



## The EU's role in combating discrimination

**SUMMARY** *The right to equality of treatment is a universal right recognised by a number of international human-rights agreements, including the European Convention on Human Rights. In addition to the rights provided by the ECHR, discrimination against EU citizens is also prohibited by various provisions of EU equality law. This area has grown considerably over the past 50 years.*

*The Treaty of Rome offered protection only on grounds of nationality and gender, but the scope of EU equality legislation grew significantly in the period following the coming into force of the Treaty of Amsterdam. New treaty articles and a broader range of discriminatory grounds opened up the opportunity for broader scale directives.*

*The Commission's attempt to introduce a horizontal equal-treatment directive has, however, so far failed to secure unanimous Member State approval, despite the support of the European Parliament. Most commentators consider it unlikely that this proposal will be adopted any time soon. However, there is little consensus either in academic circles or amongst Member States as to how best protection of equal treatment can be further improved.*

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### Context

Equality and non-discrimination are essential elements of Member State (MS) legal systems, often founded in their constitutions. Most MS are party to a variety of international instruments which promote these principles, such as United Nations (UN) texts, as well as conventions and recommendations of the International Labour Organisation (ILO).<sup>1</sup>

In Europe, the Council of Europe (CoE) plays a particularly important role with the European Court of Human Rights (ECtHR) enforcing the provisions of the [European Convention on Human Rights](#) (ECHR).

Discrimination is prohibited in relation to the exercise of Convention rights under Article 14 ECHR. Protocol 12 to the ECHR extends the prohibition of discrimination to cover any right which is guaranteed at national level. However, the Protocol has so far only been ratified by six EU MS.

In the EU, anti-discrimination protection is mainly implemented through national legislation. There is a growing body of EU directives, and some MS provide protection that goes beyond these standards. However in a 2009 [survey](#), European citizens considered discrimination to be widespread in four of the six grounds legally prohibited by the EU. Therefore, the goal of achieving



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comprehensive anti-discrimination legislation remains some distance away.

## The first steps – nationality and gender provisions

### *Treaty provisions*

The first Community anti-discrimination provisions, relating to nationality<sup>2</sup> and gender date back to the Treaty of Rome 1957. Articles 6 and 119 ECT (now articles 18 and 157 TFEU) were motivated by economic concerns: ensuring free movement of labour and goods, and avoiding unfair competition in the labour market.

Because only this limited range of equality measures was established in primary legislation, the Court of Justice (ECJ) played a crucial role in developing EU anti-discrimination law during the Community's formative years.

In 1976, in the landmark case of [Defrenne No. 2](#)<sup>3</sup> the Court held that an airline paying a female stewardess less than her male colleague was guilty of gender discrimination under the provisions of Article 119 ECT. The ruling was particularly significant as it established the horizontal direct effect of this Article, i.e. that it was enforceable in a national court not only by an individual against a government but between private parties.

More generally the ECJ interpreted the provision broadly, covering discrimination arising from legislative provisions, collective labour agreements, and where work is carried out in the same service or establishment, whether it be public or private.

### *Secondary legislation*

The [Equal Pay Directive](#) of 1975 was the first piece of secondary legislation in the anti-discrimination field. The Directive bans discrimination on grounds of sex with regard to all aspects and conditions of remuneration (Article 1). The Directive's scope is wider than that of Article 119 ECT, as it extends the principle of equal pay to

work of equal value. It thus addresses the problem of occupational segregation.

### **Equality, a general principle of EU law**

Although the original treaties did not contain any reference to the protection of human rights, cases soon began to appear before the ECJ alleging human rights breaches caused by Community law.

In order to effectively address these cases the ECJ developed a body of judge-made law known as the "general principles" of Community Law. They reflect principles common to all national legal systems, principles specific to one or more systems as well those found in international human rights conventions, in particular the ECHR. The ECJ stated that it would ensure the compliance of Community law with these principles.

The Court has held that **equality** is one of these general principles. It has stated that the prohibition of discrimination on grounds of nationality, sex and, more recently age, all derive from this. However, the scope of this principle is contentious.

Along with several other directives concerning equal treatment of women and men, the Equal Pay Directive was incorporated in Directive [2006/54/EC](#) (the recast Gender Directive). The objective of the latter is to clarify and simplify EU legislation on gender equality by updating the relevant acts and collating them in a single document.

Furthermore, the 2004 [Sex Equality Directive](#) (also referred to as the Gender Goods and Services Directive) implements the principle of equal treatment between men and women in access to and supply of goods and services.

## Widening the scope

Despite the ECJ's efforts, EU anti-discrimination law, and the scope of the general principle of equality, remained limited until the [Treaty of Amsterdam](#). Through this new Treaty, which came into

force in 1999, the general principle of gender equality became an objective and a fundamental EU principle (Article 2 TEU).

Furthermore, amendments to Articles 137 and 141 (now Articles 153 and 157 TFEU) opened the path to Community action in the area of equal treatment in matters of employment and occupation: a much broader sphere than equal pay. Moreover, the Amsterdam Treaty widened the scope of the original provision on equal pay to correspond to the Equal Pay Directive: men and women should be paid equally not only for equal work, but also for work of equal value.

