

# Essentials of European Law: Antidiscrimination Law

---

 [jean-monnet-saar.eu/](http://jean-monnet-saar.eu/)

## Antidiscrimination Law

---

*Prof. Dr. Thomas Giegerich, Europa-Institut, Jean Monnet Chair for EU Law and European Integration, Saarland University, Germany*

### Introduction

---

Both the Council of Europe and the European Union adhere to and try to implement the principle of equal rights and non-discrimination for all. Their respective efforts reinforce and complement one another. Since 1950, Art. 14 of the European Convention on Human Rights (ECHR) of 1950 (see below II.) has set out an accessory prohibition of discrimination based on a non-exhaustive list of problematic grounds. The exact content of this provision has been clarified by numerous decisions of the European Court of Human Rights (ECtHR). All the EU Member States are bound by the ECHR whose provisions are used by the Court of Justice of the EU (ECJ) as a means to interpret EU law. It took the Council of Europe Member States fifty years to draw up an independent and comprehensive prohibition of discrimination which is included in Protocol No. 12 of 2000. While the Protocol has meanwhile entered into force only a minority of the Convention States (and only eight of the EU Member States) have ratified it. Apparently, many of them are disinclined to give the ECtHR the final say on whether or not distinctions they make in their laws are “reasonable”. The European Union is about to accede to the ECHR, but not Protocol No. 12.

The anti-discrimination law of the EU (see below III.) reaches much further and is much better implemented. The Treaties as such have always included prohibitions of discrimination on grounds of nationality that are directly applicable in national court proceedings and override contrary national legislation. Their exact scope has been clarified by the case-law of the ECJ that tends to be strict.

With the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU (ChFR) was promoted to the rank of primary EU law, on a par with the Treaties and to be enforced by the ECJ. The Charter includes several provisions on equality before the law and non-discrimination (Art. 20 – 26). Where these correspond to rights guaranteed by the Treaties, they shall be exercised under the conditions and within the limits defined therein (Art. 52 (2) ChFR). Where the Charter rights correspond to rights guaranteed by the ECHR, their meaning and scope shall be no less extensive than those laid down by the Convention (Art. 52 (3) ChFR). It must always be remembered, however, that the Charter rights are primarily addressed to the institutions etc. of the EU. The Member States are only subject to those rights when they are implementing Union law (Art. 51 (1) ChFR).

The Treaty of Amsterdam of 1997 introduced the provision now contained in Art. 19 (1) of the Treaty on the Functioning of the EU (TFEU). That provision does not as such prohibit discrimination based on other grounds than nationality which are set forth in an exhaustive list including the most problematic grounds (such as sex, racial or ethnic origin and sexual orientation). It only identifies kinds of discrimination that deserve to be combated and empowers the Council of the EU and the European Parliament jointly to enact secondary legislation for that purpose. The fact that any legislation based on Art. 19 (1) TFEU requires unanimity in the Council (consisting of a minister from each Member State) shows that the Member State wanted to keep EU anti-discrimination under their control.

Meanwhile, several anti-discrimination directives have been enacted on the basis of Art. 19 (1) TFEU or other Treaty provisions (for an overview, see below III. 2.). The Council has, however, not yet been ready to pass a general directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation which the European Commission proposed already in 2008 (see below III. 2. C).

It should also be remembered that there are also anti-discrimination provisions in various treaties concluded by the EU with third States (see below III. 3.). Those provisions prohibit discrimination of third-state nationals on grounds of nationality. According to the case-law of the ECJ, they are usually directly applicable and override both contrary secondary EU law and national law.

## **Antidiscrimination Law of the Council of Europe: Art. 14 of the European Convention on Human Rights (ECHR) and Protocol No. 12**

---

See Art. 52 (3) of the Charter of Fundamental Rights of the European Union: See also Art. 6 (2), (3) TEU.

---

### **Art. 14 ECHR (1950)**

---

Prohibition of All Distinctions or Only Discriminations?

See the two equally authentic (English and French) versions of Art. 14 (emphasis added):

#### **Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms**

„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.*“

#### **Art. 14 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales**

„La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, *sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou*

sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.“

#### **Accessory Nature of Art. 14 ECHR**

**European Court of Human Rights, judgment of 30 Sept. 2003 – Koua Poirrez v. France (No. 40892/98)**

„36. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the “rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter ...“

#### **Non-Exhaustive Character of List of Problematic Distinctions**

Other problematic grounds of distinction recognized in the case-law of the European Court of Human Rights: marital status, nationality, disability, age, sexual orientation, genetic heritage.

