



# Discrimination on grounds of racial or ethnic origin (Directive 2000/43)

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## International law

### Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

- Article 1 (1) (a): For the purpose of this Convention the term *discrimination* includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

### Convention for the Protection of Human Rights and Fundamental Freedoms

- Article 14: 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.
- “[W]hereas Article 14 [...] prohibits discrimination in the enjoyment of ‘the rights and freedoms set forth in [the] Convention’, Article 1 of Protocol No. 12 [to the Convention] extends the scope of protection to ‘any right set forth by law’. It thus introduces a general prohibition of discrimination.” (Sejdić and Finci v. Bosnia and Herzegovina, No 27996/06 and 34836/06, 22.12.2009, § 53).

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# EU law

## The Treaty on European Union

- Article 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
- Article 3: [...] It (the EU) shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

## Treaty on the Functioning of the European Union

- Article 19 (1): Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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## Charter of Fundamental Rights of the European Union

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### Article 20: Equality before the law

Everyone is equal before the law.

### Article 21: Non-discrimination

- 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.
- Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

“[This article] is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law“ (C-414/16, p 76).

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## Objectives of directive 2000/43

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Protection of all natural persons against discrimination on grounds of racial or ethnic origin as discrimination may undermine the *achievement of the objectives of the EC Treaty*:

- *Attainment of a high level of employment and of social protection*
- *The raising of the standard of living and quality of life*
- *Economic and social cohesion and solidarity*
- *Developing the European Union as an area of freedom, security and justice.*

The aim of the Directive is 'to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment' (C-54/07, p 3).

*Text in Italics is identical to text on directive 2000/78.*

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## Scope of directive 2000/43

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Specific action in the field of discrimination based on racial or ethnic origin should in particular cover areas such as those listed in Article 3(1) (C-83/14, p 42):

- (a) *conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*
- (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, including the benefits provided for by such organisations;*
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services which are available to the public, including housing.

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## Interpretation of scope

- Cannot be defined restrictively (C-391/09, p 43; C-83/14, p 42 and p 56; C-457/17, p 35)
- Meanings of everyday language provided there is no definition but taking into account the context and the purposes of the rules of which it is part (C-201/13, p 19, C-457/17, p 21).
- The scope may be interpreted historically (C-391/09, p 46).

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## Concept of ethnicity

- The directive does not cover different treatment on grounds of nationality (C-668/15, p 24).
- Concept of ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds (C-83/14, p 46; C-668/15, p 17).
- Cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective. Country of birth cannot, in general and absolute terms, act as a substitute for all the above criteria (C-668/15, 19).
- It cannot be presumed that each sovereign State has one, and only one, ethnic origin (C-668/15, 21).
- The concept of 'discrimination on the grounds of ethnic origin', is intended to apply without distinction, irrespective of whether the measure concerned affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the particular disadvantage resulting from that measure (C-83/14, p 50).
- Direct discrimination is not dependant on the identification of a complainant who claims to have been the victim of public statements made by an employer concerning its recruitment policy (C-54/07, p 25).

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## Example of Estonian litigation practice on transposed directive

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According to the applicant, during the interview on 17.12.2020, a member of the competition committee referred to the applicant as a summer islander and asked how he plans to cope as a "summer islander" while working here (i.e. in Saaremaa). The applicant claims that this shows the real reason why he was not even invited to an interview in the third competition – because he is not a local. In the opinion of the complainant, the undertone of the question was that the applicant knows nothing about the affairs of Saaremaa. In the opinion of the applicant, a summer islander is a derogatory term, meaning a person who is not a "real" islander, but has acquired a summer home in Saaremaa and goes on holiday in Saaremaa. The applicant concludes from this that he was not elected to office because he was not from Saaremaa. In the opinion of the district court, it is arbitrary to conclude from these statements that there is discrimination on the basis of nationality (ethnicity). In common parlance, a summer islander is a person who does not live permanently on the island, all year round, and it is not related to the person's ethnic origin, language or nationality. The scope of the Act would include, for example, a situation where someone had been asked during a competition interview how they intend to cope as a Russian, Finn or other person as the head of the social department in Saaremaa (Tallinn District Court 07.10.2024, 3-22-1337). Autor of photo: Ekke Vastli.



