

FIGHTING DISCRIMINATION IN EUROPE:

AN INTRODUCTION TO THE EU'S LEGAL FRAMEWORK ON DISCRIMINATION

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EUROPEAN LAW ON DISCRIMINATION

- Council of Europe
 - 46 Member States
 - European Convention on Human Rights
 - European Court of Human Rights – Strasbourg
 - European Social Charter

- European Union
 - 27 Member States
 - Treaty on the European Union
 - Treaty on the functioning of the European Union

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Article 14 ECHR :

« The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status »



- Non-exhaustive list
- In conjunction with other ECHR provisions

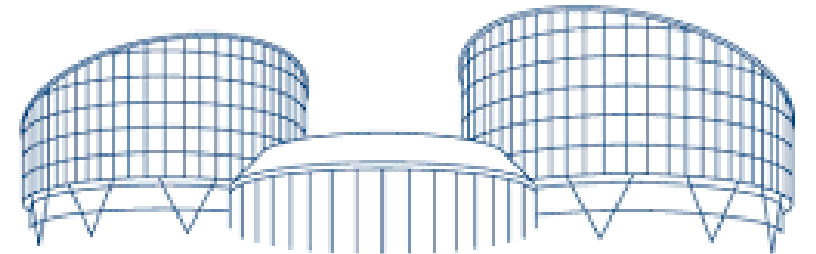
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Art. 1. Protocol 12 : 2000

« 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1. »

- General prohibition of discrimination
- Non-exhaustive list
- Self-executing provision
- Signed & ratified by 20 States – not by France)



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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- **European Social Charter**
 - Adopted in 1961 = no specific provision on discrimination
 - Revised in 1996 = **Article E** = provision similar to Art. 14 ECHR
- « The enjoyment of the **rights set forth in this Charter** shall be secured **without discrimination on any ground** such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status»
- The European Court of Human rights has no jurisdiction
- European Committee of Social Rights = system of reports/collective complaints. Recommendations

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Anti-discrimination provisions in a number of Council of Europe Conventions

- Framework Convention of the Protection of National Minorities (1995)
- Convention on Action against Trafficking in Human Beings (2005)
- Convention on Preventing and Combating Violence against Women (Istanbul Convention – 2011)

EUROPEAN UNION

- Normative power
 - EU Council (Ministers)
 - European Parliament
- Judicial control
 - CJEU
 - General Court
- General Principles
 - Direct Effect
 - Primacy



NON DISCRIMINATION IN INTERNAL MARKET LAW

- **Treaty of Rome** of 1957 = purely **economic** vocation
- No fight against discrimination in a Human Rights promotion perspective
- Ambition to create a **Common market**
- Prohibition of discrimination was meant to **remove trade restrictions** = only on grounds of nationality (of a MS)
 - Prohibition on MS to establish **barriers to trade** (on goods)
 - Free movement of **workers**, freedom of **establishment**, freedom to provide **services**

FREE MOVEMENT OF WORKERS

Article 45 TFEU

(ex Article 39 TEC)

1. **Freedom of movement for workers shall be secured within the Union.**
2. Such freedom of movement shall entail the **abolition of any discrimination based on nationality between workers of the Member States** as regards **employment, remuneration and other conditions of work and employment.**
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

FREE MOVEMENT OF WORKERS

Regulation n° 1612/68 of 1968 **replaced by Regulation 492/2011** (5 April 2011)

Abolition of discrimination based on **nationality**

- Employment
- Remuneration
- Conditions of work
- Social and tax benefits
- Access to housing
- Access to educational, apprenticeship and vocational training for children

ECONOMY VS WOMEN'S RIGHTS : THE DEFRENNE CASE

- When economic interests serve women's rights
- **Article 119 EEC** : « Each Member State shall ensure that the **principle of equal pay** for male and female workers for equal work or work of equal value is applied » - current **Article 157 TFEU**
- **Defrenne Case – 8 April 1976** – Preliminary Ruling – ECJ
« In light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a **competitive disadvantage in intra-community competition** as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pays »
- **Social objective = subsidiary ?**

ECONOMY VS WOMEN'S RIGHTS : THE *DEFRENNE* CASE

- When economic interests hold back women's rights
 - **Direct effect** of Art. 119 acknowledged by the ECJ
 - Interpretation of the Court = in principle **retroactive** to the date of entry into force of the provision (here in 1962)
 - But « **financial situation** of such undertakings » ; risk of « **bankruptcy** » ; « **legal certainty** »
 - « Direct effect of article 119 cannot be relied on in order to support claims concerning pay periods prior to the **date of this judgment** »

