

Prohibition of Discrimination in Private Law in the European Union

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Overview: EU Anti-Discrimination Directives

1. Directive 2000/43/EC: Framework for combating discrimination on the grounds of **racial or ethnic origin**
2. Directive 2000/78/EC: Framework for combating discrimination on the grounds of **religion or belief, disability, age or sexual orientation as regards employment and occupation**
3. Directive 2004/113/EC: Framework for combating discrimination **based on sex in access to and supply of goods and services**
4. Directive 2006/54/EC: Equal opportunities and **equal treatment of men and women** in matters of **employment and occupation**

Initial Question: Do we need Directives on Anti-Discrimination?

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2016/C 202/2)

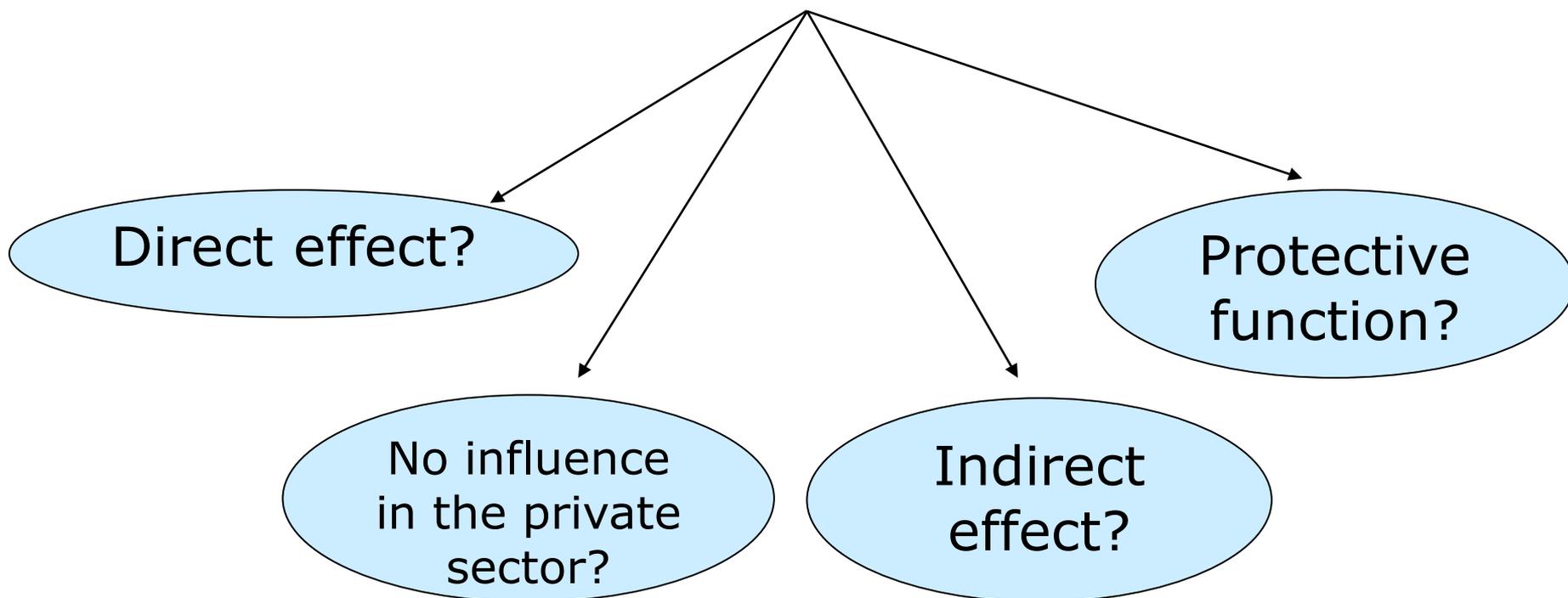
Article 21

Non-discrimination

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.



How do fundamental rights influence the validity of contracts concluded between private individuals?





