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# The ECJ Doctrine on Racial Discrimination

Jaime Cabeza Pereiro \*

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## 1. Introductory Remarks

The Treaty of Amsterdam – signed on 2 October 1997 and in force since 1999 – introduced Article 6 par. a) in the Treaty of Rome, currently Art. 19 of the Treaty on the Functioning of the European Union (TFEU). In its previous version, it was established that:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting 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.

Apart from some trivial procedural differences, this provision and that contained in Art. 19 of the TFEU are substantially the same. Compared to Art. 157 of the TFEU – which focuses on sex discrimination – Art. 19 is characterized by a lack of direct effect<sup>1</sup>. On all occasions, following this amendment, Directive 2000/43/CE of 29 June was passed implementing the principle of equal treatment between persons irrespective of their racial or ethnic origins. This piece of secondary legislation is thus the first legislative measure adopted by the EU to tackle racism and racial

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<sup>1</sup> T. Uyen Do, *A Case Odyssey into 10 Years of Anti-discrimination Law*, in *European Anti-Discrimination Law Review*, 2011, n. 12, 11. Also, S. Benedí Lahuerta, *Race Equality and TCNs, or How to Fight Discrimination with a Discriminatory Law*, in *European Law Review*, 2009, vol. 15, n. 6, 740.

discrimination<sup>2</sup>. It can be argued that the European Union has taken steps in this area relatively late, at least in comparison with other supranational organizations. For this reason, the number of judgments on discrimination cases is limited. Interestingly, there have been no more than three resolutions, one of them dismissing the matter of procedural nature. However, to fully address the issue some other decisions on related topics should be taken into consideration, such as residency rights for third-country nationals or the doctrine of sex discrimination, both of which are far more developed.

All 28 EU Members have ratified the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD). Accordingly, they are bound by this UN provision, which is in many respects as demanding as the foregoing directive. Nevertheless and somewhat paradoxically, little commitment has been reported on the part of social partners and regional authorities with regard to their duties on this score, especially from the twelve Member States that entered the European Union from 2004 to 2007, for there seems to be little awareness of the directive. Some large ethnic minorities settled in these countries – e.g. Roma communities – are living in segregated neighborhoods and under poor health and safety conditions. When it comes to minorities, there is also a lack of awareness on the implementation of anti-discrimination legislation<sup>3</sup>.

In 2000, two directives were passed on 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. These directives marked a turning point in the European approach to anti-discrimination laws, especially if one considers the market-driven nature of legislation on sex discrimination approved in the 1970s in furtherance of Art. 119 of the Treaty of Rome – currently, Art. 157 TFEU. The aim of this article was to avoid distortion of competition resulting from France's greater concern for provisions on sex discrimination<sup>4</sup>. This attempt was visible in the recitals of the first directive based on Art. 119 that is Directive 75/117/EEC of 10 February

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<sup>2</sup> E. Howard, *The EU Race Directive: Time for Change*, in *International Journal of Discrimination and the Law*, 2007, vol. 8, 237.

<sup>3</sup> See Wien, 2010, *The Impact of the Racial Equality Directive. Views of Trade Unions and Employers in the European Union*, Summary Report, European Union Agency for Fundamental Rights, 8.

<sup>4</sup> See, among others, H. Monaghan, *Equality and Non Discrimination*, Bar European Group and Administrative Law Bar Association, Athens, 2011, 2.

1975 concerning the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women. The directive begins with the following proposition:

whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market [...]

Both the directives enforced in 2000 are based on other principles incorporated in the Treaty of Rome in 1957. Since then, equality has been considered a substantive aim of European policy from the point of view of dignity. Therefore, economic efficiency loses its role as the main reason in support of European measures in the field of discrimination<sup>5</sup>. Obviously, this change, irrespective of the amendments introduced by the Treaty of Amsterdam, cannot be regarded as a drastic move away from previous interpretations. The ECJ had already adopted an increasing number of social values from its first judgments relating to Art. 119 of the Treaty of Rome. For instance, in *Defrenne v. Sabena*<sup>6</sup>, the Court regarded the social values in the original version of the 1957 Treaty and the necessity of avoiding distortions of the market as equivalent<sup>7</sup>. However, when the Treaty of Amsterdam entered into force, social values become relevant among the principles of the European Community. In this context, market efficiency lost its hierarchical status to justify secondary legislation on equality and discrimination.

