

**Should weight discrimination be prohibited by the European Union
legislation in employment?**

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Abstract

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Name of the Thesis Should weight discrimination be prohibited by the European Union legislation in employment?			
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<p>Abstract</p> <p>Weight discrimination is topic which has progressively come under discussion because overweight and obesity have increased in the European Union the in past years. The problems concerning weight discrimination have become recently recognized, yet there is no legislation to protect individuals against such discrimination. Weight discrimination not only heightens the risk for unemployment, but also causes significant loss of income for obese employees in Finland, whereas equality-related issues are commonly better addressed. Moreover, obesity discrimination in employment is mainly a problem for female employees rather than male ones. Theoretically, the Charter of Fundamental Rights Article 7 could provide protection for individuals in weight matters due it provides protection in interference situations regarding appearance-related matters, but in practice, these rights are less frequently invoked. Due to the lack of protection for obese persons, the European Court of Justice have interpreted alleged obesity discrimination only once, and as a result, did not extent the coverage of the discrimination to concern obesity. Reasoning for possible prohibition of the weight discrimination base on the adverse consequences of the discrimination: female employees lose just in Finland approximately billion euros of income annually. Weight discrimination, stereotyping and stigmatizing increase provently the risk for mental disorders and also the risk for unemployment increases noticeably due to obesity. Obese persons are also denied equal opportunities due to their looks. Prohibition of weight discrimination might not, however, be a direct solution towards improving the position of obese employees, as the prevalent cultural values support the current way of thinking about obese people, and, on the other hand, leaving the problem of weight discrimination up to national discretion would not make any difference, due this is the status at the moment. Prohibiting the discrimination on the grounds of state of health could be suitable legislative solution in European Union level, as it also covers also weight-related matters.</p>			
<p>Key words</p> <p>European Union law, Charter of fundamental Rights, Equality Employment Directive, weight discrimination, European Court of Justice, European Court of Human rights</p>			

TABLE OF CONTENT

BIBLIOGRAPHY.....	V
ABBREVIATIONS.....	XII
1 INTRODUCTION.....	1
1.1 Background and current status.....	1
1.2 Research objectives and methodology.....	5
1.3 Context and scope.....	6
2 REASONS OF APPEARANCE DISCRIMINATION AND RELEVANT CONCEPTS...9	
2.1 Reasons behind appearance discrimination.....9	
2.1.1 Overview.....9	
2.1.2 Stereotypes.....9	
2.1.3 Stigmas.....11	
2.2 Overweight and obesity.....11	
2.3 The Principle of Equal Treatment..... 12	
2.3.1 Overview.....12	
2.3.2 Direct discrimination.....13	
2.3.3 Indirect discrimination.....14	
2.4 Discrimination grounds in trait classification.....16	
2.4.1 Overview.....16	
2.4.2 Involuntary traits.....16	
2.4.3 Voluntary traits.....17	
2.4.4 Mixed traits.....18	
2.4.5 Weight in trait classification.....19	
3 APPEARANCE AS A FUNDAMENTAL RIGHT..... 21	
3.1 Overview.....21	
3.2 Value of identity in European Member states.....22	
3.3 Content of the private life..... 24	
3.3.1 Overview.....24	
3.3.2 Interpretation of the Article 8 of the Convention.....25	
3.3.3 Desired appearance as part of Article 8 in the case law.....26	
3.3.4 Respect of private life within the professional life.....29	
3.4 Field and scope of the Article 7 of the Charter.....30	

3.5 Direct and indirect horizontal applicability of the Charter.....	32
4 WEIGHT DISCRIMINATION IN CASE LAW.....	35
4.1 Overview.....	35
4.2 Equality interpretation in European Union courts.....	35
4.3 Obesity as a disability: Court of Justice of the European Union.....	36
4.3.1 Background of the case.....	36
4.3.2 ECJ interpretation concerning coverage of legislation.....	37
4.3.3 ECJ interpretation on obesity referred as a disability.....	38
4.4 Finnish Supreme Court case regarding weight discrimination.....	39
4.4.1 Relevant legislation.....	39
4.4.2 Background.....	40
4.4.3 Interpretation in the Supreme Court.....	41
4.4.4 District Courts argumentation.....	42
4.5 Comparative aspect to European Union and national case law.....	43
5 PRO & CONTRA ARGUMENTS FOR PROHIBITION OF WEIGHT DISCRIMINATION.....	45
5.1 Overview.....	45
5.2 Affecting factors of weight as an argument for prohibition.....	45
5.3 Consequences of stereotyping, stigmas and weight discrimination as an argument for the prohibition of weight discrimination.....	46
5.4 Gender related argument for prohibition of weight discrimination.....	48
5.5 Equal opportunities as an argument for weight discrimination.....	49
5.6 Cons of appearance discrimination.....	50
5.7 European Union level legislation or national discretion.....	51
6 CONCLUSIONS.....	53

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ABBREVIATIONS

EED	Council Directive 2000/78/EC of 27 th of November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303/16.
EU	European Union
CFR	Charter of fundamental Rights Official Journal 18.12.2000 C 364/1.
CHR	Convention on Human Rights
ECHR	European Court of Human Rights
ECJ	European Court of Justice

1 INTRODUCTION

1.1 Background and current status

The Principle of Equality is one of the oldest principles in the European Union, as it has a long history to the very beginning of the European Community: The Treaty of Rome¹. During the time of the Treaty of Rome, the Principle of Equality was already recognized by securing people from gender discrimination in pay². The Principle of Equality fall under the category of fundamental rights, which are drawn from the constitutional traditions of the Member States, and particularly, the European Court of Human Rights (hereinafter the ECHR).³ Ever since, the equality legislation has developed, partly by the case law,⁴ and later on, was drafted into the Employment Equality Directive⁵ in 2000 (Hereinafter EED). The concept of non-discrimination focuses on prohibition in the Article 1 of the EED, discrimination on the grounds of religion or belief, disability, age or sexual orientation, as regards employment and occupation. Moreover, European Union citizens are protected against discrimination on the grounds of sex, race, color, ethnic or social origin, genetic features, language, political or any other opinion, membership in a national minority, property, birth, age or sexual orientation and nationality (Article 21 of the Charter of Fundamental Rights⁶, hereinafter the Charter or CFR).

Most of these protected grounds refer to something that the persons themselves cannot influence; disability, age, sexual orientation, gender, race, color, genetics, ethnic and social origin, nationality, language or membership in a national minority are totally beyond the individual's influence, and probably they are fundamental in legislative sense, because of their immutable nature. By protecting these grounds, no individual can, at least in principle, be discriminated against on such grounds that one may not change. On the other hand, protected is also grounds that are partly affect by environment; political or

¹ Treaty Establishing the European Economic Community, Mar. 25, 1957.

² Article 119 of Treaty Establishing the European Economic Community, Mar. 25, 1957.

³ McCrudden – Prechal, 2011, p. 4.

⁴ McCrudden – Prechal, 2011, p. 4. For example, important case law regarding development of principle of equality were Case C-149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*. EU:C:1978:130 paras 26-27, which broadened the principle of equal pay between women and men to cover also the working conditions. In Case C-144/04 *Werner Mangold v Rüdiger Helm*. EU:C:2005:709 the principle of equality was recognized as a general principle.

⁵ OJ L 16/303 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶ Charter on Fundamental Rights, Official Journal 18.12.2000, C-364, p. 13.

any other opinion, birth and property. Within these grounds people have some level of influence to their decisions, but the environment also affects. The main idea behind the prohibition of discrimination, relies on the ideology that people in similar situations should be treated alike, unless differential treatment can be objectively justified (Article 2 EED).

If we stop here to consider the group of reasonings, we notice that quite a large number of these are heavily associative with appearance; a person with a physical disability can be noticed by appearance in certain cases, as well as by age. Religion can be noticed from religious symbols characteristic to each religion when dressed. Certain features or characteristics of a person may indicate the persons' sexual orientation. And as it may be, we should be able to be who we are, mentally and physically, certainly even in areas which we may not effect. But this raises the question of why it is legal to discriminate a person in work life, on the grounds of appearance in general, but particularly in cases where outside our control.

Appearance discrimination can be understand referring to any discrimination, that is executed due to individual's appearance, such as hairstyle, facial features, style of clothing (in other words, discrimination towards one's looks). However, in this thesis, appearance discrimination refers mainly to discrimination, where individuals are discriminated due to their weight. Features such as "beauty" or "best dressing style" are relatively hard to substantiate, within the meaning that those could be base for discrimination claims. Beauty can be a wide range of combinations of factors than vary between individuals. Although, discrimination against other appearance-related factors cannot be excluded entirely, because European Union case law regarding weight discrimination remains very slight due to the absence of legislative prohibition. However, weight is measurable, and these measures are internationally used, and therefore, we will focus on weight as a discriminatory ground instead of unmeasurable factors.

Discussion about appearance discrimination stays relatively minor level in the European Union. This may be due to that in Europe, people are enjoying a greater freedom of self-

expression from a privacy standpoint, than for example in the United States.⁷ Furthermore, the statistics shows that overweight and especially obesity remain slightly lower levels in Europe, than in United States.⁸ The topic of obesity discrimination or appearance discrimination therefore might be relatively new subject in Europe, which has just recently started to produce research about the effects of obesity in employment.⁹ However, the lack of the discussion does not abrogate the fact that a person may be treated less favorably due to his or her appearance. This is particularly interesting and important subject in selection criteria and recruitment conditions, but also concerning employment and working conditions, including dismissals and pay.

Appearance discrimination, specially concerning weight, is existing phenomenon around the world, which numerous studies prove, even though most of the research is done in the United States. Moreover, recently it has been proven to also exist in the European Member States.¹⁰ In consideration, should appearance discrimination be prohibited (or any kind of discrimination whatsoever), the arguments usually focuses to the negative impacts or consequences caused to the group discriminated against. Indeed, any kind of discrimination, legal or illegal, have some kind of impacts to discriminated against. However, in working life discrimination against weight or appearance may result to notable loss of income. These situations are usually concerning access to employment¹¹, dismissals¹² and even actual loss of income due smaller pay¹³.

Rates of obesity and being overweight have increase in the past two decades and Europe is following the development of overweight and obesity rates in United States. While discussion and research into obesity has been plentiful in the United States since the 20th century, including discrimination based on weight and appearance,¹⁴ in Europe this discussion has been relatively minimal; discussion have raised only occasionally in magazines¹⁵ and even

⁷ Rhode 2010, p. 139.

⁸ See obesity research from Finland: Koponen et al. 2017 and the United States research: Ng et al. 2017, pp. 766-781.

⁹ Härkönen – Räsänen – Näsi 2013.

¹⁰ Ng et al. 2017, pp. 766-78, and Härkönen – Räsänen – Näsi 2011.

¹¹ Finnish Supreme Court case KKO:2018:39.

¹² Case C-354/13 *Fag og Arbejde (FOA) v. Kommunernes Landsforening* EU:C:2014:2463.

¹³ Härkönen – Räsänen – Näsi 2011.

¹⁴ You may familiarize to American obesity research Puhl – Andreyeva – Brownell, 2008 or, read more about survey on attitudes towards obesity Luck-Sikorski- Riedel-Heller, - Phelan, 2017.

¹⁵ Discussion in Finland may be found in few news articles, such as; Talouselämä 2009, Yle news, 2011.

less in surveys. The reason for significantly higher number of researches and discussion in the United States may be, that roughly two thirds of Americans are overweight or obese¹⁶, whereas in comparison to Europe, the number is half of the European population¹⁷. The number of obese people in 2014, however, remains remarkable lower than overweight in Europe, around twenty percent, where in the United States the number of obese people was roughly forty percent in 2014.¹⁸ Therefore, it may be assumed, that obesity and overweight exist in Europe and the United States, but discussion in US may be more common due to higher rates of overweight people and double number of obese people.

In what comes to weight discrimination in Europe, it is also existing phenomenon. In the study *Obesity, Unemployment, and Earnings* researchers found that in Finland, which among other Nordic countries is generally considered a pioneer of equality,¹⁹ obese women have a significantly higher risk to be unemployment than men. In their study, *Härkönen* and colleagues note that obesity does not affect noticeably for men salaries, nor does it decrease the risk of employment. However, the situation remains highly different for women; obese women are more than twice as like to be unemployed compared to normal weight women. Moreover, there is wage gap in earnings for obese women and men; obese men have relatively equal payment compared to normal weight men. Obese women, however, have an estimated 5 percent lower income than normal weight women. Although, one of the factors for lower salary is believed to be that obese women tend to select professions with lower salaries.²⁰ Because of the increasing obesity rates and recent prove of weight discrimination, we might be in the state of a legislative era, whereas new laws are needed to protect citizens of the European Union concerning prohibition of weight discrimination.

In this thesis it shall be discussed about protected discrimination grounds as *traits*, whereas the main idea is to consider whether people have the power to influence to the circumstances relating to discrimination. So, the main question remains, whether discrimination be justified in such situations, where people have little or no power to affect their traits or characteristics. Furthermore, in this study the potential justification of prohibiting

¹⁶ Ng et al. 2018.

¹⁷ See detailed information Eurostat, 2018.

¹⁸ The state of obesity, 2018.

¹⁹ More information about equality in Europe: Statista 2017.

²⁰ Härkönen – Räsänen – Näsi 2011, pp. 34-35.

weight discrimination will be discussed, and into some extent, psychological mechanisms that cause people to discriminate based on the stereotyping and stigmas.

In addition, this thesis will examine the consequences of discrimination from the view of discriminated persons, and also the factors that lie behind overweight and obesity. This consideration is part of the pro-and contra discussion concerning the prohibition of the weight or appearance discrimination; why do these phenomena exist altogether and what are the causes of these phenomena. This perspective is relevant considering the justifications for, or against prohibiting appearance discrimination. The trait classification bases on the individual's ability to impact traits, whereas of the protected grounds in legislation are divided into voluntary, involuntary and mixed traits by the capability of people to affect this part of their life and its extent. These classifications will be discussed in the chapter 2.4. In this discussion it is crucial also to investigate the mechanisms behind discriminatory behavior.

Another aspect of the prohibition of appearance discrimination is found in charter of Fundamental rights (hereinafter the Charter or CFR) in Article 7, the right to have one's private life respected. The Charter received treaty-like status with the signing of the Lisbon treaty²¹ and therefore might constitute rights or obligations between private parties. The concept of private life is mostly interpreted by European Court of Human Rights (hereinafter ECHR), due to that the Convention of Human Rights (hereinafter the Convention) falls under ECJ jurisdiction. In the Convention, private life is protected in Article 8, but this narrows the impact of the Convention to public authorities' interference. However, the concept of private life, is very widely interpreted concept and therefore it should also be examined thoroughly regarding appearance-related matters.

1.2 Research objectives, methodology

The main research goal of this thesis is to examine whether the European Union legislation recognizes weight as a protected trait cornering discrimination. To answer to the main research objective, this thesis will examine the currently protected discrimination grounds and their division of the trait categorizations, based on the level of impact that individual have on the trait (all, none and something in between). After, under scrutinize will be,

²¹ Treaty on the Functioning of the European Union, OJ C 326.

where weight place in this categorization. Following this, the examination continues to the Charter of Fundamental Right, Article 7. Under examination will be, can this particular Article provide protection against weight discrimination. Lastly, under examination will be, how European court of Justice have interpreted weight discrimination issue and whether the European Case Law give any kind of value for appearance of individuals, in the sense that it may be used to invoke one's rights.

The second main research objective is, to examine whether appearance discrimination should be prohibited. The answer for this question will be based on examination of the reasons behind weight discrimination, affecting factors of weight (in the sense of possibility to impact one's weight) and the consequences of weight discrimination.