#### **Justification of Problematic Distinctions**

**European Court of Human Rights, judgment of 30 Sept. 2003 – Koua Poirrez v. France (No. 40892/98)**

„46. According to the Court’s case-law, a distinction is discriminatory, for the purposes of Article 14, if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised ...“

#### **Differing Scope of Convention States’ Margin of Appreciation**

Under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background.

**European Court of Human Rights, judgment of 30 Sept. 2003 – Koua Poirrez v. France (No. 40892/98)**

„46.... Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment ... However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention ...“

**European Court of Human Rights, judgment of 24 July 2003 – Karner v. Austria (No. 40016/98)**

„41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought.

It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.“

**Protective Duty of Convention States (Art. 1 ECHR “shall secure”) vis-à-vis private discrimination gives rise to certain positive obligations**

**Protocol No. 12 (2000)**

---

From the **Explanatory Report**:

„16. The third recital of the preamble refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them ... The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures (see, for example, Article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 2, of the Framework Convention for the Protection of National Minorities ...). However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable. ...

21. Article 1 provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the ,enjoyment of the rights and freedoms set forth in [the] Convention‘.

22. In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

23. In this respect, it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category.

24. The wording of Article 1 reflects a balanced approach to possible positive obligations of the Parties under this provision. This concerns the question to what extent Article 1 obliges the Parties to take measures to prevent discrimination, even where discrimination occurs in relations between private persons (so-called „indirect horizontal effects“). The same question arises as regards measures to remedy instances of discrimination. While such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals.

25. On the one hand, Article 1 protects against discrimination by public authorities. The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons. An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character. Detailed and tailor-made rules have already been laid down in separate conventions exclusively devoted to the elimination of discrimination on the specific grounds covered by them (see, for example, the Convention on Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which were both elaborated within the United Nations). It is clear that the present Protocol may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination (see the comment on Article 3 in paragraph 32 below).

26. On the other hand, it cannot be totally excluded that the duty to „secure“ under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play (see, *mutatis mutandis*, the judgment of the Court of 26 March 1985 in the case of X and Y v. the Netherlands, Series A, No 91, paragraphs 23-24, 27 and 30).

27. Nonetheless, the extent of any positive obligations flowing from Article 1 is likely to be limited. It should be borne in mind that the first paragraph is circumscribed by the reference to the „enjoyment of any right set forth by law“ and that the second paragraph prohibits discrimination „by any public authority“. It should be noted that, in addition, Article 1 of the Convention sets a general limit on state responsibility which is particularly relevant in cases of discrimination between private persons.

28. These considerations indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention. On the one hand, Article 1 protects against discrimination by public authorities. The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons. An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character. Detailed and tailor-made rules have already been laid down in separate conventions exclusively devoted to the elimination of discrimination on the specific grounds covered by them (see, for example, the Convention on Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which were both elaborated within the United Nations). It is clear that the present Protocol may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination (see the comment on Article 3 in paragraph 32 below).

**Protocol No. 12: Status as of 5/9/2014** Member States of the Council of Europe

	Signature	Ratification	Entry into force
Albania	26/5/2003	26/11/2004	1/4/2005
Andorra	31/5/2007	6/5/2008	1/9/2008
Armenia	18/6/2004	17/12/2004	1/4/2005
Austria	4/11/2000		
Azerbaijan	12/11/2003		
Belgium	4/11/2000		
Bosnia and Herzegovina	24/4/2002	29/7/2003	1/4/2005
Bulgaria			
Croatia	6/3/2002	3/2/2003	1/4/2005
Cyprus	4/11/2000	30/4/2002	1/4/2005

