comparative approach was not relevant in this case, since the justification for the salary gap on the part of the employer was based on experience and seniority. In this case commenting on admissible justification to evidence of apparent discrimination, the Court of Cassation decided that experience and seniority were admissible grounds to justify difference in salary

Name of the court: Court of Cassation, Social Chamber
Date of decision: 20 May 2008
Reference number: Judgment No 06-45556
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000018870195&fastReqId=234808965&fastPos=1
Brief summary: The plaintiff sued her employer for back pay and compensation after retirement, claiming discrimination in her career's evolution due to her union activities.

The plaintiff's case was dismissed by the Court of First Instance due to failure to provide evidence of her discrimination relating to the remuneration of her same level colleagues.This is one of the first higher court's judgements analysing the plaintiff's and defendant's respective burden of proof.

The court clearly alerts the defendants that although the plaintiff must present to the court an evidence of discrimination, if s/he chooses to challenge comparability or less favourable treatment the burden of proof falls upon the defendant. In addition, it concludes that the defendant will be called upon to provide information in order to allow the calculation of the damages.

Name of the court: CAEN Appeal Court
Date of the decision : 17 September 2010
Name of the parties: Enault vs. SAS ED
Reference number: n° 08/04500
Brief summary: Plaintiff and her spouse are both employees at Ed supermarkets on the same site. They have a child and their employer knows that they are a couple. Mr M is store manager and union delegate and Ms E. is head cashier together with a colleague. Ms E had never been sanctioned. During the period of annual negotiation, the regional manager stormed in the store, telling Plaintiff that she was in charge in the absence of Mr M. and asking her to account for the bad condition of the lay out. She was questioned brutally, suspended and dismissed, her head-cashier colleague was not and Mr M, who could not account for his short absence, received minor formal sanctions.

The events occurred in the course of tensed union negotiations. Given the disproportion of sanctions inflicted upon Plaintiff, the HALDE held that she was a proxy for union discrimination. Her protection against dismissal on the ground of the prohibition of discrimination therefore results from evidence that her association with the union representative was the ground for the unfavourable unequal treatment she was subjected to.

The case was presented before the Labour Court and the HALDE presented its observations to the Court. This is the first French jurisdictionnal decision concluding that the protection against discrimination can be invoked by any person intimately associated with a person protected against discrimination if there is a presumption that this association is the ground for unequal treatment. The Court decided that the absence of evidence that Plaintiff was more responsible for the store then her colleague or that formal measures had been taken for the replacement of Mr M., and the disproportion between Plaintiff and Mr M's sanctions, constitute sufficient evidence that Plaintiff appears to have been victim of a discriminatory treatment on the basis of her spouse's union activities. Appeal before the Caen Court of Appeals by SAS ED was dismissed.

Name of the court: Administrative Supreme Court
Date of decision: 30 October 2009
Name of the parties: Mrs P vs. Minister of Justice
Reference number: n° 298348
Address of the webpage: http://www.conseil-etat.fr/cde/node.php?articleid=1839
Brief summary: In this case, the Court unilaterally requested a postponement of the case to a plenary session including all chambers of the High Administrative Court, to discuss: "the rules of evidence to be applied by the National judge at the expiration of the delay for the implementation of a Directive into National Law".

Discrimination was alleged by a magistrate against the Minister of Justice, in a matter dealing with discrimination based on union activities, not covered by the EU Directive 2000/78. Petitioners argued the applicability of anti-discrimination law to magistrates by raising direct application of Directive 2000/78. This argument was made in order to further support that given the protection of magistrates against discrimination in general, the extension of protection against discrimination on the ground of union activities that had been decided in favour of civil servants was to be applied.

The Administrative Supreme Court reversed previous jurisprudence (CE Assembly, 22 December, 1978, Cohn-Bendit) and concluded that, in the face of the failure of the French government to implement Directive 2000/78 to the status of magistrates, Directive 2000/78 was to be directly applied when sufficiently precise, in determining the scope, content and rules of implementation of the legal protection against discrimination applicable to magistrates. It however concluded that in the case at hand it was not applicable while agreeing to extend protection against discrimination to union activities. On the implementation by the administrative tribunal of the shift in burden of proof provided at article 10 of Directive 2000/78, the Administrative

Supreme Court goes on to provide general directions to lower courts and contradicts the constant jurisprudence of administrative courts refusing to implement the shift in the burden of proof on the ground that, pursuant to Recital 32 of the Directive, the administrative tribunal had its own investigative management of evidence. The Administrative Supreme Court defines the applicable rules of evidence and evaluation of the parties' respective burden in all cases of discrimination.

Name of the court: Court of cassation, Social Chamber
Date of the decision : 10 November 2009
Reference number: n° 07-42849
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&Texte=JURITEXT000021270548&fastReqId=197431819&fastPos=1
Brief summary: Plaintiff's professional progression was abruptly interrupted after participating in a legal strike. From then on, for the next 18 years, her workload decreased, she was progressively isolated and never significantly progressed. The Court of appeal dismissed the claim for discrimination on the ground that her situation was not presented in the context of a comparator.

The Court of cassation quashed the Court of appeal decision deciding that evidence of interruption of progression, isolation of the employee and denial of work are sufficient to establish a presumption of discrimination without requiring a comparator.

Age:

Name of the court: Administrative Supreme Court
Date of decision: 25 April 2006
Name of the parties: Avenir Naviguant
Reference number: no 278105
Address of the webpage:
http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2006X04X000000278105
Brief summary: The NGO Avenir attacked decree no 2004-1427 of 23 December, 2004 limiting on flight service of plane service personnel to the age of 55 years old, alleging discrimination on the ground of age on the basis of Directive 2000/78. The Administrative Supreme Court dismissed this claim concluding that the underlying elements of expertise filed before the Court justified age limitations on the basis of the specific job description and its fitness requirements.