The methodology of this thesis is legal studies. This means that in order to answer the first research objective, it shall be examined, within the legal frames, whether the European Union legislation recognizes weight-based discrimination at the first place. With regards to the second research objective, this thesis also advantages sociological and psychological research, because determination whether particular actions in professional life should be prohibited, the context cannot be purely legislative, as there are no statutes yet to prohibit certain actions. Concrete advantaging sociological and psychological studies means examination of research that explains the reasons behind the phenomenon of discrimination and examination of the studies that observes the consequences that weight or appearance discrimination cause to individuals in order to determine, should such discrimination be prohibited.

1.3 Context and scope

In this study, the main focus will be on the primary research question, on whether the European Union legislation recognize appearance, focusing on weight, as a discrimination ground. This will be examined by this study in the context of currently binding EU legislation, and how EU case law relates to weight-based discrimination. A section concerning binding legislation will be based on the Employment Equality Directive, and another aspect of this study will focus on the Article 7 of the Charter of Fundamental rights. Any national legislation will only be examined as an example, unless it has significant

value to the research question. This research will focus mainly on weight-related discrimination, because evidence of the existence of weight-based discrimination is available better, than for example, discrimination on facial features. In other words, non-weight-related features are likely significantly harder to be demonstrated to exist.

The second research question, as mentioned above, is should discrimination on the ground of weight should be prohibited. Answering this will focus firstly on the affecting factors of weight, to determine whether weight is something that is fully under individual's own control. Therefore, any findings that environment impacts weight most likely suggest that weight as a discrimination grounds should be prohibited. For this research question, other aspects are what the reasons behind weight-based discrimination, and most importantly, what are the consequences of weight discrimination. Lastly, there will be a short consideration of the impact of legislative prohibition of discrimination.

The structure of this thesis will be following: second section will at the first place examine the existence of weight discrimination and some reasons behind it. For this study, it is crucial to provide information and demonstrate the existence of the appearance discrimination, and reasons behind it because this justifies the research question itself in legal aspect. Section two, therefore, focused on proving that there is real disorder regarding the discrimination on the grounds of appearance, and this phenomenon has consequences for a great number of people, especially in working life. Secondly, chapter two will explain the main concepts that are relevant for this study; Obesity and overweight, the principle of equal treatment via concepts of direct and indirect discrimination, the concept of trait classification, and where the current discrimination grounds will place in this classification. Classification will be based on the ability of the individual to impact the existence of the trait. After the categorization, will be examined and discussed how appearance discrimination, based on weight, settles in this categorization.

In section three, this thesis will examine whether weight can be regarded to fall within the fundamental rights, provided in the Charter of Fundamental Rights, Article 7. This shall be executed, firstly, within the examination of overall variation of valuing individualism in European Member states. Following that, this thesis will aim to understand the concept of private life, and this will be done by exploiting the case of the European Court of Human Rights, and the Article 8 of the Convention of Human Rights. The reason for this is, that Article 8

of the Convention and Article 7 of the Charter provide the same right and are interpreted similarly. However, ECHR have a longer history of interpretation of the concept of private life, and therefore, from there it shall be given more comprehensive understanding of the meaning of private life. Following these points, section three will focus on the field and scope of private life and, following this, a discussion of the possibility of direct horizontal applicability will be investigated.

Section four continues from theoretical level to concrete interpretation of the case law regarding weight discrimination. Due to the fact that weight discrimination is not directly protected by legislation, even though right to respect of private life may provide protection on some level, there is only one European Court of Justice case, which concerns the dismissal of an obese employee. The absence of legislative support on this ground results in an interpretative approach to existing legislation. Another court case to be examined is from Finland Supreme Court case number 2018:39, which concerns obese individual access to employment. This case will be examined for comparison of the cases and part of the discussion on whether weight discrimination should be protected. This section on case law analyses, and at the end of the chapter, some comparative analysis of these cases.

Section five continues the consideration of prohibiting weight discrimination in point of pro and contra argumentation. In other words, the section will focus on examining the argumentation that supports the prohibition of weight discrimination and argumentation that are against the prohibition of weight discrimination. Firstly, there will be discussion on the affecting factors of weight as a part of considering whether this should be protected ground against discrimination. The discussion will continue to the consequences of stereotyping and discrimination attributed to weight. In addition to the legal studies, this thesis will yet again utilize sociological and psychological research to determine the consequences of weight discrimination, stereotyping and stigmatizing. Moving forward, the section will briefly discuss the principle of equal opportunity within employment. At the very end of this thesis, there will be an overview of the legislative considerations related to the prohibition of weight-based discrimination. Section six will summarize the findings and provide the conclusions from this thesis.

2 REASONS OF APPEARANCE DISCRIMINATION AND RELEVANT CONCEPTS

2.1 Reasons behind appearance discrimination

2.1.1 Overview

It is important to understand the reasons behind appearance discrimination at least while trying to conclude an idea, on how to prevent such phenomenon. In this part the focus of discussion is on the reasons behind appearance discrimination, focusing on mechanism that are driven person to discriminate another. This section will focus on unconscious mechanisms regarding human behavior, stereotyping and stigmatization. At this point, it should be noted that the act of discrimination is usually made by conscious decision, even though it has unconscious mechanisms that potentially cause the actions. On the other hand, some practices may cause discrimination, even though they are done with in good intentions. However, the focus of this chapter is on unconscious mechanisms behind the tendency of discrimination.

2.1.2 Stereotypes

One of the reasons that there is appearance or weight discrimination lies in the way that human minds is thinking; we have certain schemas to help understand our world and operate in it. One of the subcategory of these schemas is scripts, which are basically schemas of events; structured information in our mind about events or encounters, for example, how individuals are expected to behave in certain situations.²² In other words, stereotypes are common assumptions of features, that we expect people to share. Stereotypes-related phenomenon is called illusory correlation, which demonstrates two mechanisms; one, to reinforce and maintain stereotypes and to create minority stereotypes. This second mechanism includes tendency of human mind to overestimate behavior that occurs more rarely and among minorities.²³ Basically, this refers to a built-in mechanism of people to make an assumptions, but these assumptions may not be always correct.

²² Helkama – Myllyniemi – Liebkind 2015(e-book), part: skriptit ja skeemat. an example of stereotyping; if individual is known to participate gang activities as a member, he or she is most likely assumed to be criminal.

²³ Helkama – Myllyniemi – Liebkind 2015(e-book), part: skriptit ja skeemat.

Research about obesity and stereotyping obese people's characteristics goes back to the 1940's, when obesity was believed to associate with complacency and love of physical comforts. On the other hand, a muscular body type was associated with aggressiveness and love of adventure, and thin individuals were believed to be restrained and socially inhibited. Even in 40s an obese silhouette was seen in a more negative way compared to another silhouettes. At the very beginning of these studies obese people were believed to have the such traits as introverted, insecure, and lazy.²⁴ There is a lot of research on how obese people are seen, and results remain quite similar; obese people face lots of negative stereotyping, while people conclude that they are lazy, self-indulgent, unattractive, asexual, unhappy, lacking in self-esteem, socially inept, uncooperative, and intellectually slow.²⁵

Bessenoff and *Sherman* have made research about stereotyping mechanisms concerning obese people. According to them, there are differences between controlled and automatic processes. Conscious processed occur when an individual is aware of the process and, can therefore control his or her answers about obese people's traits. Moreover, they found that individuals have a tendency to see certain groups of people in a similar way, regardless of whether or not they are familiar with stereotypes concerning the group of people in question. This means that people evaluate groups of people similarly to stereotypical presentations, without knowledge of these stereotypes. In research whereas test group was familiar with stereotypes concerning group in question, this tendency activated automatically.²⁶

Prejudices for obesity evolve from a cultural idea that weight is controllable. Traditionally, people believe that weight can be controlled, and therefore, obese or overweight people either avoid exercise, so they are lazy, or they eat excessively, so they are gluttonous. These ideas come partly from cultural values, such as individualism, self-discipline and personal responsibility, and usually obese people are seen with low will power.²⁷ It is easy to draw conclusion, that these ideals and way of thinking are affecting professional life, as well. However, I agree with *Bessenoff* and *Sherman*, with regards to the fact that the perception of weight controllability shapes our ways of thinking about obese people, but actually weight is far less controllable than we assume: our genetics and metabolism have quite an impact.

²⁴ Blane 2007, p. 132-133.

²⁵ See for example Wolman 1993, pp. 130– 174, DeJong 1993, pp. 963-970, Harris 1990, Hebl – Heatherton 1998, pp. 417-426.

²⁶ Bessenoff - Sherman 2000, p. 331.

²⁷ Bessenoff - Sherman 2000, p. 333.

The fact that 90 percent of people fail to maintain the weight they have lost gives quite good understanding about the controllability of weight; if it was easy and subject to our own decision, success rates would probably be higher.²⁸

2.1.3 Stigmas

At this point, our focus turns to stigmas. Stigma basically refers to the experience of being socially different. In ancient terms, it meant a physical mark symbolic to negative status. These days the meaning has not changed much: stigma can be understood as a negative status that person receives due to their appearance, and it carries negative social implications. Stigmatizing attributes can concern, for example, individual's social status or physique.²⁹ It seems self-evident that obesity or overweight are partially social stigmas due to their discernible nature. Stigmas can be understood as a consequence of stereotyping; without stereotypes, there would not be stigmas either. Stigmas also have a more collective or wider nature; whereas stereotyping concerns only the individual's own thinking.

Stigmas are one reason for discrimination, and they provide reason to withhold the presumption of equality and provides also justification for doubting a person's worthiness.³⁰ *Schiek and Chege* note, that if stigmas could have legal recognition, it would be via general examination of the social, political and economic consequences of the stigmas, such as, has the group in question suffered a history of purposeful discrimination? Does the discrimination constitute a level of unfairness that they should ideally be protected from?³¹ Considering these questions as a test for discrimination, legislation would be flexible to determine discrimination beyond the existing and exhaustive list of protected grounds. Moreover, obesity or overweight would certainly be included in this group.

2.2 Overweight and obesity

Measurement of the individual's amount of fat is based on the body mass index (hereinafter BMI). BMI is an internationally used metric which defines anthropometric height and weight characteristics in adults. Basically, this refers to individuals body mass divided by the square of the height (kg/m²). BMI is also used for risk analyses regarding weight-related health

²⁸ Jeffery – Epstein – Wilson 2000, pp. 5-16.

²⁹ Blaine 2007, pp. 170-171.

³⁰ Schiek – Chege 2009, p. 157.

³¹ Schiek – Chege 2009, p. 158.

issues.³² Simply, body mass index rates indicate following: BMI rate under 18,5 means that the person is underweight. BMI rate between 18,5 to 24,9 indicates normal weight. Rate from 25 to 29,9 indicates overweight and BMI over 30 means obesity.³³ Naturally, this index does not measure muscular intensity, so it will be deceptive concerning certain group of athletics, namely bodybuilders.³⁴ Obesity (where individual's BMI is over 30) is also defined as Mental and Behavioural Disorder (basically referring to illness) by the World Health Organization (WHO) in code E66 of the 'International Statistical Classification of Diseases and Related Health Problems' (ICD).

Overweight and obesity correlates also with health issues: the higher the number of BMI, the higher the risk for health conditions. High BMI has been observed to associate with hypertension, type 2 diabetes, coronary heart disease, stroke, even some type of cancers, stress incontinence, and psychological disorders.³⁵ However, there are a wide range of studies that actually suggest that high levels of overweight by itself higher the risk, but in lower overweight ranges, the most important factor for health risks is inactivity of the individual, rather than the weight.³⁶

2.3 The Principle of Equal Treatment

2.3.1 Overview

The Principle of Equal Treatment is general principle in the European Union, which was originally written into the Treaty of Rome, regarding free movement of goods, workers and non-discrimination of European nationalities in the labor market.³⁷ Later on, the European Court of Justice have noted equal treatment as a one of its general principles of law, in cases *Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen*³⁸, whereas ECJ states that "...the prohibition of discrimination....is merely a specific enuncia-

³² Nutall, 2015, p. 117.

³³ Lemond – Kennedy, 2018.

³⁴ Nordqvist, 2017, Lambert Adolphe Jacques devised BMI in the 1830s.

³⁵ National institutes of health 1998, p. 12

³⁶ Official journal of the American collage of sports medicine Vol 31 (11), pp. 497 – 667.

³⁷ Treaty of Rome Article 9 (goods), Art 48 (workers, nationality).

³⁸ Joined cases 117-76 and 16-77, *Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen* C:1977:160.

tion of the general principle of equality which is one of the fundamental principles of Community law”³⁹. Subsequently, the Principle of Equal Treatment in labor market was drafted in the Directive 2000/78 EC, which provided the legal concepts of direct and indirect discrimination. We may see *prohibition of discrimination as a tool to promote and execute the Equal Treatment Principle*. We shall discuss the concept of discrimination in the next chapter.

2.3.2 Direct discrimination

In 2000, the Principle of Equal Treatment become little more concrete when enacted into the Equality Employment Directive⁴⁰. According to Article 2, the Principle of Equal Treatment “shall mean that there shall not be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1” (Art 2(1)). Safeguarded grounds are religion or belief, disability, age and sexual orientation in employment and occupation (Article 1 EED). List of discrimination grounds seems to be exclusive in EE-directive, at least in part what comes to consideration of the appearance.⁴¹ However, the main focus is to understand the concept of discrimination without associative, safeguarded groups. In other words, what is the behavioral mechanism that conduct discrimination? After understanding what kind of behavior conduct discrimination in employment, we shall discuss later in chapter 5 weather it could be applicable to appearance.

Direct discrimination “occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation” (Article 2(2a)). In direct discrimination there are three main features: 1) unfavorable treatment, 2) comparator and 3) grounds (which were listed above). The central idea in unfavorable treatment is, that a person is treated differently and, of course, evidence of that (which actualize through comparison). Direct discrimination is relatively easier to prove compared to indirect discrimination, hence it is usually discernible.⁴² Another feature mentioned above was comparator, and it is crucial in the sense, that without a comparator there may not be evidence. The basic idea is to compare treatment received by someone in a similar situation. For example: one person receives lower

³⁹ Joined cases 117-76 and 16-77, *Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen* C:1977:160, part decision, 7 (3).

⁴⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303, pp. 16–22.

⁴¹ For example see Case C-354/13 *Fag og Arbejde (FOA) v. Kommunernes Landsforening* EU:C:2014:2463.

⁴² European Union Agency for Fundamental Rights 2011, p. 22-23. For example, smaller pension, smaller pay, difference in retirement age ect.

pay from the same work than another employee.⁴³ The concept of direct discrimination is relatively clear and easy to understand.

2.3.3 *Indirect discrimination*

Indirect discrimination, on the other hand, is a more complex concept. According to EED Article 2(2b)) “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons...” Basically, indirect discrimination may be understood in a way, that people in different situation are treated similarly, so the effects of this treatment put people in particular disadvantage, compared to another person or group of people, not so much by the treatment itself.⁴⁴

The concept of indirect discrimination contains identifiable requirements. According to EED Article 2 (2b i-ii), there is indirect discrimination, “unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.”

The first requirement is neutral rule, criterion or practice. This means that there is an actual rule, criterion or practice that applies to everyone in the working place (or, as in our following example, schooling). Czech Republic used a series of test, which aimed to measure students’ intelligence and suitability to the schooling system. The test aimed to determine whether the student should be within mainstream schooling or, in the case of intellectual disability, has a need for special schools. European Court of Human Rights (hereinafter ECHR) notes that this testing practice put fifty to ninety percent of Romanian students to special schools, as they performed the test worse than the main population. This was found

⁴³ Commission 2011, p. 23. Although, this may vary greatly at least in Finland, hence trade unions are capable to negotiate about salaries during internship and age bonuses.