Czech Republic	4/11/2000		
Denmark			
Estonia	4/11/2000		
Finland	4/11/2000	17/12/2004	1/4/2005
France			
Georgia	4/11/2000	15/6/2001	1/4/2005
Germany	4/11/2000		
Greece	4/11/2000		
Hungary	4/11/2000		
Iceland	4/11/2000		
Ireland	4/11/2000		
Italy	4/11/2000		
Latvia	4/11/2000		
Liechtenstein	4/11/2000		
Lithuania			
Luxembourg	4/11/2000	21/3/2006	1/7/2006
Malta			
Moldova	4/11/2000		
Monaco			
Montenegro	3/4/2003	3/3/2004	6/6/2006
Netherlands	4/11/2000	28/7/2004	1/4/2005
Norway	15/1/2003		
Poland			
Portugal	4/11/2000		
Romania	4/11/2000	17/7/2006	1/11/2006
Russia	4/11/2000		
San Marino	4/11/2000	25/4/2003	1/4/2005
Serbia	3/4/2003	3/3/2004	1/4/2005

Slovakia	4/11/2000		
Slovenia	7/3/2001	7/7/2010	1/11/2010
Spain	4/10/2005	13/2/2008	1/6/2008
Sweden			
Switzerland			
The former Yugoslav Republic of Macedonia	4/11/2000	13/7/2004	1/4/2005
Turkey	18/4/2001		
Ukraine	4/11/2000	27/3/2006	1/7/2006
United Kingdom			

Total number of signatures not followed by ratifications: 19

Total number of ratifications/accessions: 18

## Antidiscrimination Law of the European Union

### Primary Law

#### General Provisions on EU Objectives and Principles

**TEU:** Art. 2, Art. 3 (3) (2), Art. 9 sentence 1

**TFEU:** Art. 8, Art. 10 (so-called horizontal clauses)

**Charter of Fundamental Rights of the EU:** Art. 22, Art. 25, Art. 26 (to be read together with Art. 52 (5))

#### Directly Applicable Prohibitions

##### Direct Applicability of Treaty Provisions

**ECJ, Case 26/62 – van Gend & Loos, ECR 1963, 1, 12:** “[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Members States, Community law therefore not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage. These rights



arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”

Direct applicability of a Treaty provision means that private persons can invoke them in proceedings in national courts and in the Court of Justice of the EU. The competent court will thereupon use the relevant provision as a standard of review of the legality of a national or EU measure. The direct applicability makes the Treaty provision judicially enforceable upon the application of private persons whose private interest in compliance with that provision is utilized by EU law in order to secure effective enforcement of the Treaties.

### **Overview of Antidiscrimination Provisions in the Treaties**

**TFEU:** Art. 18 (1) (general prohibition of discrimination on grounds of nationality “within the scope of application of the Treaties” [accessory nature]) – see also the special provisions of Art. 34, 45 (2), Art. 49, Art. 56, Art. 63 which take precedence over Art. 18;

Art. 22 (no discrimination on grounds of nationality with regard to municipal elections and elections to the European Parliament);

Art. 23 (no discrimination on grounds of nationality with regard to diplomatic and consular protection);

Art. 95 (no discrimination by carriers on grounds of the country of origin or destination of goods);

Art. 110 (1) (no higher internal taxation of similar products of other Member States – neither directly nor indirectly);

Art. 157 (1), (2) and (4) (equal pay for male and female workers for equal work or work of equal value)

**Charter of Fundamental Rights of the EU:** Art. 20, Art. 21, Art. 23, Art. 24, Art. 39, Art. 40, Art. 46 (to be read together with Art. 51 (1) and Art. 52 (2), (3))

### **Prohibition of Overt (Direct) and Covert (Indirect) Discrimination**

ECJ, Case C-209/03, judgment of 15 March 2005 – The Queen on the application of Dany Bidar v. London Borough of Ealing etc.)

“51 ... the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria [such as residence in the national territory for a certain period of time, holding of certificates issued by school or university in the particular state], lead in fact to the same result ...

53 Such requirements risk placing at a disadvantage primarily nationals of other Member States ... [because they] are likely to be more easily satisfied by United Kingdom nationals.”

## **Justification of Differential Treatment**

ECJ, Case C-209/03, judgment of 15 March 2005 – The Queen on the application of Dany Bidar v. London Borough of Ealing etc.)

“54 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions ...”

The ECJ permits that justification both in cases of covert (indirect) and overt (direct) discrimination.