FROM AN ECONOMIC TO A POLITICAL PERSPECTIVE

2 important steps to strengthen the fight against discrimination in EU law

- Creation of **Citizenship of the EU**
 - Maastricht Treaty, 1992
 - Political rights (EP elections, municipal elections State of residence)
 - Civil rights = right of free movement **irrespective of professional status**
 - Achieved with Directive 2004/38/EC, June 2004, « Citizenship Directive »
 - **Prohibition of discrimination on the basis of nationality** in all situation under the scope of application of EU law
- Deepening of the **EU's social competence**
 - Treaty of Amsterdam of 1997
 - Article 19 TFEU = general competence conferred to the EU to fight against discrimination

CURRENT SOURCES : VALUES AND OBJECTIVES

- **Article 2 TEU : EU values**

« The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and **equality between women and men prevail** »

- **Article 3(3) TEU : EU goals**

« The Union (...) **shall combat social exclusion and discrimination**, and shall promote social justice and protection, **equality between women and men**, solidarity between generations and protection of the rights of the child »

CURRENT LEGAL SOURCES : EU CHARTER

- **Charter of Fundamental Rights :**

- **Article 20 :**

« Everyone is **equal** before the law »

- **Article 21 :**

« 1. Any discrimination based on **any ground** such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, **any discrimination on grounds of nationality shall be prohibited** »

CURRENT LEGAL SOURCES : EU CHARTER

- Article 23 : **Equality between men and women**

« Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex »

- Article 24 : **The rights of the child**
- Article 25 : **The rights of the elderly**
- Article 26 : **Integration of persons with disabilities**

Charter applicable to EU institutions and to MS whenever they implement EU law (article 51)

MAINSTREAMING

- Article 8 TEU : **Gender Mainstreaming**

« In **all its activities**, the Union shall aim to **eliminate inequalities, and to promote equality, between men and women** »

- Article 10 TFEU : **Equality mainstreaming**

« In defining and implementing **its policies and activities**, the Union shall aim to **combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation »

- Article 18(1) TFEU : Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality** shall be prohibited.

- General approach
- No direct effect
- No extra competence to the EU

GROUND FOR LEGISLATIVE ACTION

- Article 18(1) TFEU: discrimination based on **nationality**

« The European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, may adopt rules designed to prohibit such discrimination »

- Council and European Parliament on an equal footing
- Qualified majority (Council) ; simple majority (EP)

GROUND FOR LEGISLATIVE ACTION

- Article 19 TFEU: **other grounds** of discrimination

« 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the **Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament**, may take **appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**

2. By way of derogation from paragraph 1, **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure**, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to **contribute to the achievement of the objectives referred to in paragraph 1.**»

- Competence of the EU / legal basis for legislative action
- no subjective rights – not self-executing ≠ 157 TFEU / Defrenne case

EU SECONDARY LAW : EQUALITY DIRECTIVES

- **Directive 2000/43/EC** against discrimination on grounds of race and ethnic origin.
- **Directive 2000/78/EC** against discrimination at work on grounds of religion or belief, disability, age or sexual orientation.
- **Directive 2006/54/EC** equal treatment for men and women in matters of employment and occupation.
- **Directive 2004/113/EC** equal treatment for men and women in the access to and supply of goods and services.
- + **Directive Proposal (COM(2008)462)** against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

EMPLOYMENT EQUALITY DIRECTIVE (2000/78/EC)

General framework for equal treatment in employment and occupation

- Scope of application = employment
 - **Work** = irrespective of the legal form in which it is provided : public/private ; employed/independent...
 - Employment and working conditions = selection, pay, dismissal, ...
- Prohibited grounds for discrimination : **religion, belief, age, disability, sexual orientation**

RACIAL EQUALITY DIRECTIVE (2000/43/EC)

- Framework for equal treatment irrespective of **racial or ethnic origin**
- Scope of application = wider
 - **Work**
 - Public/private
 - Employment and working condition
 - **Other areas**
 - Social protection, including access to medical care
 - Social benefits
 - Education
 - Access to goods and services, including housing
- Motive of the directive = to find a job = necessary to get access to healthcare, education, housing...

