



THE ECJ DOCTRINE ON RACIAL DISCRIMINATION


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TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

- Art. 19.- *“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”*.
- Lack of direct effect.
- Directive 2000/43/CE of 29 June, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Number of Court Judgments rather scarce.

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- Little commitment has been detected between social partners and regional authorities to their duties and responsibilities in this field, mainly in the twelve Member States that entered into the European Union from 2004 to 2007.
 - The degree of awareness of the Directive is very small.
 - In some of these States there are important minorities of racial or ethnic origin, e.g., Roma communities,

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- In 2000 two Directives were passed about equality and non discrimination: the 2000/43/EC Directive and the 2000/78/EC Directive of 27 November, establishing a general framework for equal Treatment in Employment and Occupation.
 - New generation in the European approach to anti-discrimination law.
 - Not based on market considerations.
 - Since 1997 –Treaty of Amsterdam-, equality is considered a substantive aim of European policies from the point of view of dignity.

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- The comparison between Directive 2000/43/EC and Directive 2000/78/EC reveals that the former contains procedural rules and duties of Member States, which are absent in the second, apart from some substantive rights.
 - It has been said that there is a clear hierarchy between discrimination fields in which sex or gender and race are in the paramount position, while the others deserve a subsidiary consideration.

SOME FEATURES OF DIRECTIVE

2000/43/EC

- Sharpening the concept of direct discrimination:
“*direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin*”.
- Possibility of affording more flexible comparators because these persons are not going to be necessarily actual people. Hypothetical comparators. The term “*would be*” in the definition cannot be interpreted in any other way.

FIELD OF APPLICATION



- Whilst the other anti-discrimination Directives only deal with vocational training, employment, working conditions and workers' involvement, the D 2000/43/EC also includes social protection, along with social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.
- It is the first piece of EU legislation that had dealt with the prohibition of discrimination in the access to services.
- So, goods and services available to the public are of diverse nature although housing is expressly cited.

HOUSING



- All the contracts which provide the sale, tenancy or loan of properties, in the public or in the private sector, are included, and access to house ownership constitutes without any doubt one of the most important contents of this field.
- There have been some internal resolutions from French, Belgian or Dutch Judges and Courts (the vast majority of them relating to direct discrimination cases), but there are also a few number of cases about indirect discrimination, including language criteria, refusals to grant housing loans or imposing higher interest rates.

RIGHTS OF THIRD-COUNTRY NATIONALS

- 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”*.
- This exclusion is of great importance considering the proximity between both topics, nationality and racial discrimination.
- However, the personal scope of the Directive does not exclude non-EU nationals. They are also protected against racial or ethnic origin discrimination. The differences between these two fields are not clear enough.

RELIGION



- One very apparent fault in the EU Anti-discrimination Directives refers to the wrongful placement of religion. It is considered among other causes in Directive 2000/78/EC but not in Directive 2000/43/EC. So, it is kept isolated from racial and ethnic discrimination.
- The unsimilar protection offered in both directives makes the difference.
- In the vast majority of circumstances, these causes of discrimination appear jointly, and it is very difficult to distinguish one from the others. Sometimes religion is linked too much with ethnicity as an inherent part of the individual's being.

JUSTIFYING DISCRIMINATIONS



- In comparison to the other anti-discrimination Directives, it is a novelty that the threshold which exists for justifying discriminations is narrower in Directive 2000/43/EC.
- The 2000/43/CE Directive only contemplates valid –*bona fides*–, genuine and determining requirements in the scope of employment and occupation. So, there is no rule like Art. 4.5 of the Directive 2004/113/EC which allows this sort of different treatment in the provision of goods and services.

Affirmative action



- There is an evident weakness of the Directive in this respect because it allows, but not imposes, the affirmative action.
- The European Union imposed on its Member States as duties the existence of minimum competences related to the provision of a designated body or bodies for the promotion of equal treatment and of these type of structures, in the same way as the duty establish in Directive 2006/54/EC in relation with sex discrimination.