Two years later, Directive 2002/73/EC of 23 September was passed amending Directive 76/207/EEC. Its main concern was with the enforceability of equality and anti-discrimination provisions and their effectiveness, accompanied by a number of related initiatives. Some of

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<sup>5</sup> A more detailed analysis is provided in L. Mason, *The Hollow Legal Shell of European Race Discrimination Policy: The EC Race Directive*, in *American Behavioral Scientist*, 2010, vol. 53, n. 12, 1733-4.

<sup>6</sup> Case 43/75, *Defrenne v. Sabena* (1976).

<sup>7</sup> First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.



them had already been introduced in the two Directives of 2000, while other aspects were not covered in previous secondary legislation. Concurrently, a comparison between Directive 2000/43/EC and Directive 2000/78/EC reveals that the former contains binding procedural rules and places duties on Member States which were not present in the latter, apart from some substantive rights. Accordingly, it has been argued that a clear hierarchy exists between discrimination fields in which sex, gender and race occupy a paramount position, while the others deserve a subsidiary consideration<sup>8</sup>.

The transposition of Directive 2000/43/CE has been a complex process. Notwithstanding the acquired experience by Member States to incorporate into national legislation binding provisions derived from directives about sex discrimination, the majority of them failed to meet the deadline set in Art. 16. Consequently, the European Commission had to send a formal warning to all those countries that incurred delays<sup>9</sup>. The transposition of the directive took more than expected even in those countries which had legislated on racial and ethnic discrimination long before the issuing of the directive itself. For instance, The United Kingdom and The Netherlands, both with a long-standing tradition in terms of anti-discrimination laws which inspired the European Directive, encountered major difficulties to comply with its requirements. Among other causes, public opinion in the two countries did not consider it necessary to make further amendments to comply with the minima imposed by secondary European legislation<sup>10</sup>.

## 2. Some Features of Directive 2000/43/EC

The two anti-discrimination directives which were passed in 2000 signified an important step forward in legislative terms, in comparison to secondary legislation previously enforced in the field of sex equality. One of the most important aspects involved narrowing down the concept of direct discrimination. According to the new definition:

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<sup>8</sup> E. Howard, *The EU Race Directive: Time for Change*, International Journal of Discrimination and the Law, 2007, vol. 8, 239.

<sup>9</sup> Concerning this matter, N. Boccadoro, *Housing Rights and Racial Discrimination*, in *European Anti-Discrimination Law Review*, 2009, n. 9, 23.

<sup>10</sup> *Ibid.*, 25.

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.

As a rule, this formulation is far more accessible to plaintiffs, who might encounter less difficulty to initiate legal proceedings against a person or an institution in the event of disparate treatment on the grounds of ethnic origins. The key point consists in the possibility of affording more flexible comparators because these persons are not necessarily going to be actual ones. They can be hypothetical comparators, or real men or women who had past experience in this connection. In fact, the introduction of a hypothetical comparator is one of the most decisive advances of the 2000 Directives<sup>11</sup>. The wording “would be” in the definition cannot be interpreted in any other way. Indeed, this terminology was expressly rejected in the majority of previous judgments concerning sex discrimination, although it was predictable that the doctrine would be abolished with the new definition of direct discrimination provided in Directive 2006/54/EC, which was very similar to that laid down in Directive 2000/43/EC<sup>12</sup>.

The broad interpretation of “prohibited forms of discrimination” is also worthy of notice. Not only racial harassment, but also an instruction to discriminate against persons on the grounds of racial or ethnic origins shall be deemed discriminatory<sup>13</sup>. Again, the same definition applies to the three directives, yet implying an important development in comparison to previous EU legislation.

The main difference between the directive on discrimination and the other two lies in its field of application<sup>14</sup>. Whereas the last two directives deal with vocational training, employment, working conditions and workers’ involvement on an exclusive basis, the former also includes social protection, social security, healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing. The widened scope of Directive 2000/43/EC has been pointed out in the relevant literature. For example, it has been

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<sup>11</sup> L. Mason, *op. cit.*, 1735.