ECJ, 6 November 2018, C-569/16 – *Bauer*

Direct effect of directives between a state and private individuals

- “1. In addition, where a person involved in legal proceedings is able to rely on a directive against a State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case, it is necessary to **prevent the State from taking advantage of its own failure** to comply with EU law.”
- “2. On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise **may be relied upon by individuals**, in particular against a Member State and all the organs of its administration, including decentralised authorities.”



ECJ, 17 April 2018, C-414/16 – *Egenberger*

Direct effect between **private individuals** in the future?

- “1. As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties **prohibiting discrimination** on various grounds, even where the discrimination derives from contracts between individuals.”
- “2. Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the **right to effective judicial protection** is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.”

(Confirmed by **ECJ, 6 November 2018, C-569/16 – *Bauer, par. 89***)

A note on terminology: Discrimination based on “racial origin”

Directive 2000/43/EC, recital 6:

“The EU rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories.”

Example of an implementation into national law: Germany

Germany transposed the four existing EU Anti-Discrimination Directives into national law by creating one single statute, the **General Equal Treatment Act (AGG)**, that entered into force on August 18, 2006.

This statute goes beyond the Directives insofar as religion, disability, age and sexual identity are included in the general rules whereas on the EU level they are only addressed with regard to employment contracts.



Scope of application

Section 19 (1) AGG

In any contract that is "*typically concluded in many cases under comparable conditions irrespective of the person concerned*" (so-called **bulk contracts**), as well as in **private insurance contracts** there must not be any distinction made based on the gender, racial or ethnic origin, religion, disability, age or sexual identity of the prospective contractual partner.

Direct and indirect discrimination

The Directives expressly prohibit both **direct** and **indirect discrimination**.

Indirect discrimination refers to “hidden” unequal treatment.

For instance, a spelling test – although valid for all applicants – may discriminate against foreigners because of their origin. As German is not their native tongue, they are more likely to fail the test.

Any such provision that cannot be proven to be **justified** by a legitimate aim is considered invalid.

Example 1: Housing

In the context of housing, an additional exception was incorporated into the statute:

Section 19(3) AGG

Unequal treatment concerning the access to housing is legal if it serves the purpose of establishing or maintaining socially stable housing structures and a balanced mixture concerning the economic, social and cultural composition of a neighbourhood.

Problem: This exception is not provided in Directive 2000/43/EC



Example 2: Private insurance contracts

ECJ Case C-236/09 “*Test-Achats*” (1 March 2011)

*“Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services **is invalid with effect from 21 December 2012.**”*

Article 5 of Council Directive 2004/113/EC Actuarial Factors

- (1) Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
- (2) Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. [...]***



Reasoning of the ECJ decision

- (1) The principle of equal treatment requires that **comparable situations** not be treated differently, and different situations not be treated equally, unless such treatment is objectively justified.
- (2) It is not disputed that the **purpose** of Directive 2004/113 in the insurance services sector is, as is reflected by Article 5(1) of that directive, the application of **unisex rules on premiums and benefits**.
- (3) Directive 2004/113 is based on the **assumption** that, for the purposes of applying the principle of equal treatment for men and women enshrined in Articles 21 and 23 of the EU-Charter, the **respective situations of men and women** with regard to insurance premiums and benefits contracted by them **are comparable**.
- (4) There is a **risk** that EU law may permit the **derogation** from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to **persist indefinitely**.
- (5) Such a provision [...] works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.



Legal consequences

- (1) The prohibition of the use of gender as a factor in the calculation of insurance premiums and benefits in relation to insurance contracts entered into after 21 December 2007.
- (2) National equal treatment acts, which justified an unequal treatment in this regard (e.g. Section 20[2], 1st sentence German AGG) had to be amended as of 21 December 2012.

Practical consequences

- (1) New calculation of insurance premiums, now based on unisex tariffs.
- (2) Other possibilities to calculate risk-related premiums that are not based on gender?

Example 3: Dismissals

General Equal Treatment Act (AGG)

Section 2 – Scope

- (...)
- (4) Only the provisions governing the protection against unlawful dismissal in general and specific cases shall apply to dismissals.



