

Dr Krzysztof Ślebzak

Supreme Court, Office of Research and Analysis
Chair of Labour Law and Social Law, Faculty of Law and Administration, Adam Mickiewicz University,
Poznań

**Scope of the EU antidiscrimination law and definitions of key concepts
(direct discrimination, indirect discrimination, harassment)**

1. The concept of the EU antidiscrimination law in labour law

The concept of the EU antidiscrimination law should be understood as the prohibition of discrimination expressed explicitly or implicitly or equal treatment (order of equality) expressed both in primary law and secondary law. In this paper I want to discuss problems connected with the prohibition of discrimination and the order of equal treatment in the area of labour law and particularly with a focus on Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation² and 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 version).³ Although the latter directive is not covered by this conference, I do not think it should be neglected, for two reasons. Firstly, it employs similar concepts and legal constructs on discrimination as the other two directives. Secondly, the legal acts which were binding prior to the implementation of Directive 2006/54/EC, were analysed in the literature and were also the subject of decisions made by the Court of Justice of the European Union (CJEU). Therefore, these analyses and decisions can and even should be taken into account when discussing Directives 2000/46 and 2000/78 since they determine the understanding of specific problems in these legal documents.

1.1. Primary law

From the point of view of the EU primary law related to employment there are norms of two types. The first one expresses the prohibition of discrimination *expressis verbis*. The other ones are competence norms, which serve as the basis for taking legal action to fight discrimination or strive

¹ 2000/43/EC (OJ 2000 L 180, p. 22)

² 2000/78/EC (OJ 2000 L 303, p. 16)

³ 2006/54/EC (OJ 2006 L 2004 p. 23)

for equal treatment. Acts of international law or those of the Council of Europe, in particular in the context of the reference contained in the Charter of Fundamental Rights of the European Union, which are also part of EU law, are a different issue. For this reason we can additionally speak of prohibitions of competition deriving from these legal acts.

Let us look at the treaty law first. Article 157 of the Treaty on the Functioning of the European Union (TFEU) (Article 141 of the Treaty Establishing the European Union – TEC) imposes on member states the obligation to adhere to the principle of equal pay for male and female workers for equal work or work of equal value. Equal pay without discrimination on grounds of sex means that 1) pay for the same work at piece rates is calculated on the basis of the same unit of measurement and 2) pay for work at time rates is the same for the same job. Article 141(3) contains a delegation for the Parliament and the Council, which, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, should adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. Judgments of the CJEU quickly recognized that Article 141 TEC ordering equal pay for workers irrespective of sex is of both economic and social value. And it has been recognized that the prohibition of discrimination expressed in that provision serves as the basis for the functioning of the Community⁴ and expresses the fundamental right of the European Union.⁵

The prohibition of discrimination has also been expressed in Article 18 TFEU (ex Article 12 TEC), in which nationality of the European Union is treated as a discrimination criterion. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited. The words “without prejudice” seem to indicate a subsidiary character of the prohibition compared to detailed prohibitions of discrimination under other provisions of the Treaty.⁶ At the same time the European Parliament and the Council, acting in accordance with the ordinary legislative procedures, may adopt rules designed to prohibit discrimination on grounds of nationality.

When the Amsterdam Treaty became effective, a special competence norm was incorporated into Article 13(1) TEC (presently Article 19(1) TFEU), which expanded the extent of possible

⁴ CJEU judgment of 8 April 1976, 43/75, *Defrenne II*, ECR 1976/3/00455; CJEU judgment of 10 February 2000 in case C-270/97 and in case C-271/97, *Siebers and Schrage*, ECR 2000/2/I-00929; CJEU judgment of 13 January 2004 in case C-256/01, *Allonby*, ECR 2004/1B/I-00873

⁵ CJEU judgment of 9 June 2003 in case C-25/02, *Rinke*, ECR 2003/8-9A/I-08349

⁶ CJEU judgment of 12 May 1998 in case C-336/96, *Gilly*, ECR 1998/5/I-02793

antidiscrimination provisions. From that time it has been possible to legislate antidiscrimination law not only on grounds of sex but also on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. So we can say that the problems of equal treatment have become a priority area of the community employment law.⁷