The case *Feryn*

- The company was looking for recruit fitters, but its director had written a public statement saying that they could not employ immigrants because the customers were reluctant to facilitate them the access to their private houses for doing the work.
- The Court concluded that the lack of an identifiable complainant does not lead to the conclusion that there is not direct discrimination. The need to foster the conditions for a socially inclusive labor market determines that a system in which there must be an unsuccessful candidate for a job does not fit.
- Clearly, a public statement like the one announced in the case *Feryn* can strongly dissuade certain candidates from ethnic or racial origin to apply for employment and, consequently, to enter into the labor market.

The case Feryn

- The damage infringed in terms of racial discrimination must not be accredited in current terms, but it is possible to hypothesize that members of the victimized collective will not apply for a selective process in which there is an advertisement against their concurrence.
- The Court expresses that statements like the one published in this case give rise to a presumption of a discriminatory recruitment policy. This understanding has given rise to criticism because apparently, and as stated in the first part of the Judgment, the statement signifies more than a presumption of direct discrimination. It constitutes a direct discrimination in itself. This is the weakest aspect of the Judgment.

The case Meister

- Mrs. Meister, born in Russia, 45 years old and who holds a Russian degree recognized as equivalent to a German one. The defendant company opened a selection process for a job and Mrs. Meister sent her application but later she received a rejection letter without inviting her to an interview. Not long afterwards a new advertisement with the same content was published again and Mrs. Meister sent again her solicitude, but anew she was rejected without calling her nor giving any reason for this. In these circumstances Mrs Meister considered that she was being treated less favorably treatment on the grounds of her sex, age, and ethnic origin and sued the company.

The case Meister

- The Directive does not specifically entitle persons who consider themselves being victims of any sort of discrimination to information in order to establish the facts from which the discrimination can be presumed and satisfied the burden of proof of the plaintiff. However the Court recognizes that a refusal of disclosure on the part of the defendant is not rejectable, and it would be a circumstance that can be taken into consideration in the context of the process to establish the facts. Otherwise, the targets of the Directives could be defeated. Accordingly, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by the abovementioned Directives.
- This refusal of disclosure, jointly with the fact that the company had not discussed with Mrs. Meister her level of expertise and abilities, nor that she met the requirements of the job advertisement, is of considerable importance taking into account that the defendant had not been offered a job interview.

The case Meister

- The ECJ reached an eclectic and uncompromising decision that left all the responsibility to the Referring Court.
- Clearly, the plaintiff could not accede to a third party due to the negligent conduct of the employer. In this situation, it would be possible to presume that the discrimination had taken place or to have a hypothetical third party, not belonging to one of the protected groups –women, elderly workers, racial minorities. Otherwise, it would be highly unfair to dismiss Mrs. Meister's claim.
- It would possible, for instance, to look for previous recruitment processes to ascertain the treatment given to young male or majority ethnic applicants or to construct the hypothesis on the behavior expected from a reasonable employer who examines the application from a woman who is not so young and pertaining to a racial minority.
- Problems of protection data.

The case Belov



- The Judgment of the ECJ in this case has not any importance in discrimination issues. This is so because the competence of the Bulgarian administrative body to send preliminary ruling is discussed and finally the Court concludes that, in effect, it lacks the competence required in this respect. Consequently, the Court rules that it does not have jurisdiction to answer the questions referred by that body.

The case Belov. Opinion of the Advocate General

- In two neighborhoods of Sofia which were inhabited mainly by citizens from Roma communities, the electricity meters were suspended much higher than in other parts of the city where this ethnic minority had not prevalence. The reason afforded to this practice by the Municipality resided in keeping the meters inaccessible for customers in districts where there had been numerous cases of illegal interference with the electricity supply infrastructure and manipulation and illegal electricity extraction. So, the measure was an attempt to avoid future fraud and abuse in order to assure the quality and a financially reasonable service.
- The scope of Art. 3(1)(h) of Directive 2000/43/EC in its reference to “access to and supply of goods and services which are available to the public” clearly covers the placement of these meters.

The case Belov. Opinion of the Advocate General

- it is enough to produce the reversion of the burden of proof under Art. 8.1 of the Directive 2000/43/EC that persons who consider themselves wronged establish facts which substantiate a prima facie case of discrimination.
- It is a typical case of indirect discrimination. So it becomes necessary to discuss the legal justifications. In this respect, the necessity to prevent future fraud and abuse and the convenience to ensure the quality of electricity supply were the two main reasons expressed by the Municipality. This reason is upheld by the Advocate General.