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Non-discrimination on grounds of race and ethnic origin

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International Law

- **INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965)**
 - *Article I*
 - 1. In this Convention, the term "racial discrimination" shall mean **any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.**
 - 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
 - 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
- **Committee on the Elimination of Racial Discrimination**
 - <https://www.ohchr.org/en/treaty-bodies/cerd>

Racism - criminal sanctions

- UN Convention on the Elimination of All Forms of Racial Discrimination 1965
 - Propaganda, incitement to racial hatred or discrimination, acts of violence or incitement to commit such acts against any race or group of individuals, aiding racist activities
- Council Framework Decision 2008/913
 - all EU Member States are obliged to provide for criminal sanctions for inciting violence or hatred against a person or a group of persons on grounds of race, colour, descent, religion or belief, national or ethnic origin, for dissemination of racist and xenophobic material, and for condoning, denying or trivialising crimes of genocide, war crimes and crimes against humanity directed against such groups of persons
 - Member States are also required to consider racist and xenophobic intentions an aggravating circumstance
- Code of Conduct on Countering Online Hate Speech
 - https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_it

EUROPEAN STANDARDS

- COUNCIL OF EUROPE
 - European Convention on Human Rights and Fundamental Freedoms
 - European Social Charter

- EUROPEAN UNION
 - Treaties
 - Derived standards

EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOM

- **ART. 14: Prohibition of discrimination**

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.

**PROTOCOL NO. 12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS**

Rome, 4.XI.2000

- Article 1 - General prohibition of discrimination
 - 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 any other status.
 - 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Bodies

- European Court on Human Rights
 - c.d ECHR
 - <https://www.echr.coe.int/>
 - <https://www.echr.coe.int/factsheets>
- **European Commission against Racism and Intolerance (ECRI)**
 - <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance>

Racism - criminal sanctions

- Court of Human Rights
 - Various sentences on both hate crimes and hate speech
 - Convicted persons often challenge the violation of the freedom of thought in Art. 10
 - Interesting judgements also on social network managers/digital platform managers
 - See EDU Court Factsheet
- OSCE
 - <https://hatecrime.osce.org/>

Article 19 TFEU

Legal basis for the adoption of measures to combat discrimination based on:

- sex
- race or ethnic origin
- religion or belief
- disability
- age
- sexual orientation

EU Charter of Fundamental Rights

- Article 20 **Equality before the law**
- 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
 - 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
- Article 22 **Cultural, religious and linguistic diversity**
- Art. 23 **Equality between women and men**
- Art. 24 **Rights of the child**
- Art. 25 **Rights of the elderly**
- Art. 26 **Integration of persons with disabilities**

Implementation of Article 19 TFEU

- Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
(Dir. 2000/43/EC)

Material scope of application

- Directive 2000/43

- Employment

- Access to work
 - Vocational guidance and training
 - Employment and working conditions
 - Membership of workers' or employers' organisations

- Education

- Also access to education, including scholarships, also provided by private entities Case Maniero C-457/17 of 15 November 2018

- Social protection, including social security and health care

- Social benefits

- Access to the provision of goods and services, including accommodation

- Also private accommodation if publicly offered

Personal scope

It applies to all persons:

- **Natural**
- **Legal**
- **Public and private sector**

Personal scope

- Directive 2000/43
 - Does not apply to the prohibition of discrimination on grounds of nationality
 - Does not affect the provisions on entry and residence of third-country nationals and stateless persons
 - Does not affect the treatment resulting from the legal status of the third-country nationals and stateless persons concerned
 - Indirect discrimination?
 - Finans C-668/15 of 6 April 2017