## **Enabling Provisions (authorizing the EU institutions to enact directly applicable prohibitions also with regard to behaviour of private persons)**

TFEU: Art. 18 (2)

Art. 19 (1)

Art. 19 (2)

Art. 157 (3)

---

## **Secondary Law**

---

### **Overview of Important EU Antidiscrimination Directives**

COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180/22; based on Art. 13 EEC Treaty, now replaced by Art. 19 (1) TFEU)

COUNCIL DIRECTIVE 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303/16, based on Art. 13 EEC Treaty, now replaced by Art. 19 (1) TFEU)

COUNCIL DIRECTIVE 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373/37, based on Art. 13 (1) EEC Treaty, now replaced by Art. 19 (1) TFEU)

DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204/23, based on Art. 141 (3) EEC Treaty, now replaced by Art. 157 (3) TFEU)

DIRECTIVE 2010/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity ... (OJ L 180/1; based on Art. 157 (3) TFEU)

### **Relevant Provisions of the COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000**

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (as a typical example of antidiscrimination laws)

## CHAPTER I: **GENERAL PROVISIONS**

### *Article 1: Purpose*

The purpose of this 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.

### *Article 2: Concept of discrimination*

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where 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;

(b) 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 and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

### *Article 3: Scope*

1. Within the limits of the powers conferred upon the Community, this Directive shall apply 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, 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.

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.

#### **Article 4: Genuine and determining occupational requirements**

Notwithstanding Article 2(1) and (2), 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.

#### **Article 5: Positive action**

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

#### **Article 6: Minimum requirements**

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

### **CHAPTER II: REMEDIES AND ENFORCEMENT**

#### **Article 7: Defence of rights**

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

#### **Article 8: Burden of proof**

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

#### **Article 9: Victimisation**

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

#### **Article 10: Dissemination of information**

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

#### **Article 11: Social dialogue**

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.
2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

#### **Article 12: Dialogue with non-governmental organisations**

Member States shall encourage dialogue with appropriate nongovernmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

### **CHAPTER III: BODIES FOR THE PROMOTION OF EQUAL TREATMENT**

#### **Article 13**

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:

— without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

— conducting independent surveys concerning discrimination,

— publishing independent reports and making recommendations on any issue relating to such discrimination.

### **CHAPTER IV: FINAL PROVISIONS**

#### **Article 14: Compliance**

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

#### **Article 15: Sanctions**

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

#### **Article 16: Implementation**

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

#### **Article 17: Report**

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

...

## Should a General Antidiscrimination Directive be Enacted?

**(1) Proposal for a COUNCIL DIRECTIVE on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation** (presented by the Commission on 2 July 2008 – COM(2008) 426 final – but never enacted due to lack of unanimity in the Council; the legal base was to be Art. 13 (1) EEC Treaty, now replaced by Art. 19 (1) TFEU)

From the Explanatory Memorandum accompanying that Commission proposal (footnotes omitted):

“The aim of this proposal is to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market. It sets out a framework for the prohibition of discrimination on these grounds and establishes a uniform minimum level of protection within the European Union for people who have suffered such discrimination.

This proposal supplements the existing EC legal framework under which the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation applies only to employment, occupation and vocational training ... This proposal builds upon Directives 2000/43/EC, 2000/78/EC and 2004/113/EC which prohibit discrimination on grounds of sex, racial or ethnic origin, age, disability, sexual orientation, religion or belief. Discrimination based on race or ethnic origin is prohibited in employment, occupation and vocational training, as well as in non-employment areas such as social protection, health care, education and access to goods and services, including housing, which are available to the public. Discrimination based on sex is prohibited in the same range of areas, with the exception of education and media and advertising. However, discrimination based on age, religion and belief, sexual orientation and disability is prohibited only in employment, occupation and vocational training. ...

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the Community. The objectives of the proposal cannot be sufficiently achieved by the Member States acting alone because only a Community-wide measure can ensure that there is a minimum standard level of protection against discrimination based on religion or belief, disability, age or sexual orientation in all the Member States. A Community legal act provides legal certainty as to the rights and obligations of economic operators and citizens, including for those moving between the Member States. Experience with the previous directives adopted under Article 13(1) EC is that they had a positive effect in achieving a better protection against discrimination. ...

Moreover, national traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal choices in areas which fall within national competence. The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and



practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognize same-sex marriages, and the nature of any relationship between organised religion and the state.”

**(2) Jean-Claude Juncker, Candidate for President of the European Commission: A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission, Strasbourg, 15 July 2014, p. 8**

“Discrimination must have no place in our Union, whether on the basis of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, or with regard to people belonging to a minority. I will therefore maintain the proposal for a directive in this field and seek to convince national governments to give up their current resistance in the Council.

