Discrimination on the grounds of race or ethnic origin

Dr. Sara Benedí Lahuerta

University College Dublin

Sara.benedilahuerta@ucd.ie

**APPLYING EU
ANTI-DISCRIMINATION LAW**
ERA Seminar

Madrid, 24-25 September 2024

Centre for Legal Studies

**Funded by
the European Union**

1

1

Scheme

- Summary of EU legal instruments
- **The Racial Equality Directive:**
  - ✓ Personal and material scope
  - ✓ Focus on 3 key aspects:
    1. The concept of "racial or ethnic origin".
    2. The nationality exception
    3. The overlap between "ethnicity" and "religion".
  - ✓ Example(s) of direct discrimination
  - ✓ Examples of indirect discrimination

2

2

Summary of EU legal instruments (1)

PRIMARY LAW:

• **Charter of Fundamental Rights (CFR), Art. 21:**

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.

• **Art. 10 TFEU - mainstreaming** obligation:

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.

• **Art. 19(1) TFEU - legal basis**

3

3

Summary of EU legal instruments (2)

Importance of Art. 21 CFR:

• The CFR only applies within the limits of EU competence (Art. 51.1-2).

• **BUT:** when developing national legislation, MS must respect the level of protection provided by the CFR and the principles of primacy, unity and effectiveness of EU law (*Melloni*, para. 60).

• In a religious discrimination case (***Egenberger***), the CJEU confirmed that:
  • The binding effect of Art. 21.1 CFR is "similar" to that of other primary provisions.
  • Art. 21 CFR "is sufficient in itself to confer on individuals a right which they may invoke as such in litigation against them" (paras. 76-77).

Individuals can invoke Art 21.1 CFR before national courts to enforce their rights in:
-Horizontal claims
-Vertical claims (vs. public authorities)

4

Overview of EU legal instruments (3)
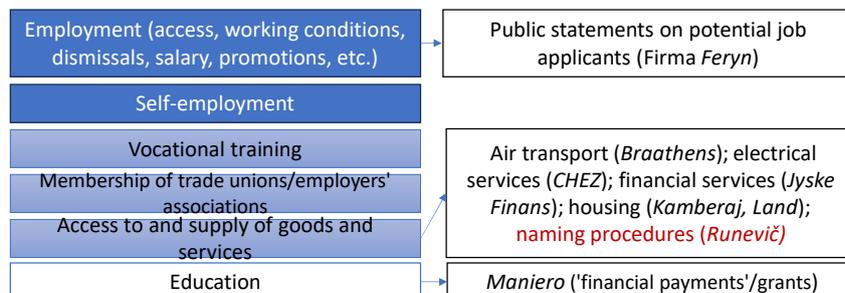
SECONDARY LEGISLATION:

- **Racial Equality Directive** (2000/43/EC, "RED")

- **Framework Decision against racism and xenophobia** (2008/913/JHA)

- **Proposal under Art. 83.1 TFEU:**

    → Legal basis for "extending the EU list of crimes to all forms of hate crime and incitement to hatred, whether based on race, religion, gender or sexuality".

    →Like "EU response to extremist ideologies online and, more specifically, to the proliferation of racist and xenophobic hate speech on the Internet".
    (Von der Leyen, Speech to the Union, 16/09/2020)

5

The RED: personal and material scope

- Personal scope: "**all persons**, both in the public and private sector, including public bodies" (Art. 3.1).
    - ✓Applies to legal persons (Rec. 16; Opinion AG in *CHEZ*, para. 65)
    - ✓Applies to EU and third country nationals (Rec. 13)
    - ✓**BUT: nationality** exception
- Material scope:

Employment (access, working conditions, dismissals, salary, promotions, etc.)	Public statements on potential job applicants (Firma *Feryn*)
Self-employment	
Vocational training	Air transport (*Braathens*); electrical services (*CHEZ*); financial services (*Jyske Finans*); housing (*Kamberaj, Land*); naming procedures (*Runevič)*
Membership of trade unions/employers' associations	
Access to and supply of goods and services	
Education	*Maniero* ('financial payments'/grants)

6

1. Concept of "racial or ethnic origin".

The RED:

-It applies to "discrimination on grounds of racial or ethnic origin" (Art. 1).

-It does not imply acceptance of racist/xenophobic theories (Rec. 6).

BUT does not include a definition of "racial or ethnic origin".

⌐ Rec. 3: reference to **international conventions**, including:

• International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
• European Convention on Human Rights (ECHR)

⌐ Concept interpreted in several judgments of the CJEU:

Chez		*Firma Feryn*	*Land*
Jyske Finans	✚	*Kamberaj*	

Case C-83/14, *CHEZ* (2015)

Source: https://urban-energy.org/2013/09/10/the-rise-of-the-networked-ghetto/

• Nikolova: runs shop in neighbourhood inhabited mainly by Roma

• Not Roma

• Electric meters at 6-7 metres

• Nikolova: such a practice due to the fact that **considers a 'Roma district**

• **CJEU:**

> discrimination based on a person's **ethnic origin** constitutes a form of **racial discrimination**" (para 73, ref Art. 1 ICERD).