The new article 13 TEC (now Article 19 TFEU) dealt with discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It does not in itself prohibit discrimination, and it has no direct effect. This means that individuals cannot directly rely on it in proceedings before national courts.

However, Article 13 ECT empowered the EU to adopt anti-discrimination legislation on the grounds listed above.

### **Race and employment directives**

Two landmark anti-discrimination directives were adopted on the basis of Article 13 ECT in 2000:

- [Racial Equality Directive](#) implementing the principle of equal treatment irrespective of racial or ethnic origin. The introduction of the Racial Equality Directive in 2000 extended the prohibition of discrimination outside employment to include access to goods and services, and access to state welfare systems. It was considered necessary to ensure equality in these other areas, which can have an impact on employment, in order to guarantee equality in the workplace. The directive prohibited discrimination not only in the context of employment, but also in accessing the welfare system and social security, and goods and services.
- [Framework Employment Directive \(Employment Equality Directive\)](#) prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation.

There is a notable difference in the scope of application of the two directives. The Racial Equality Directive has a very broad scope as it obliges MS to adopt relevant anti-discrimination legislation in the areas of:

- social protection (including social security and healthcare);
- education; and
- access to and supply of goods and services available to the public (including housing).

The Framework Employment Directive, on the other hand, is restricted to employment, occupation and vocational training.

The question arises as to whether this difference in the scope of protection ("hierarchy of grounds") is legitimate and consistent with international human rights law. The Race Equality Directive and the [Sex Equality Directive](#) (2004) require MS to maintain an equality body. However, there is a general tendency among MS to address this hierarchy of grounds by creating a single equality body to deal with all grounds of discrimination.

### **General principles**

One limitation of a directive in comparison to a regulation is that it does not have horizontal direct effect. This means individuals cannot rely on it in an action against another individual (as opposed to against the state or a state body) prior to its transposition into national legislation.

However, the ECJ has found a way around this problem through the use of the general principle of equality. In the 2005 [Mangold ruling](#), the ECJ noted that the Framework Directive itself does not set out the principle of equal treatment on the grounds of age, instead the source arises from the general principle of equality. It ruled that even if the directive was not capable of horizontal

direct effect, the general principle was. This ruling was then supported in [Kücükdeveci](#).<sup>4</sup>

These judgments are controversial and have been criticised by academics, and also by Advocates General in more recent cases.<sup>5</sup> It has been questioned whether this ruling jeopardises legal certainty and the hierarchy of norms. It is also unclear whether the Mangold ruling is limited just to discrimination on the grounds of age or whether it extends to other grounds.

One Advocate General argued that the general principle should only be applied independently in situations where there is no applicable directive.<sup>6</sup>

### Towards a horizontal directive?

In 2008, the European Commission [proposed](#) a "horizontal" directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The proposed directive aimed at protecting, promoting and fulfilling fundamental rights in line with the Charter, would extend comprehensive protection against discrimination on several grounds. It thus seeks to remedy the problem of the existing "hierarchy of grounds", by increasing protection from discrimination on the above grounds to the same level as that currently applicable in relation to discrimination on grounds of sex and race.

**Figure 1. Anti-discrimination coverage in EU legislation**

		Grounds of Discrimination					
		Age	Disability	Religion or Belief	Sexual Orientation	Sex	Race, Ethnic Origin
Fields covered by EU legislation	Education	NO	NO	NO	NO	NO	YES
	Social Protection	NO	NO	NO	NO	PARTLY COVERED	YES
	Social Advantages	NO	NO	NO	NO	PARTLY COVERED	YES
	Access to Goods and Services available to the Public, including Housing	NO	NO	NO	NO	YES	YES
	Employment and Vocational Training	YES	YES	YES	YES	YES	YES

Source: [Social Platform, 2012](#)

The prohibition would be extended to the following areas:

- Social protection, including healthcare;
- Education;
- Access to and supply of goods and services available to the public, including housing.

The prohibition of discrimination would apply only within the limits of EU competence. As an additional reassurance to MS, the directive contains several clarifications. According to Article 3, the directive would not affect:

- National laws on marital or family status and reproductive rights;
- National responsibilities for the content of teaching activities and the organisation of educational systems; or
- National legislation concerning the status of churches or other religious organisations.

The European Parliament adopted its opinion on the proposal in April 2009 under the consultation procedure. However, following the entry into force of the Lisbon Treaty, the proposal falls under Article 19 TFEU which requires the EP's consent in addition to unanimity in the Council.

Following a March 2009 [report](#) by the LIBE committee, the ensuing plenary debate established that there were significant differences between MEPs and political groups. Some expressed support for the proposal

and called for higher standards of protection. However, others voiced concerns that the proposal would involve excessive administrative costs. It was also argued that the new provisions would affect religious freedom and undermine the activities of churches, religious organisations and faith schools.

