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# Discrimination on grounds of race and ethnicity and its relevance to nationality

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## Fighting racial discrimination

- ▶ Multiple international legal instruments
  - Universal Declaration of Human Rights
  - International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
  - International Covenant on Civil and Political Rights (ICCPR)
  - European Convention on Human Rights (ECHR)
  - European Social Charter (initial and revised)

## Fighting racial discrimination

### ▶ EU law

- Art. 21(1) CFREU: «*Any discrimination based on any ground such as [...] **race**, colour, **ethnic** or social **origin**, genetic features, language, religion [...] membership of a national minority, [...] birth [...] shall be prohibited*».
- Art. 19(1) TFEU (ex Art. 13 TEC): «*Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council [...] may take appropriate action to combat discrimination based on sex, **racial or ethnic origin**, religion or belief, disability, age or sexual orientation*».

## Directive 2000/43/EC

- Discrimination on grounds of **racial or ethnic origin**
- Aim (12<sup>th</sup> Recital to the Preamble):
  - the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin
- Covers a) direct discrimination, b) indirect discrimination, c) harassment, d) instruction to discriminate, e) victimisation
- Broad scope
- Limited exceptions to the prohibition of direct discrimination

## Directive 2000/43/EC

- Broad scope/ Purposive interpretation
  - Applies 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 and to occupation;
    - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
    - (c) employment and working conditions, including dismissals and pay;
    - (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession

## Directive 2000/43/EC

- Broad scope/ Purposive interpretation
  - (e) **social protection, including social security and healthcare;**
  - (f) **social advantages;**
    - Also compare free movement of workers
  - (g) **education;**
    - Includes scholarships (Opinion, AG Sharpston, *Maniero*, C-457/17, 11.9.2018)
  - (h) access to and supply of **goods and services which are available to the public, including housing.**
    - CJEU, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291

## Directive 2000/43/EC

- Limited exceptions to the prohibition of direct discrimination
  - Art. 4: Genuine and determining occupational requirements
  - Art. 5: Positive action
  - Art. 3(2): *“This Directive does not cover difference of treatment based on **nationality** and is without prejudice to provisions and conditions relating to the entry into and residence of **third-country nationals and stateless persons** on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned”.*
    - Member states citizens => Art. 18 TFEU

## Directive 2000/43/EC

- Racial origin
  - = *“the notion of race is rooted in the idea of **biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics**”.*
    - ECHR, *Timishev v. Russia*, (55762/00 and 55974/00), 13.12.2005, para. 55
    - Recital No. 6 to the Preamble of the Directive 2000/43: *“The European Union 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.”*

## Directive 2000/43/EC

- National origin
  - = “*has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds*”
  - CJEU, *CHEZ Razpredelenie Bulgaria*, C-83/14, para. 46 (e.g. Roma community)
    - Clarified the difference between direct and indirect discrimination
    - Further developed the notion of “discrimination by association”

## Nationality and discrimination on grounds of racial or ethnic origin

- Directive 2000/43, Art. 3(2): “*This Directive does not cover difference of treatment based on nationality*” => third-country nationals
- CJEU, *Kamberaj*, C-571/10, 24.4.2012
  - Less favourable treatment of **of third-country nationals who are long-term residents** από εκείνη που προβλέπεται για τους πολίτες της Ένωσης, concerning housing benefit for low income tenants
  - => Directive 2000/43 **does not cover difference of treatment based on nationality**

## Nationality and discrimination on grounds of racial or ethnic origin

- CJEU, *Feryn*, C-54/07, 10.7.2008
  - Public statements of the employer that it could not employ “immigrants” (or “Moroccans”, in the AG’s Opinion) because its customers do not want them
  - Direct discrimination on grounds of ethnic origin => such statement is clearly likely to strongly dissuade certain candidates from submitting their candidature
  - The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim

## Nationality and discrimination on grounds of racial or ethnic origin

- CJEU, *Jyske Finans*, C-668/15, 6.4.2017
  - Danish citizen, born in Bosnia and Herzegovina
  - The bank required additional proof of his identity, due to an internal procedure applicable only to people born in a country other than the EU and EFTA member states
  - CJEU:
    - A person’s country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group.
    - That requirement is applicable without distinction to all persons born outside the territory of a Member State of the European Union or the EFTA.
    - Neither direct nor indirect discrimination
      - Compare however ECtHR, *Biao v. Denmark* [GC], 38590/10, 24.5.2016.

## Nationality and discrimination on grounds of racial or ethnic origin

- OLG Frankfurt am Main, 25.09.2018 – 16 U 209/17
  - Kuwait Airways cancelled the booking of an Israeli citizen, because Kuwait (location of the stopover airport) prohibits transactions with Israeli citizens
  - Indirect discrimination on grounds of ethnic origin
  - Justified due to the airline's legal inability to carry the passenger on its stopover flight
- President Trump's executive orders and Proclamation suspending entry for citizens of certain countries in the USA ("Muslim bans")
  - Upheld by the US Supreme Court

Thank you for your  
attention



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