Name of the court: Administrative Supreme Court
Date of decision: 1 March 2006
Name of the parties: Syndicat parisien des administrations centrales économiques et financières
Reference number: no 268130

Address of the webpage:
http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2006X03X000000268130
Brief summary: The Union of central administration attacked the age limitation for access to the internal recruitment competition to enter the National School of Administration (ENA) set by decree no 20043-313 of 29 March, 2004. The Administrative Supreme Court decided that this age limitation met the requirements of the exception foreseen at Article 6 of the Law no 83-684 regarding rights and obligations of public agents of 13 July, 1983 which foresees that conditions of age can be determined in order to insure that training is followed by sufficient years of service and career perspectives in senior functions requiring sufficient experience.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 12 December 2006
Reference number: no 05-4486
Brief summary: The forced retirement of an employee on the basis of age when he or she has not made sufficient contribution to be entitled to full pension, is a dismissal based on age prohibited by Article L122-45-2 (new Article 1133-1LC) of the Labour Code.

Name of the court: HALDE
Date of decision: 3 April 2006
Reference number: Deliberation no 2006-60
Brief summary: The HALDE considers that the conditions of a pension scheme cannot justify the age limitation set at 29 years of age, for hiring maintained by the Paris public transport corporation (RATP). The recommendation to repeal all age limitations was followed by RATP.
The same recommendations were made to the Public electricity corporation (EDF) and the public train corporation (SNCF) in Deliberation no 2006-62 but have not yet been followed.

Name of the court: Court of Appeal of Poitiers
Date of decision: 17 February 2009
Reference number: no 08/00461
Brief summary: A woman of 44 years old had continuously worked for Defendant on a succession of short term contracts and received very favourable evaluations. She applied in a recruitment campaign opening 46 long term contracts and her application was denied on the ground that she did not show the required evolution potential. The HALDE presented observations before the Court. Its investigation concluded that many of the hired candidates were not as competent as Plaintiff and that most were under 29 years of age and a few between 30 and 38. The case was dismissed in first instance on the ground that Plaintiff had failed to establish that the employer had erroneously exercised its discretion. The Court of Appeal held that the superiority of her profile, the low potential of some hired candidate and their age was sufficient to establish a presumption of age discrimination that was not rebutted by the employer.

Name of the court: Court of cassation, Criminal Chamber
Date of the decision : 7 April 2009
Reference number: n° 08-88.017
Brief summary: Denial of car insurance on the ground of age is prohibited by Article 225-2 of the Penal Code, which precludes age to be a relevant risk analysis factor.

Name of the court: Court of cassation, Social Chamber
Date of the decision : 17 November 2010
Reference number: Banque Finaref, n° 09-42071
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023118267&fastReqId=1788605396&fastPos=1
Brief summary: The limitation of compensation for redundancy because of age on the ground that an employee is two years from full retirement meets the requirement of reasonability and proportionality provided by the exception authorized by Article 6 of Directive 2000/78 implemented by Article L1133-1 of the Labour Code.

Origin:

Name of the court: Court of Cassation, Criminal chamber
Date of decision: 27 June 1997
Reference number: Bull. Crim. 1997 no 253 p. 864
Brief summary: In reference to accusations of provocation to discriminate, the terms “Invaders”, those occupying the land and disrespectful and “toxic foreigners” generate a feeling of aggression and intend to produce a feeling of hatred or acts of discrimination against immigrants considered as a group of persons who are not part of the French community.

Foreigners living in France when they are targeted because they are not part of the French community constitute a group of persons according to Article 24 (6) of the Law on the press of 29 July, 1881.

Name of the court: Administrative Supreme Court
Date of decision: 30 October 2001
Name of the parties: Association française des sociétés financières.
Reference number: no 204909
Address of the webpage:
www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2001X10X0000004909
Brief summary: The Administrative Supreme Court heard an action for judicial review of a deliberation of the National Commission on Data Collection and the Protection of Personal Data, CNIL, of 22 December, 1998, which forbade, on grounds of discrimination, the use of a person’s nationality as a criterion in credit assessments. The Administrative Supreme Court struck down the CNIL’s decision on the ground that, so long as nationality was merely one element in an automatic calculation that was not in itself determinative of a credit decisions made by a

financial institution, the criteria of nationality was not discriminatory under the terms of article 19 par.1 TFEU and the Criminal Code.
Nationality may be relevant as to the likelihood of a debtor leaving the country and, as a result, failing to repay a loan. It is therefore an admissible criterion and applicants for a loan may lawfully be required to provide it.

Name of the court: Administrative Supreme Court
Date of decision: 30 November 2001
Reference number: no 212179, 212211 DIOP
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008029234&fastReqId=1919547595&fastPos=1
Brief summary: The Administrative Supreme Court granted the request for judicial review of pension arrangements of a Senegalese former Army Sergeant-Major on the ground that the relevant Law of 1961 was discriminatory. The Administrative Supreme Court found, not only that nationality is an inappropriate consideration on which to base a difference in pension calculation, but furthermore that "if the objective of French law was to draw the consequences from the independence of the former colonies and their distinct development, the difference of treatment thus created cannot be regarded as based on a criterion consistent with the objective, and that the provisions are therefore inconsistent with article 14 of the European Convention on Human Rights".

Name of the court: Court of Cassation, Social Chamber
Date of decision: 10 December 2002
Name of the parties: X c/ Institut Goethe
Reference number: no 0042158
Address of the webpage:
www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2002X12X05X00373X000
Brief summary: Discrimination based on nationality -differential remuneration of EU citizens working in France- all employees must receive the same remuneration regardless of citizenship and origin.

Name of the court: Court of Appeal of Paris
Date of decision: 17 October 2003, Appeal from TGI Paris 22 November 2002
Name of the parties: Affaire « Moulin Rouge » SOS Racisme et Marega c/ Beuzit et Association du Moulin
Reference number: DO July 2003 p.284
Brief summary: The evidence introduced before the Court was based on the results of an investigation by a Labour Inspector, which showed that the table and bar staff were 97% European whereas "colored" workers were numerous in the kitchens, and on a taped telephone conversation in which the manager stated that "colored" staff were not hired for table and bar service. The Paris Criminal Court found that illegal discrimination leading to a racist management of the workforce had been established.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 2 June 2004
Name of the parties: Sté Pavillon Montsouris c. X. and Sté Spot Image
Reference number: no 02-45269
Brief summary: An employee pronouncing racist insults against a subordinate or addressing an electronic email to his employer containing anti-Semitic menaces and insults necessarily commits a wrongful act generating a real and serious reason for dismissal.

Name of the court: Administrative Tribunal of Paris
Date of decision: 16 March 2005
Reference number: no 0502805/9
Address of the webpage: www.gisti.org/doc/actions/2005/bnf/arret.html
Brief summary: The Court decides that article L312-1 of the Monetary and Financial Code, defining the conditions of the right to a bank account, does not foresee the obligation to prove legal residence in France. Therefore, the Banque de France cannot refuse the right to open a bank account to illegal and non-resident non nationals.

Name of the court: Administrative Supreme Court
Date of decision: 18 July 2006
Name of the parties: GISTI
Reference number: no 274664, Comment: AJDA n° 33, 09/10/2006, p. 1833-1838
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008254273&fastReqId=1007816713&fastPos=3
Brief summary: The Administrative Supreme Court annuls Articles 4 and 5 of the decree of August 27, 2004 modifying the decree of 27 May, 1999 and Article 2 of the decree of 27 August, 2004 which condition the right to be elected and to vote in the Chamber of trade to being holder of French citizenship or of a country of the European Union.

Name of the court: Court of Cassation, Criminal Chamber
Date of decision: 28 November 2006
Reference number: no 06-81060
Address of the webpage:
http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2006X11X06X00294X000
Brief summary: The Town Mayor was accused of having intervened towards the seller in order to prevent the sale of the land on the ground that there were already too many Roma, thereby committing discrimination in access to goods and services under article 225-2 PC. Public prosecution failed to criminally prosecute the landowner and the Mayor on the basis of the prosecution's discretion to prosecute. The victim chose to take advantage of his right to institute direct criminal proceedings (citation directe) exclusively against the Mayor. The Court decided that the fact that the state itself had not prosecuted the landowner who refused to sell had no bearing

on the constitutive elements of the offence and the criminal liability of the person (Mayor), who, by his own actions, made himself accomplice to this refusal to sell. The Mayor was convicted of discrimination by a person in public power (Article 432-7 PC) to a three month suspended prison sentence, one year ineligibility to hold or be elected to public office (which entails that his current elected mandate was revoked and that he was prevented to run for re-election for the post of Mayor).

Name of the court: Court of Cassation, Criminal Chamber
Date of decision: 17 June 2008
Reference number: no 07-81666
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019165007&fastReqId=1759105447&fastPos=1
Brief summary: A Mayor used his right to prevent acquisition of housing by Roma buyers. The first instance and appellate courts concluded that this constituted a refusal of access to rights on discriminatory grounds under article 437-2 of the Criminal Code and condemned the Mayor to a fine, but did not have jurisdiction to annul the decision, which must be attacked before an administrative tribunal. The Court of cassation quashed the condemnations on the ground that the Mayor had no power to provide access to a right to purchase but had exercised a discretionary right of his own and as such could not be held to have interfered with the exercise of a right provided by distinct legal provisions pursuant to the definition of Article 437-2 CP. Exercise of a right cannot qualify as the criminal offence of interfering with the exercise of a right.

Name of the court: High Judicial Court of St-Etienne
Date of decision: 3 February 2009
Reference number: no 304/09
Name of the parties: SOS Racism vs. Metropole Habitat
Brief summary: The Social housing manager kept indications of racial/ethnic origin of tenants, arguing that this was necessary in order to comply with the legal requirements to monitor “social mix in social housing”. The Court decides that the classification of tenants on the basis of an interpretation of racial/ethnic origin is a violation of article 226-19 of the Criminal Code which forbids collecting personal data relating to racial/ethnic origin. In addition, management of social housing by taking into account racial/ethnic origin gives rise to the criminal liability of the corporation.

Name of the court: Court of Cassation, Social Chamber
Date of decision: 10 November 2009
Reference number: no 08-42286
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021270532&fastReqId=1915162919&fastPos=1
Brief summary: At the time of his hiring, Plaintiff was requested to change his name from Mohamed to Laurent. The employer claimed that this request was made because there were too many Mohameds. One cannot legally forego the right to be

called by his own name. An employer's request to change an ethnically connoted name to a classical French name constitutes direct discrimination.

Name of the court: Constitutional Council
Date of decision: 23 July 2010
Reference number: 2010-18 QPC
Address of the webpage:
http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-201018qpc.pdf
Brief summary: Article L 253 bis of the Code of Military Pensions provides that, are to be recognized as veterans, persons of French citizenship or persons residing in France at the time of presentation of their application.
This provision is contrary to the principle of equality as provided by Article 6 of the Declaration of Human Rights of 1789, Article 1 of the Constitution of 1958 and the preliminary paragraph of the Constitution of 1946**.**

Name of the court: Court of cassation
Date of decision*:* : 03/11/2011
Name of the parties: Dos Santos
Reference number: n° 10-20765
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1
Brief summary: A woman originating from the Cape Verde Island illegally residing on the French territory was hired by a couple as in house employee during nine years to take care of the house and children. The Court of Appeal condemned the couple to 50.000 € in damages for discrimination on the ground of origin. The Court of cassation rejects the recourse of the defendants alleging absence of comparative evidence to establish discrimination and reiterates that evidence of discrimination does not require comparative evidence. The abuse related to the exploitation of plaintiff's predicament and resulting in a negation of her legal and contractual rights is a detrimental situation in comparison to the situation of employees benefiting from the protection of labour law, thus resulting in indirect discrimination on the ground of origin.