> **Ethnicity** "is rooted in the idea of social groups characterised, in particular, by nationality, religious faith, language and common cultural and traditional origins and backgrounds".
>
> (para 46, refs *Nachova (ECtHR)* and *Sejdić (ECtHR)*)

Case C-668/15, *Jyske Finans* (2017)

- Bosnian national who acquired Danish citizenship
- Passport required for loan (car)
- For EU/EFTA citizens only: driving licence

- **CJEU:**

→Country of birth can be a valid ethnic marker (for 17-18)
→**BUT:** "[e]thnicity cannot be determined on the basis of a single criterion [...] it is based on a whole range of factors, *some objective and some subjective*" (para 19).
→ **AND:** "country of birth cannot, in general and absolute terms, replace all the criteria set out in [the *CHEZ* definition of ethnicity]". (para 19)

9

Concept of 'ethnicity' according to CHEZ + *Jyske Finans*

1. Ethnicity → **combination** of factors (*CHEZ + Jyske*)

2. *CHEZ* Ethnic Criteria: NOT a closed list

   → **Other possible factors:**

   - Colour, ethnic or social origin, genetic characteristics or membership of a national minority (Art. 21 CFR).
   - Offspring (Framework Decision, Arts. 1(1), (3))

3. *Objective* **and** *subjective* factors can be taken into account (*Jyske*).

4. **BUT** it is unlikely that self-identification will be accepted as the **sole** criterion for determining membership of an ethnic group.

10

2. Nationality derogation

Art. 3(2) RED: "This Directive does not cover difference of treatment based on nationality. It is without prejudice to the provisions and conditions governing the entry into and residence of third-country nationals and stateless persons in the territory of the Member States and to _any treatment_ arising from the legal status of the third-country nationals and stateless persons concerned".

Rec. 13 RED: The prohibition of discrimination "also applies to third-country nationals, BUT does not relate to differences of treatment based on nationality AND is without prejudice to the provisions governing the entry and residence of third-country nationals and their access to employment and occupation".

→How to interpret these parts of the RED? "TJUE:

Firma Feryn	v.	_Kamberaj_	_Jyske Finans_	_Land_

Case C-54/07, _Firma Feryn_ (2008)

I am not willing to hire **Moroccans**!

- The CJEU did not define "racial or ethnic origin".
- **BUT:** implicitly accepted that the RED could apply to such a declaration on the **nationality** of future employees.
- The issue of nationality is not addressed
- CJEU concludes: declaration amounts to **direct discrimination**

Kamberaj (2012) + *Land Oberösterreich* (2021)

In both cases:
Long-term residents → denial of housing benefits in countries of residence

Kamberaj	*Land Oberösterreich*
• Country of residence: Italy	• Country of residence : Austria
• Application for renewal of housing benefit already received for 10 years	• To qualify for the benefit, non-EU citizens were required to submit a **form** → to **prove "basic proficiency in German"**.
• Similar admissibility criteria for EU and non-EU nationals	• Exemption from the requirement for EU/EEA nationals and their family members (German-speaking or not).
• Application rejected because **the "funds *for third country nationals*"** (paras 31-33) **have been exhausted**.	

CJEU: Differential treatment arose from its legal status as a third county national (TCN)
óExcepción of nationality (Art. 3.2) → **RED NOT APPLICABLE**

13

13

2. The nationality exception (cont'd)

Critique of the case law of the CJEU:
- *Firma Feryn* v. *Kamberaj-Jyske-Land* show the uneasy relationship between the concepts of "nationality", "national origin" and "ethnicity".
- *Firma Feryn* → progressive approach →nationality = ethnicity
  - Probably understood as **ethnic/cultural background**
- *Kamberaj-Jyske-Land* → formalist approach:
  - Ignore the overlaps between these concepts
  - Ignores that "foreignness" is often a proxy for racial or ethnic origin
- The CJEU seems more inclined to adopt such formalistic approaches when:
  - The claimant is of **migrant** or TCN **origin**
  - Treatment justified by **citizenship/legal status** (non-EU, even if long-term resident)
- The CJEU seems to ignore its own case law:

  Exceptions to the principle of equal treatment must be interpreted restrictively.

14

14

2. The nationality exception (cont'd)

PROBLEM:

In practice, it is not always easy to differentiate between

- origen ethnic/cultural and

- citizenship/legal-status:

> *Example:*
> ✓ An Egyptian man moves to an MS to study.
> ✓ Apply for a position in a consultancy firm in that MS.
> ✓ The application is rejected because "he does not *have the nationality*".
>
> ↳ Would the real reason for the rejection be related to:
> – Ethnic/cultural background (= *Feryn Signature*)
> – Visa requirement → legal status (= *Kamberaj/Land*)?

3. Religion as part of "ethnicity"?

• Sometimes: blurred line between ethnic and religious discrimination

• Obvious example: Islamic headscarf cases

• Anti-Muslim prejudice as a form of **cultural racism**
  [Modood (2005); Bamforth et al (2008); Bell (2009); Farkas (2017)].