In light of the above provisions an argument could be advanced that the regulations of the primary law can serve as the basis for inference of the prohibition of discrimination as the principle of the EU primary law (in particular with respect to equal treatment of pay irrespective of sex, as indicated by the CJEU⁸). The definition of the legal character of the principle understood as above is another problem – is this a principle from which specific rights and obligations can be inferred (particularly those applicable to natural persons) or is this a principle of a hermeneutic character, which can be applied to interpret the secondary law and in this meaning understood as an optimization order?⁹

1.2. Secondary law

Historically, the first prohibition of discrimination was expressed in the Council Directive 75/117/EEC of 10 February 1975 on the approximation of laws of the Member States relating to the application of the principle of equal pay for men and women.¹⁰ Its aim with respect to pay was to implement the prohibition of discrimination expressed in Article 141 TEC (presently Article 157 TFEU). As the prohibition of discrimination was also directly expressed in the regulation in question, from the point of view of the justification of the prohibition of discrimination the directive referred to did not have any practical significance since this principle was expressed in TFEU on the basis of Article 141 TEC.¹¹ There were other directives adopted subsequently, e.g. 1) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (76/207/EEC)¹²; 2) Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (86/378/EEC)¹³ and 3) Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.¹⁴

⁷ L. Mitrus, *Wpływ regulacji wspólnotowych na polskie prawo pracy*, Kraków 2006

⁸ CJEU judgment of 11 July 2006 in case C-13/05, *Chacón Navas*, ECR 2006/7A/I-06467; CJEU judgment of 22 November 2005 in case C-144/04, *Mangold*, ECR 2005/11/I-09981

⁹ K. Riesenhuber, *Europäisches Arbeitsrecht*, Heidelberg 2009, p. 171 and the literature therein

¹⁰ 75/117/EEC (OJ 1975 L 45, p. 19)

¹¹ CJEU judgment of 14 December 1993 in case C-110/91, *Moroni*, ECR 1993/12/I-06591; CJEU judgment of 31 March 1981, 96/80, *Jenkins*, ECR 1981/3/00911; CJEU judgment of 17 May 1990 in case C-262/88, *Barber*, ECR 1990/5/I-01889; CJEU judgment of 26 June 2001 in case C-110/91, *Brunnhöfer*, ECR 1993/12/I-06591

¹² 76/207/EEC (OJ 1976 L 39, p. 40)

¹³ 86/378/EEC (OJ 1986 L 225, p. 40)

¹⁴ 97/80/EC (OJ 1998 L 14, p. 6)

In 2000 two new directives were adopted based on Article 19 TFEU in which discrimination on other grounds was regulated, namely Directive 2000/43 and Directive 2000/78. These two legal documents significantly expanded the extent of discrimination criteria. Mention should also be made of 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.¹⁵

Such a great number of antidiscrimination and equal treatment directives has led to the lack of transparency of legal provisions and triggered action to consolidate problems stipulated in them. This was done partially, in 2006, when Directive 2006/54 was adopted. The latter repealed Directives 75/117, 76/207, 97/80 and 86/378.

Consequently, within the secondary law related to the broadly understood labour law we have three basic legal acts, which stipulate the prohibition of discrimination or order equal treatment in the context of 1) equal treatment on grounds of religion or belief, disability, age or sexual orientation (2000/78), 2) equal treatment irrespective of racial or ethnic origin (2000/43) and 3) equal treatment of men and women in matters of employment and occupation, and particularly in matters of pay (2006/54).