<sup>12</sup> E. Howard, *op. cit.*, 247-8.

<sup>13</sup> See M. Ambrus, M. Busstra, K. Henrard, *The Racial Equality Directive and Effective Protection Against Discrimination: Mismatches between the Substantive Law and its Application*, in *Erasmus Law Review*, 2010, vol. 3, n. 3, 166.

<sup>14</sup> According to Howard, “One of the strong features of the Race Directive”, *op. cit.*, 239.



argued that it was the first piece of EU legislation dealing with the prohibition of discrimination in the access to services<sup>15</sup>.

Concerning social protection and social advantages, it is interesting to note that according to the Memorandum of the Proposal for the Directive, the expression “social advantages” has the same meaning as in Regulation (ECC) 1612/68 on freedom of movement for migrant workers – currently replaced by Regulation (EEC) 492/2011 of the European Parliament and of the Council of 5 April 2011 – in the manner that the European Court of Justice has interpreted it: “benefits of an economic or cultural nature which are granted within the Member States either by public authorities or private organizations”<sup>16</sup>. This amendment has to be regarded as a relevant one, taking into consideration the broad definition that the ECJ gives to this terminology<sup>17</sup>.

Access to and supply of goods and services which are available to the public involve another interesting field of application covered by the anti-discrimination directive. On close inspection, this is the only one dealing with either discrimination in employment or while accessing services. As far as sex discrimination is concerned, Directive 2004/114/EC of 13 December 2004 was passed subsequent to Directive 2002/73/EC, implementing the principle of equal treatment between men and women in the access and supply of goods and services. In addition, in the context of the Employment Equality Framework Directive 2000/78/EC, a proposal was advanced for a Council Directive to implement the principle

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<sup>15</sup> J. Ringenheimer, *The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU Law*, in *European Anti-Discrimination Law Review*, 2010, n. 10, 12.

<sup>16</sup> On this point, see Howard, E., *op cit.*, 245. Pursuant to the Memorandum, “examples include concessionary travel on public transport, reduced prices for access to cultural or other events and subsidized meals in schools for children from low income families”. See Proposal for a Council Directive implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, Brussels, 25 November 1999, COM(1999) 566 final, 7.

<sup>17</sup> Tellingly, “as regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages. That principle is applicable not only to all employment and working conditions, but also to all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory (see, inter alia, Case C-85/96 Martínez Sala [1998] ECR I-2691, paragraph 25, and Commission v Germany, paragraph 39)”. Case C-542/09, *European Commission v Kingdom of the Netherlands*, Judgment of the Court of 14 June 2012.

of equal treatment between persons, irrespective of religion or belief, disability, age or sexual orientation, which is still under evaluation. Directive 2000/43/EC provides a definition of “services” which is rather controversial. Paragraph 11 of Directive 2004/113/EC points out that services should be taken to be those within the meaning of article 50 of the Treaty (currently, Art. 57 of the Treaty on the Functioning of the European Union –TFEU-): “services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”<sup>18</sup>. Consequently, for the purposes of the 2004 directive on sex discrimination, it is useful to go through the ECJ doctrine on the concept of services<sup>19</sup>. Nonetheless, the fact that Directive 2000/43/EC kept silent about the links with the free movement of services must be also taken into account. Above all, it is necessary to consider the different perspective of Art. 57 of TFEU and the foregoing anti-discrimination directive: the free movement of services is based on market considerations and is more business-oriented. Conversely, the Racial Equality Directive is concerned with the protection of human rights, which is acknowledged to be one of the fundamental principles of the European Union. In consequence, services are likely to be considered in a broader sense in this second field, not restricted to economic activities but also including activities without commercial translation or whose value can hardly be paid with remuneration<sup>20</sup>. Goods and services available to the public are of diverse nature although housing is expressly cited. Within this scope, contracts concerning the sale, tenancy or loan of properties in the public or in the private sector are included, and access to home ownership constitutes without any doubt one of the most important aspects of this field. With regard to housing, there have been some rulings from French, Belgian or Dutch tribunals

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<sup>18</sup> And the definition goes on: “‘Services’ shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions”.