Given evidence of her working conditions and weekly number of hours worked, Plaintiff is entitled to claim the highest level of employment of the collective agreement of house workers in order to evaluate the wages owed by her former employer as well as non-material damages.

Name of the court: Court of cassation
Date of decision*:* 15/12/2011
Reference number: Airbus Operations SAS n° K 10-15873
Brief summary: A candidate of North African descent is hired a number of times as short term employee with very favorable evaluations. When he applies for an indefinite term contract, the application of a short term employee with less favorable evaluations and less experience, but of French descent, is chosen.

The Halde's enquiries as regards the list of persons employed indicated that among recruited staff between 2000 and 2006, all were of French citizenship, and only two had a last name of North African origin. Moreover, for the period between January 2005 and July 2006, on the 43 employees hired under indefinite term contracts, none had a last name of North African origin. The Court explicitly referred to the HALDE's conclusions to conclude to a presumption of discrimination. As regards justifications presented by the employer, the Court concludes that the sole fact that the hired employee has a higher degree is insufficient to provide a satisfactory justification given Airbus' non transparent hiring practices. The Cour de cassation confirms the decision of the Court of Appeal.

Religion:

Name of the court: Administrative Supreme Court
Date of decision: 14 April 1995
Name of the parties: Consistoire central des israélites de France, Mr Koen
Reference number: (2 cases) Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.
Brief summary: This case concerns the applicability of children's obligation to attend school when their religion requires worship on a day other than Sunday. In this case, the *Administrative Supreme Court* has given priority to the protection of freedom of worship, arguing that compulsory school attendance is not intended to, and may not lawfully "deny to pupils who request it such individual leave of absence as may be necessary for worship or celebration of a religious festival, at least in so far as their absence is compatible with performance of the tasks entailed by their studies and with the maintenance of public order *(ordre public)* in the school".

Name of the court: Court of Cassation, Third Civil Chamber
Date of decision: 18 December 2002
Name of the parties: X c. Société d'investissement et de gestion de la Caisse centrale de réassurance
Reference number: no 01-00519
Address of the webpage:
www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2002X12X03X00262X000
Brief summary: The installation of an electrical digicode to open the door to a housing building, to the exclusion of any key or mechanical device, does not violate the freedom of worship of people who, for religious reasons, cannot use electricity on Saturday and religious holidays. Religious practice does not create underlying contractual obligations under a lease unless the contract contains an express clause providing for accommodation of the lessee's demands. In the Court's analysis, no reference was made to the concept of reasonable accommodation or to that of indirect discrimination.

Name of the court: Administrative Supreme Court
Date of decision: 7 December 2005

Reference number: no 264464
Address of the webpage:
http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2005X12X000000264464
Brief summary: Plaintiff was denied access to the Consulate and therefore could not file her request for a visa, because she refused to momentarily remove her Islamic veil during security checks upon entering the French Consulate in Marrakech. The Administrative Supreme Court decided that the right to wear the Islamic veil can be subject to restrictions in the interest of public order, and that a request for momentary removal of the Islamic veil for security control purposes is a proportionate restriction pursuing a legitimate aim. The European Court of Human Rights dismissed plaintiffs recourse (ECHR no 15585/06 8 March, 2008, EL MORSLI).

Name of the court: HALDE
Date of decision: 19 September 2005
Reference number: Deliberation no 2005-26
Brief summary: The Bank of France refused access to the premises to people wearing a Sikh Turban on account of security directives taken in application of the anti-terrorist directives, prohibiting indiscriminately in very vague terms "*suspicion related to a person's garments, the guard can ask a person to remove any head covering garment or accessory covering totally or partially a person's face*" (our translation). The HALDE decided that by referring indiscriminately to religious and non religious garments, these instructions did not take into account the specificity of the latter, i.e. that a person cannot normally be asked to remove religious garments if freedom of religion will be respected. In the absence of a law, security measures must respect a principle of proportionality that conforms to freedom of religion. The HALDE asked the Bank of France to review its policy and the Banque de France reported back on December 27, 2005 to have changed its security instructions, allowing for identification without reference to the presence or not of religious garments.

Name of the court: HALDE
Date of decision: 5 June 2006
Reference number: Deliberation no 2006-132
Brief summary: Claimant was expelled by the tribunal of a Court hearing for public adjudication, because he was wearing a Sikh Turban.
The HALDE's inquiry revealed the absence of an administrative instruction of the Minister of Justice on the issue. The HALDE stressed that each person has a right to wear religious garments in the Court house and concluded to discrimination by public agents, requesting that the Minister of Justice issue clear instructions to his judicial services in this regard. The Minister of Justice issued internal ministerial instructions, addressed to the President of the Court of Cassation, the general inspector of judicial services, the presidents of all levels of judicial courts and the Director of the national school of magistrates, on 17 November, 2006 reiterating the requirements of freedom of conscience and the right of citizens to appear before the court wearing religious

garments, as long as this dress complies with the requirements of decency and public order.