2. The aim of the EU antidiscrimination law

The purpose of the directives declared by the legislator in Article 1 of each of them must be compared with their recitals. Generally, the legal acts in question have been implemented because of 1) the need to retain transparency of the existing provisions relating to the equal treatment of men and women in matters of employment and occupation (2006/54), 2) the will to recognize equal treatment in the process of employment as a fundamental right and human right in the understanding of the Convention for the Protection of Human Rights and Fundamental Freedoms as they result from the constitutional traditions common in the member states as well as the contribution to the achievement of a high level of employment and social protection, increase of the level and quality of life as well as economic and social cohesion, solidarity and free movement of people (2000/78) and 3) recognition of equal treatment irrespective of racial or ethnic origin as a fundamental right and human right, which should also lead to a high level of employment and social welfare, increase of the level of the quality of life, economic and social cohesion and solidarity and development of the European Union as a space of freedom, security and justice (2000/43). It follows

¹⁵ 2004/113/EC (OJ 2004 L 373, p. 37)

from the comparison of the recitals that insofar as Directive 2006/54 serves mainly to achieve economic aims, which, by the way, are the primary aims of the European Union, in the other two directives the recognition of the right to equal treatment or non-discrimination as a fundamental human right comes to the fore. In the literature one encounters opinions saying that in this way foundations for the identification of European social law¹⁶, of a harmonizing¹⁷, and not only coordinating character, are built. However, a number of specific problems arise relating to both the character of the directives and the relation of the prohibition of discrimination as regards pay expressed in Directive 2006/54 to that formulated in Article 157 TFEU. For this reason determination of the normative text of the individual prohibitions of discrimination becomes complex. It is equally difficult to say whether Directives 2000/78 and 2000/43 lay down a general framework for combating discrimination only (which is indicated by Article 1(2) in both of them, which say that the purpose of the directive is to “lay down a framework for combating discrimination” on the grounds of specific criteria), or whether they are an independent source of the prohibition of discrimination. This is indicated by the judgment in the Mangold case¹⁸, in which the CJEU said that Directive 2000/78 is not the source of the principle of non-discrimination. This judgment was criticized by attorney generals in subsequent cases.¹⁹ Similar views can also be found in the doctrine.²⁰ In its subsequent CJEU judgments departure from the arguments given in the Mangold case is evident.²¹ At the same time, in new judgments the horizontal impact of the directive as well as the character of the prohibition of discrimination and its sources are addressed. It seems that the source of the prohibition of competition based on recital 12 and Article 2(1) and Article 1 of Directive 2000/78, interpreted in a historical context, can be easily found in the provisions of the directive, which is corroborated by different authors in the doctrine.²² These arguments could also be applied to the prohibition of competition stipulated in Directive 2000/43. Consequently, a conclusion could be drawn that irrespective of the disputes about Article 19 TFEU (whether it is only a competence norm or an independent source of the prohibition of competition according rights *in personam*), the right of a person to be treated without discrimination with a specific normative tenor would have to be

¹⁶ M.S. Bell, *Beyond European Labour Law? Reflections on the EU Racial Equality Directive*, ELJ 8 (2002), 384

¹⁷ E. Eichenhofer, *Sozialrecht der Europäischen Union*, Berlin 2006, p. 41

¹⁸ CJEU judgment of 22 November 2005 in case C-144/04, *Mangold*, ECR 2005/11/I-09981

¹⁹ Cf. opinion of attorney general L.A. Geelhoed of 16 March 2006, in case C-13/05, *Chacón Navas*, ECR 2006/7A/I-06467; opinion of attorney general J. Mazák of 15 February 2007 in case C-411/05; *Palacios de la Villa*, ECR 2007/10A/I-08531

²⁰ K. Rieshuber, “Mangold” verabschiedet, in: Hanua/Hau/Rohe, *Gegen den Strich – Festschrift für Klaus Adomeit*, 2008, p. 631-644

²¹ Judgment of 19 January 2010 in case C-555/07, *Kücükdeveci*, www.eur-lex.europa.eu; judgment of 11 July 2006 in case C-13/05, *Chacón Navas*, ECR 2006/7A/I-06467

²² F. Temming, *Altersdiskriminierung im Arbeitsleben – Eine rechtsmethodische Analyse*, 2008, p. 393 ff.; also E. Muir, *Enhancing the Effects of Community Law on National Employment Policies; the Mangold Case*, ELR 31 (2006), p. 871 ff.; U. Preis, *Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht*, NZA 2006, 401-410

inferred from the prohibitions of competition expressed in Directives 2000/78 and 2000/43 on grounds of the discrimination criteria stipulated therein.