<sup>19</sup> For instance, in Case 544/11, *Petersen*, Judgment of the Court of 28 February 2013, it was argued that “the first paragraph of Article 57 TFEU provides that services are to be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Furthermore, it follows from the case-law of the Court that the provisions relating to the freedom to provide services are connected to activities carried out by independent service providers (see, to that effect, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 7)”.

<sup>20</sup> This point was supported by J. Ringelheim, *op. cit.*, 14.

(the majority of them relating to instances of direct discrimination), and a limited number of cases about indirect discrimination, including language criteria, refusals to grant housing loans or imposing higher interest rates<sup>21</sup>. The wording “inclusion of housing” is of special interest as this aspect falls outside of the EU remit.

One key element of Directive 2000/43/EC is the reference to the rights of third-country nationals, an aspect which is closely related to discrimination. Art. 3.2 establishes that:

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 nationality and racial discrimination.

However, the individual scope of the directive does not exclude non-EU nationals. They are also safeguarded against discrimination on the grounds of racial or ethnic origin. Yet they can experience more disadvantages and mistreatment in comparison to EU nationals. The differences between these two fields – total coverage for racial discrimination and the lack of substantive equality when it comes to nationality issues – are difficult to explain.

In this respect, the language of the directive is not as straightforward as that employed in the International Convention on the Elimination of all Forms of Racial Discrimination (ICEFRD). Art. 1(2) of ICEFRD states that “this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”<sup>22</sup>. Nevertheless, the Committee on the Elimination of Racial Discrimination – a body established pursuant to Art. 8 of ICEFRD – issued General Recommendation No. 30<sup>23</sup>, which specifies that:

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<sup>21</sup> For further considerations on this issue, see Boccadoro, n., *op. cit.*, 25 ss.

<sup>22</sup> In addition, Art. 1.3 determines that “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”.

<sup>23</sup> Discrimination against non-citizens, 1 October 2004.

4. under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of Article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory; 5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin [...].

Accordingly, under the coverage of ICEFRD, a different treatment reserved to non-nationals can be considered discrimination, if not justified by objective reasons<sup>24</sup>.

Moreover – and following the interpretation provided by the European Court of Human Rights of Art. 14 of the European Convention of Human Rights, (ECHR)<sup>25</sup> – relevant case law seems to include non-national residents in its scope of application. Along similar lines, it has been argued that a different treatment based on one's immigration status is tantamount to a breach of the prohibition of discrimination<sup>26</sup>. Unfortunately, the ECJ is not bound by this doctrine, although two considerations can be made. First, all EU Member States have signed the ECHR. Second, Art. 6.3 of the Treaty on European Union establishes that the fundamental rights recognized by the ECHR shall constitute the general principles of EU Law.

Undoubtedly, Directive 2000/43/EC places a particular focus on third-country nationals. Art. 19 of TFEU does not mention nationality as a ground of discrimination, yet this choice appears to be intentional. Ideally, they are protected by this article, as considered racial or ethnic minorities.

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<sup>24</sup> Howards, E., *op. cit.*, 252.

<sup>25</sup> 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”.

<sup>26</sup> For example, *Bah v The United Kingdom* (app. n° 56328/07) Judgment of 27 September 2011. Of relevance is the following sentence: “The Court finds therefore, in line with its previous conclusions, that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an ‘other status’ for the purposes of Article 14. In the present case, and in many other possible factual scenarios, a wide range of legal and other effects flow from a person’s immigration status”.

In contrast, Art. 18 prohibits discrimination based on nationality but only when involving EU nationals, consequently excluding third-country nationals<sup>27</sup>. Moreover, the majority of racial and ethnic minorities are third-country nationals, however the number of EU nationals belonging to these minorities is concurrently on the rise. For all these reasons, it is sensible to review the interpretation of the wording “any treatment” contained in Art. 3.2 of Directive 2000/43/EC, taking into consideration aspects like legal residence and border control. A broader interpretation would result in the ineffectiveness of the directive, if related to third-country nationals<sup>28</sup>. As will be seen later, the ECJ has dealt with third-country nationals without taking into consideration the anti-discrimination directive.