Name of the court: Paris Appeals Court
Date of decision: 8 June 2010
Name of the parties: Mme Boutaina Benkirane c/ Centre universitaire de formation par l'apprentissage Sup 2000
Reference number: no 08/08286
Brief summary: A post secondary training centre is condemned to a fine of 3 275€, its Director to a fine of 1250 €, and both are ordered to pay damages in the amount of 10 500€ for having refused access to classes starting September 2005 to a young woman because she was wearing the Islamic veil. The Law no 2004-228 of 15 March, 2004 is not applicable to post secondary training centres as they are not primary or secondary public schools.

Name of the court: Administrative Supreme Court
Date of decision: 6 March 2006
Name of the parties: Association United Sikhs, M. Shingara Mann Singh c/ Ministère des Transports
Reference number: no 289947
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008241193&fastReqId=888060389&fastPos=14
Brief summary: The Ministerial order of the Minister of transport no 2005-80 of 6 December, 2005 requires for the issuance or renewal of a driver's licence, that the photograph identifying the driver be taken "*de face et tête nue*" (in face and without head garment or any exterior element covering the driver's head, whether a scarf, turban or hat). It was challenged by the United Sikhs Association before the Administrative Supreme Court. The Court decided that Article 9 of the European of Human Rights Convention, relating to freedom of religion, combined to Article 14, relating to the principle of non-discrimination, foresee that the freedom they aim to protect can be subject to restrictions set out in the interest of public safety and protection of public order. This requirement, that aims to protect against fraud and forgery by allowing identification as thorough as possible, was not deemed disproportionate to its legitimate objective. The ECHR dismissed Plaintiff's recourse on November 13, 2008, in a non-admissibility decision.

Name of the court: Administrative Supreme Court
Date of decision: 30 March 2007
Reference number: no 304053
Brief summary: Refusal by a City Mayor to rent a municipal room to the local association of Jehovah's Witnesses on the ground that the city's tariffs are more favourable than that of private rental rooms and that such an advantage could be perceived as a subsidy to a cult contrary to the Law on the Secularity of the State of December 9, 1905. The Administrative Supreme Court concludes that the refusal to rent is discriminatory and a serious violation to the freedom to reunite and associate.

Name of the court: HALDE
Date of decision: 3 September 2007
Reference number: Deliberation 2007-210
Brief summary: Is not a violation of freedom of religion, the refusal to admit a mother wearing a Niqab, in a children's hospital reanimation ward. Since her presence might disturb waking sick young children, such limitation is reasonable considering that she was offered to assist her child in a separate room.

Name of the courts: Administrative Supreme Court/ ECHR
Date of decisions: 05 December 2007; ECHR, 30 June 2009
Name of the parties: M. Singh
Reference number: Administrative Supreme Court n° 285394; ECHR n° 25463/08
Adress of the webpage:
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=852659&portal=hbkm&source=externalbydocnumber&tabl
Brief summary: A student was excluded for wearing a Sikh Turban within the school. The Administrative Supreme Court confirmed that the turban is forbidden by the law on the basis of the principle of secularity in public schools and confirms the prohibition to wear ostensible religious signs, whatever the behaviour of the student. Plaintiff has brought his claim before the ECHR.

It was heared together with X other cases regarding X Turban and X Islamic veils. It is the first case before the ECHR raising conditions of application of the Law of 14 March, 2004 of the prohibition of religious signs in public school. The ECHR refused to hear the appeal. The Court decided the case on the sole ground of article 9 of the Convention relating to freedom of religion. It concluded that the Administrative Supreme Court applied the law in conformity with the ECHR's jurisprudence and that the disciplinary procedure leading to expulsion had been examined with sufficient scrutiny by the French administrative tribunals. In addition it concludes that the prohibition of religious signs in public school is based on the safeguard of the Constitutional principle of secularity and that this objective conforms to the values underlying the Convention. Moreover, the expulsion from school is not disproportionate considering the pre-existing home learning system made available to all children by the State.

Name of the court: Administrative Supreme Court
Date of decision: 27 June 2008
Name of the parties: Mme Faiza A.
Reference number: Decision No. 286798
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019081211&fastReqId=1889970737&fastPos=1
Brief summary: The petitioner challenged the Government's denial of her request to obtain the French citizenship by marriage on the ground of her radical religious practice which was considered to be incompatible with essential values of the French community, such as the principle of gender equality. Petitioner wears the burqa. The

Administrative Supreme Court seems to have followed the jurisprudence of the European Court of Human Rights in Dahlab vs Swizerland (15 February, 2001 no 42393/98), regarding religious practices that could be considered to interfere with gender equality, thereby legitimizing measures taken for the protection of the rights and freedom of others, public order and public safety**.**

The Court decision notes that the fact that the Petitioner has adopted a radical practice of her religion is incompatible with essential values of the French community, such as the principle of gender equality, and that therefore the petitioner does not meet the requirement of assimilation provided for by article 21-4 of the Civil Code, allowing the government to reject her request for naturalization. According to the Court, this decision is not contrary to or does not violate the petitioner's freedom of religion, neither it is contrary to the Constitutional principle of freedom of religious expression or the provisions of Article 9 of the ECHR.

Name of the court: Administrative Supreme Court
Date of decision: 4 April 2009
Name of the parties: El Haddioui
Reference number: no 311888
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007679628&fastReqId=752299846&fastPos=1
Brief summary: After having received high grades at the written internal examination to become Commissar of Police, Petitioner was eliminated at the oral examination. He requested an annulment on the ground that during his examination he was asked questions regarding his and his wife's origin and religious practice in France. In the course of the HALDE's investigation, the interview panel admitted asking these questions, arguing that they were asked to evaluate capacity to withstand stress and conflict. The HALDE presented observations to the Administrative Supreme Court; which annulled the results and decided that any question relating to a candidate's religious practice was irrelevant and discriminatory and should be deleted.

Name of the court: Administrative Tribunal of Paris
Date of decision: 5 November 2010
Name of the parties: Said vs. Greta of Paris
Reference number: no 0905232
Brief summary: Plaintiff was denied access to an adult education program managed by a public Secondary school on the ground that she was wearing an Islamic Headscarf. An injunction ordering her immediate re-integration was granted. The decision was confirmed on the merits. HALDE presented observations.

Name of the court: Constitutional Council
Date of decision: 7 October 2010
Name of the parties: Law forbidding covering of the face in the public space
Reference number: 2010-613 DC

Address of the webpage: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html
Brief summary: Article 1 of the law provides that no one can, in the public space, wear garments covering the face, unless authorized by regulation.
Considering the objectives of the law, i.e. public safety, requirements of life in modern society and the protection of women against exclusion and inferiority, this is a reasonable and proportionate generalisation of safety requirements in considerations of the necessity to maintain public order, and protection of the constitutional rights of women to equality and freedom. However, these restrictions cannot be interpreted as forbidding the use of garments for the exercise of religious freedom within the premises of places of worship.

Name of the court: Administrative Supreme Court
Date of decision: 23 December 2010
Reference number: no 337899
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023296384&fastReqId=1953633009&fastPos=1
Brief summary: The fact that a candidate for regional elections wears the Islamic veil does not violate article 339 of the Electoral Code stating conditions to be met to be a candidate. This article does not require religious neutrality. The fact that a candidate wears a religious sign has no impact on the freedom of choice of voters and does not jeopardise the independence of elected officials. The Administrative Supreme Court validates the list of candidates registered for election.

Name of the court: Versailles Court of Appeal
Date of decision: 27/10/2011
Reference number: Baby Lou n° 10/05642
Brief summary: Plaintiff is assistant director at a day care centre financed by City funds, which is open 24 hours a day in a disadvantaged neighbourhood where the majority of the population is immigrant. She returned at work after a parental leave of 5 years, wearing the Islamic veil and was invited by the Centre's director to remove it on the ground of the in-house regulation imposing on employees of the centre a duty of neutrality. Plaintiff argued that in the private sector employees are not bound by a duty of neutrality and that imposing a requirement of neutrality by way of in-house regulation is discriminatory and contrary to the prohibition of discrimination provided by articles L1132-1 and 1321-3 of the Labour Code and a limitation to her fundamental rights contrary to article L1121-1 of the Labour Code, which could not be justified by the nature of her function or proportionate to the objective pursued. The Court concluded that neutral garments have been required since the adoption of an in house regulation in 1990 and that considering the centre's statutes underlining its mission as developing an action toward disadvantaged children and social reinsertion of the women of the neighbourhood, neutrality was justified in order to insure hospitality to all. The principle of freedom of religion protected by article L1121-1 of the Labour Code cannot undermine the respect of the principle of

secularity and neutrality that is to be applied by personnel in all its mission and duties. These restrictions are therefore justified by the nature of the function of the personnel and the Centre's in-house regulation therefore complies with the requirements of article L1121-1 and L1321-3 of the Labour Code.

Name of the court: Montreuil Administrative Court
Date of decision: 22/11/2011
Reference number : Recteur de l'Académie de Créteil n° 1012015
Brief summary: The In-house regulation of the Paul Lafargue elementary school of Montreuil provides that "*parents volunteering to accompany school excursions must honour, in their garments and behaviour, the neutrality of public education*". According to claimant, this rule prevents mothers wearing the Islamic veil from accompanying their children in school excursions. This is the first court decision on this very controversial issue and the Montreuil administrative court held that parents accompanying school excursions are concurring to the public service and as such are subject to the obligation of neutrality of public servants. The court further decides that this does not constitute an excessive hindrance of freedom of religion as protected by article 9 of the ECHR, since this restriction is justified by the superior interest of the child in the context of the exemplary educational mission of the integration of children in public school, and that it is not discriminatory as it does not take in consideration the religion of the parent. This decision has been appealed.

Sexual orientation:

Name of the court: Court of Cassation, Social Chamber
Date of decision: 17 April 1991
Name of the parties: Association Fraternité Sainte Pie
Brief summary: The dismissal of a Catholic Church employee by reason of his homosexuality is abusive if there is no evidence of fault or of a substantial disturbance to the community. The Court refused to consider any argument of principle opposing faith and homosexuality as a legitimate occupational conflict. In matters related to faith, the rule is that the behaviour of the employee must be provocative and generate a functional problem. This case is further discussed in the report (section 4.2).

Name of the court: Nancy Court of Appeal
Date of decision: 24 January 2008
Reference number: no 07NC00335
Brief summary: The Regional school authorities refused to certify an association dedicated to raising public awareness on homophobia that requested to be on list of NGOs authorised to give presentations in schools, on the ground that it did not pursue a discourse of public interest but rather the promotion of a specific community. The Administrative Court of Appeals quashed this decision on the ground that it was illegal considering homophobia is a matter of public interest combated by law.

Name of the court: Constitutionnal Council
Date of decision: 6 October 2010
Reference number: 2010-39 QPC
Name of the parties: Isabelle D. & Isabelle B.
Address of the webpage:
http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-39-qpc/decision-n-2010-39-qpc-du-06-octobre-2010.49642.html
Brief summary: Article 365 of the Civil Code regulates parental authority towards the minor child in case of single adoption (a system allowing adoption without severing prior legal filiations to biological parents). According to the Court of Cassation, if the biological father or mother intends to continue raising the child, the transfer of parental authority to the adopting unmarried parent resulting from simple adoption is against the interest of the child. This interpretation prevents adoption by the same sex partner of the biological parent. The principle of equality allows differences in treatment and this provision does not prevent de facto normal family life. This principle does not open a right to establish a legal parental relationship. The fact that it reserves simple adoption by the parent's companion to the spouse is not against the Constitution. It is not the function of the Constitutional Council to substitute its appreciation as regards the definition of the rights and conditions related to the institution of marriage, to that of the legislator.[178]

Name of the court: Court of cassation
Date of decision: 8 July 2010
Reference number: 08-21740
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022458314&fastReqId=43672397&fastPos=1
Brief summary: The court decides that, if procedural conditions of Exequatur are met, it cannot refuse to recognize and execute a foreign judgment of adoption by a same sex partner of his or her partner's biological child on the ground of public order, since it does not contradict fundamental principles of French law.