⁴⁴ European Union agency for fundamental rights 2011, p. 29.

to be indirect discrimination.⁴⁵ So, the test itself turned out to set Roma children to disadvantaged position compared to other children.

Another highly interesting and ambiguous area of indirect discrimination is that it can be justified with objective reasoning. First of all, for reasoning to be objective, there should be a legitimate aim. The European Court of Justice have clarified in the case *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*⁴⁶, that if there is justification that is unrelated to any safeguarded discrimination grounds, and this reason corresponds employer's actual need of undertaking, justification is successful.⁴⁷ However, the reasoning in the case is demanded to be sufficient to the case concerned, so there is also a requirement of relation between reasoning and actions.⁴⁸

Like direct discrimination, also in indirect discrimination there should be comparator. Reason for the need of a comparator remains the same, as in direct discrimination; without a comparator there would hardly be any evidence of discrimination. Within the case of indirect discrimination, statistics are in quite an important role, and there are evidential issues, not only with direct discrimination, but also especially with indirect discrimination.⁴⁹ Because of evidential issues, burden of proof is shared in discrimination cases, regarding any kind – direct or indirect - discrimination. This means that if the claimant can show facts which create a base for presumption of possibility of discrimination, the burden of proof falls to the perpetrator. Moreover, there is no need to prove intentional aspects of discrimination, but sufficient proving concerns actual existence of differential treatment on the basis of the prohibited grounds. Therefore, also practices executed in good faith or good intentions may disadvantage certain group of people, and therefore fall into category of indirect discrimination.⁵⁰

⁴⁵ *D.H. and Others v. the Czech Republic*, No. 57325/00, 13th of November 2007.

⁴⁶ Case C-170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*. EU:C:1986:204.

⁴⁷ Case C-170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*. EU:C 1986:204, para 30. The court have had similar approach to justifications in cases Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit*. EU:C:2003:458, para 57, and Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*. EU:C:2005:141, para 47.

⁴⁸ Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*. EU:C:2005:141.

⁴⁹ The Council of Europe 2018, pp. 29-30.

⁵⁰ The Council of Europe 2018, pp- 123-127.

2.4 Discrimination grounds in trait classification

2.4.1 Overview

In order to examine whether appearance should be even partly safeguarded against discrimination, we should have some kind of understanding what existing legislation protects currently and why. In following subchapters, we shall examine protected grounds against discrimination under trait classification. The main idea is dividing protected grounds in to three groups according how affectable they are. The division will be (1) involuntary traits, where a person has absolutely no power of influence, (2) voluntary traits, which individuals have full power to influence and (3) mixed traits, which fall between these categories. Another interesting question remains in Article 7 of the Charter, which states, that everyone has a right to have their private life respected. This objective will be discussed more closely in section 3 of the thesis.

Legislation protects the following discrimination grounds: religion or belief, disability, age or sexual orientation, according to Employment Equality Directive⁵¹ Article 2. Moreover, Charter of Fundamental Rights (hereinafter CFR)⁵² article 21 adds sex, race, color, ethnic or social origin, genetic features, language, political or any other opinion, membership of a national minority, property, and birth to this list.

2.4.2 Involuntary traits

In trait classification, we may understand that involuntary safeguarded grounds from EED Article 1 include disability, sexual orientation and age. From the Charter, involuntary traits can be regarded sex, race, color, ethnic or social origin, genetic features, language, and membership of a national minority. Indeed, in what comes to these grounds, they can be seen as involuntary traits; no person can in these matters influence his or her origin, nor can anyone else. For example, if one has given birth to part of national minority, he or she will be part of this minority for lifetime, even without participating in actions of the minority group. In other words, heritage cannot be reversed. Same applies to ethnic or social origins; even if a person can improve his or her social status with time, past will remain the same. These grounds actually all concern our heritage, and remains beyond our power of influence.

⁵¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303, p. 16.

⁵²Charter of Fundamental Rights of the European Union, Official Journal C 364, p. 13.

Considering appearance in the light of involuntary traits, we may state that there are certain features, mainly related to our heritage that cannot be changed, for example facial features. This, however mainly falls within the category of genetic features and could therefore be protected by the law. So, appearance related discrimination is, at least in principle, prohibited on the grounds of gender, religion or belief, disability, age, or sexual orientation⁵³ race, color, ethnic or social origin, genetic features, language, and membership of a national minority. These are protected in the Charter⁵⁴ and they are considered to implicate identity in such a fundamental way that they are untouchable compared to characteristics.⁵⁵ Safeguarded traits in the Charter of Fundamental Rights of the European Union⁵⁶ received legal and binding status with Lisbon Treaty.⁵⁷

2.4.3 *Voluntary traits*

Second group of traits concern purely voluntary traits, such as hair color, style of clothing, piercing, tattoos etc., which people have comprehensive control to decide whether these traits exist or not.⁵⁸ These traits are result of free will, so to speak. At the first sight it seems obvious that employer have the leverage and every right to decide whether or not they prefer very distinctive employee looks as a part of the company's image. In other words, it seems justified to decide the company's image when it comes to voluntary traits of people. For example, in customer service that happens face-to-face, is generally considered ideal that personal appearance concerning voluntary traits are moderately neutral, for example, concerning hair color of piercings⁵⁹ and, on the other hand, some professions may require more distinctive looks, given example of tattoo artists, who usually have tattoos. In what comes to voluntary traits, it seems justified that employers have leverage to decide to some extent the employee's image, in that sense, that they are also possibly representing the employee. The protected grounds in the EED and in the Charter do not include any purely voluntary traits,

⁵³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/18. Article 2 does not directly prohibit appearance discrimination, but discrimination on the grounds of these "traits" is prohibited so appearance in these grounds will fall to prohibited category.

⁵⁴ Charter of fundamental Rights article 21. Official Journal 18.12.2000 C 364/1.

⁵⁵ Rhode 2010, p. 92.

⁵⁶ Charter of fundamental Rights Official Journal 18.12.2000 C 364/1.

⁵⁷ Article 6 of the Consolidated version of the Treaty on European Union, Official Journal C 326, 26.10.2012, pp. 13-46.

⁵⁸ Rhode 2010, p. 92.

⁵⁹ Overall observation from customer serving persons in Finland; there are not been seen very distinctive people with green hair or punk style, lots of piercing of facial tattoos for example as a cashier in markets.

which also indicates that the employer has leverage in this field. One part of the voluntary trait can be understood to be also dressing and grooming habits.⁶⁰

However, in what comes to dressing, it may fall within the category of social origin: estimation of this subject in another aspect, we come across subordination of class and persons status (economic inequality). Take for example of clothing; expensive clothing reflects class privilege and wealth, and people with lower income may be disadvantaged by beauty standards; lack of money can disable a person from investing in their appearance, such as clothing and wellness products.⁶¹ So, if we separate spiky green hair and other very distinctive appearance characteristics and consider discrimination on the grounds of the appearance of wealth, delivered by brand clothing or expensive jewels, discrimination in voluntary traits starts to seem at least unfair towards people with lower income, hence they are set to different position due to something that they may not be able to influence.

2.4.4 Mixed traits

The third, and most relevant category, is mixed traits. When we come across traits that are not in their entirety under personal authority, we are discussing traits or characteristics that should be scrutinized more closely. In legislation, there are protected grounds that can be understood to be a part of mixed trait category: religion or belief, political or any other opinion and property and birth. Justification for this categorization can be made with the following thesis; opinions usually arise from our way of thinking and they are affected by our environment. For example, majority of children in Finland represents the same religion as their parents. This would not be the case without nurture and influence from the environment.⁶² Humans tend to assimilate the ideologies of their parent or friends. However, these ideologies are not unchangeable; people have changed their religion, political opinions (and other opinions) during their lifetime, which indicates that religion is not involuntary trait (basically, it is not unchangeable).

The main point in here is, that people have freedom to choose otherwise and persons insight to these grounds may be affected by environment, so these traits are not immutable for lifetime, unlike color or other involuntary traits. Moreover, property and birth (understood as

⁶⁰ Read Rhode, 2010, pp. 95-97. grooming habits are for example the way that one prefers to do his or her hair or preference of certain style of clothing.

⁶¹ Rhode 2010, p 96.

⁶² Sakasti, 2015. By nurturing children, our own sights will be distributed from paradigms that children assimilate, same applies to cultural differences.

the decision to give a birth to children) are as much a result of choice and the person's will, though birth is believed to be biological driven. On the other hand, there are people with no children by their choice.

So far it has been shown, that there are no voluntary appearance-related traits protected by the European Union law, but there are some mixed traits, which are protected by the law. Following the research objectives, next this thesis will examine, in which category weight can be rightly set, by investigating the affecting factors of weight. As presented in the introduction, weight discrimination is real phenomenon and the majority of European Union citizens are overweight (thus, not obese), so we are discussing a subject that affects people widely.

2.4.5 *Weight in trait classification*

The reasons behind obesity are crucial to understand, while considering whether weight-based discrimination should be prohibited. It is easy to draw the conclusion that voluntary traits, such as hair color should not be protected by legislation. These traits can be altered easily if necessary or desired. Weight, on the other hand, can be seen as a mixed trait, due to it has both, biological and psychological foundations, and it may not be altered as easily as thought. In the next section, we will examine mechanisms that affects human body weight.

Biologically, our weight is affected by metabolism, which is basically an entire range of biochemical processes that transform nutrients into energy. The metabolic activity level varies between people and may be expedited by exercising. Resting metabolic rate accounts for 60-75 percent of total daily energy expenditure, physical activity 15-30 percent and food digestion 10 percent.⁶³ Another factor to be considered is genetics, which traditionally is not seen as a major part of obesity. However, there are studies that demonstrate that genetics plays a major role; nonidentical twins raised together were less similar in weight, than identical twins raised apart. Moreover, overweight and obesity are result of interactions of genetics, metabolism, lifestyle, diet, environmental and psychological factors and the level of impact varies individually. *Heshmat* gives a great example of obesity to be ten times more likely in people, whose family includes one or more obese individuals.⁶⁴

⁶³ Heshmat 2011, p. 14.

⁶⁴ Heshmat 2011, p. 15. See also from genetics Koob et al. 2010, p. 479.

Weight is also result of neuroanatomical and neurochemical features. This mean, that we have multiple appetite-related hormones and signaling factors, which make reactions in our hypothalamus trigger hunger and indicate satiety, and the dysfunction of these factors may impact our food intake.⁶⁵ Moreover, we have also neurocognitive and behavioral features, which influence our weight. As mentioned, environmental factors and lifestyle choices (such as dietary habits, eating patterns, physical activity) have an important role in the development of obesity. Obesity co-occurs usually with mental health disorders, especially among women, and it may be result of stigmatization and social discrimination. Overall, decrease of physical activity, changes in lifestyle in the past decades indicates less physical activity, such as television and motorized vehicles. Research shows that Binge Eating Disorder often include the existence of negative factors in childhood⁶⁶ and these findings suggest that binge eating may be a type of maladaptive emotional coping mechanism.⁶⁷ To summarize, weight management is complex process with numerous affecting mental and physical factors, and the majority of the population of European Union have somehow “failed” to accomplish to stay in “normal” weight.⁶⁸

It is a common assumption around the world that weight is controllable, and this assumption shapes our way of thinking. People are easily judged lazy if they do not have the willpower for maintaining the weight or exercising. However, the fact is that ninety percent of people fail to maintain their lost weight which gives a different impression; if weight control was easy, the percentage for successful weight loss would be higher.⁶⁹ Not to mention, that there are also commonly known physical disorders that affect person’s weight⁷⁰. Indeed, a person’s weight can be regarded part of the mixed traits, due it has biological and psychological foundations, and it is therefore partly beyond the individual’s own control⁷¹. For this reason, it can be assumed that obesity is not anyone’s choice of free will (and if so, this is probably only for a minority of obese persons).

⁶⁵ Koob et al. 2010, p 479.

⁶⁶ including physical or sexual abuse, family problems, bullying, and teasing or negative criticism about weight, shape, or eating.

⁶⁷ Koob et al., 2011, pp. 479-480.

⁶⁸ Eurostat: Overweight and obesity - BMI statistics, 2018. You may read about obesity and eating disorders for example Rother, Buckryod 2008 and Choate 2013.

⁶⁹ Jeffery – Epstein – Wilson, 2000, pp. 5-16.

⁷⁰ Healthline, 2018.

⁷¹ Rhode 2010, p. 92.

3 APPEARANCE AS A FUNDAMENTAL RIGHT

3.1 Overview

One of the main questions in consideration of prohibition of appearance discrimination, is in the balance between employer's right to determine their company's image and the employees right to private life, and what private life includes. The focus of this thesis at this point will be concept of private life regarding appearance and weight. Appearance may be recognized as discrimination ground in cases, where males and females are treated differently or in cases where discrimination concerns protected grounds, but not, however, in the case, where one person is discriminated against purely based on appearance. Equality Employment Directive Article 1 includes sex discrimination⁷², so in principle, employers cannot make different demands concerning appearance for women and men. In this section we will examine, whether appearance and weight could be part of the private life of a person, which falls under the jurisdiction of the European Court of Human Rights. To be noted, Lisbon treaty⁷³ transferred interpretational power to European Court of Justice on private life matters, because the Charter of Fundamental Rights⁷⁴ was given similar status as the Treaties and right to private life is protected in this Charter Article 7, which falls under the jurisdiction of the ECJ. Furthermore, the Treaties can provide rights to individuals directly.

This section will discuss how the Member States recognize the value of individuality in their own legislations. Following this, chapter 3.2 will explore the content of the private to the Content of the private life according to the Convention of Human Rights Article 8. Convention article 8 will be examined, due to that ECHR has long roots of interpretation of private life, and identity as a part of it, compared to ECJ, which received jurisdiction to interpret the content of private life with Lisbon treaty⁷⁵. Also, there are numerous court cases from ECHR regarding appearance (mostly in the aspect of dressing), whereas ECJ cases have not, at least yet, concerned purely appearance. By these cases, this thesis will examine, into what extent individuality is recognized and valued in employment and, on the other hand, chapter 3.3.4

⁷² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303, 02.12.2000, p. 18

⁷³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306, 17.12.2007 pp. 1-271.

⁷⁴ Charter of Fundamental rights, Official Journal C 326, 26.10.2012, p. 397.

⁷⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306, 17.12.2007 pp. 1-271.

will discuss the dimension of professional life within the private life. Chapter 3.4 will examine the field and scope of the Article 7 of the Charter. Protection of private life receives highly interesting features, as the Convention applies to public authority interference, but with the Treaty Status of CFR, applicability may also concern private parties. This aspect will be examined in the chapter 3.5.

3.2 Value of identity in European Member states

One of the reasoning for prohibiting appearance discrimination is respect of individuality and person's private life, which includes identity. In European Case law there is not much interpretation about person's weight as a part of his or her identity. However, cases concerning dressing in employment have received a relatively large deal of discussion and interpretation. In this chapter we shall examine ECJ, as well as some national courts interpretations to what extent European Union nationals are free to express themselves, mainly through clothing. This text, as explained in chapter 2.4⁷⁶ evaluation of discrimination grounds is based on dividing protected and unprotected grounds of discrimination into traits; voluntary, involuntary and mixed, and by this way, finding the justifications behind safeguarded grounds. Clothing goes under voluntary traits, as a person is fully capable of changing his or her appearance with daily choices, and therefore, if voluntary traits can have any kind of value or protection, so should weight as discrimination ground, considering that it can be regarded as a mixed trait.

Rhode notes, that European Courts have generally interpreted appearance related issues in a way similar to American Courts; specific grooming codes are permissible, if their effect is similar for women and men, and regulations have reasonable justifications.⁷⁷ However, there are differences between European countries in emphasizing employees' rights and employers' rights. For example, English courts have considered employer's right to set appearance standards greater than individual's freedom to dress as they wish.⁷⁸ On the other hand, in France and Germany, employees' rights for privacy gets somewhat more value. French law

⁷⁶ See page 16 of this thesis.