One glaring fault in the EU anti-discrimination directives lies in the consideration of religion, which is regarded as a ground for discrimination in Directive 2000/78/EC, while the same is not true of Directive 2000/43/EC, since here it is distinct from racial and ethnic discrimination. This circumstance would be irrelevant, but the varied degree of protection ensured in both directives is peculiar.

As already stated, the priority given to discrimination based on race, ethnicity and other grounds – except gender – places religion in a subordinate position. This aspect seems to overlook the deep relation existing between race, ethnicity, origin and religion. These grounds for discrimination are frequently intertwined, and it is very difficult to distinguish one from the others<sup>29</sup>. Although religion usually rests on one’s choice, it is not always a personal decision. Sometimes, it is linked to ethnicity as an inherent part of the individual human being. From this point of view, it is not a matter of belief but rather a substantive dimension of membership to a community identified as an ethnic collectivity<sup>30</sup>.

In comparison to other anti-discrimination directives, Directive 2000/43/EC is innovative in that it narrows down the set of criteria used to justify discriminatory practices. Art. 4 lays down the main requirements to justify a different treatment. Without considering the broader scope of direct discrimination allowed by Directive 2000/78/EC – above all concerning churches or other public or private organizations on which the ethos of religion or belief is based – a clear limitation emerges on racial

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<sup>27</sup> See S. Benedí Lahuerta, *op. cit.*, 741.

<sup>28</sup> *Ibid.*, 742.

<sup>29</sup> E. Howard, *op. cit.*, p. 241. Also, S. Benedí Lahuerta, *p. cit.*, 739.

<sup>30</sup> S. Benedí Lahuerta, *p. cit.*, 748.

discrimination as opposed to Directive 2004/113/EC. This is because Directive 2000/43/CE only regards as valid those requirements within the scope of employment and occupation. Consequently, there is no provision like Art. 4.5 of Directive 2004/113/EC permitting such different treatment in the provision of goods and services<sup>31</sup>.

The wider implementation of the anti-discrimination directive can be seen as a positive outcome. Yet it is not easy to predict the latitude granted by the ECJ regarding these measures.

Taking gender equality into account, it is expected that the ECJ will take a stricter approach, outlawing any measure which penalize less represented and victimized communities. It is worth remembering that Directive 2002/73/EC derogated Art. 2(4) of Directive 76/207/CEE, which was considered the main barrier to furthering positive discrimination<sup>32</sup>. Notwithstanding this, the major shortcoming of the directive is that it allows, but not imposes, affirmative action. If one were to compare EU legislation with Art. 2 of ICEFRD<sup>33</sup>, the former would certainly prevail in terms of safeguards. Furthermore, a duty is placed on Member States to appoint a body or bodies for the promotion of equal treatment, similarly to the obligation laid down in Directive 2006/54/EC in relation to sex discrimination. Once again, this points to the higher consideration given to sex and race compared to other grounds of discrimination.

Apart from the characteristics described above, there are many other interesting aspects in the anti-discrimination directive that should be highlighted. Although some shortcomings, the reading given by the ECJ is very interesting, and can offer new developments in the path to tackling all forms of discrimination. Significantly, it has been argued<sup>34</sup> that the directive has a more result-oriented approach than those concerning other forms of discrimination. Apart from a conclusion by the Advocate General, which has not been taken into account by the Court due to a

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<sup>31</sup> J. Ringelheim, *op.cit.*, 17.

<sup>32</sup> In this respect, E. Howard, *op. cit.*, 249.

<sup>33</sup> “States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved”.

<sup>34</sup> E. Howard, *op. cit.*, 250.



procedural flaw, a limited number of judgments have been delivered on racial discrimination.

### 3. Case Law of the European Court of Justice

#### *a) Case C-54/04. Judgment of the Court, 10 July 2008: Discriminatory Criteria for Selecting Staff*

Apparently, this is a simple case, yet some interesting considerations can be made. The Belgian body for the promotion of equal treatment appealed to the court alleging that a company specialized in the sale and installation of up-and-over and sectional doors, adopted a discriminatory recruitment policy. The company was looking for fitters, but the director made a public statement saying that they could not employ immigrants because customers were reluctant to give them access to their houses to perform their work. The courts rejected the claims for lack of evidence, adding that the presumption that a person would apply for a job and would not be employed due to his ethnic origin was ill-founded. Having appealed this decision, the court of appeal sent a preliminary ruling to the ECJ. One question was primarily whether the fact that the employer had challenged the allegedly discriminatory selection criteria from the very beginning amounted to direct discrimination. For the purposes of the ruling, another question was whether the recruitment of indigenous workers on an exclusive basis can be considered as a form of direct discrimination. Finally, the national court enquired about the burden of proof and the dividing line between direct and indirect discrimination.

The ECJ answered this preliminary ruling providing a relatively few arguments. The first aspect to ascertain was whether a public statement constitutes enough evidence for establishing direct discrimination, or whether a formal complaint from the victim of the discriminatory practice is a necessary pre-condition. Contrary to what happens in some Member States, the court concluded that the lack of an identifiable complainant does not lead to the conclusion that no direct discrimination has occurred. The need to foster the conditions for a socially inclusive labour 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 made in this case can dissuade candidates with certain ethnic or racial characteristics from applying, and consequently, entering the labour market. Accordingly, the decision of the ECJ draws on the meaning of Directive 2000/43/EC, according to which

discrimination is not dependent on the identification of a complainant who claims to have been treated differently on grounds of race.

The possibility for the Belgian body to initiate legal proceedings in cases of racial discrimination without the existence of an individual or a group of people treated differently is not imposed by the directive, although Member States can amend this provision, which accordingly, cannot be deemed contrary to Art. 13<sup>35</sup>. The ECJ concludes that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination.

This interpretation represents an important step forward in the theorization of direct discrimination within the European Union doctrine. In its decision, the ECJ has argued that a public body, as contemplated in Art. 13 of the directive, can file a complaint against an employer, although there are no actual victims. So, the damage arising from racial discrimination must not be accredited in current terms, but it is possible to hypothesize that potential victims will not take part in a selective process where a job advertisement excludes them *a priori*.

The final considerations provided by the ECJ in *Feryn* leave us with some doubts. In line with Art. 8 of Directive 2000/43/EC, the ECJ holds that statements like the one published in this case give rise to the presumption of a discriminatory recruitment process. This interpretation has given rise to criticism because apparently, and as pointed out in the first part of the judgment, the statement signifies more than a presumption of direct discrimination. It constitutes a direct discrimination in itself<sup>36</sup>.

This aspect is problematic as placing the burden of proof on the defendant, who should give evidence that there has not been a breach of the principle of equal treatment and that his practice does not correspond to that described in the “suspicious statement”. Yet again, the only way to justify a direct discrimination practice is determining either occupational requirements or positive action. Obviously, the justification allowed in this case cannot include both. It must be concluded then that the weakest aspect of this judgment is the dubious difference between presumption and discrimination.

Finally, the Belgian Court that delivered the preliminary ruling asked about the possible sanctions faced by the employer. In this respect, the ECJ refers to the principles laid down in Art. 15: effectiveness, proportionality and dissuasive character, apart from enough compensation

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<sup>35</sup> Stressing this point, M. Ambrus, M. Busstra, K. Henrard, *op. cit.*, 168.

<sup>36</sup> *Ibid.*, 171.

to the victim, adding that a specific sanction is not provided. Rather, each Member State can choose the most appropriate solution. When no specific victims exist, the public body can seek a declaration of the discrimination with an adequate level of publicity in which the cost might be borne by the defendant, or alternatively it may ask for a prohibitory injunction ordering the employer to cease the discriminatory practice. Also, it is possible to obtain compensation for damages from the public body and compensation for the expenses or the imposition of a penalty to the sued entity.

*b) Case C-415/10. Judgment of the Court, 19 April 2012: Access to Information and Privacy*

This is a more complex case of discrimination called “multiple discrimination”, as involving discrimination on several grounds (sex, age and race). It is a special case concerning the recruitment process. The complainant is Russian-born Mrs. Meister, 45 years old, who holds a Russian degree recognized as equivalent to a German one. The defendant company commenced a selection procedure and Mrs. Meister sent in her application, subsequently receiving a rejection letter without an invitation to sit an interview. Not long afterwards a new advertisement with the same content was published and again Mrs. Meister put forward her candidature, but she was turned down without any reason for this. Mrs. Meister considered that she was being treated less favorably on the grounds of her sex, age, and ethnic origin and made a formal complaint against the employer. The complaint being rejected, she appealed to the higher Court, which dismissed the appeal. But the complainant challenged this second decision, turning to the Federal Labor Court. The Federal Labour Court made reference to a preliminary ruling about the information rights that Mrs. Meister could claim in furtherance of Directive 2000/43/EC.

Concerning the information rights of a person who considers himself or herself having been victim of disparate treatment, he/she can stake a claim, based on provisions on the burden of proof, included in Directives 2000/43/EC, 2000/78/EC and 2006/54/EC, the three pieces of legislation being almost identical. All of them draw on Council Directive 97/80/EC of 15 December 1997 on the burden of proof in the event of discrimination based on sex. Currently, this Directive has been transposed

in Directive 2006/54/EC. At all events, the foregoing provisions have been interpreted in *Kelly*<sup>37</sup>, in which the court held that the assessment of facts from which the existence of direct or indirect discrimination can be presumed is a matter for national judges. Consequently, the directives do not specifically entitle those who consider themselves being victims of any sort of discrimination to information in order to establish the facts from which discrimination can be presumed to satisfy the plaintiff's burden of proof. However, the court recognizes that a refusal of disclosure on the part of the defendant is not possible, 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 directives. National courts must ensure that the refusal to disclose information by the employer in the context of the facts and circumstances would not be liable to compromise the achievement of those objectives.

In this context, upon remembering the relevance that these cases can have in terms of statistical evidence, the ECJ recognizes that, in the case submitted to a preliminary ruling, the employer seemed to have refused Mrs. Meister any access to information that she asked for. This refusal of disclosure – jointly with the fact that the company had not discussed with Mrs. Meister her level of expertise and abilities, nor had she met the requirements of the job advertisement, is of considerable importance taking into account that the defendant was not offered a job interview.

Following this reasoning, the ECJ ruled that the directives must be interpreted as they do not guarantee access to information, including if the employer has selected other applicants at the end of the recruitment process and irrespective of a worker's plausible claims that he meets the requirements listed in a job advertisement but his application had been rejected. Nevertheless, it cannot be ruled out that a company's refusal to give access to that information may be taken into account while establishing the facts from which the direct or indirect discrimination can be presumed. But this weighing is for the Referring Courts.

It must be concluded that the ECJ reached an eclectic and uncompromising decision that places all responsibility on the Referring Court. That behavior constitutes a repeated trend in cases concerning discrimination issues. In the case referred for preliminary ruling, it might

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<sup>37</sup> Case C-104/10, Judgment of the Court 21<sup>st</sup> July 2011.

be recognized that Mrs. Meister had done her best to discover the facts because she requested all the relevant information to the company. Clearly, she 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 discrimination had taken place or to have a hypothetical third party, not belonging to one of the protected groups –women, elderly workers, or racial minorities. Otherwise, it would be highly unfair to dismiss Mrs. Meister’s claim. So the ECJ decided, without reasoning enough, to suggest to the Referring Court that, in view of the circumstances, the lack of information fulfills the presumption of discrimination and satisfies the burden of proof attributed to Mrs. Meister. It is not necessary to remark that this is a mere suggestion of the ECJ because the main ruling consists in rejecting that the directives grant access to information.

This reluctant reasoning does not contribute much to consolidating a sound ECJ doctrine on some very controversial questions, such as the burden of proof or the way to define the hypothetical third party. About this last question, Mrs. Meister had not been able to select any actual comparator, but it would be 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 an older woman and pertaining to a racial minority<sup>38</sup>.

Of course, the disclosure of information encounters problems in the context of discrimination proceedings. Granting information about certain aspects may violate data protection and privacy rights from third persons involved in the facts. Consequently, the rights of persons who allegedly have been victims of disparate treatment must be limited in terms compatible with these privacy rights. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free dissemination of such data constitutes the main piece of legislation in this aspect, without prejudice to national developments. However, to balance information rights and data protection rights does not mean that the latter must be privileged. Rather, the problem must be focused on how the information must be disclosed in a manner respectful of privacy. Unfortunately, the Meister ruling does not offer any clues in this respect.

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<sup>38</sup> Suggesting both possibilities, L. Farkas, *Getting it Right the Wrong Way? The Consequences of a Summary Judgment: the Meister Case*, in *European Anti-Discrimination Law Review*, 2012, n. 15, 26 ff.

*b) Case C-394/11. Judgment of the Court, 31 January 2013: Roma Communities and Access to Services*

The judgment of the ECJ in this case does not have any relevance on discrimination issues. This is because the competence of the Bulgarian administrative body to deliver preliminary rulings is discussed and the ECJ concluded that it lacks the authority required to perform this task. Consequently, the Court rules that it does not have jurisdiction to answer the questions referred by that body. Notwithstanding this, the opinion of the advocate general, Mrs. Kokott, delivered on 20 September 2012 is very useful. First and foremost, it is important to provide an overview of the discussion on the supply of services: in two neighborhoods of Sofia which were inhabited mainly by members of Roma communities, the electricity meters were placed higher than in other parts of the city where this ethnic minority was not prevalent. 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 electricity 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 Advocate General argued that the controversy fell within the scope of Directive 2000/43/EC. The electricity meters are clearly part of the general conditions under which customers receive the electricity service. Accordingly, the scope of Art. 3(1)(h) 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.

Following this statement, the reasoning moved to an apparently clear question. Undoubtedly, it is not necessary to identify an entitlement or a right to access the service on the part of the claimant. The existence of a discriminatory practice does not require an infringement of rights or interest legally safeguarded. A national rule which makes discrimination dependent on these sorts of infringements is totally contrary to Directive 2000/43/EC.

After these considerations, the conclusions lead to questions about the burden of proof. The referring body had asked if the fact that the different placement of electricity meters was in itself enough to fulfill the requirements on the person or institution that alleges discrimination. The matter is related to how high the degree of certainty must be before drawing the conclusion that discrimination has occurred. In this respect, the Advocate General, after reviewing several versions of the Directive in



different languages, came to the conclusion that the same criteria established in sex discrimination cases must be applied to this field. One must remember that the reversal of the burden of proof has been introduced to improve the situation of the potential victims of discrimination. For this reasoning, the Advocate General has expressed that it is enough to produce this reversion under Art. 8.1 of the Directive 200/43/EC that persons who consider themselves wronged because the principle of equal treatment has not been applied should establish facts which substantiate a *prima facie* case of discrimination.

It can be concluded that when determining the difference between direct and indirect discrimination, this case refers to the latter. Actually, there were no indicators of direct discrimination based on ethnic origin. Apparently, the municipality did not have the purpose of violating the dignity of the members of Roma community or creating a humiliating living environment for them. Having established this, 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. Obviously, according to the Advocate General, the measure of placing the meters higher in more problematic neighborhoods does not guarantee that there would be fewer incidences. But such a measure must be regarded as suitable for achieving a legitimate aim and as contributing to an appreciable reduction in the number of cases of illegal interference with the electricity supply, and apparently other systems obtaining similar results would be considerably more expensive and almost as detrimental to citizens' rights. So, the principle of proportionality was also safeguarded.

Although briefly described, this case is of great interest for developing the doctrine on discrimination issues, mainly, the burden of proof, the difference between direct and indirect discrimination and justification matters. Unfortunately, procedural problems caused the dismissal of the preliminary ruling. So, the ECJ lost a great opportunity to clarify interesting aspects concerning the provision of goods and services, a field in absolute need of case law. Nowadays, there is only one Judgment about gender discrimination in that field<sup>39</sup>.

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<sup>39</sup> Case C-236/09, *Test-Achats ASBL*, Judgment of 1 March 2011.



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