GENDER EQUALITY DIRECTIVES

- **Directive 2006/54/EC** equal treatment for men and women in matters of employment and occupation
 - Replaces and improves former directives (1976 and 1986)
 - Covers employment and social security
 - **Directive 2004/113/EC** equal treatment for men and women in the access to and supply of goods and services
 - Access to good and services
- Protection not as wide as Racial equality directive = does not include access to social benefit (access to healthcare and education)

A HIERARCHY OF PROTECTED GROUNDS

Scope of application Grounds	Employment	Social Security	Goods and Services	Social advantages, Education
Race and Ethnicity	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
Gender	2006/54/EC	2006/54/EC	2004/113/EC	
Religion Disability Sexual Orientation Age	2000/78/EC			

PROPOSAL FOR A COUNCIL DIRECTIVE

“on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”

- Proposal by the European Commission in 2008
- Blocked by the Council = unanimity not reached
- To extend the protection outside the labour market
- To end the « hierarchy of grounds » of discrimination

COMMON KEY FEATURES OF EQUALITY DIRECTIVES

- Direct and indirect discrimination
- Burden of proof
- Transposition - invocability

DIRECT DISCRIMINATION - CONCEPT

- Direct discrimination
 - To treat **equally** people in a **comparable** situation
 - Treating someone with a **protected characteristic less favourably** than others
 - Example : the owner of a restaurant refuses to serve a black family saying that he does not want migrants. Unlawful direct race discrimination in the provision of a service
 - Example : the HR director of a company refuses to hire a woman claiming that it is a man's job. Unlawful direct gender discrimination in access to employment

DIRECT DISCRIMINATION – CASES

- ECJ, *Feryn* (C-54/07)
 - employer publicly stated = not recruit employees of a certain ethnic or racial origin
 - direct discrimination in recruitment within the meaning of the Racial Equality Directive
- ECJ, *Coleman* (C-303/08)
 - Woman dismissed because of her child's disability.
 - protect against discrimination by association ?
 - Court does not use the terms, but finds that the prohibition of direct discrimination is not limited solely to people who have the characteristic of being disabled

DIRECT DISCRIMINATION - JUSTIFICATION

- Principle: no justification
- Except : except where the justification is provided for in the directive
 - The employment directives = genuine and determining **occupational requirements**
 - E.g . = age limit in the police / gender/age requirement in theater, etc.
- 2000/78/EC : 2 specific grounds for justification
 - Art. 4(2) = activities within **churches** or organisation based on religion or belief = person's belief not a discrimination on religion
 - Art. 6 = **age** if difference of treatment if **objectively and reasonably justified** within the context of national law

INDIRECT DISCRIMINATION - CONCEPT

- an **apparently neutral provision, criterion or practice** is applied to **persons of a protected group**
- the provision, criterion or practice would put that group at a **particular disadvantage** compared with other persons
- AND**
- the provision, criterion or practice is **not objectively justified**
- Crucial criteria = appearance of neutrality
- Example = the prohibition of headwear may cause an indirect discrimination on the basis of religion as this disadvantages persons who belong to certain religions

INDIRECT DISCRIMINATION - JUSTIFICATION

General justification allowed = 2 conditions

- legitimate aim
- If means of achieving it are appropriate and necessary

INDIRECT DISCRIMINATION – CASES

EXAMPLE OF RELIGION - ISLAMIC HEADSCARF

- CJEU - **WABE** – 2021 – C-804/18 - **Private sector** – islamic **headscarf**
- balancing religious freedom with entrepreneurial freedom
- operation of private day nurseries
- **neutrality** required by the company by virtue of the parents' right to bring up their children in accordance with their beliefs
- Indirect discrimination = **justified** ?
- Only if it covers **any visible form of expression** of political, philosophical or religious beliefs
- Only if applied **systematically and consistently**

INDIRECT DISCRIMINATION – CASES

EXAMPLE OF RELIGION – ISLAMIC HEADSCARF

- CJEU – 2023 – **OP v. Commune d’Ans** – C-148/22 - **Public Sector**
- Back office worker – no contact with users
- Refusal to grant her the right to wear a headscarf
- Change in internal rules = strict neutrality
- Principle of **strict neutrality admitted by the Court**
- Here Belgium – but also French laicity – Constitutional Principle
- Margin of appreciation of MS
- National judge = **proportionality** and **necessity** test

BURDEN OF PROOF

- Principle of **reversal** of the burden of proof
- MS must set up measures to ensure that **facts from which it may be presumed that there has been direct or indirect discrimination**, it shall be for the **respondent to prove that there has been no breach** of the principle of equal treatment.
- Only applies to **civil proceedings**, not criminal procedures

Example: an employee who believes that she is paid less because she is a woman. It is up to her to prove :

- 1. That her pay is lower than that of her male colleague

and

- 2. That the work she does is of equal value.

It is then up to the defendant to rebut this presumption.