⁷⁷ Rhode 2010, p. 137. These justifications are also discussed in the next chapter, concerning respect for private life according to Article 7 of Charter of Fundamental Rights and Article 8 of Convention on Human Rights.

⁷⁸ See cases: *Schmidt v Austicks Bookshops Ltd.* Employment Appeal Tribunal 26 July 1977 [1978] I.C.R., whereas employment appeal tribunal notices in its judgement that "...an employer is entitled to a large measure of discretion in controlling the image of his establishment, including the appearance of staff, and especially so when, as a result of their duties, they come into contact with the public." In case *Smith v Safeway PLC* [1996] IRLR 457(CA), whereas male worker was required to cut his hair due appearance standards of the working place. The court of appeal did not find this to be discrimination.

limits employers' rights for work rules by requiring that people's individual or collective liberties may not be restricted, unless those restrictions can be justified by the nature of the work, and those requirements are proportional to the goal.⁷⁹ Moreover, Germany provides protection of free development of personality, and even though this law applies directly only to the State, the courts in Germany have interpreted them to analogously apply to private employment contracts.⁸⁰

Weiss and *Geck* have made research about the obligation for respect of the private life and free development of personality in Germany; for example, German courts agree that prohibition of smoking is permissible for protecting non-smokers and preventing fires, but such prohibitions may interfere with the smoking employees' rights, who may freely decide over matters of his or her personal development. So, as in ECHR case law, also in German law prohibition is justifiable only to the extent that it is necessary to achieve its purpose. Basically, this means that in every case, the possibility of organizational rearrangements should be considered for respecting the smokers' rights. This applies also for regulations on dressing in the work place.⁸¹

One extremely good example of employer's right to determine about the company's image regarding weight was from the United States in 2002, when the company rejected a fitness instructor, because she was not suitable for the company's image (due to overweight) and did not fulfill the required appearance standards, even though she was qualified for the work. This would affect the company's credibility. The job was about selling fitness and the instructors should be leaner than the public. In San Francisco, height and weight discrimination are prohibited, and the claimant won the case in court, because according to the Court, "fit" does not only mean external appearance, but rather individual's physical condition regarding capability of exercising (mainly muscular strength and cardio endurance).⁸² Weight discrimination sets people to disadvantageous position, even though the individual could actually

⁷⁹ Finkin, 2002, p. 578.

⁸⁰ Finkin, 2002, p. 581.

⁸¹ Weiss – Geck, 1995, p. 78-79. Employer may make such regulation justified only if it is necessary for business. For example, employees which are not in contact with clients, may not be required specific dressing codes.

⁸² Bell, Myrtle 2011, p. 474.

manage the work adequately.⁸³ Even though this case is not European, it offers a great example of expectations in certain professions and disadvantage that weight might cause for employee.

To summarize, there is quite a bit of variation between European Union Members States in whether national courts give greater importance for individual rights or employers rights, concerning appearance. Germany and France seem to be pioneers in protecting individual development of personality, giving employees a broad protected right for self-expression. In Finnish Supreme Court case, we sought that at least state of health can be interpreted to cover weight and personal characteristics may even more broadly cover individual rights against discrimination. European Court of Justice policy for individual self-expression and appearance seems to favor employer. Indeed, interpretations in the European Court of Human rights seems to be similar, in what comes to dress. In the next section, we shall get acquainted with the policy of European Court of Human Rights to appearance discrimination.

3.3 Content of the private life

3.3.1 Overview

The basic guarantee in Article 8 of the Convention on Human rights is, that: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The convention continues to narrow this to public authority intervention, but the Charter itself does not. Reason for scrutinizing both of these Articles is, that the guide on Article 8 concerns the European Convention on Human Rights, whereas there are very little interpretational guides from the Article 7 of the Charter. Our first question remains, what is the real content of “private life” concerning appearance and could one’s weight be part of it. The European Court of Human Rights have established a guide on Article 8 of the Convention of Human Rights,⁸⁴ which gives the basic knowledge of the applicability of the Article in question. This guide includes over 100 pages of information, which gives hint of the complexity of the Article 8. Below, discussed shall be whether or not overweight (or weight in the first place) can be protected by this Article. In the next sections, we shall examine the

⁸³ As might be assumed, the fitness instructor discriminated actually have become famous – which indicates good incomes. For more information about the outcome of the case for instructors, see for example Forbes, 2002.

⁸⁴ Council of Europe – European Court of Human Rights, 2018.

content and scope of Private life and in chapter 3.3.3 how the European Court of Human Rights have interpreted the desired appearance as part of fundamental rights. Lastly, it shall be examined how professional life and private life are interpreted in cases, where they are inseparable.

3.3.2 Interpretation of the Article 8 of the Convention

At the very beginning it shall noted yet again, that the Convention is interpreted by European Court of Human Rights and the Charter is interpreted by the Court of Justice of the European Union.⁸⁵ Also, only the Charter has treaty-like status.⁸⁶ However, the interpretation lines are similar, even though ECHR handles merely cases where the second party is public authority, excluding private parties.⁸⁷

European Convention on Human Rights, Article 8 states that:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁸⁸

Article 8 in Convention concerns only private party and public authority situations, as stated in paragraph 2 of the Article and its main task is to protect against arbitrary interferences. This is a negative obligation, not to interfere. However, it includes also the positive obligation to ensure that these rights are respected, even between private parties. These obligations may involve adoption of measures designed to secure private life.⁸⁹ Basically, the State is obliged, under Article 8 of the Convention, to protect individuals effectively against grave acts, where fundamental values and essential aspects of private life are at stake (for example, through efficient criminal law, investigation, and prosecution). In the case of less severe violations between individuals, the State is merely obliged to maintain and apply in practice an adequate legal framework affording protection.⁹⁰ So,

⁸⁵European Commission 2018, part Why do we need the Charter? See also article from differences between the Charter and the Convention: Emmert – Carney 2017, p. 1051-1173.

⁸⁶ Article 6 on the Treaty on European Union, Official Journal C 202, 7.6.2016. p. 19.

⁸⁷ According to Article 52 (3) of the Charter.

⁸⁸ Council of Europe – European Court of Human Rights, 2018.

⁸⁹ Council of Europe 2018, p. 8.

⁹⁰ Council of Europe 2018, p. 9.

this means in the context of weight discrimination that the State could be obliged to secure people against weight discrimination in employment, as it can be regarded as part of private life by identity and appearance (desired or not). In the case *Mickulic v Croatia*,⁹¹ the ECHR have stated that private life “includes person’s physical and psychological integrity, and can sometimes embrace aspects of an individual's physical and social identity. Respect for “private life” must also comprise to a certain degree the right to establish relationships with other human beings.”⁹² Psychological integrity probably refers to actions that are criminalized in national legislation, but consequences of the weight discrimination have proven to increase the risk for mental disorders, such as depression (psychological damages). Therefore, it can be justified to argue, that there should be protection by the legislation. The next chapter will discuss in detail what desired appearance actually covers.

3.3.3 *Desired appearance as part of Article 8 in the case law*

According to the ECHR, individual’s desired appearance is related to expression of one’s personality, and therefore it does fall within the notion of private life.⁹³ Indeed, ECHR have dealt with cases where one’s appearance was the topic regarding haircut, in case *Popa v Romania*⁹⁴, where a prisoner had 45-centimeter-long hair for a 25-year period. His hair was cut in prison and Popa concerned this as a violation against his identity. ECHR found this measure to be appropriate, as it is intended to apply in the context of large communities, namely prisons, which are overcrowded, and hygienic conditions are therefore weaker or vulnerable than in normal circumstances.⁹⁵ This case was remarkable concerning the research question in this thesis, because it did not include any protected grounds of equality directive (such as religion, gender etc.), but purely concerned appearance and individual identity by a voluntary trait, hair. As the ECHR notes that people are entitled to style themselves according to their own preference and a way of expressing one's personality, but measures taken were regarded as a public health matter, which was more important than personal appearance in this situation, and there was lack of evidence concerning resistance to having their hair cut.⁹⁶

⁹¹ *Mickulic v Croatia*, 2002.

⁹² *Mickulic v Croatia*, 2002.

⁹³ Council of Europe 2008, p. 41.

⁹⁴ *Popa v Romania*, 2013.

⁹⁵ *Popa v Romania*, 2013, para 28.

⁹⁶ *Popa v Romania*, 2013. Paras 33-34.

Another case concerned a ban imposed by the law, on wearing clothes that conceal the face in public places, when the plaintiff would have worn full-face veil due to religion reasons.⁹⁷ The law was seen as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”⁹⁸. So, the plaintiff lost the case, which seems to be the theme in these cases. However, all these restrictions approved by ECHR includes notification that restriction on personal appearance is obliged to be proportionate.⁹⁹ The legitimate aim of restricting something is key factor; in the case *Biržietis v. Lithuania*¹⁰⁰, the government failed to explain legitimate aim for banning beards in prison and lost the case.¹⁰¹

*Kara v. United Kingdom*¹⁰² was another case from 1998, which actually fully concerned preferable dressing style and was not associative to any protected grounds on EE-Directive Article 1.¹⁰³ Mr. Kara was a transvestite and he preferred to dress clothing, that are conventionally considered as female clothing. Mr. Kara had worn “female clothing” a few times during his employment with Inner London Education Authority, which resulted in an internal review, where Mr. Kara volunteered not to wear female clothing at the working place. Later on, Mr. Kara’s matter was referred to Deputy Director of Social Services and two principal issues were raised; equal opportunity and religious beliefs. Nevertheless, Mr. Kara was denied wearing female clothing at work.¹⁰⁴ ECHR examined whether in Mr. Kara’s case article 8 of the Convention was breached. For intervening in Mr. Kara’s private life, three conditions must be satisfied; legality of the interfering, interference must pursue at least one legitimate aim and it must be necessary in a democratic society to achieve one of those legitimate aims.¹⁰⁵

⁹⁷ *S.A.S v France*, 2014.

⁹⁸ *S.A.S v France*, 2014. Para 157. See also from restricting appearance cases: *Gough v. the United Kingdom*, 2014 about appearing naked in public places and *Tığ v. Turkey* 2005, denial of access to university due wearing beard.

⁹⁹ Council of Europe 2008, p. 41.

¹⁰⁰ *Biržietis v. Lithuania*, 2016.

¹⁰¹ *Biržietis v. Lithuania*, 2016. Paras 54, 57-58.

¹⁰² Case *Paul Kara v. United Kingdom*, 1998.

¹⁰³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303, 02.12.2000, p. 18.

¹⁰⁴ *Paul Kara v. United Kingdom*, 1998. Part: the facts.

¹⁰⁵ Case *Paul Kara v. United Kingdom*, 1998. Part: facts and the law.

First of all, there was the internal policy from the dress code that which was confirmed by the Industrial Tribunal to be lawful, so requirement of the lawful was fulfilled. Furthermore, the aim for dress policy was legitimate due to representing the Government and the business community, and dressing requirements protected proper functioning on behalf of the public. Necessity in democratic society seems also to be fulfilled; in the judgement it is noted, that dressing requirement remain relatively limited (only to working hours) and otherwise Mr. Kara may perform as he wishes. Furthermore, the employer is entitled to require certain dress code, which is reasonably related to the work itself, for example helmets, hygienic covers and uniforms.¹⁰⁶ The judgement continues that this may also involve requirement of dress code for employees, who are in contact with the public or other organizations for enhancing employer's image and facilitating its external contacts.¹⁰⁷ In other words, the employer can require certain dress code, if the employee is in contact with external relations as a representative of their employer. European Court of Justice actually published at press release regarding dressing issue, stating that the employer can ban political, philosophical and religious symbols from being worn visibly in the workplace.¹⁰⁸

Indeed, it is undeniable that European Courts value the employers right to determine its image over individual self-expression, whereas at least national courts of Germany, France (and Finland in some extent) seem to highlight the value of individuality. However, as seen in European Court cases, right to respect private life, in the sense of Article 8 of the Convention, includes haircut and facial hair (or Article 7 of charter).¹⁰⁹ It can be assumed that weight, as desired or undesired part of individual is, in as much as facial hair, protected in this article, because it is inevitable part of the person's identity and appearance. Therefore, in principle, weight issues may – or should be respected. Assessing article 8 of the Convention on private life, however, excludes private parties from coverage of the article.

¹⁰⁶ At this point I have to notice that helmets concern usually safety in working place, referring to compulsory safety accessories, and in this context, it seems to compare safety equipment's to dressing standards. Also reference to hygienic falls mainly under occupations, where groceries or other products requiring high hygienic standards are handled.

¹⁰⁷ Case *Paul Kara v. United Kingdom*, 1998. Part: the law, para 1.

¹⁰⁸ Court of Justice of the European Union, press release No 54/16.

¹⁰⁹ Article 8 on the Convention on Human Rights corresponds with the Article 7 of the Charter of Fundamental Rights, and charter have treaty status according to Article 6 of the Treaty on European Union, Official Journal C 202, p. 19.

3.3.4 *Respect of private life within the professional life*

At this point discussion will turn to private life again, in point of cross situation of private life and professional life. Above, it has been shown that right to respect private life concerns individuals, it may also cover professional activities. Though, ECHR have not, regarding these professional activities' extent the interpretation to professional life in the sense of the question, should employer have more discretion than individuals for desired appearance or weight, but in this chapter the context of the privacy profession according to the ECHR will be examined.

One of the ECHR cases concerned the termination of employment contract of the priest, who was married and a father of five children. The priest applied for dispensation from the obligation of celibacy, which he received in 1997, thirteen years later. In the meanwhile, he married and got children.¹¹⁰ The rescript from the Pope granted dispensation from celibacy, and he lost his clerical "state", which means that without local bishop permission, he was denied teaching the Catholic religion in public institutions. This rescript was given after publication of a new article, which concerned Movement for Optional Celibacy of priests, in which the priest was also part of and his name and marital status was published. After Popes answer, his employment contract was terminated after receiving this rescript.¹¹¹ So, this case was very comprehensively interpreted, as religious communities were noted to have autonomy in Spanish legislation.¹¹² The ECHR notes, that private life should not be excluded from professional activities, because restrictions on an individual's professional life may actually fall within Article 8, if they restrict social identity or development of relationships.¹¹³ The ECHR focused on its arguments, to note that there was publicity in *Martinez case* and he could have been seen to breach the terms of the employment contract and related legislation of the priest occupation by publishing his name in the contrarian article.¹¹⁴ This case actually raised conflicted opinions in the Judges, therefore that the vote rates was nine votes to eight that there was no violation of the Article 8 of the Convention. So, here again, the employer's reputation was set above individual right.

¹¹⁰ *Fernández Martínez v. Spain*, 2014. Paras 12-13.

¹¹¹ *Fernández Martínez v. Spain*, 2014 paras 15-21.

¹¹² *Fernández Martínez v. Spain*, 2014. Para 69.

¹¹³ *Fernández Martínez v. Spain*, 2014. Para 110.

¹¹⁴ *Fernández Martínez v. Spain*, 2014. Paras 114-122.

In contrast, what comes to data protection or video surveillance of the individuals, the case law seems to turn to respect private life of individuals above employers right, or at least sets stricter limits to usage of individual data.¹¹⁵ In the case *Antovic and Mirkovic v. Montenegro*¹¹⁶, the ECHR found that installation of surveillance cameras was not executed in accordance with the law, and the data was collected in an unlawful manner, even when the purpose was to secure environment.¹¹⁷ To summarize from these cases, interference of private life seems to fall under stricter scrutiny, and in such situations and the measures taken need to be lawful and appropriate. In the next section, the content and scope of the Article 7 of the Charter will be examined, which falls within the jurisdiction of the ECJ.