Name of the court: Constitutionnal Council
Date of decision: 28/01/2011
Reference number: n° 2010-92 QPC
Address of the webpage:
http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2010-92-qpc/decision-n-2010-92-qpc-du-28-janvier-2011.52612.html
Brief summary:

[178] In Gas vs Dubois, the ECHR confirmed that the refual to grant parental rights to the female partner of the mother is not protected by the prohibition of discrimination covered by articles 8 and 14 of the ECHR (ECHR n° 25951/07 - 15/03/2012).

Articles 75 and 144 of the Civil Code reserving marriage to heterosexual couples and prohibiting marriage between persons of same sex is not contrary to the freedom of marriage, to the right to a normal family life and to the principle of equality. The Council recognises Parliament's exclusive prerogative to define its conception of marriage and holds that the legislator is the sole competent authority to decide whether or not marriage must be reserved to unions between a man and a woman.

Name of the court: Constitutionnal Council
Date of decision: 29/07/2011
Reference number: n° 2011-155 QPC
Address of the webpage: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc2011155qpc.pdf
Brief summary:
In a decision of 29 July 2011 (QPC-2011-155), the Constitutional Council decided whether restricting access to surviving spouse's pension rights for civil servants to married couples violated the constitutional principle of equality towards non married couples (i.e. concubines and partners registered in a civil partnership). The Council decided that the purpose of the surviving spouse's pension is to provide for the loss of revenue supported by the spouse further to the death of a civil servant. Therefore, considering that the institution of marriage is the only one to provide for obligations, after its dissolution by death or other legal means, to give a right to the patrimony and to institute legal duties for the financial security of a family, the difference in treatment provided by the law between marriage, cohabitation and civil partnership does not violate the principle of equality which allows the legislator to institute different rules for different situations. The legislator had recognised three different legal regimes for couples – i.e. cohabitation, registered partnership and marriage - instituting various rights and obligations that each respects the principle of equality.

Disability:

Name of the court: Court of Appeal of Paris
Date of decision: 14 March 2005
Name of the parties: SNCF c. Thetier
Reference number: no 200108355
Brief summary: The Plaintiff has a disability and needed to travel with an electric respiratory device. He informed the SNCF agent of this at the time of booking his train tickets in order to be seated near an electrical plug. This request was not taken into consideration and the Plaintiff had to travel in the lavatory. In the absence of a civil recourse in damages for discrimination in access to goods and services, the Plaintiff had to sue for contractual liability under article 1142 of the Civil Code and was awarded 2000€ in damages.

Name of the court: High Judicial Court of Paris, 17th Chamber
Date of decision: 28 June 2005
Name of the parties: Poncelet c. Lassailly
Reference number: no 0402608235

Brief summary: The Defendant admitted to having refused to rent an apartment because of Plaintiff's disability and argued that this decision was justified because the apartment was on an upper floor and the elevator was not reliable. The Court concluded that the Defendant could not substitute her own appreciation of the reasonableness of the situation to that of the Plaintiff and condemned the Defendant to a fine under Article 225-2 of the PC.

Name of the court: Court of Appeal of Poitiers
Date of decision: 1 September 2005
Name of the parties: Association des paralysés de France c. Société Hellucha
Reference number: no 419/05
Brief summary: The Defendant refused to sell cinema tickets to people in a wheel chair for safety reasons. After having failed to negotiate the installation of an access ramp to the Defendant's Movie theatre, the Plaintiff association asked a bailiff to certify the state of the installations and filed a criminal complaint. The Court decided that unless the Defendant demonstrated the technical impossibility of installing means of access to the theatre, or its disproportionate cost, the present condition of the premises did not constitute an acceptable ground of defence, since the file shows that the failure to install means of access was driven by a policy not to bother other clients with the presence of wheelchairs on the premises. The Court condemned the Defendant to a fine under article 225-2 of the PC and damages in the amount of 2000 €. No demand for an injunctory order to install an access ramp was made by the civil parties.

Name of the court: Administrative Tribunal of Lyon
Date of decision: 29 September 2005
Name of the parties: M. & Mme Hebri
Reference number: AJDA 2005, no 0403829
Brief summary: The failure of the State to provide access to school to a child with disability because of insufficient specialised facilities available triggers the liability of the State in damages whether or not it is at fault, the additional burden on the family being unreasonable. The liability of the State in administrative law is based on a jurisprudential legal regime ensuing from the consequences of breach of equality regarding the French principle of equality before the law and the state.

Name of the court: Court of Cassation (Social Chamber)
Date of decision: 11 October 2006
Name of the parties: Métallerie bayeusaine
Reference number: n° 04-47168
Address of the webpage:
http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2006X10X05X00471X068
Brief summary: The employer is condemned to damages for not having taken into account in the order of economic dismissal, the special condition of a disabled person who is thus in a less favourable position to find reemployment.