• The concept of **"ethnicity"** also refers to:
  "religious faith" and "cultural background

Creative Commons ©
Spain

3. Religion as part of "ethnicity"?

Overlap recognised in various instruments:

• ECRI General Policy Recommendation 7:

Racial discrimination is defined as "differential treatment on the basis of race or colour".

race, colour, language, **religion**, etc.".

• Framework Decision 2008/913/JHA against **racism** and xenophobia:

Art 1(1) - Applies to conduct directed at:

persons or members of a group defined in relation to race, colour, **religion**, descent, or national or ethnic origin".

Art 1(3) - applies to religion, *at least*, when religion is used as a pretext for incitement to violence etc. (**covert racism**)

• ECtHR refers to "religious faith" as **an element of ethnicity**

(*Nachova*; *Sejdić*; *Timishev*, Appl. Nos. 55762/00 & 55974/00)

---

3. Religion as part of "ethnicity"?

• **CJEU approach in *CHEZ* → 'Ethnicity'** defined by reference to

social groups characterised in particular by a common nationality, **religious denomination**, language and cultural and traditional origins".

(*CHEZ*, para 46, refs *Nachova* (ECtHR) and *Sejdić* (ECtHR)).

• Given the **narrower scope of the Employment Equality Directive** (78/2000/EC), the RED could apply to some religious groups that are **also ethnic** groups.

• **But → Differences** in treatment **between religious groups?**

The RED: Examples of DIRECT Discrimination (DD)

- Most obvious case → *Firma Feryn*:
  - ✓ First time DD recognised in a "victimless" discrimination case
  - ✓ The declaration could deter certain candidates from applying for a job.
  - ✓ Discriminatory statements are "inherently" discriminatory (GA, paras 25, 28).

- *CHEZ*: Possibly DD, but the conclusion is left to the national court:
  - ✓ The applicant was treated less favourably "on grounds *related to his* racial or ethnic origin".
  - ✓ Direct discrimination **by association** falls within the scope of application of the RED

- Direct discrimination **by perception** → *Braathens*:
  - ✓ Chilean-born airline passenger resident in Sweden
  - ✓ Perceived as "an Arab person" when boarding a Swedish flight
  - ✓ Obligation to undergo an additional security check
  - ✓ Ombudsman = DD "related to his physical appearance and ethnicity".

19

19

The RED: examples of INDIRECT Discrimination (ID)

- *CHEZ* → **'seemingly neutral practice'** = neutral at first glance
  - ✓ The practice was only applied in "Roma neighbourhoods" = non-neutral

- *Jyske Finanz* → **"particular disadvantage".**
  - ✓ No particular degree of severity required (ref *CHEZ*)
  - ✓ More people with the protected characteristic are affected (ref *CHEZ*)
  - ✓ The comparison should be made between *defined ethnic groups*, **AND**
  - ✓ disadvantaging a person *of a particular* ethnic origin (*Jyske*, paras 31-32)
  - ✓ In casu: the practice targeted *all* non-EU and non-EFTA nationals.
    → it is not possible to make a "concrete comparison" that demonstrates a "particular disadvantage" to a *specific* ethnic group.

- *Maniero* → **"unfavourable treatment".**
  - ✓ Italian citizen, born/resident in Germany, graduated in Armenian law.
  - ✓ He did not apply for a scholarship from a private foundation because he did not have the 1st State Examination.
  - ✓ Not accepting his Armenian law degree = DI?
  - ✓ CJEU relies on *Jyske*: some foreigners could be disadvantaged by...
  - ✓ **But** the plaintiff *himself* was NOT, because he spoke German/lived in Germany.
  - ✓ CJEU: if the applicant "in question" is not disadvantaged → **No DI**
    → Although other foreigners *might* have been

20

20

Conclusions

- **Concept of "racial or ethnic origin".**
  - → *Feryn, CHEZ: more expansive*
  - → Recent cases: more formalistic
  - → Similar approaches: *Braathens & Feryn* (?)

- **Nationality exception:** the great legal loophole

- **Overlap between "ethnicity" and "religion"** → possibility to extend coverage of some ethnic or religious groups

21

Pending cases

- **Case C-799/23, *Commission v. Slovakia Slovakia*** → Requests that:

"declare that by **disproportionately placing Roma children in special schools** or in special classes for children with intellectual or other disabilities, in which they are taught a limited curriculum, and by **segregating Roma children in separate schools** or separate classes in mainstream schools, the Slovak Republic has systematically and persistently failed to fulfil its obligations under Article 2(1) of the EC Treaty and by **segregating** Roma children in separate schools or in separate classes in mainstream schools, the Slovak **Republic has systematically and persistently failed to fulfil** its obligations under Article 2(1) of Council **Directive 2000/43/EC**, 1 read in conjunction with Articles 2(2)(b) and 3(1)(g) thereof."

- **Case C-417/23, *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge*** → interpretation of the term **'ethnic origin'.**

22