3.4 Field and scope of the Article 7 of the Charter

At this point we have comprehensive understanding of the concept of private life within the meaning of the Convention and the Charter, as these are interpreted similarly. Because the Charter may have impact on individuals directly (or indirectly), the thesis will now focus on examining the field and scope of the Charter in this chapter.

Whereas Article 8 of the Convention concerns public authority, we should examine the coverage of the Charter of Fundamental Rights Article 7, which has the treaty-like status and can therefore directly affect the rights of individuals. To reiterate, article 7 of the Charter provides the right to respect of one's private life and it is interpreted similarly to article 8 of the Convention.¹¹⁸ This is the result of the Article 52 of the Charter, which determines the scope of the Charter.

Article 52 (1) of the Charter states that:

“1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. “

¹¹⁵ Case C-131/12 *Google Spain v González*, EU:C:2014:317 about data protection and

¹¹⁶ *Antovic and Mirkovic v. Montenegro* 2017.

¹¹⁷ *Antovic and Mirkovic v. Montenegro* 2017.

¹¹⁸ According to Article 52 (3) of the Charter. See also: European Union Agency for Fundamental Rights, 2018, p. 23. This is likely result of the principle of uniform interpretation on EU law (established in Article 267 TFEU).

This part of the Article 52(1) actually suggests, that there are conditions which must be fulfilled if the limitations are made. Conditions are relatively similar to those in Article 8 of the Convention; measures taken are required to be lawful, so they base on some kind of legislation. Secondly, the measures taken needs to proportionate; limitations must be necessary and necessity requirement must be fulfilled, measures are taken either to meet the objectives of general interest recognized by the European Union or executed due to protection of others' rights and freedoms. Noticeable is also, that this Article refer to "any limitation on the exercise these rights and freedoms", which indicates that limitation may be done by actively or passively restricting or interfering individual's right to respect their private life. In other words, leaving obese persons outside the equal possibilities could be regarded to fall under this category.

Moreover, other requirements for applicability are also set in Article 52 (2-4):

“2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.”

These parts actually suggest, that the scope of the Charter would remain to apply to vertical situations, between public authority and individuals. At this point, however, our interests turn to the question, whether or not Article 7 of the Charter provides rights to individuals in horizontal situations (between private parties). According to Article 51 (1-2) of CFR the Charter provisions are:

“addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity¹¹⁹ and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the

¹¹⁹ Principle of Subsidiary is established on TEU article 5 (3). It secures member States ability to take decision and actions in field where Union does not have exclusive competence unless objectives cannot be achieved by the Member State.

powers of the Union as conferred on it in the Treaties” and “2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

Indeed, there is a clear lack of the mention of private parties, but this Article also does not expressly exclude the possibility of effectiveness between private parties, either. Examination of the *Defrenne- case*¹²⁰ reveals that the ECJ approached the problem in question through the aim of interpreting the spirit of the legislation, rather than strict linguistic interpretation.¹²¹ So, Article 51 does address Charter obligations for Member States when implementing European Union Law. Regardless of the wording of the Article 51, ECJ have found in at least in one case, that the Charter has direct applicability for horizontal level, as well.¹²² In the following section, the possibility of horizontal applicability is investigated more thoroughly.

3.5 Direct and indirect horizontal applicability of the Charter

Direct applicability of the European Union legislation between private parties is called direct effect. Direct effect is generally understood to refer to rights granted by the European Union, which may be relied on by individuals in front of their national courts.¹²³ Doctrine of direct effect was originally developed by the European Court of Justice in the well-known *case 26/62 Van Gend en Loos*¹²⁴ in 1963, and it included three conditions for provision to be directly applicable: they must be sufficiently clear and precisely stated, unconditional and independent of any other legal provision, and it must confer a specific right, upon which private individuals can base a claim.¹²⁵ Horizontal direct effect refers to situations, where individuals can rely on the Treaty provisions that confer individual rights, in order to make a claims against others private individuals before national courts. Moreover, the impact of direct effect of the Treaties has been limited to employment, and after Lisbon Treaty, where

¹²⁰ Case C-43/75 *Defrenne v Société anonyme belge de navigation aérienne (Sabena)*. EU:C:1976:56.

¹²¹ The court held that: “The fact that certain provisions [...] are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down. [...] In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only in the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals. Case C-149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*. EU:C:1978:130, paras 31-39.

¹²² See case C-131/12 *Google Spain v González*, EU:C:2014:317, para 99 & ruling 4.

¹²³ Switzer 2009, p. 53.

¹²⁴ Case C- 26/62, *Van Gend en Loos*, EU:C:1963:1.

¹²⁵ European Observatory of Working Life 2017.

the Charter received treaty-like status, direct effect doctrine could be interpreted to have horizontal and vertical direct effect.¹²⁶ Theoretically, this indicates that right have one's private life respected includes employer – employee relationship and as explained above, the concept of private life actually includes desired appearance. The next section will explore whether the Charter could actually provide such a possibility to invoke for the Article 7 of right to have one's private life respected for private party situations.

While considering of horizontal applicability of the Charter, we should explore the doctrinal mechanisms that parties could invoke relying on the Charter. It should be stated, that only a few EU rights, apart from the regulations, have been noted to have actual self-standing character. These include internal market freedoms against the state, the right to equal pay for women and men, the non-discrimination obligation on the ground of nationality and the right for compensation of losses, which results from anti-competitive conduct.¹²⁷ As stated before, the Charter has treaty-like status, according to the Article 6 of the TEU. This includes the Treaties ability to provide binding norms in horizontal disputes, as exemplified in articles 45 and 157 TFEU. This created the presumption that the Charter could impose obligations for individuals. However, the scope of the Charter indicates exclusion of individuals from coverage of the Charter (Article 51(1)). So, in which case individuals could rely on the Charters rights? With strict interpretation, the Charter rights are not horizontally effective without implementation to part of national legislation, and in other situation, they may be regarded to only affect the interpretation of national law. However, less strict interpretation can lead to the assumption, that the Charter can be interpreted similarly to the Treaty provisions. The third, and probably the most appropriate approach, is to interpret the question so that the Charter provision falls between these, giving it fixed formal significance.¹²⁸

¹²⁶ *ibid.* By doctrine of indirect effect is meant that national courts are required to interpret national law in accordance with directives. The doctrine of indirect effect is crucial for enforcement of EU rights in horizontally (usually directives have only vertical direct effect). National courts are obliged to ensure consistent interpretation of legislation with EU law. See more about direct effect: European Observatory of Working Life 2017, available at: [<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/direct-effect>]

¹²⁷ Leczykiewicz, 2013, p. 485. Internal market freedoms, see case C-26/62 *Van Gend en Loos* EU:C:1963:1, equal pay for equal work: C-43/75 *Defrenne* EU:C:1976:56, prohibition of discrimination on the ground of nationality: C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA*. EU:C:2000:296, and compensation losses from anti-competitive conduct: Case C-453/99 *Bernard Crehan v Courage Ltd and Others* EU:C:2001:465.

¹²⁸ Leczykiewicz, 2013, p. 486.

There are some problems concerning the use of the Charter, especially concerning the Article 7 (right to private life). The treaty provisions can have direct effect only if the three conditions of the *Van Gen den Loos- case*¹²⁹ are fulfilled and the main problem here is, that the right to have one's private life respected is not sufficiently clear or precisely stated. In other words, it leaves a wide range of interpretation, by being vague and incomplete. Acceptance of Fundamental Rights as a normative source would transfer the interpretational power of the European Union legislation to national judges, and this would result in several different interpretations of EU law, not to mention, that the CJEU¹³⁰ is the only court system competent to interpret Union legislation in unclear situations.¹³¹ Moreover, the article 52(3) of the Charter indicated, per se, that the coverage merely concerns the public authority.¹³² Therefore, the direct effect of the Charter may be regarded somewhat unlikely option. However, indirect applicability could be the case, since the member States have to interpret national legislation in accordance with European Union legislation.

To conclude, from a discriminatory perspective it must be noted, that the ECHR, and therefore also ECJ is, in its prejudice, less likely to accept differential treatment in cases, where it relates to core concepts of personal dignity, such as discrimination on ethnic origin and private life, and more likely to accept differential treatment, when it relates to broader social policy considerations, particularly where it has fiscal implications.¹³³ Furthermore, European Union legislation certainly notes the value of human identity, which includes the desired appearance. Protected grounds have been, according to the European Court of Human Rights, haircut and facial hair, so it is reasonable to assume, that also weight can be recognized under protected category of private life. According to ECHR case law, restrictions may be possible, if they have legal basis and are deemed necessary.

¹²⁹ Case C- 26/62, *Van Gend en Loos*, EU:C:1963:1 .

¹³⁰ Referring to all courts acting in the European Union; Court of Justice, the General Court and specialized courts.

¹³¹ Article 19 of the Treaty on European Union, Official Journal C-326, 26.10.2012, p. 27.

¹³² According to Article 52(3) of the Charter: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

¹³³ Council of Europe 2018, 49.

4 WEIGHT DISCRIMINATION IN CASE LAW

4.1 Overview

Chapter 4 will on examining how the European Court of Justice have interpreted weight discrimination in its case law. Since weight discrimination is not prohibited by European Union legislation, there is only one case regarding this subject in European Union case law. For comparison, one Finnish Supreme Court case regarding weight discrimination are also examined. Moreover, analysis of case resolved with contradictory results to the ECJ will give further value for considering weight discrimination prohibition.

4.2 Equality interpretation in European Union courts

Equality and the Principle of Non-Discrimination are among the corner stones of the European Union. Yet, some critics have demonstrated, that these principles are so abstruse, that even experts have some difficulties in explaining the application of the concept by ECJ, and therefore, the concept of equality is very general and inconsistently applied. Most of the critics comes from German scholarship, which prefer logical and coherent application of legislation.¹³⁴ The main idea in the equality lies in assimilating the equality principle with the American model, and equality would be actualized, when people in the same situation would be treated in a similar way, and people in different situations would be treated differently. However, this is very wide and unspecified definition, which usually leads to different interpretations in courts and administrative.¹³⁵ This idea refers to formal equality, where persons are treated similarly ignoring the structural differences. Substantive equality means a situation, whereas persons treatment is based on their real context.¹³⁶

Overall, the interpretation of the execution of equality in European courts' case law can be divided in three scrutinizing standards; low scrutiny, intermediate and strict scrutiny. Low scrutiny basically means that the Court's way to interpret situation from the perspective, that there is no discrimination, unless differential treatment is so arbitrary, that there are no kind of appropriate grounds to found.¹³⁷ Strict scrutiny focuses on the interpretation of the legality of one's actions, which is based on two comparable groups. In this case, the court will

¹³⁴ Croon 2013, p. 153-154.

¹³⁵ De Witte 2010, 1715-1718, ja Croon 2013, s.153. About the development of equality in 2000's: Howard 2011 ELJ, pp. 785-803.

¹³⁶ Caracciolo Di Torella 2006, p. 341.

¹³⁷ Croon 2013, p. 154-155.

dismiss the examination of objective reasoning and moves to examine whether the objective differences among the compared groups justify the differentiation. In concrete terms, this means the selection of a suitable comparator unit, when considering the purpose of the measures taken. Following this the differences between the selected groups are weighed against the disadvantageous effects on one of them, in order to assess whether the differential treatment is justified.¹³⁸ Intermediate scrutiny falls in between the categories; review is stricter than just testing for objective reasoning, but does not so much weigh the differences between the compared groups, with the negative effect on the disadvantaged group.¹³⁹

Another thing to be noted from ECJ case law is, that grouping people seems to be one of the aspects, that is in use in European Courts. Any assessment of indirect discrimination is based, on whether or not the group of people have suffered from more negative effects than the other.¹⁴⁰ According to *Advocate General Léger*, the measure taken must affect a far greater number of women than men, in order to be presumed discrimination.¹⁴¹ Group division can be seen also in the EED article 1 and the Charter Article 21, as these protect the interests of groups of people.¹⁴² How this comes into context of the topic of this thesis, similarly overweight people may be divided to group; majority of the European Union citizens, and concerning obese persons, twenty percent of the European Union citizens. Certainly, we come across of the situation, where a group of people are discriminated against, resulting of notable economic losses. In the following chapter, it will be examined, how ECJ have considered the dismissal of an obese employee. After the chapter, comparison is made to Finnish Supreme Court ruling regarding access to employment.

4.3 Obesity as a disability: Court of Justice of the European Union

4.3.1 Background of the Case

The European Court of Justice have considered the applicability of these principles, and their relation to obesity discrimination in the case *Fag og Arbejde v Kommunernes Landsforening*¹⁴³, which was first of its kind in European Union. Mr. Kaltoft was working as a

¹³⁸ Croon 2013, p. 156.

¹³⁹ Croon 2013, p. 157.

¹⁴⁰ European Union agency for fundamental rights, 2011, p. 29.

¹⁴¹ Opinion of Advocate General Léger of 31 May 1995, paras. 57-58.

Similar approach from ECHR, see the case of *D.H. and Others v. the Czech Republic* 2007.

¹⁴² For example; group of persons by religion, group of elder or young persons, group of minorities regarding sexual orientation or group of persons with disability.

¹⁴³ Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463.

childminder for 15 years in the Municipality of Billund. Mr. Kaltoft was overweight throughout his employment period in Municipality regardless of efforts in losing weight, even with financial support by the Billund Municipality. Mr. Kaltoft was on leave for year, and after resuming his work as a childminder, head of the childminders began to make observations about Mr. Kaltoft's weight. Mr. Kaltoft was selected to be dismissed in hearing procedure, which was typical for redundancy situations for Danish public sector employees. Kaltoft's obesity was also brought under discussion, when he asked the reasoning behind his dismissal. Even though it was not written in any documents, Mr. Kaltoft got the impression that he was dismissed due to his obesity, hence the decrease of work load was also minimal.¹⁴⁴ In the next chapter, we shall examine the interpretation on the European Union legislation in the light of the case presented above.

4.3.2 ECJ interpretation concerning coverage of legislation

The question in this particular case was, can discrimination on the ground of obesity be regarded as discrimination in the sense of European Union legislation. Firstly, The Court noted that there is a general Principle of Non-Discrimination in European Union, which is an inseparable part of Union legislation and binding in the Member States, where the issue within the main proceedings fall within the scope of EU law.¹⁴⁵ Though, under the general principle of equal treatment, everyone should be treated equally, there is no specific provision on discrimination against obesity in European Union legislation. The ECJ continues to examine whether the European Union legislation contains any statutes that prohibit discrimination on the grounds of obesity, noting, that neither primary, nor secondary legislation (namely Employment Equality Directive) legislate on this issue, and therefore cannot constitute a legal basis for such a prohibition.¹⁴⁶

The primary task of the ECJ is the interpretation of the European Union legislation.¹⁴⁷ The ECJ has repeatedly complied with the opinion that interpretation should not be extended by

¹⁴⁴ Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463, para 16-29. Moreover, national court should also take under consideration if there was any need for redundancy procedure at the first place.

¹⁴⁵ Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463, para 32.

¹⁴⁶ *Ibid.* para 33-34. This actually sounds very conflicting over all; equal treatment should be everyone's rights, but not for certain people.

¹⁴⁷ Treaty on European Union (hereinafter TEU) article 19. OJ C 326, 26.10.2012, p. 13–390

analogy of Union legislation, and *Kaltoft*'s case was no exception.¹⁴⁸ So, the ECJ have interpreted legislation with linguistic methods (as written, so understood). As a result, the ECJ did not interpret discrimination grounds to extent do obesity, and noted, that the issue does not fall within the scope on European Union legislation and therefore EU law “must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation.”¹⁴⁹

4.3.3 *ECJ interpretation on obesity referred as a disability*

Another question under consideration was, whether obesity be regarded as disability, which is safeguarded ground against discrimination in employment. This is a highly interesting question, as was discussed in chapter 2.4.5, obesity, which was found to have both biological and behavioral foundations, and which were found to be, at least in part, beyond individual control.¹⁵⁰ The ECJ held that disability refers to “a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life, on an equal basis with other workers...”¹⁵¹ Moreover, disability must be understood not only as preclude of professional activity, but also as hinderance of such activity. The court continued to argue, that it is not relevant whether the disability is self-caused, and the fact that Billund municipality had not made accommodations to Mr. *Kaltoft* (as understood in Article 5 EED), does not itself entail that he may not be regarded as a disabled person.¹⁵² At this point ECJ arguments seems very preferential to Mr. *Kaltoft*, and they appear logically drafted from the concept of disability.

However, the tone of the ECJ's arguments at this point take several variable directions; in para 58, the ECJ states, that obesity itself does not constitute a disability due it does not entail that there is actual limitation, and consideration of disability resulting from obesity should be evaluated case-by-case. In Mr. *Kaltoft*'s case, the ECJ noted, that obesity may conduct disability, hence he might be applicable to fall under the definition of disability (long-term physical, mental or psychological impairments, which, in interaction with various barriers,

¹⁴⁸ See cases *Chacón Navas*, EU:C:2006:456, para 56 and case *Coleman*, C-303/06, EU:C:2008:415, para 46.

¹⁴⁹ case *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463, para 38-40.

¹⁵⁰ See page 19.

¹⁵¹ case *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463, para 53. Assuming that overweight, or at least obesity is trait of person, which he or she may not fully control, obesity at the first sight seems to fit in to the description well.

¹⁵² Case *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463, para 54-57.

may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers). In obesity, disability could manifest as reduced mobility or medical conditions that prevents or hinders the person in performing in their work. To the end, the Court noted that it is respondent's obligation to prove, that there is no breach of the equality principle.¹⁵³

So, the ECJ's stand was that weight can be seen as a disability, if it hinders or prevents the person from effectively participating in professional life and this falls under case-by-case consideration.¹⁵⁴ Following the Court's reasoning we inevitably come to the question, should weight discrimination be prohibited in legislation? Certainly, such consideration neither did, nor will fall within the ECJ jurisdiction, as it was not a case brought to the Court and this question would be a matter of public discussion rather than judgement. *Advocate General Jääskeläinen*, on the other hand, emphasizes that the amount of weight is relevant factor, and only severe obesity could be regarded as a disability. Otherwise his opinion represented the courts view.¹⁵⁵

4.4 Finnish Supreme Court case regarding weight discrimination

4.4.1 Relevant legislation

European Court of Justice decided that weight, by itself, does not constitute a base for discrimination, but it may be seen as a disability, if it hinders professional life. This judgement was made by interpreting European Union legislation, and the court did not provide extension of discrimination grounds. As is established, European Union legislation created the minimum standards for Member State legislation to cover in the field of discrimination.

In Finland, there are a relatively small number of equality-related problems compared to other Member States, and in Finnish legislation, there is its own law for prohibition of discrimination in employment. In Non-discrimination Act (1325/2014) Section 8, prohibits discrimination "against on the basis of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, *state of health*, disability, sexual orientation or other *personal characteristics*. Discrimination is prohibited, regardless

¹⁵³ Case *Fag og Arbejde v Kommunernes Landsforening* EU:C:2014:2463, para 58-60, 63.

¹⁵⁴ *Kaltofts* case was judged for the benefit of Billund Municipalities. See Billund Kommune – news article.

¹⁵⁵ Opinion of advocate general Jääskeläinen, 2014, para 59.

of whether it is based on a fact or assumption concerning the person themselves or another. (2) In addition to direct and indirect discrimination, harassment, *denial of reasonable accommodation*, as well as an instruction or order to discriminate, constitute discrimination as referred to in this Act.¹⁵⁶ Indeed, there is the difference between Finnish legislation and European Union legislation; in Finland there exists a prohibition of discrimination in employment on the grounds of state of health and personal characteristics, which both are very important concerning weight discrimination, but also could cover appearance discrimination.

4.4.2 Background

The case KKO 2018:39 concerned an employee (hereinafter Mr. A)¹⁵⁷, who had worked for company X over one year in three separate fixed-term employment contracts. Entering employees are required to undergo an occupational physical check, where a physician examines whether the employee is suitable for the occupation, and without this statement the person cannot become employed. Mr. A was obese, but he received a statement affirming his suitability to work, although his state of health should be monitored, and a new checkup was necessary before regularizing the employment contract (at the beginning of their first fixed-term employment contract). At the beginning of the second and third contract, employee's state of health was not examined. Mr. A was willing to continue his career. In Finland, occupational health care negotiations may be arranged, if there are anomalies concerning the employee's health.¹⁵⁸ So, Mr. A asked for a confirming statement from occupational health care provider, but the doctor recommended that he discuss with his employer whether such above mentioned negotiations could be arranged. Soon after, he became unemployed, therefore that he neither received the statement nor was granted the negotiations.¹⁵⁹

The question remained, what ground of discrimination was violated, and did Mr. A provide information, on the basis of which the violation of discrimination can be said to have occurred¹⁶⁰ If so, it should be valued whether or not defendant can prove that there has been

¹⁵⁶ English version of Non-discrimination act can be found at: [<https://www.finlex.fi/en/laki/kaanokset/2014/en20141325.pdf>] (visited 25.9.2018).

¹⁵⁷ In courts case the name or sex of the employee was not announced, so this employee is hereinafter fictively named to Mr. A by author.

¹⁵⁸ Based on Health Insurance Act 2004/1224, Chapter 8, section 5 a.

¹⁵⁹ Finnish Supreme Court judgement KKO 2018:39 para 16-19.

¹⁶⁰ Principle of this shared burden of proof is valid in Finland also.

no violation against employee. Also, the examination targets to scrutinize, whether the employer has failed to fulfill requirement of equal treatment, therefore that they did not provide occupational health care negotiations for Mr. A.¹⁶¹

4.4.3 Interpretation in the Supreme Court

Mr. A sued the company on the basis, that he has been discriminated because of his obesity; the company did not make new employment contract, and therefore he was discriminated on the grounds of state of health. The Supreme Court notes, that in this situation, the comparable situations would be that he was not overweight, and he would receive a statement affirming his suitability to work from the occupational health care doctor. The assumption of discrimination requires that there is causal relation between the favorable treatment and the state of Mr. A's health.¹⁶² At this point, the Supreme Court noted, that fixed-term employment contract ends on the date established in contract, and the employer have no obligation to employ the person after expiration. However, Mr. A had proven that the company had a practice to regularize fixed-term employers' contracts without a separate application procedure. Moreover, Mr. A was hired twice before without such procedure, and the employer was aware that Mr. A was willing to continue in the company's service.¹⁶³

Mr. A did not receive the affirming statement from the occupational health care provider by June 2012, but doctor required negotiations concerning Mr. A's health with the employer and after receiving this information Mr. A requested to enter negotiations with the employer, into which the company refused to enter. Meanwhile, the company hired several other employees, meaning that they had need for workers. Mr. A's weight was known from the beginning on his career in the company.¹⁶⁴ The Supreme Court noted, that the situation needs to be examined as an access-to-employment situation, and that there was the assumption of direct discrimination on the grounds of state of health. The Supreme Court continued to note, that there is no convincing evidence that the employer had not committed discrimination against Mr. A.¹⁶⁵

¹⁶¹ Finnish Supreme Court judgement KKO 2018:39 para 20.

¹⁶² Finnish Supreme Court judgement KKO 2018:39 para 30.

¹⁶³ Finnish Supreme Court judgement KKO:2018:39 para 31.

¹⁶⁴ Finnish Supreme Court judgement KKO:2018:39, paras 32,33, 36.

¹⁶⁵ Finnish Supreme Court judgement KKO:2018:39, paras 37,39, 40-53.

Another aspect of this case was, that the requirement of equal treatment principle was violated as well in that he was not provided with opportunity for occupational health care negotiations, whereas other employees were, and due to the lack of these negotiations, he was not hired. In Finnish legislation (Employment Contracts Act 55/2001, chapter 2, section 2) there is the requirement for equal treatment for all employees, unless deviating from this is justified in view of the duties and position of the employees.¹⁶⁶ This demand requires, as with the Equality Employment Directive¹⁶⁷, that similar situations are treated alike and differential treatment to be justified objectively. In this case, evidence of differential treatment within similar situation was provided; another overweight employee was in a similar situation, but he did not enter any negotiations and was later given a permanent employment contract. Mr. A was received differential treatment, but the Supreme Court saw that there was not enough evidence to show equal treatment principle violation.¹⁶⁸ There was no explanation whatsoever, as to why the Supreme Court did not consider that requirement of equal treatment was not violated, which weakens the value of this judgement, even though this court case was solved in Mr. A's favor, on the grounds of discrimination.

4.4.4 District Courts argumentation

At this point, we will briefly examine the district court's judgement, which differed from the Supreme Court judgement (as was court of appeals¹⁶⁹). The district court saw that Mr. A was discriminated on the grounds of weight, whereas the Supreme Court ruled, that grounds of discrimination was state of health. The district court brought up a very good point in its' judgement concerning discrimination in the work place; the acceptance of discrimination on the grounds of overweight, would inevitably lead to policy, whereas allowing personal weight to be used as grounds of discrimination in access to employment and during the employment.¹⁷⁰ In a situation where the employer is prohibited to discriminate against people and obliged to treat employees equally, this would by itself violate the employment contract act in Finnish legislation.

¹⁶⁶ Finnish Supreme Court judgement KKO:2018:39, paras 54-55.

¹⁶⁷ Council Directive 2000/78/EC of 27th of November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303/16.

¹⁶⁸ Finnish Supreme Court judgement KKO:2018:39, paras 56, 58, 59.

¹⁶⁹ Appellate court of Turku interpreted that there was neither breach of Employment contract act nor situation could not be seen as access to employment. The plaintiff could not show that there is reasonable doubt about discrimination and therefore burden of proof did not actualize for plaintiff. Appellate court actually decided the case for company by these reasons.

¹⁷⁰ Finnish Supreme Court judgement KKO:2018:39, para 10.

Requirement of equal treatment was also scrutinized in this judgement. Where the Supreme Court noted there to be no violation of equal treatment requirement, the district court saw the violation. The company did enter occupational health care negotiations with another employee that was overweight, who also had a fixed-term employment contract that was about to end, and this employee also not been given a confirming statement from the doctor. The district court's judgement did, however, note that negotiations by themselves would not necessary lead to hiring, so there was no income loss to the plaintiff.¹⁷¹ The company had provided information that they had arranged between twenty to thirty negotiations annually, if an employee was struggling with works tasks¹⁷² and due this (and in the name of equal treatment requirement) it seems at least surprising that the rejection of negotiations, in view of the regularity they set up these negotiations annually, was not reason enough to consider a violation of equal treatment.

4.5 Comparative aspect to European Union and national case law

If we compare Mr. Kaltoft's and Mr. A's court cases, we certainly can note, that the connecting factor was plaintiff's obesity, and accusation of discrimination on this ground. However, Kaltoft's case was about exit from employment, on the grounds of redundancy, whereas Mr. A's case was about access to employment. Also, legislation concerning the cases varied; in the way Mr. Kaltoft's case was interpreted, could obesity have been seen as a disability, whereas in Mr. A's case the concern was over the state of health. State of health as a ground of discrimination also covers overweight at least in access to employment, but the situation remains greatly complex in legal redundancy situations, whereas employer decrease the number of employees.

If Mr. A's case would have fictively concerned about redundancy situation, where the employer is obeying employment contract act chapter 7, section 3, Mr. A would probably lose his court case. The statute mentioned above states, that the employer may terminate the employment contract for financial or productivity related reasons, if the work has diminished substantially and permanently, or if the employer is reorganizing his or her operations. Finnish legislation denies redundancy in situation, where the employer can relocate or train the employee for other duties, if there has been new hiring before or after redundancy, or if there is no actual decrease in the amount of available work (Employment contract act, chapter 7,

¹⁷¹ Finnish Supreme Court judgement KKO:2018:39, para 11.

¹⁷² Finnish Supreme Court judgement KKO:2018:39, para 57.

section 3). So, this statute does not provide any kind of preconditions, over whose contract the employer may or may not terminate in a legal personnel redundancy situation, and therefore Mr. A's case judgement could be rather different.

Mr. Kaltoft's case, on the other hand could be very different in its' result, if the Danish legislation included a prohibition of discrimination on the grounds of state of health, and, if Mr. Kaltoft could prove, that he was discriminated due to obesity. Danish legislation includes prohibition of discrimination to dismissals¹⁷³, but unfortunately, other discrimination grounds are not as comprehensive as in Finnish legislation, which only safeguards race, color, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. So, in Mr. Kaltofts' case, there were no other option on legal grounds to interpret or consider whether obesity in his case can be regarded as disability.

I continue to advocate for advanceness of Finnish legislation on equality, therefore, that it actually sets obligation for employer to generally strive to further the employee's opportunities to develop themselves, so they may advance in their careers (Employment contact act chapter 2 section 1). This means, in other words, that the employer is an obliged to guarantee the employee equal opportunities in career advancement. Thus, there might not be statistics about how this actually works in reality. Section 2 of this law continues: "An employer must treat all employees equally, unless deviating from this is justified in view of the duties and position of the employees." Finnish legislation is, in this manner, exemplary, in what comes to equality in employment, and it might provide resolutions for other inequalities that occurs in European Union regarding employment.

¹⁷³ Consolidation Act no. 1349 of 16 December 2008 Consolidation Act on Prohibition of Discrimination on the Labour Market etc. English version available. Paragraph 2 (1) states that: "2. (1) An employer shall not discriminate against employees or applicants for vacancies in connection with recruitment, dismissal, transfer, promotion or with regard to pay and working conditions."

5 PRO & CONTRA ARGUMENS FOR PROHIBITION OF WEIGHT DISCRIMINATION

5.1 Overview

This chapter focuses to answer the second research question: should appearance discrimination be prohibited? This shall be executed by arguing for and against the prohibition of weight discrimination. Some of the arguments are already presented, but they will be shortly viewed in the next sections.

The protected grounds from discrimination were divided into three groups: voluntary, involuntary and mixed traits. Voluntary traits are personal features, which are subject to choice. In this field, it seems fair, that the employer has right to choose employees with neutral looks as a part of company's image, for example in situations what comes to very distinctive hair-coloring, piercings of even tattoos that shows distinctively. Also, the fact that EED Article 1 or CHFR Article 21 does not cover any voluntary traits in any forms, advocates to the privilege of employer to choose freely employees to express company's image. The second category was involuntary traits, which are mostly protected by the legislation (as should be); no one should be entitled to decide somebody's suitability for an occupation, on the grounds of color, race, genetics, or any other grounds the person themselves cannot affect. The third category was mixed traits, which may raise contradictory thoughts, as some of them are protected by the legislation and some of them are not.

Weight is not protected against discrimination in European Union legislation, and this chapter will focus on considering of the aspects for and against the legislative prohibition of discrimination. Firstly, it shall briefly repeat the affecting factors of weight, as a part of the consideration of individual responsibility of the weight. Secondly, this chapter shall familiarize to the consequences of discrimination, stereotyping and stigmatizing due to weight.