According to article 321-1-1 LC (new Article 1233-5 al 3 LC), disability is one of the considerations to be taken into account in the order of economic redundancy

Name of the court: Administrative Supreme Court
Date of decision: 22 October 2010
Name of the parties: Mme Bleitrach c/ Garde des Sceaux (in appeal)
Reference number: no 301572
Address of the webpage: http://www.conseil-etat.fr/cde/node.php?articleid=2151
Brief summary: Plaintiff is a lawyer who initiated a procedure that exclusively allows to claims damages against the State, for denial of access to the court room by reason of lack of accessibility in contravention of Directive 2000/78/CE. The first instance courts held that, since the deadline for implementation of works of accessibility according to the Law of 11 February, 2005 runs until 2015, there can be no liability of the State for lack of access to Court Houses and that there is no specific obligation towards lawyers in this respect. The Council of the State considered that the lower courts erred in fact and in law by relying on the sole fact that the deadline for insuring accessibility provided by the Decree of 17 May 2006 that runs until 2015 is reasonable, in order to dismiss liability of the State, without evaluating whether Directive 2000/78 imposes a specific obligation towards lawyers as access to Court Houses is concerned, and whether the State met its duties in this respect. In addition, they should have verified whether the *de facto* inequality before public charges of lawyers using a wheel chair during this period was such as to engage liability without fault on the part of the State. The Administrative Supreme Court concludes to liability without fault of the State and awards Plaintiff 20 000€ in non-pecuniary damages after finding that Plaintiff failed to establish her alleged financial damages.

Name of the court: Rouen Administrative Tribunal
Date of decision: 24 June 2008
Name of the parties: Boutheiller vs. Minister of Education
Reference number: no 0500526-3
Brief summary: In public service, priority of appointment is determined by the ranking of the civil servants in the qualification process. Plaintiff has a disability and circulates in a wheelchair. He was ranked first in the category of Educational Attaché for 2004. He requested an appointment as General Secretary of the Regional Administration of sports and youths, in application for which he was ranked third in the list of applicants. Plaintiff was never appointed as Attaché. In addition, the two first contenders for the post of General Secretary refused the appointment and instead of appointing Plaintiff, the person ranked fourth was appointed. Plaintiff was proposed an appointment in a secondary school that provided mobility accommodations for wheel chair users and the ministry argued that such a practical approach to the appointment of a disabled person corresponded to the principle of appointment in the best interest of public service, duty to which is subjected every civil servant. Plaintiff filed a claim with the HALDE, which after investigation presented observations before the administrative Court.

The Court decided that the appointment of Plaintiff was decided by the Ministry of Education on the basis of available premises offering already installed mobility accommodations for a person in a wheelchair: this was not an appropriate application of the right to reasonable accommodations.

Plaintiff had a right to be appointed to the requested post as soon as the second ranking candidate refused the appointment. For the Ministry of Education, the classical appointment criteria based on the interest of service was interpreted as referring to the appointment that would not require investing in reasonable accommodations. The right to reasonable accommodation supersedes the notion of "interest of service" and was interpreted here as meaning a right of appointment.

Name of the court: Administrative Supreme Court
Date of decision: 18 November 2009
Reference number: no 318565
Address of the webpage:
http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=91301&fonds=DCE&item=1
Brief summary: Annulment of the results of a hiring entry examination in the public service on the ground of insufficient accommodation in the light of concrete requirements to compensate disability of a candidate who had requested accommodation to pass the exam.

Name of the court: Administrative Supreme Court
Date of decision: 15 December 2010
Reference number: no 344729
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023248217&fastReqId=1516890910&fastPos=1
Brief summary: A child was awarded the support of a school auxiliary in kindergarten. The person hired by school authorities resigned and was not replaced. The Marseilles administrative court granted an injunction ordering the replacement of the auxiliary which was challenged before the Administrative Supreme Court. The Administrative Supreme Court decided that adapted access to education of disabled children at preschool level is a fundamental freedom, and failure to provide the required accommodation violates this freedom which can benefit from injunctive relief provided by article L 521-2 of the Code of administrative justice, ordering that all required measures be taken by education authorities in order to satisfy the requirements of implementation of this right.

Name of the court: Constitutional Council
Date of decision: 28/07/2011
Reference number: n° 2011-639 DC
Brief summary: On 11 February 2005, Parliament adopted the Law on Disability providing for a program to implement general access to new buildings, buildings open to the public, public transports as well as to the outdoors mobility chain, by

2015.

An amendment to the Bill concerning various measures relating to disability policy (Article 19) was adopted by Members of the National Assembly in first reading and confirmed by the Senate, in order to create a derogation to the obligation to provide for systematic accessibility measures and to allow for the adoption of a decree of implementation. The Constitutional Council decided that the legislator has the possibility to create technical exceptions to the implementation of the obligation to insure accessibility of buildings and infrastructures, but that their requirements had to be circumscribed by the legislator who must insure that they meet the constitutional guarantee of equality and access to employment.

Name of the court: Administrative Supreme Court
Date of decision: 20/04/2011
Reference number: n° 345434 et 345442
Brief summary: The Departmental Commission for the Rights and Autonomy of Disabled Persons is the local authority competent to establish the individual educational orientation and support of disabled children, under Article L351-3 of the Code of Education. Article L916-1 of the Code of Education provides that the special needs assistant acting in the context of state education can also intervene outside school hours. The Departmental House of Disabled Persons of Finistère (West of Brittany), satisfied the request of two families seeking for special needs assistance that included six (6) hours of assistance outside school hours. The departmental representative of the Ministry of Education *('inspecteur académique'*) refused to implement this request arguing that the State's obligations in the field of education did not extend to out of school support. The Administrative Supreme Court decided that the State has an obligation of result to organise state education, to take and allocate all means and measures, as evaluated by the Commission pursuant to Article L351-3 of the same Code, necessary to insure the effectiveness of the right to education of disabled children. In this context, if the Commission concludes that the necessary support must extend beyond schooling hours, the Ministry must take financial charge of the necessary special needs assistant.