(Available at [http://ec.europa.eu/about/juncker-commission/docs/pg\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf))

---

## **International Treaties Concluded by EU with Third States**

---

### **Status of Treaties in EU Law**

Rank: Art. 216 (2), Art. 218 (11) TFEU

Direct Applicability: ECJ, ECR 2008, I-4057 (Case C-308/06 – Intertanko)

“42. It is clear from Article 300(7) EC [now Art. 216 (2) TFEU] that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation ...

43. It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. Where that invalidity is pleaded before a national court, the Court of Justice thus reviews, pursuant to Article 234 EC [now Art. 267 TFEU], the validity of the Community measure concerned in the light of all the rules of international law, subject to two conditions.

44. First, the Community must be bound by those rules ...

45. Second, the Court can examine the validity of Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise ...”

### **Examples of Antidiscrimination Provisions in International Treaties**

STABILISATION AND ASSOCIATION AGREEMENT between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, of 12 June 2006 (OJ 2009 L 107, p. 166)

#### Article 46

1. Subject to the conditions and modalities applicable in each Member State:

— treatment accorded to workers who are Albanian nationals and who are legally employed in the territory of a Member State shall be free of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, compared to its own nationals,

— the legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming

under bilateral Agreements within the meaning of Article 47, unless otherwise provided by such Agreements, shall have access to the labour market of that Member State, during the period of that worker's authorised stay of employment.

2. Albania shall, subject to the conditions and modalities in that country, accord the treatment referred to in paragraph 1 to workers who are nationals of a Member State and are legally employed in its territory as well as to their spouse and children who are legally resident in the said country.

Corresponding provisions in Art. 49 of the STABILISATION AND ASSOCIATION AGREEMENT between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, of 15 October 2007 (OJ 2010 L 108, p. 3).

### Further Reading

---

1. Arnardóttir, Oddný Mjöll, *Equality and Non-Discrimination under the European Convention on Human Rights*, 2003
2. Chalmers, Damian/Davies, Gareth & Monti, Giorgio, *European Union Law: Text and Materials*, 3<sup>rd</sup> ed. 2014, Chapter 13: Equal Opportunities Law and Policy, pp. 569 et seq.
3. De Schutter, Olivier, *International Human Rights Law*, 2<sup>nd</sup> ed. 2014, Chapter 7: The prohibition of discrimination, pp. 632 et seq.
4. Ellis, E. & Watson, P., *EU Anti-Discrimination Law*, 2<sup>nd</sup> ed. 2012

5. Handbook on European non-discrimination law (co-published in 2010 by the European Union Agency for Fundamental Rights and the Council of Europe), available at [http://www.echr.coe.int/Documents/Handbook\\_non\\_discrim\\_law\\_ENG\\_01.pdf](http://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG_01.pdf) (last accessed on 13 November 2014)
6. Handbook on European non-discrimination law: Case-law update July 2010 – December 2011 (co-published in 2012 by the European Union Agency for Fundamental Rights, the Council of Europe and the European Court of Human Rights), available at [http://www.echr.coe.int/Documents/Handbook\\_non\\_discrim\\_law\\_ENG\\_02.pdf](http://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG_02.pdf) (last accessed on 13 November 2014)
7. Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights, 3<sup>rd</sup> ed. 2014 (by David Harris, Michael O'Boyle and others), pp. 783 et seq.
8. Peers, Steve/Hervey, Tamara/Kenner, Jeff/Ward, Angela (eds.), The EU Charter of Fundamental Rights: A Commentary, 2014, pp. 563 et seq. (Art. 20), pp. 579 et seq. (Art. 21), pp. 605 et seq. (Art. 22), pp. 633 et seq. (Art. 23)
9. Wintemute, Robert, 'Within the Ambit': How Big *Is* the 'Gap' in Article 14 European Convention on Human Rights?, European Human Rights Law Review vol. 9 (2004), pp. 366 et seq.
10. Wintemute, Robert, Filling the Article 14 'Gap': Government Ratification and Judicial Control of Protocol No. 12 ECHR, European Human Rights Law Review vol. 9 (2004), pp. 484 et seq.

Image credit / Beitragsbild: [Kurt Löwenstein Educational Center International Team](#)