ECJ, 11 July 2006, C-13/05 - *Navas*; [2006] ECR I-6467

- “1. A person who has been dismissed by his employer solely on account of **sickness** does not fall within the general framework laid down for combating discrimination on grounds of disability by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.”

- “2. The prohibition, as regards dismissal, of discrimination on grounds of **disability** contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.”

Additional remark concerning the notion of disability:

The ECJ held that “[w]hile no general principle of EU law prohibits, in itself, discrimination on grounds of **obesity**, that condition falls within the concept of ‘disability’ where, under particular conditions, it hinders the full and effective participation of the person concerned in professional life on an equal basis with other workers ...”

“Such would be the case, in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.”

(See ECJ, 18 Dec 2014, C-354/13 - *Kaltoft*, available at <http://curia.europa.eu>)

Directive 2000/78/EC

Article 4 – Occupational requirements

(...)

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within **churches** and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a **genuine, legitimate and justified occupational requirement**, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.



Sanctions upon infringements

- Injunction
- Compensation for material damages
- Compensation for immaterial damages
- **Problem:** obligation to conclude the contract?

Articles 15 and 14 of the Directives merely state that sanctions must be “**effective, proportionate and dissuasive**” and may comprise payment of compensation to the victim.

Burden of proof: The claimant (alleged victim) only needs to provide *prima facie* evidence of a case of discrimination. The other party then has to prove that no discrimination has occurred.

Example 4: age requirements

On the **one hand**:

A **maximum age of 30** for an initial employment as a police officer (of the local police of Oviedo) is incompatible with the Directive 2000/78/EC.

Reasoning: The aim of ascertaining **physical fitness** is legitimate but it may be **achieved by other means**.

(See ECJ, 13 Nov 2014, C-416/13 - *Vital Pérez*, available at <http://curia.europa.eu>)



Example 4: age requirements

On the **other hand**:

A **maximum age of 35** for an initial employment as a police officer (of the autonomous community of the Basque Country) **is** compatible with the Directive 2000/78/EC if

- a) the officer does **not carry out administrative** duties, but performs **essentially operational duties**, and,
- b) a gradual replacement of older agents through the recruitment of younger staff is necessary, to be better equipped to take on physically demanding tasks.

(See ECJ, 15 Nov 2016, C-258/15 - *Salaberria Sorondo*, available at <http://curia.europa.eu>)



Case No. 1:

C works as a legal secretary since 2001. In 2002, she gives birth to a son who suffers from serious illnesses. Her son's condition requires particular care. After C returns from maternity leave, her former employer refuses to allow her the same flexible working conditions as those of her colleagues who are parents of non-disabled children.

Is this compatible with Directive 2000/78/EC?

(See ECJ, 17 July 2008, C-303/06 - *Coleman/Law*, available at <http://curia.europa.eu>)



Directive 2000/78/EC

Article 1:

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2:

1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1; (...).



Notes on Case No. 1

The ECJ held that the prohibition of direct discrimination laid down by the provisions is not only limited to people who are themselves disabled.

If an employer treats an employee who is not him-/herself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of the first employee is based on the disability of his/her child, whose care is provided primarily by that employee, then such treatment is **contrary to the prohibition of direct discrimination.**

Case No. 2:

The director of an undertaking specialised in the sale and installation of doors states publicly that his undertaking was looking to recruit fitters, but that it could not employ “immigrants” because its customers were reluctant to give them access to their private residences for the period of the works.

Is this compatible with Directive 2000/78/EC?

(See ECJ, 10 July 2008, C-54/07 - *Feryn*, available at <http://curia.europa.eu>)



Directive 2000/43/EC

Article 2:

(...)

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(...)

Notes on Case No. 2

The ECJ held that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes **direct discrimination** with respect to recruitment.

Such statements are likely to dissuade certain candidates from submitting applications and, accordingly, to hinder their access to the labour market.