5.2 Affecting factors of weight as an argument for prohibition

As explained in chapter 2.4.5 there are several functions that interact with each other and weight management: metabolism, genetics, as well as neuroanatomical- and chemical features, that regulate hormones and appetite. Moreover, some of the health condition are known to cause gain weight. Psychologically, neurocognitive and behavioral features also

regulate our eating patterns. Some of these behavioral features may function as a coping strategy from traumatic events in individual history. Weight loosing can be challenging due to mental disorders, such as depression. Moreover, research suggest that even if an individual manages to lose weight, ninety percent gain at least some it back in the next four years. Discrimination, especially in cases where depression also occurs may, and probably will, complicate the weight loss or maintenance due to mental stress. Therefore, the impact of the environment on weight cannot be denied completely, which suggest that weight should, at least on some level, be considered a protected ground from discrimination. The next chapter will focus to the proven mental consequences of the stereotyping, stigmatizing and discrimination. Thirdly, the gender aspect of weight discrimination should be considered, as this is mainly a problem for female representatives. Section 5.4 will discuss equal opportunities for obese employees. Finally, the last sections will consider the results and consequences of legislative prohibition of weight discrimination and, how this should be executes, if at all.

5.3 Consequences of stereotyping, stigmas and weight discrimination as an argument for the prohibition of weight discrimination

Stereotyping is, as noted in chapter 2.1.2, one way of our mind to function; creating assumptions about people or groups. However, it is also an enabler of discrimination, which has phycological consequences for any person discriminated against. *Blane* has written about weight discrimination at work. As we have discussed above in chapter 2.1.2, obese people are subjects to stereotypes, such as lazy and undisciplined, which affects beliefs about how obese workers manage to perform in their work tasks. According to surveys in the 90's, this has greater impact on women's salaries; in the United States in 1992, obese women received 40 percent less income than thin women¹⁷⁴. In 1998, the rate was even higher, at 60 percent¹⁷⁵. Though, this problem should be handled in Europe, therefore that the Treaty on the functioning of the European Union, article 157, provides obligation for equal pay for equal work¹⁷⁶. However, even in Finland this seems not to be fulfilled.¹⁷⁷

For consideration of whether weight discrimination should be prohibited, we should take a look of consequences of weight and obesity discrimination. According to *Blane*, several

¹⁷⁴ Loh., 1993.

¹⁷⁵ Institute for Social Research, 2000.

¹⁷⁶ Treaty on the functioning of the European Union, Official Journal C 326, p.117.

¹⁷⁷ Discussion about the losses of income, see page 52.

studies have shown that weight discrimination cause depression, lower self-esteem, personal dissatisfaction and poorer psychological adjustment compared to thin people.¹⁷⁸ For comparison, discrimination on sexual orientation, which is protected against discrimination in European Union legislation, results are remarkably similar by the outcome such as minority stress, which is basically repetitive experience of judging, disliking. Research suggest that gay population are two to three times more likely to have psychological disorder, such as depression, anxiety problems even suicidal behavior in their lifetime than straight persons.¹⁷⁹ The consequences are relatively similar, and there is reason to believe that it remains similar for obese people facing discrimination. Looking at the similarity of the result of discrimination, it hardly seems justified to allow weight discrimination to remain legal, at least in what comes to the consequences.

As with stereotypes, stigmas also affect people's well-being. One of the most notable consequence is mismatch of person's identity. Through stigmatization, a person is given a so-called virtual identity; a sense of identity, as others see them, which does not correspond to their personal sense of identity, and which is typically more negative and simplistic than the person's actual identity.¹⁸⁰ This is, as research from the very beginning of the 20th century has demonstrated that identity is fundamentally a social construct.¹⁸¹ This means, that part of our self-understanding comes from internalizing others' views of us, which is very important for person's ability to create and maintain short and long-term relationships.¹⁸²

Schiek and Chege question, whether stigmatizing should be prohibited, but they also have relatively good questions about the consequences of stigmatization, such as does stigmatize lead to social, political or economic degradation? Is there casualization that stigmas have contributed to differential treatment.¹⁸³ These could perfectly apply to weight discrimination as well, and, in fact, discrimination could be diminished if stigmatization could be intervened. Moreover, Schiek and Chege see an opportunity for discrimination laws to evolve, if social context could be part of the examination, which by itself would enable deeper identification of discrimination, and, furthermore, would provide a thorough examination of the

¹⁷⁸ Blaine 2007, p. 131, see the studies: Allon, 1982, Friedman – Brownell, 1995, Maddox – Back – Liederman 1968 and Miller – Downey 1999.

¹⁷⁹ Blaine 2007, p. 148.

¹⁸⁰ Blaine 2007, p. 171.

¹⁸¹ For example: Mead, 1913 and Cooley 1902.

¹⁸² Blaine 2007, pp. 171-172.

¹⁸³ Schiek – Chege 2009, pp. 158-159.

stigmas and stereotypes in our society. Additionally, this approach would decrease the misuse of positive measures and reverse discrimination.¹⁸⁴ To summarize, the human mind has a tendency to make assumptions of person or group of people, which is also automatic process in our minds, and it is affected partly by cultural values and environment over all. Notwithstanding of the environment, discrimination against of someone is matter of willingly chosen behavior by person.

Lastly the real, economic consequences of discrimination are also notable in Finland. In observing statistics, there are 5 591 463 habitants in Finland¹⁸⁵. In 2017, three quarters of the men and two thirds of the women are overweight in Finland, and 27,5 percent of women are obese.¹⁸⁶ Approximate annual income for women in Finland is 24 674 euros¹⁸⁷. Women as a group was affected as 5 percent lower income due obesity¹⁸⁸, totaling a loss of 1233,7 euros annually per person (thus, Härkönen and colleagues estimated this to be almost to 180 euros per month, so annually this would be over 2000 euros)¹⁸⁹. In Finland, there are 768 349 obese women, so we may calculate the annual loss of income for obese women, even using conservative estimates, to near 948 million euros, we may not speak diminutive amount of income due stereotyping and stigmas.¹⁹⁰ The numbers of income losses surely receive quite new atmospheres when discussion is taken into European wide.

5.4 Gender related argument for prohibition of weight discrimination

Even though European Union legislation merely recognized the value of a person's identity in employment situations, one aspect for consideration of weight discrimination is gender, for the reason, that women suffer in proportionately from weight discrimination. In a study by Härkönen and colleagues research, it was found that while men's salaries were affected by approximately 50 euros a month, due to obesity, the correlating number for women was 180 euros a month. What this means, is that gender division was also found in wages, and women are in a noticeably inferior position to men. Lower salary for obese women related heavily on two phenomena: female workers stay with the employer for shorter periods of time than normal weight employees. Another factor is, that obese women seems to have

¹⁸⁴ Schiek – Chege 2009, pp. 158-159.

¹⁸⁵ Tilastokeskus: Suomen ennakkoväkiluku elokuun lopussa 5 519 463.

¹⁸⁶ Terveysten ja hyvinvoinnin laitos: lihavuuden yleisyys suomessa.

¹⁸⁷ Tilastokeskus: Tulot ja kulutus.

¹⁸⁸ Härkönen – Räsänen – Näsi 2011, pp. 34-35.

¹⁸⁹ Härkönen – Räsänen – Näsi 2011, p. 31.

¹⁹⁰ Tilastokeskus: Väestörakenne 31.12.

more difficult in finding a position. If they do, a tendency to be employed in lower paid occupations either voluntary or due to the labor market discrimination.¹⁹¹ Nonetheless, if the situation is that obese women are discriminated against in terms of payment, this may turn out hard to prove. Direct discrimination in equal pay may actualize in some cases, if salaries are brought under examination. Thus, in this situation, experience-based raised, for example, may raise the salary, and therefore discrimination cannot be shown to be true. Even indirect discrimination may be difficult to prove, as it is based on estimations from women and men. If one person is discriminated in payment, this may not affect the average value of v women's wages noticeably. For conclusion, it is proven fact, that in Finland obese women are in weaker position due to obesity, than obese men.¹⁹²

5.5 Equal opportunities as an argument for weight discrimination

One aspect for appearance discrimination is *equal opportunities* in employment. Equal Employment Directive states, that employment and occupation are key elements in guaranteeing equal opportunities for all. It is also heavily related to the possibility for citizens of the EU to participate in economic, cultural, and social life.¹⁹³ Nonetheless, this concerns only religion or belief, disability, age or sexual orientation within the meaning of the EED Article 1 (and CHR article 21). Equal opportunities can be understood as formal equality, with the main focus on equal starting point for people (within the meaning of Article 11 of EED). Equal opportunity can be seen as possibility for individuals to compete, only on the basis of the relevant characteristics to the performance itself, not so much for factors regarding appearance. This concept may be understood in the way, that individuals occupy positions based on their talent and skills, as sex and race are irrelevant to the performance of the work. At this point, it should be noted, that weight can affect work performance, if mainly in such situations, where a person needs to be in good physical condition. However, *Moens* notes, that the as a result, equality might widen in the occupation, overall, if the employer does not set any trait barriers to employment, because this might allow classes of people, previously excluded, to participate in the occupation.¹⁹⁴

¹⁹¹ Härkönen – Räsänen – Näsi 2011, p. 34.

¹⁹² Härkönen – Räsänen – Näsi 2011, p. 35.

¹⁹³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, official Journal L 303, 2.12.2000, p. 16, para 9.

¹⁹⁴ Moens 1997, p. 44. Personally, this seems quite contradict; improving possibility to equality in authors view actually widens the participant category, whereas every applicant needs to be considered.

The promotion of equal opportunities can, in the sense of European Union social policy, refer to a process that aims to eliminate inequalities.¹⁹⁵ Yet, again, this does not concern weight. The question of equal opportunity becomes important in two situations regarding appearance discrimination: access to employment and promotion, but also dismissals, of which Mr. Kattoft's case was an excellent example. Mr. A's case was access to employment. *Rhode* notes, that individuals should be judged on their merits and performance, rather than their physical characteristics.¹⁹⁶

5.6 Cons of appearance discrimination

One of the most important question regarding the prohibition of weight discrimination is to consider the possible consequences. This question was partly brought up regarding the *Kaltoft* case¹⁹⁷, whereas Advocate General *Niilo Jääskeläinen*¹⁹⁸ deliberates whether obesity should be seen as disability. The main concern was related to the idea of expanding the coverage of disability and the possible misuse of the concept in other illnesses, such as alcoholism and drug addiction, which could, with the possibility of the expansion of the disability concept, also be covered. *Jääskeläinen* notes, that this concern would be misplaced, due to breaches of contractual obligations. Usually, it is prohibited to perform work duties under the influence of alcohol or drugs and having a disability would not make a difference to employment contract obligations. *Jääskeläinen* also notes, that in such a case, any employer would be entitled to expect the employee to seek medical treatment necessary for performing obligations established in the employment contract.¹⁹⁹ Although, this may bring some costs to the employer.

In what comes to weight discrimination, it should be considered from the aspect of costs, which could be one of the main factors while we consider the background of appearance discrimination in the field of weight. One common belief is, that overweight employees are more likely to cause expenses to the employer having a higher risk of illness than thin or normal weight individuals. This is mostly true, but have also another aspect: according to researches, it has proven that the factor for higher risk health problems is more likely to be

¹⁹⁵ Plantenga – Hansen 1999, p. 352.

¹⁹⁶ Rhode 2010, p. 92.

¹⁹⁷ Case C-354/13 *Fag og Arbejde (FOA) v. Kommunernes Landsforening* EU:C:2014:2463.

¹⁹⁸ Opinion of advocate general *Jääskeläinen* delivered on 17 July 2014 (1) Case C-354/13 EU:C:2014:2106.

¹⁹⁹ Opinion of advocate general *Jääskeläinen* delivered on 17 July 2014 (1) Case C-354/13 EU:C:2014:2106 para 59.

related to amount of physical activity rather than weight.²⁰⁰ Risk for health issues were higher with individuals that have lower BMI and who were inactive, than individuals with higher BMI, but who were active. Due to this, we may state that overweight by itself does not indicate health problems, nor does it automatically lead to higher expenses for employer. Neither we can confirm that overweight people are more or less active than thin employees, but usually overweight and obesity correlate with the higher health risks. At this point it should be stated, that the risk for expenses regarding occupational healthcare come to the employer to bear, but this risk exists always when hiring employee, regardless of weight. Similarly, it may be asked if prohibition of weight discrimination would drive persons to misuse their rights against to employer. Could any person sue employer from discrimination due weight? At this point it can be said, that this ground would not face merely higher misuse percent than any other discrimination grounds, that are already in legislation specially in situation where the treatment of employees is equal.

5.7 European Union level legislation or national discretion?

Finally, we come to the question, should appearance discrimination, concerning mainly weight, be prohibited on an EU-wide, or leave to national discretion. The main idea in European Union legislation is, that we share certain value, that every Member State has established as part of their core values.²⁰¹ The fact that individuals can be discriminated against weight, that have been proven to associated with so many altering factors, including psychological factors, it seems sanctimonious to protect individuals right to opinion but not physical appearance that are not part of the purely voluntary traits.

While considering whether weight discrimination should be banned EU-wide, we may consider this following aspect: at this very moment, legislation does not cover weight discrimination or provide any protection on this ground. As a result, it seems that Finland is one of the only Member states (if not the sole only) to prohibit weight discrimination under certain circumstances, concerning the state of health. Consequently, leaving the weight discrimination deliberation to national discretion would not make any difference to current situation.

²⁰⁰ Official journal of the American collage of sports medicine Vol 31 (11), pp. 497 – 667. However, it is notably that usually physical inactivity also contributes to weight gain, p. 663.

²⁰¹ This is due the principle of conferral, which is established in Article 5 of the Treaty on European Union, Official Journal 115, 09/05/2008, p.18.

Differential treatment is acceptable, if it is objectively justified and so would be in the case concerning overweight people. Objective justification could relate to a person's ability of performing in their work. For example, if the work sets high physical requirements, it would seem sensible that a person with high amounts of excess weight could not perform the work tasks. Therefore, some positions that require good physical condition, such as police officer or firefighter, would be able to exclude obese applicants, because this is a matter of ensuring safety in work. Execution of the prohibition of the weight discrimination could be similar to prohibition of discrimination overall. By this way, employer would still have the possibility to exclude applicants that are not "physically suitable".

6 CONCLUSIONS

Rates for obesity and overweight are higher than ever: more than half of the European population is overweight, and more than twenty percent are obese, while at the same time the modern-day society focuses on the healthy lifestyle and slim looks. In employment, obese people are put in a differential position, where they miss work opportunities, get lower salaries, or otherwise become victims of discrimination. This thesis aimed to answer, whether the European Union legislation recognizes the weight discrimination currently, and if not, should weight discrimination be prohibited. The people or groups of people that are protected at the moment by the Union legislation, in as much as obese persons, have probably suffer from loss of income and loss of job opportunities before the legislative prohibition. Weight discrimination on the other hand is a matter that legislation have not yet noticed. The reason for this seems self-evident also: we are examining matter that have just recently taken into discussion. Research about obesity's effects to earnings in Finland was from 2013, so it is relatively new information and it was executed as a part of larger European research. Therefore, basically at this moment the European Union still stand within the situation where under investigation are still the possible effects of obesity discrimination. Therefore, it is likely to assume that legislation cannot exist in this sector.

Examination of the research questions was carried out by dividing the legally protected grounds against the discrimination by trait classifications, in three groups of traits or characteristics: the first group of traits or characteristics are considered as involuntary traits, which refers to characteristics that individuals have no power to change, such as disability, sexual orientation and age, sex, race, color, ethnic or social origin, genetic features, language and membership of a national minority. These all somehow refer to our heritage, which is beyond our own power of influence. Contrary to involuntary traits, voluntary traits are purely on individuals own decision. Voluntary traits include, for example, hair color and length, style of facial hair and style of clothing. Union legislation does not, at least directly, recognize any of the involuntary traits to be worth of protection against discrimination. The third category is mixed traits. This refers to characteristics, which are partly influenced by the environment and partly under individuals own decision. By legislation, there there exists, to some extent, protection for this area of characteristics, mainly concerning religion or belief,

political or any other opinion, property and birth. All of these characteristics are partly out of individuals own control, yet not completely, due to environmental impact.