TRANSPOSITION OF DIRECTIVES

- Directives – article 288 TFEU
 - Obligation of **result**
 - Obligation to **transpose** in national order
 - MS free of the means / procedures
 - Must transpose within the transposition **time limit** laid down in directive
 - Once transposed = national law is invoked

JUSTICIABILITY OF DIRECTIVES

If MS doest not comply with transposition obligation before deadline ?

- **Vertical dispute** (ECJ, *Van Duyn*, 1974 – Marshall 1986)
 - Against the State (ascending)
 - Possible to invoke unconditional and sufficiently clear and precise provisions
 - State cannot invoke against an individual – (ECJ, *Ratti*, 1979)
 - Wide definition of « State » = State as employer, territorial authorities
 - **Horizontal dispute** (ECJ, *Faccini Dori*, 1994)
 - Against a private company / individual
 - Not possible
 - MS liability before national courts (ECJ, *Francovich*, 1991)
 - Commission can bring an infringement procedure against MS (article 260 TFEU)
- **Inequality between workers in public and private sector**

JUSTICIABILITY OF DIRECTIVES

But = Equality directives = often horizontal disputes (workers, consumers)

ECJ = **Mangold**, 2005

Facts

- 56 yo German employee on a 2y fixed term contract in a law firm
- Fixed term contract on the basis of « Employment Promotion Act » of 1996
- For persons from 52 yo to promote employment

JUSTICIABILITY OF DIRECTIVES

- ECJ
 - Such provisions **contravene Directive 2000/78/EC**
 - But = **horizontal dispute** = not possible to rely solely on directive
 - + time for **transposition not expired** (2006)
- Non-discrimination – age = **General Principle of EU Law**
 - Directive « does not itself lay down the principle of equal treatment in the field of employment and occupation »
 - **Pre-existing** in various international instruments and in the constitutional traditions common to the Member States
- Consequences
 - national courts must **set aside any provision** of domestic law that **conflicts** with the Directive
 - even **before the period for implementation** of the Directive has **expired**

JUSTICIABILITY OF DIRECTIVES

- CJEU, *Kücükdeveci*, 2010
- Confirmed *Mangold*
 - General Principle of EU law = non-discrimination on the ground of age
 - Directive gave expression to that principle of equality that permeates all EU law
 - Mention of EU Charter of Fundamental Rights, now binding
 - Article 21(1) = same legal value as EU Treaties

GENDER EQUALITY

+ extra action to combat discrimination based on Gender

- **Directive EU 2022/2381** of the European Parliament and of the Council of 23 November 2022 on improving the **gender balance among directors of listed companies and related measures**
 - To improve gender balance in large listed companies
 - Target of **40 % among non-executive board members or 33% among all directors of the under-represented sex** by 30 June 2026
- **Directive (EU) 2024/1385** of the European Parliament and of the Council of 14 May 2024 on **combating violence against women** and domestic violence
 - Criminalizes certain forms of violence against women (genital mutilation, forced marriage, “revenge porn”, cyber stalking,...)
 - Requires MS to set preventive measures and access to justice
- **EU accession** to the Council of Europe Convention on preventing and combating violence against women and domestic violence in 2023 (**Istanbul Convention**)

NON-DISCRIMINATION BEYOND SOCIAL POLICY



- Asylum seekers
 - CJEU, **WS**, 16 January 2024
 - Women as a whole may be considered as belonging to a social group
 - Qualify for the status of refugee
 - When exposed to violence (including sexual and domestic) in their country of origin
 - Because of their gender
 - Here, Turkish national of Kurdish origin, Sunni Muslim, married by force at 16 and subjected to domestic violence
 - CJEU, « **Afghan women** », 4 October 2024
 - Discriminatory measures adopted by the Taliban regime against women are acts of persecution – Gender apartheid
 - MS can rely solely on gender and nationality of Afghan Women to grant them asylum

NON-DISCRIMINATION BEYOND SOCIAL POLICY

- Right to move and reside freely within the EU - **gender recognition**
- CJEU, *Mirin*, 4 October 2024
 - A Romanian citizen was registered at birth in Romania as female on his birth certificate
 - Moved to the UK – acquired citizenship and obtained legal recognition of his male gender identity
 - Then, requested that the Romanian administrative authorities record in his birth certificate entries relating to his change of gender
 - Romanian authorities rejected his claim – requirement to initiate a new proceedings in Romania
 - CJEU = risk of a different outcome
 - Affect right to move and reside freely within the EU





THANK YOU FOR YOUR ATTENTION !