As regards Directive 2006/54, it is beyond dispute that the EU legislator did not manage to put the individual aspects of the prohibition of competition in order, which is evidenced by the fact that the prohibition of discrimination as regards pay is stipulated twice in the directive (Article 4 and Article 14(1)(c)).²³

Observance of the correct legislation principles when adopting the directives in question is another problem. The texts of the directives could have been written more clearly and in a more straightforward language. As they are, they are difficult to understand and there are also problems with their interpretation. It is very difficult to define the specific rights and obligations of specific target groups. And for this reason the problem of the normative text of the individual prohibitions of competition seems to be open.

3. The scope of the EU antidiscrimination law

3.1. Personal scope

Personal scope has been defined in the same way in Directive 2000/78 and Directive 2000/43. It also overlaps that defined in Directive 2006/54. Pursuant to Article 3(1) of the former two directives, they are applied to “all persons, as regards both the public and private sectors, including public bodies”. The subsequent part of this provision specifying the subjects to which it applies proves that the legislator intended the directive to apply to broadly understood employment (Article 3(1)(a-d) of both directives) and social benefits (Article 3(1)(e-h) of Directive 2000/43). In this context both directives relate primarily to workers (and so does Directive 2006/54). Although the directives do speak *expressis verbis* about men and women (Article 1, sentence 1), reference to employment and occupation means that the directive relates to men and women who are workers (or candidates for workers).

However, in none of the directives the concept of worker has been defined. Consequently, following the interpretation of EU law, which is reflected in the CJEU case law, it must be assumed that this concept is autonomous and its meaning must be derived from the provisions of EU law and not from the provisions of individual national laws of the member states. Article 45 TFEU (ex Article 39 TEC) guarantees freedom of movement for workers. It is precisely this provision which CJEU used to

²³ Cf. K. Riesenhuber, *Europäisches Arbeitsrecht*, op. cit., p. 212

formulate a definition of worker in the understanding of EU law. The word “worker” is understood very broadly. So a worker is a natural person, who performs a specific economic activity²⁴, under the direction of another person in return for which he/she receives remuneration²⁵. The type of the employment or service relation as well as its legal basis is not important.²⁶ The concept of a worker also covers officials of both higher and lower levels, who perform work in the framework of public law relationship. In the latter context the functionaries of uniformed services can also be treated as workers. Temporary workers, border workers, trainees and persons in management positions are also workers. The amount of remuneration, types of contract under which work is performed or time of contract are immaterial to classify a given person as a worker. The only criterion is remuneration for work.

The use of the concept of workers in the understanding of EU law is important not only because it is necessary to take account of the existing CJEU judgments but also because the prohibition of discrimination in employment, deriving from the primary and secondary law, relates to broadly understood employment, which, in turn, is differently implemented in individual member states. Therefore, it is not legitimate to differently define the concept of worker in the directives.

It must also be noted that Directives 2000/78/ 2000/43 and 2006/54 relate also to self-employment and to the performance of work and discrimination is prohibited in the context of access conditions to both. Thus, the personal scope of the directives is much broader and comprises not only workers in the understanding of EU law. In this context an interesting problem relates to discrimination connected with self-employment. There is no doubt that equal treatment relates also to situations in which the employer forces prospective candidates for workers to choose self employment on grounds of a specific discriminatory criterion. The extension of the personal scope of the directive and inclusion of self-employed persons and access to trade proves that the European labour law is, in fact, the employment law, going away from a narrowly understood labour relationship. This is logical if we take into account the fact that the promotion of professional activity irrespective of its form is one of the aims of the European Union and practically that of each member state because of the

²⁴ CJEU judgment of 12 December 1974 in case 36/74, *Walrave and Koch*, ECR 1974/8/01405; CJEU judgment 31 May 1989 in case 344/87, *Bettray*, ECR 1989/5/01621

²⁵ CJEU judgment of 3 July 1986 in case 66/85, *Lawrie-Blum*, ECR 1986/7/02121 ; CJEU judgment of 2 February 1992 in case C-357/89, *Raulin*, ECR 1992/2/I-01027; CJEU judgment of 23 March 2004 in case C-138/02, *Collins*, ECR 2004/3B/I-02703 ; CJEU judgment of 7 June 2004 in case C-456/02, *Trojani*, ECR 2004/8-9A/I-07573; CJEU judgment of 17 March 2005 in case C-109/04, *Krenemann*, ECR 2005/3B/I-02421; CJEU judgment of 17 July 2008 in case C-94/07, *Raccanelli*, www.eur-lex.europa.eu

²⁶ CJEU judgment of 7 June 2004 in case C-456/02, *Trojani*, ECR 2004/8-9A/I-07573; CJEU judgment of 2 February 1992 in case C-357/89, *Raulin*, ECR 1992/2/I-01027

labour system, existing from the times of the industrial revolution, the main aim of which is to earn means of support through work.

3.2. Material scope

The material scope of the directives is stipulated in Article 3(1) of Directive 2000/43 and 2000/78 and Article 1 of Directive 2006/54. It might *prima facie* seem that the material scope is most narrow in the latter of the three documents since it only relates to “employment and occupation” (Article 1(1), sentence 1) with reference to 1) access to employment, including promotion and vocational training, 2) working conditions, including pay and 3) occupational social security scheme. However, the scope is defined much more precisely in Articles 5, 7 and 14.

As regards Directives 2000/78 and 2000/43, they comprise 1) conditions for access to employment or self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion, 2) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; 3) employment and working conditions, including dismissals and pay; 4) 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 organizations (Directive 2000/78). Directive 2000/43, compared to Directive 2000/87, extended the scope by 1) social protection, including social security and healthcare; 2) social advantages; 3) education; and 4) access to and supply of goods and services which are available to the public, including housing. The Directive excluded “occupation” (Article 3(1)(a) from equal treatment.

Directive 2006/54 defines in detail the material scope of social security schemes, which comprises protection against the risks of sickness, invalidity, old age, including early retirement, industrial accidents and occupational diseases, unemployment; occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment. With reference to that part, exclusions from the material scope were regulated in Article 8 of Directive 2006/54, which comprise: 1) individual contracts for self-employed persons, 2) single-member schemes for self-employed persons, 3) insurance contracts to which the employer is not a party, in the case of workers, 4) optional provisions of occupational social security schemes offered to participants individually to guarantee them either additional benefits or a choice of date on which the normal benefits for self-employed persons will start, or a choice between

several benefits, 5) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

In the discussion of material scope common problems of the individual labour law must be addressed first. In this context the obligation of equal treatment relates to 1) conditions of access to employment, including promotion, 2) working conditions, including pay and 3) conditions of dismissal and remuneration. The basic problem is that none of the terms (except for remuneration) has been legally defined. Therefore, their normative tenor has been determined on specific cases heard by the CJEU.

As regards to conditions of employment and promotion (Article 3(1)(a) in Directives 2000/78 and 2000/43 and Article 14(1)(b) in Directive 2006/54), the judgments of the CJEU, which mainly relate to the latter directive, stipulate that conditions of employment should be understood as the criteria used to select a candidate for a worker as well as determination of conditions of employment and professional support. For example, it was stated that access to employment comprises not only access to occupation but also the extension of a fixed-term contract²⁷, determination of conditions of employment comprising prohibition of employment of women²⁸, prohibition of night work²⁹ or extra allowances to pay (family credit) if they determine access to employment in a situation when they affect employment taken by families³⁰. In the latter case the Court also said that the concept of access to employment cannot be understood as relating to the conditions existing prior to the establishment of the employment relationship. The prospect of obtaining a family credit on condition of accepting a low paid job encourages a worker to take the job but the family credit regulates access to employment.