On the bases of this categorization, this thesis examined the categories into which personal weight could fall into. To conclude, there are various affecting factors for weight, but the main division can be made into two factors: the biological and the psychological. The main biological factors are metabolism, genetics, neuroanatomical and neurochemical features, which are wide range of processes interacting with each other. Besides biology, human weight is affected also by few psychological factors. According to researchers, most eating-related disorders have correlation with negative factors or events in childhood, so eating may be coping strategy for some individuals. In adulthood obesity commonly correlates with higher risk for depression even though the research did not provide information about causality (in other words, is obesity the trigger or consequence of depression). Nonetheless for comparison discrimination overall increase the risk for depression within any group of people, not just obese persons.

Weight is also affected by several health conditions, that are known to decrease weight, for example, of thyroid conditions. The fact that ninety percent of individuals that lost weight, cannot maintain it for the next four year, speaks of the difficulty of weight management, and as fifty percent of the European population is overweight, this discussion broadly concerns EU citizens. These research arguments strongly support the fact, that weight is not, unlike assumed, under total individual control, and could be changed in the way, that it may be changed in the way that hairstyle can be, and therefore, it cannot be regarded purely voluntary characteristics but, also not within the involuntary category. Weight have various environmental affecting factors, which indicate its position to mixed traits, and therefore, it should have protection of some level.

Finnish research notices that weight discrimination within the people that have BMI rate 30 or over suffers from discrimination and this concerns mainly women: theoretically calculated, the losses for income of obese women only in Finland raise high, near to one billion euros annually (or even higher, if calculated with approximation of *Härkönen* and colleagues study rates). Indeed, there is noticeable outcome for obese women not only in what comes to earnings, but also they face higher risk for unemployment. At the moment, European Union legislation does not directly recognize obesity as ground for discrimination, even though

there are notable proven economic losses for obese women. Importance in here is, that especially obese women are set in differential position (compared to men), which by it self indicated that the weight discrimination should be prohibited solely due to the Principle of equal pay for women and men (Article 157 TFEU).

One of the reasons enabling weight discrimination, shown in several studies, is the human tendency to make assumptions relating to the characteristics of individuals or groups of people. The human mind is also built to overestimate the negative impacts of people, which reinforces and creates stereotypes. Stereotyping obese people is a relatively common phenomenon: already in the 40s, researchers found that obese people are assumed to be lazy, introverted, and insecure and in later research, the list of assumptions has grown to include continue to unattractiveness, uncooperativeness and intellectual slowness. These assumptions are perhaps also one reason which enables obese women to succeed in working life, and they fundamentally rise from cultural aspect: cultures where individualism, self-discipline and personal responsibility are seen as cultural values, stereotyping is stronger. Stigmas may be seen as a consequence of individual stereotyping; stigma refers to a negative status, which is noted to be rather collective than individual in nature. Stigmatizing and stereotyping individuals are part of the reason why weight discrimination appears at the first place. Weight is one of the most stigmatizing characteristics for individual, due it is so apparent, and it cannot be hide from public. However, discrimination is action that is more likely to executed consciously rather than unconsciously. Nonetheless, prohibiting stigmatizing or stereotyping, as Schiek and Chege considered, would certainly not result to decrease of discrimination, because of their automatic nature of origin.

Stereotyping, stigmatizing and discrimination have been proven to have several negative impacts to those discriminated against. Weight discrimination has been shown to cause depression, lower self-confidence, lead to personal dissatisfaction and poorer psychological adjustment, compared to those who are not discriminated against. The results are similar in any groups discriminated against: for example, gay population members are two to three times more likely to have a psychological disorder because of discrimination. Stereotyping, on the other hand, directly affects the individual's conception of their identity. Identity is based on two factors: our own perception of how we see ourselves, and other's perception of us. Fundamentally, our identity is a complex social structure, which affects our capability

to create and maintain social relationships with another human beings. These consequences argue for prohibition of weight discrimination.

Examination whether legislation recognized weight as value of any kind, this thesis examined the Charter of Fundamental Rights Article 7, right to respect private life. Traditionally, the interpretation of the concept of private life have been under the European Court of Human Rights, due to Convention of Human right was original the source of the statute. With the Lisbon Treaty, the Charter was given treaty like status, and therefore European Court of Justice received the interpretational rights in this field. Anyway, the content of Convention's definition of private life and Charter's private life varies a little: The Convention forbids public authority to interference to the private life, unless it is lawful and proportionate. The Charter does not directly exclude rights granted to private parties in horizontal applicability situations, and due to its Treaty-like status, it could potentially provide protection for individuals in case of breach of the Article 7.

Indeed, the ECHR have a long history of interpretation concerning the content of private life, and this concept is similarly interpreted also by the ECJ. Therefore, the meaning of the concept of "private life" was interpreted from ECHR case law. There were no cases in the ECHR concerning weight, but there were certainly cases that covered appearance, in the sense of purely voluntary traits. These cases mostly concerned matter of voluntary appearance, and therefore it is justified to assume, that if characteristics, such haircut or freedom to wear preferred clothing style (referring to desired appearance) fall within the scope of private life, so certainly weight, which can be seen as part of personal identity and recognized value, could do so as well. Moreover, the general interpretation lines in European Courts have been supportive to individuals, but also the employer's right for setting grooming standards have been seen valid, unless they are found differentiating depending on gender, or not to have reasonable justification. The European Union Member States have also taken a variable approach, to what extent individual rights are protected, and the leaders of supporting individuality are France and Germany, most likely also Finland, having a good status in implementing equality.

The content of private life within the interpretation of the EU Courts is very broad. In this thesis the focus was on appearance-related cases, as they had great comparison value concerning weight discrimination. Although, the problem with the ECHR case law is, that they

examine whether there is interference of private life by a public authority. This part of court examination does not include the cases that are processed by the ECJ, as the Charter does not include such demands in Article 7 of Charter, and, because of the Treaty-like status breach of respect of private life may concern breaches made by and between private parties, as well.

Since the interpretation of private life assimilate in both, the ECHR and the ECJ, this thesis examined, firstly, private life within the definition of the Convention, as it historically has longer tradition of interpreting of the concept of private life. Article 8 of the Convention includes both, negative and positive obligations, not to interfere with individual's rights and, on the other hand, obligation to ensure that this right is respected by the private parties. Positive obligation to ensure this right refers to the State obligation to protect individuals against acts, where the fundamental rights are at stake. Usually this may be executed by legislative actions, such as criminal law. As mentioned, the concept of "private life" is interpreted broadly, and it covers person's identity, including desired appearance. Therefore, one possibility could be to ask, whether the Member States have fulfilled their obligations in protecting private life against discrimination.

Common to all these cases, also in the ECJ, and interpretation of interference generally, is that measures, that restrict the rights provided in the Charter, need to be appropriate and to have legal basis. Moreover, they must be necessary for democratic society to achieve this legitimate aim. What is also notable, is that the ECHR case law has also concerned cases, where the question has been limited only to purely voluntary characteristics, such as hair, in the case *Popa v. Romania*. However, the common good is generally regarded more important than individual appearance. According to the ECHR, individual desired appearance is related to expression of one's personality, and therefore, it falls within the concept private life, and limitations of rights of this kind need to be legally justified and measures taken need to be proportionate. Hence, as voluntary appearance is recognized as value in the European Union case law, there is no reason to deny personal weight to be regarded as part of this value as well.

Kara v. United Kingdom was also concerning appearance, interpreted the relations between employers right to determine the company's image and the employee's right to preferred

appearance, and it was excellent example of individuals right to desired appearance in employment. Again, the question remained, whether the three conditions were fulfilled; legal base of the interference, legitimate aim of interference and necessity requirement in democratic society. Conclusions in this case suggested, that the general policy is that employers are entitled to set dressing policy, unless this sets women and men in differential position. The dress policy can be justified with the simple reason of representing the business community or, as with the case, public authority. Moreover, this is limited only to working hours, so the employer's dress policy does not limit the individual's right for self-expression, to a degree that could be regarded as a restrictive measure. Also, the European Court of Justice is in the similar interpretational lines: employer can ban political, philosophical and religious symbols from being worn visibly in the workplace. In conclusion, reputation and image does have the greater value over individual's self-expression in work.

In the author's view, already the employment contract in itself can justify the dressing code; with the employment contract, the individual's commits to perform tasks for the benefit of the employer in exchange for compensation. Because of this contract, the employer has power to decide how tasks are performed, as it is time that the employer pays for to the individual. At least from this aspect, there is no reason why individuals could not be required to wear certain type of clothing during working hours. However, if weight is included into the Kara case's justifications, demands on weight in employment does not actually limit into the working hours, as to weight management requires full time participation of the individual for successful results. From this aspect, at least, demands regarding losing weight could not be justified and weight discrimination in this sense could be protected already by the European Union legislation.

The coverage of the Charter, on the other hand, have more significance regarding weight discrimination concerning private party situations, such as employment. Due to the treaty-like status, invoking the Article 7 of the Charter may be possible in disputes between private parties. The Charter Article 52 states, that any limitations on the exercising of these rights recognized by the Charter, must be provided for by the law and respect for the essence of those rights. For limitations of these rights, same conditions apply as to the Article 8 of the Convention; limitations must be proportional, necessary, and genuinely meet the objectives of general interest recognized by the European Union. Another justification may rely on the protection of the rights and freedoms of others.

Article 51 of The Charter, on the other hand, addresses the Charter to institutions, bodies, offices of the European Union and to Member States only, when they are implementing the EU law. Moreover, the Charter does not extend the field of application of Union law beyond the powers of the European Union, or establish any new power or task to the Union, or modify powers and tasks as defined in the Treaties. However, this Article does not directly exclude the application between private parties and regardless of this Article, has indeed been a case, where provisions of the Charter have been directly applicable to private parties (case C-131/12 *Google Spain v González*, EU:C:2014:317).

Traditionally, direct applicability has been recognized in limited situations, concerning market freedoms against the state, right to equal pay between women and men, prohibition of discrimination on the grounds of nationality, and the right for compensation of losses, which results from anti-competitive conduct. Even if the Charter scope is interpreted strictly, it may still affect the interpretation of national legislation and with the less strict interpretation, the Charter could have similar effects than the Treaty provisions by themselves. Direct applicability requires the statute to be sufficiently clear and precisely stated, which, obviously, the concept of private life does not fulfill. Therefore, the effect to national legislation's interpretation may be the only option individuals to invoke for their rights regarding weight discrimination. On the other hand, interpretation lines of the ECHR suggest, that differential treatment is less likely to be accepted in cases, where the treatment is related to core of personality, as concluded earlier, would be most likely to cover weight, as well.

At this point we can assume, that because desired appearance is covered by the Union legislation, certainly weight can be seen as part of this protected right, desired or not. The consequences of weight discrimination do not only limit to the psychological damages, but it also causes concrete losses on income. Whether or not discrimination on the grounds of weight can be seen as an insult against persons privacy, remains to European Court of Justice (or in the case of public authority interference, European Court of Human Rights) to decide. Logically thought, this area would be covered within the meaning of the private life.

As to what comes to recognition of the weight discrimination, the European Court of Justice have interpreted in Mr. Kaltoft's case, whether obesity can be regarded as a disability, and in this way, whether weight could be receive protection of any kind against discrimination.

However, in absence of European Union legislation, such protection could not be provided by the ECJ, therefore, that extension of the coverage of the legislation most likely interpreted in a strict sense, rather than liberal. In Mr. Kaltoft's case, the ECJ did not extent the Principle of Equal Treatment to cover obesity. Instead, as asked in preliminary ruling, the Court focuses to examine whether obesity can be regarded as a disability. According to the ECJ, disability must be understood, not only as a preclude of professional activity, but also as hinderance of such activity, regardless of the possibility of being self-caused. As an outcome, the ECJ noticed that weight can be seen as disability, if it hinders or precludes a person from effectively participating in professional life, and this is case-by-case consideration, which was left to national discretion, also in Kaltoft's case. The ECJ did not find any breach of law in Kaltoft's dismissal, as there was no European Union legislation to protect his rights. Consequently, the national court stated, that there was no breach neither under European Union, nor national legislation. To conclude from this, European Union legislation, within the meaning of the Equal Employment Directive, does not provide support for prohibition of discrimination against obese persons at the time and this level of protection is left to national discretion. Mr. Katoft's case did not include consideration of protection provided by the Charter Article 7.

Other aspect for prohibiting weight discrimination is that obese persons are left outside to principle of equal opportunity, for example, in access to employment and possibility to advance in their career. Equal opportunities usually refer to possibility of individuals to compete on the basis of relevant characteristics to the work performance itself, and in this way, individuals would occupy the position based on their talents, not their looks. Certainly, this is not the case with obese job applicants, due there are most likely to be assumed incompetent compared to others due to stereotyping. Currently, legislation provides equal opportunities only to limited groups of people, protected by the law. Concerning the recognition, the author believes, that the existing negative psychological impact of weight discrimination on a great number of people, as well as the concrete loss of income, could form a sufficient argument to prohibit weight discrimination.

Contradict arguments against prohibiting weight discrimination, could include that employers could not have as much discretion to decide the company's image (by the looks of the employee). This could cause some kind of credibility issues, as shown with the case of the US fitness instructor, certain occupations are expect to have certain looks. In this aspect, we

might have to alter our way of thinking in certain group of occupations, such as “fit” fitness instructors or actors in dietary commercials. Thought, popularity of an “average looking” person as fitness instructors might also receive good reception from audience. Moreover, there could be higher costs of health care and sick leaves, due to obesity has proven to correlate with higher risks for health problems. However, even the health problems are shown correlate stronger with lack of exercise, rather than overweight, and even normal weight people have health problems.

The case would be different in situation, where the employer would suffer from loss of income due to weight related reasons (though, it is relatively hard to discover such occupation), or in situations, where other employees would be subjected to danger because of individual’s weight. This might actualize in the professions, where good physical condition is demanded, namely with firefighter or police officers. On the other hand, if weight was on the protected grounds list, differential treatment would be acceptable, if it was objectively justified, and these sorts of situations would definitely fall into this category.

The last question remains, how this prohibition could be executed. By leaving the question of prohibition of weight discrimination up to national discretion, the status of the discriminated persons would not make any difference to prevalent circumstances, nor does the concession from the European Court of Justice, that obesity could be seen as a disability, if national court so decides. In principle, we can assume that European Union legislation honors individuals’ identity, and by this, also their weight. However, even after the Lisbon Treaty gave the Charter treaty-like status, it seems that in most cases this only concerns public authority, and not so much for situations between private parties. The fact is that current legislation does make weight discrimination possible, and that is the cause notable losses of income, and this discrimination also causes a variety of mental disorders.

As noted, weight is mostly a matter of cultural ideals and covert ideals. European Union legislation prohibiting weight discrimination would probably not change the attitudes towards obese persons. Regardless, it would be a start. The change would be more neutral by prohibiting discrimination on the grounds of state of health, which includes weight-related matters, as given example of the Finnish Supreme court, which found weight discrimination fall under state of health. One way to implement the prohibition of weight discrimination,

would be that the European Union would note the problems relating to weight discrimination, and recognize that this issue should be addressed somehow. A less binding approach might work in this case, such as voluntary commitment to fight against weight discrimination in employment. This might work similarly to the Convention of Human rights, even though it has no legal binding, it represents the values of the European Union. Even if this could not be considered, the Principle of Equal Pay to women and men could be broadened to cover all individuals. This would not make a difference to the damaging effects of weight discrimination in psychological aspect, but certainly it would affect one of the major consequences of weight discrimination: the losses of income. What comes to change of attitudes, propriate might be to begin from education of acceptance of diversity and education of respect for individuals and their identity.