Nationality/race/ethnic origin

- Different terminology in international instruments (CERD, ECHR and EU) and implementing legislation
- Understood in an inclusive sense by case law
 - Feryn case on 'foreigners' and Italian cases on 'illegal' 'asylum seekers'
- Race
 - Physical characteristics
- Ethnic origin
 - Social groups characterised by a commonality of nationality, religious faith, language, cultural and traditional origin and living environment
- Application also to those who do not belong to the discriminated group but suffer the consequences of the discriminatory behaviour
 - *Chez* case
 - the applicant, Ms Nikolova, lives in a highly concentrated neighbourhood and shares the resulting inconveniences; if she did not qualify as a Roma, the directive would still apply
- Attention: in EU law nationality is understood only as citizenship; different, more favourable regime for EU citizens

Definitions

- Direct discrimination
- Indirect discrimination
- Harassment
- Instruction to discriminate
- Victimisation

Feryn Case 2008

- Employer publishes a job advertisement stating that it will not hire foreign workers
- Feryn sells and installs overhead and sectional doors; it has experienced a reluctance on the part of its customers to have doors installed by foreigners
- "I have to meet the needs of my customers. If she says, 'I want that product this way or that way', and I say, 'I don't, I still get those people to come', then she will say, 'I don't want that door anymore'. So I will have to close shop. We have to meet the needs of our customers. This is not my problem, I did not create this problem in Belgium. I just want the company to move forward and at the end of the year we reach our turnover, and how do I reach it?...I have to reach it the way the customer wants!"

Feryn 2018

- The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, since such statements are likely to strongly dissuade certain candidates from applying for employment and thus hinder their access to the labour market.
- The existence of such direct discrimination does not presuppose an identifiable complainant claiming to have been the victim of such discrimination.
- Public statements by which an employer makes it known that, as part of its recruitment policy, it will not recruit employees of a certain ethnic or racial origin are sufficient to give rise to a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43.
- It is therefore incumbent on that employer to prove that there was no breach of the principle of equal treatment. It may do so by showing that the actual recruitment practice on the part of the undertaking does not correspond to those statements. It is for the referring court to verify that the facts alleged are established and to assess whether the evidence adduced in support of that employer's assertions that it did not breach the principle of equal treatment is sufficient.

Case Chez 2015

- Discrimination on the basis of ethnic origin' also exists where the contested measure affects persons who have a certain ethnic origin or those who, without having that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure
- The harm need not relate to rights or legitimate interests
- Direct discrimination if based on racial or ethnic origin, a fact to be established by the court on the basis of the procedural means provided for by the Directive, including reversal of the burden of proof under Article 8
- 'Particular disadvantage', within the meaning of that same provision, does not designate relevant, obvious or serious cases of inequality, but means that it is in particular persons of a certain racial or ethnic origin who are disadvantaged because of the provision, criterion or practice in question

Chez 2015

- Objective justification
 - Ensuring the security of the electricity transmission network and the proper recording of electricity consumption only on condition that such a measure does not exceed the limits of what is appropriate and necessary to achieve those legitimate aims, and that the inconvenience caused is not disproportionate to the aims thus pursued
 - Excluded if there are other appropriate and less restrictive means to achieve these ends
 - Or if the measure is in any case disproportionate

More than difficult to prove...

- Harassment
 - Unwanted conduct related to the grounds listed with the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive climate
- Instruction to discriminate

Exceptions

- Genuine and determining occupational requirements
- Positive Actions

Defence of rights

- Right to legal protection against discrimination administrative/judicial procedures
- Right of action by associations, organisations on behalf of or in support of the victim and with his/her consent
- Referral to national legislation for the identification of such organisations

Collective actors

- Essential role
 - For example, associations and trade unions
 - Rather broad legal standing in Italy
- Damages also by collective action

Equality bodies

- Article 13 Dir. 2000/43/EC
 - Bodies for the promotion of equal treatment irrespective of racial and ethnic origin
 - Independent assistance to victims of discrimination
 - Independent investigations
 - Independent reports and recommendations
- New Directive 2024/1500 of 14 May 2024 on the rules concerning equality bodies in the field of equal treatment and equal opportunities of women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU