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Non-discrimination in Administrative Law

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OUTLINE

- I) The scope and sources of anti-discrimination law
 - 1. Legal framework
 - 2. Two basic concepts
 - 3. The scope of non-discrimination provisions and the level of protection of grounds of discrimination
- II) Discrimination cases before administrative courts
 - 1. The state as an employer
 - 2. Social Security
 - 3. Review of administrative acts
 - 4. Equality authorities
- III) Applying non-discrimination provisions in the context of administrative jurisdiction

Legal Framework (1/2)

I. EU Charter of Fundamental Rights (CFR): art. 20-26.

II. Gender Equality

- Directive 79/7 (Equal Treatment in Social Security)
- Directive 92/85 (Pregnant Workers Directive)
- Directive 2010/18 (Parental Leave Directive)
- **Directive 2004/113** (Goods and Services)
- **Directive 2006/54** [Equal Treatment Directive (recast)]

Repeals:

- ✓ Directive 75/117 (Equal Pay Directive)
- ✓ Directive 76/207 (Equal Treatment Directive)
- ✓ Directive 86/378 (Equal Treatment in Social Security Schemes)
- ✓ Directive 97/80 (Burden of Proof Directive)

Legal Framework (2/2)

III. Other grounds of discrimination in EU law

- Directive 2000/43 (Race Equality Directive -RED)
- Directive 2000/78 (Employment Directive or Equality Framework Directive - EFD)

IV. Council of Europe

- ECHR art. 14
- Protocol 12 to the ECHR
- European Social Charter (1961): Part I.1; Part II. art.1 [Revised ESC (1996) Part I.20 and 27;Part II. art.20; Part V. art.E.]

V. National Constitutions and legislation

Two Basic Concepts

- **Direct discrimination:** *where one person is treated less favourably on grounds of [X] than another is, has been or would be treated in a comparable situation*
- **Indirect discrimination:** *where an apparently neutral provision, criterion or practice would put persons having [characteristic X] at a particular disadvantage compared with other persons*
Unless: the provision, criterion or practice is objectively justified and proportionate

Grounds of discrimination in EU directives – scope and levels of protection

Grounds Areas	Race	Sex	Disability	Sexual Orientation	Religion	Age
Employment (incl. access to employment/self-employment/occupation, vocational training, working conditions, participation in professional organizations)	Difference in treatment justified by Occupational Requirements	Difference in treatment justified by Occup.Req. (except for equal pay and occupational social security schemes)	Difference in treatment justified by Occupational Requirements	Difference in treatment justified by Occupational Requirements	Difference in treatment justified by Occupational Requirements (incl. the organization's ethos if it is based on religion or belief)	Difference in treatment justified by Occupational Requirements /objectively and reasonably justified differences (incl. employment policy, labour market and vocational training objectives)
Social protection						
Access to goods and services		Justified by a legitimate aim+ proportionality				
Education						
Social advantages						

Grounds of discrimination in CFR – field of protection

- Art. 21(1) CFR: *“any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”*
- Art. 51 CFR (Field of protection): *“the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”*
- The scope of art. 21 CFR is wider than the scope of the equality directives – still not covering every aspect of national legislation (e.g. income taxation C-122/15)

Grounds of discrimination in ECHR

- Art. 14 ECHR and art. 1 Protocol no 12: *“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**”*
- Non-exhaustive list of grounds
- Article 14 has no independent existence, but complements the other provisions of the Convention and the Protocols thereto, since it protects individuals, placed in similar situations, from any discrimination in the enjoyment of the rights set forth in those other provisions ≠ Protocol no 12 is independent and includes a more comprehensive equality provision

Grounds of discrimination in ECHR – levels of protection

- Suspect grounds: differential treatment may only be justified by “*very weighty reasons*” and it has to be suitable and necessary for realizing the legitimate aim
- Non-suspect grounds: states enjoy a wide margin of appreciation
- No connection between the explicit identification of a ground in art. 14 or art. 1 Protocol no 12 and its status as suspect or non-suspect
- **Suspect**: race or colour, ethnic origin, birth status, sex, sexual orientation, nationality, disability, mental faculties, HIV-status
- **Non-suspect**: property, age, language, religion, political opinion parental and marital status, immigration status, etc
- Race and ethnic origin: “***no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures***” (ECtHR app.no. 55762, 55974/00 *Timishev*, par. 58; Gr.Ch. 57325/00 app.no. *D.H. and Others* par. 176)