In the resolution adopted in plenary, the EP made a number of specific proposals:

- A specific provision outlawing "multiple discrimination";<sup>7</sup>
- Prohibiting discrimination based on assumptions about a person's religion, beliefs, disability, age or sexual orientation;
- Forbidding discrimination against a person associated with those having a particular religion, beliefs, disability, age or sexual orientation.

Although the proposal was initially supported in principle by a large majority of MS, some questioned the need for additional legislation at that time. Concerns were expressed as to the proposed directive's practical and economic impact as well as issues regarding subsidiarity and proportionality. In particular certain provisions were seen by some to infringe on national competence.<sup>8</sup> As a consequence the proposal has been blocked at the first reading stage in Council for several years.

A LIBE committee [hearing](#) on "Unblocking the Anti-Discrimination Directive" took place on 20 March 2012, at which a number of NGOs were invited to express their opinions on how best to resolve the issue.

## The current position

### *Legal perspective*

In addition to EU equality directives, the principle of equality and the prohibition of discrimination today have an extensive legal

basis in the Treaties (e.g. Articles 2 and 3 [TEU](#), and Article 10 [TFEU](#)).

Those treaty provisions are complemented by the [Charter of Fundamental Rights of the EU](#) which – under the Lisbon Treaty – has the same legal value as the Treaties. As a result, the institutions of the EU are bound

to comply with it. The MS are also bound to comply with the Charter, but only when implementing EU law.

Article 21 of the Charter contains a prohibition on discrimination on various grounds. *Inter alia* the Charter was the first international human-rights charter to explicitly prohibit discrimination on the grounds of "sexual orientation" (Article 21(1)).

The **Lisbon Treaty** further reinforces the principle of gender equality, in Articles 2 and 3 TEU, placing it among the values and objectives of the EU.

### *Political perspective*

Many commentators argue that the proposed horizontal equal treatment directive is unlikely to be adopted in the near future. In terms of the future development of EU equality law, three different trends have been identified from negotiations on the Commission proposal.

It is argued, based on amendments submitted to the Commission proposal, that some MS desire to step back from the scope of previous directives, particularly the Racial Equality Directive, and either adopt something more modest or nothing at all.

A second approach, preferred by some other MS and reflected in the Commission's text, is

### What constitutes discrimination in the EU?

Each non-discrimination directive requires that MS introduce measures to combat discrimination, both direct and indirect.

**Direct discrimination** occurs when an individual is treated less favourably than another person is, has been or would be treated in a comparable situation because of a particular characteristic this individual possesses.

**Indirect discrimination** occurs when an apparently neutral provision, criterion or practice would put persons having some specific characteristic at a particular disadvantage compared with other persons.

In addition, the non-discrimination directives all state that an "instruction to discriminate" is deemed to constitute discrimination. The prohibition of discrimination applies only within the limits of EU competence.

to continue on the path set by previous equality directives rather than adopt a more proactive approach. The failure of the proposal to address the issue of "multiple discrimination", where two grounds of discrimination may intersect in the same case, has been cited as an example of a different approach.

A third trend reflects a desire to adopt a more ambitious approach specifically to disability discrimination. It is argued that with many MS having already ratified the United Nations [Convention on the Rights of Persons with Disabilities](#) and others expected to, each will have to take action to review their respective legislation. An EU directive in this context could therefore be welcomed.<sup>9</sup>

## Main references

[Handbook on European non-discrimination law](#) / The European Court of Human Rights and the EU Agency for Fundamental Rights, 2011.

[Handbook on European non-discrimination law: Case-law update July 2010-December 2011](#) / ECtHR and FRA, 2011.

[Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive](#) / L Waddington, E.L. Rev. 2011, 36(2), 163-184.

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## Endnotes

<sup>1</sup> The UN Charter, which referred to sex equality, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child. The ILO Conventions and Recommendations– including the Equal Remuneration Convention No 100 – have long influenced relevant EU legislation. Moreover, ECJ case law has referred to them.

<sup>2</sup> Discrimination on the grounds of nationality is expressly excluded from the scope of the current range of EU anti-discrimination directives. It is instead protected under the Free Movement Directive.

<sup>3</sup> *Defrenne v Sabena (No 2)* (C-43/75).

<sup>4</sup> Criticising the horizontal direct effect of the EU general principle of equality / T Papadopoulos, *European Human Rights Law Review*, 2011. Westlaw.

<sup>5</sup> Op. cit. See also [The Küçükdeveci Judgment: A Horizontal Direct Effect for Directives?](#) / V Krzeminski, July 2010.

<sup>6</sup> Opinion of Advocate General Colomer in *Othmar Michaler* (C-55/07 and C-56-07).

<sup>7</sup> [Speech by Ioannis N. Dimitrakopoulos, EU Fundamental Rights Agency, 20 March 2012.](#)

<sup>8</sup> [The Council's progress report](#), November 2011.

<sup>9</sup> [Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive](#) / L Waddington, E.L. Rev. 2011, 36(2), 163-184.