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## What is discrimination?

Discrimination may consist of:

- The application of different rules to comparable situations
- The application of the same rule to different situations

(C-394/96, p 30)

Assessment of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice, as stated in Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54 (C-415/10, p 37).

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## Direct discrimination

Article 2 (2) (a): *Direct discrimination occurs when 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.*



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## Example of “would be treated” case of *Feryn* (C-54/07)

On 28 April 2005, the newspaper *De Standaard* published an interview with Mr Pascal Feryn, one of the firm’s directors, under the heading ‘Customers do not want Moroccans’. Mr Feryn was reported to have said that his firm would not recruit persons of Moroccan origin:

‘Apart from these Moroccans, no one else has responded to our notice in two weeks ... but we aren’t looking for Moroccans. Our customers don’t want them. They have to install up-and-over doors in private homes, often villas, and those customers don’t want them coming into their homes.’

The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment (C-54/07, p 25).

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## Genuine and determining occupational requirements (rare)

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*Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*

It is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (Micropole C-188/15 p 37).

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## Indirect discrimination

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*Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim (relevance) and the means of achieving that aim are appropriate and necessary (proportionality).*

The concept of 'particular disadvantage', within the meaning of that provision, must be understood as meaning that it is particularly persons of a particular racial or ethnic origin, because of the provision, criterion or practice in question, who are disadvantaged (cases on directive 2000/43, C-668/15 p 27 and C-457/17, 47).

Indirect discrimination may be established by any means including on the basis of statistical evidence (C-415/10, p 43).

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## Applicability of interpretations on direct and indirect discrimination under 2000/78 on other grounds of discrimination?

Directive 2000/78 covers only the grounds which are exhaustively listed in Article 1 thereof [religion or belief, disability, age or sexual orientation], so that that directive does not cover political or trade union belief; nor does it cover artistic, sporting, aesthetic or other beliefs or preferences. The protection of those beliefs by the Member States is not, therefore, governed by the provisions of that directive (C-344/20, p 28; **C-148/22, p 48**).

Directives 2000/43, 2000/78 and 2006/54 share almost identical purpose of implementing equal treatment, scope regarding employment matters, wording on direct and indirect discrimination, rules on burden of proof and *common intention of the EU legislator on the latter* (C-415/10, p 40).

The CJEU has balanced art 9 of the Charter (freedom of thought, conscience and religion) against art 16 (freedom to conduct business).

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## Direct discrimination by introduction of rule on prohibiting sign of political, philosophical or religious beliefs (C-157/15, C-804/18, C-341/19, C-344/20)

Internal rule decreed by an employer which prohibits in the workplace only the wearing of conspicuous, large-scale signs of beliefs – philosophical or religious in particular – may constitute direct discrimination on the grounds of religion or belief where that criterion is inextricably linked to one or more specific religions or beliefs (C-804/18 and C-341/19, C-344/20).

Conversely, such internal rule applied in a general and undifferentiated way, would not constitute direct discrimination.

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## Indirect discrimination by introduction of rule on prohibiting sign of political, philosophical or religious beliefs

Difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, amounts to indirect discrimination which may be justified by:

- a legitimate aim and
- if the means are appropriate and necessary (proportionality).

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## Legitimate aim of different treatment

Employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users may be legitimate, there is a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out.

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## Proportionality of different treatment

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Difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner;

- and that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.
- Policy of neutrality is allowed when workers are in contact with customers **or with other workers/employees** (C-804/18 and C-341/19, p 77; C-148/22, p 38).

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## Thank you!

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