Non-discrimination in the context of administrative jurisdiction

- Non-discrimination law is usually considered part of labour law – a great portion of cases before the CJEU on discrimination issues are referred by administrative courts or by courts with jurisdiction on administrative law matters
- 4 groups of administrative law discrimination cases
 1. The state as an employer
 2. Social Security
 3. Review of administrative acts
 4. Equality authorities

1. The state acting as an employer (1/2)

- State is one of the biggest employers in every country
- Equality directives apply to all public entities in respect with all stages of employment

1. The state acting as an employer (2/2)

➤ Recruiting procedures:

- ✓ Age discrimination: CJEU C-229/08 *Wolf* (30-year age limit for fire-fighters); C-416/13 *Pérez* (30-year age limit for policemen); C-258/15 *Sorondo* (35-year age limit for policemen)
- ✓ Sex discrimination : CJEU C-409/16 *Kalliri* (common height limits for both sexes in police recruitment); ECJ C-285/98 *Kreil* (army positions open only for men)

➤ Employment and working conditions:

- ✓ Sex discrimination: C-116/06 *Kiiski* (maternity and pregnancy leave); C-222/14 *Maistrelis* (parental leave by the father when the mother is unemployed)
- ✓ ECtHR app. no. 42393/98, *Dahlab v. Switzerland* (Islamic scarf worn by school teacher)

➤ Termination of employment:

- ✓ Disability discrimination: CJEU C-795/19 (dismissal of a prison guard with a hearing impairment); C-406/15 *Milkova* (lower protection of civil servants with disabilities against dismissal than that of private sector employees)
- ✓ Age discrimination: C-159,160/10 *Fuchs and Kohler* (Compulsory retirement of prosecutors on reaching the age of 65); C-546/11 (Refusal to grant availability pay to civil servants who have reached the age of 65)

➤ Vocational training:

- ✓ Age discrimination: C-548/15 (no tax deduction of training costs incurred after a certain age)

2. Social Security

- Art. 3(3) EFD: “*This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes*” → art. 6(2): age discrimination protection doesn’t apply to occupational social security schemes for **retirement or invalidity** benefits
- Art. 7 and 8(1)(d),(e)ETD (recast): occupational social security schemes fall within the scope of the Directive, with exceptions
- CJEU case-law: the concept of ‘pay’ must be interpreted broadly
 - ✓ CJEU C-267/06 *Maruko*: survivor’s pension scheme derived from the employment relationship and financed exclusively by workers and employers, without any financial involvement of the State, which depends directly on the period of service completed and its amount calculated by reference to the last salary constitutes “pay” and the EFD is applicable
 - ✓ C- 124/11, C-125/11 and C-143/11 *Dittrich et.al.*: a financial benefit granted to public servants by the State acting as employer by reason of their employment relationship under a protection scheme against illness constitutes “pay” and the EFD is applicable
 - ✓ C-546/11: availability pay scheme for civil servants is not a retirement or invalidity benefits occupational social security scheme → art. 6(2) EFD not applicable
 - ✓ C-312/17 *Bedi*: Bridging assistance paid to former employees by the State and calculated by reference to the last salary paid constitutes “pay” and the EFD is applicable

3. Review of administrative acts

- The duty to disapply, if necessary, national legislation that is contrary to a provision of EU law which has direct effect is owed not only by the national courts but also by all organs of the State, including the administrative authorities, called on, in the exercise of their respective powers, to apply EU law (ECJ 103/88 *Costanzo* par. 30-31; CJEU C-924, 925/19 PPU *FMS*, par. 183) (principle of primacy of EU law)
- Art. 21 CFR is “sufficient in itself to confer on individuals a right which they may rely on” (see CJEU C- 414/16 *Egenberger* par. 76)
- The field of application of CFR is far wider than the one of the Equality Directives
- Discrimination cases on various fields of administrative action:
 - ✓ Art. 21 CFR: CJEU C-356/12 *Glatzel* (refusal to issue driving license for heavy goods vehicles on grounds of low visual acuity); C-528/13 *Léger* (refusal of blood donation on grounds of past homosexual activity)
 - ✓ EFD: C-670/18 *CO* (exclusion of retired employees from a public call for expression of interest for an analysis and consulting role); C- 914/19 *GN* (age limit for access to the profession of notary)
 - ✓ Art. 24 CFR and art. 2 of the Convention on the rights of the child: C-490/20 *Pancharevo* (refusal to issue a birth certificate, which is prerequisite for the issue of a passport, on the ground that the birth certificate issued by another member state mentions two mothers)