Case No. 3:

An experienced German lawyer applies for a trainee position for recent graduates in an insurance company. His application formally complies with the job posting except for him being out of university for quite some time. He applies not with a view to recruitment and employment, but only to obtain the formal status of applicant with the sole purpose of claiming compensation for discrimination.

His application is dismissed – may he claim compensation for age discrimination?

(See ECJ, 28 July 2016, C-423/15 - *Kratzer*, available at <http://curia.europa.eu>)



Directive 2000/78/EC

Article 1:

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 3(1):

Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;



Notes on Case No. 3

The ECJ held that a person who does not seek to obtain a post but only the formal status of applicant with the sole purpose of claiming compensation does not fall within the definition of '**access to employment, to self-employment or to occupation**' (art 3(1)(a) Directive 2000/78/EC), and that doing so may very well be considered to be an **abuse of rights**.

A look into the future: Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

Main objective:

To combat discrimination based on religion or belief, disability, age or sexual orientation and to put into effect the principle of equal treatment, outside the field of employment.

Concept of discrimination:

The definition of the principle of equal treatment is based on that contained in the previous directives adopted under the former Article 13(1) EC (current Article 19 TFEU; as well as the relevant case law of the European Court of Justice).

Events:

Adoption by the Commission on 2 July 2008; Council discussions on 2 October 2008; European Parliament's opinion on 2 April 2009 (Official Journal C 137 E , 27/05/2010 P. 0068–0087); further Council discussions in 2009-2016.

Proposal available online at:

http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196



Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

Article 2

(...)

7. Notwithstanding paragraph 2, in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.

The proposal for the **Council Directive** seems to be stalling because unanimity in the Council is required and some Member States see the Commission's proposal as infringing on national competence for certain issues and as conflicting with the principles of subsidiarity and proportionality (see EU Document: ST 14284 2016 INIT).



National legislation: “pink quota”

- **Norway**: Amendment to the Public Limited Liability Companies Act in 2003, by which a quota for women on company boards was established (so called “pink quota”). By now the number of women on company boards has reached 40 % as required by law.
- Implementation of or at least debate about similar quota rules **in several EU countries** including Italy, France, Spain, the Netherlands and Sweden.
- The **German** legislator has introduced a 30 % quota for women – and men – on supervisory boards in big listed companies as from January 1, 2016. Supervisory board elections which do not meet this requirement are void.



Landmark decision of the ECJ:

Case C-157/15 – *Achbita*

The **question presented** may be simply put as:

“Is a **private employer permitted to prohibit a female employee** of Muslim faith **from wearing a headscarf** in the workplace? And is that employer permitted to dismiss her if she refuses to remove the headscarf at work?”
(Case C-157/15 *Achbita*, Opinion of AG Kokott, para 1)

Facts: Ms Achbita started **working as a receptionist** under an employment contract of indefinite duration. According to the employee code of conduct employees are **prohibited from wearing any visible signs** of their political, philosophical or **religious beliefs**. Ms Achbita first complied with the corporate policy but subsequently announced that, in future, she intended **to wear a headscarf during working hours**. On account of her firm intention to wear the Islamic headscarf, Ms Achbita **was dismissed**.

Ms Achbita brought an **action for damages** for wrongful dismissal, seeking in the alternative, damages for infringement of the Belgian Law to combat discrimination.



Referred Question: “Should Article 2(2)(a) of Council Directive 2000/78/EC [...] be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute **direct discrimination** where the employer’s rule prohibits **all employees** from wearing outward signs of political, philosophical and religious beliefs at the workplace?”

Article 2 of Council Directive 2000/78/EC:

(2)

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1; (...).



Judgement of the ECJ (14 March 2017):

- “1) The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work **does not constitute direct discrimination** based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, **constitute indirect discrimination based** on religion under Article 2(2)(b) of that directive.
- 2) Such discrimination may be **justified** in order to enforce a **policy of religious and ideological neutrality** pursued by the employer in the company concerned, in so far as the principle of **proportionality** is observed in that regard. [...]”

Thank you for your attention!