4. Equality authorities

- Specialized administrative bodies for the implementation of anti-discrimination provisions
- They may have the power to implement sanctions
- They should always have jurisdiction to decide to disapply a rule of national law that is contrary to EU law (see CJEU C-378/17)
- Actions against sanctions imposed by equality bodies or against their refusal to impose sanctions fall under the jurisdiction of administrative courts.
 - ✓ EFD (employment): CJEU C-81/12 *Accept* (homophobic statements by the “sponsor” of a football club – dismissal of a complaint by the National Council for Combating Discrimination); C-824/19 *TC, UB* (total exclusion of blind person from jury duties – sanctions imposed by the Commission for Protection against Discrimination)
 - ✓ RED (provision of services): C-83/14 *CHEZ* (electricity meters in an urban district lived in mainly by Roma – decision by the Commission for Protection against Discrimination against *CHEZ*); C-668/15 *Jyske Finans* (demand for additional proof of identity in the form of a copy of a passport or residence permit from persons born abroad – sanctions imposed by the Equal Treatment Board)

Applying non-discrimination provisions in the context of administrative jurisdiction

- First question: are the equality directives applicable? If not, is the CFR applicable?
- Three areas of interest: a) reversal of burden of proof; b) justification of differential treatment; and c) possible sanctions.

1. Reversal of burden of proof (1/3)

- **Reversal of burden of proof:** All directives provide 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 [i.e. when they establish a prima facie case of discrimination], it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*”.
- Key factor that sets apart discrimination cases from others: lowers the standard of proof regarding the causal link between the protected characteristic and the differential treatment.

1. Reversal of burden of proof

(2/3)

➤ Jurisprudential concept in the context of indirect discrimination

- ✓ CJEU C-127/92 *Enderby*: “Workers would be **unable** to enforce the principle of equal pay before national courts if evidence of a prima facie nature did not **shift to the employer the onus** of showing that the pay differential is not in fact discriminatory” → **principle of effectiveness** of EU law.
- ✓ ECtHR app.no. 57325/00, *D.H. and Others v. the Czech Republic*: “Where an applicant alleging indirect discrimination thus establishes a **rebuttable presumption** that the **effect** of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory... it would be **extremely difficult in practice** for applicants to prove indirect discrimination without such a shift in the burden of proof... **the level of persuasion** necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake”

1. Reversal of burden of proof (3/3)

- If the case falls under the scope of the equality directives:
 - ✓ Art. 8 par. 5 RED, art. 10 par. 5 EFD, art. 9 par. 5 Goods and Services Directive, art. 19 par. 3 Equal Treatment Directive: the burden of proof **doesn't shift** to the respondent if the court uses an **inquisitorial** approach, i.e. where *“it is for the court or competent body to investigate the facts of the case”*.
 - ✓ This may be the case in many administrative jurisdictions (depending on whether a country has transposed this provision or not), which makes it more difficult for plaintiffs to prove discrimination.
 - ✓ How will administrative courts apply this without undermining the principle of effectiveness of EU law?
- When the case lies outside the scope of the equality directives, but the Charter is still applicable
 - ✓ No specific provision on the burden of proof
 - ✓ Application of the reversal of burden of proof in cases of indirect discrimination

2. Possible justification of differential treatment

- Art. 52 CFR (“*Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*”) applies both to direct and indirect discrimination in the context of art. 21 CFR
- Equivalent to justification for derogations from prohibition of *indirect* discrimination provided for by the equality directives → lower level of protection for direct discrimination than the equality directives.
- In case ECHR is applicable: only “very weighty reasons” can justify differential treatment on the grounds of suspect characteristics → even stricter in cases of ethnic or racial origin.

3. Sanctions

- Equality Directives: sanctions for discrimination should be effective, proportionate and dissuasive
- Member States free to choose between the different solutions suitable for achieving the directives' objective
- CJEU case-law
 - ✓ 14/83 *Van Colson*: a purely nominal amount of compensation → not dissuasive and effective
 - ✓ C-81/12 *Asociația Accept*: a simple warning would normally not be considered to be sufficient
 - ✓ C-54/07 *Firma Feryn*: finding of discrimination+an adequate level of publicity
 - ✓ C-30/19 *Braathens*: compensation without recognition → not dissuasive and effective
- Administrative jurisdiction: annulment of administrative act and award of compensation in case of damages
 - ✓ Is one of these sanctions enough?
 - ✓ Possibility of obliging the administrative body to bear the cost of publicity of the finding of discrimination
 - ✓ Legitimate interest by the plaintiff to obtain a judgment recognizing discrimination



Thank you for your attention!