The concept of the “conditions of employment” (Article 3(1)(c) in Directives 2000/43 and 2000/78 and Article 14(1)(c) in Directive 2006/54) is equally broadly understood in the judgments of the CJEU. It comprises a reduction or change of working time³¹, conditions of return to paid work from maternity leave³², including its interruption³³; claim for re-engagement in the case of unfounded

²⁷ CJEU judgment of 4 October 2001 in case C-438/99, *Jiménez Melgar*, ECR 2001/10A/I-06915

²⁸ CJEU judgment of 25 July 1991 in case C-345/89, *Stoeckel*, ECR 1991/7/I-04047; CJEU judgment of 1 February 2005 in case C-203/03, *Commission vs. Austria*, ECR 2005/2/I-00935

²⁹ CJEU judgment of 3 February 1994 in case C-13/93, *Minne*, ECR 1994/2/I-00371; CJEU judgment of 4 December 1997 in case C-207/96, *Commission vs. Italy*, ECR 1997/12/I-06869; CJEU judgment of 13 March 1997 in case C-197/96, *Commission vs. France*, ECR 1997/3/I-01489; CJEU judgment of 2 August 1993 in case C-158/91, *Levy*, ECR 1993/8/I-04287

³⁰ CJEU judgment of 13 July 1995 in case C-116/94, *Meyers*, ECR 1995/7/I-02131; the case was about family credit allowances, aimed at supporting working families

³¹ CJEU judgment of 11 June 2003 in case C-77/02, *Steinicke*, ECR 2003/8-9B/I-09027; CJEU judgment of 20 March 2003 in case C-187/00, *Kutz-Bauer*, ECR 2003/3/I-02741

³² CJEU judgment of 27 February 2003 in case C-320/01, *Busch*, ECR 2003/2/I-02041

termination of a contract³⁴, determination of holiday entitlement³⁵, the right to annual assessment of performance³⁶ and the employer's right to send home a woman who is pregnant, although not unfit for work, without paying her salary in full.³⁷

The broadly understood conditions of employment also include conditions of dismissal (Article 3(1)(c) in Directives 2000/78 and 2000/43 and Article 14(1)(c) in Directive 2006/54. This term should be understood as all the provisions which state when termination of contracts of employment (or termination of employment) is permissible as well as those which relate to the consequences of the termination of employment. This refers to all the conditions related to the termination of employment, which could be the result of an agreement between the parties (voluntary redundancy)³⁸ or achievement of retirement age.³⁹ In the latter situation there have been interesting cases related to the permissibility of dismissal when a woman reached retirement age under national law, which is lower for women than for men. The Court stated unambiguously that such a termination is against the prohibition of discrimination on grounds of sex.⁴⁰ The Court also said that the provision of the directive related to the conditions of dismissal does not exclude interpretation of the provisions of national law, according to which, generally speaking, part-time workers are not to be compared with full-time workers when an employer has to proceed to selection on the basis of social criteria when abolishing a part-time job on economic grounds.⁴¹

The last elements, which determine the material scope of discrimination, are equal treatment relating to pay (Article 3(1)(c) of Directives 2000/43 and 2000/78 and Article 14(1)(c) of Directive 2006/54). Only in this case has the EU legislator decided to formulate a legal definition of the term. It is given in Article 157(2) TFEU (ex Article 141(2) TEC and adopted in Article 2(1)(e) of Directive 2006/54. Pay is the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.

³³ CJEU judgment of 20 June 2007 in case C-116/06, *Kiiski*, ECR 2007/8-9B/I-07643

³⁴ CJEU judgment of 9 February 1999 in case C-167/97, *Seymour-Smith and Perez*, ECR 1999/2/I-00623

³⁵ CJEU judgment of 18 March 2004 in case C-342/01, *Merino Gómez*, ECR 2004/3B/I-02605

³⁶ CJEU judgment of 30 April 1998 in case C-136/95, *Tibault*, ECR 1998/4/I-02011

³⁷ CJEU judgment of 19 November 1998 in case C-66/96, *Pedersen*, ECR 1998/11/I-07327

³⁸ CJEU judgment of 21 July 2005 in case C-207/04, *Vegani*, ECR 2005/7B/I-07453

³⁹ CJEU judgment of 26 February 1986 in case 152/84, *Marshall*, ECR 1986/2/00723; CJEU judgment of 26 February 1986 in case 262/84, *Beets-Proper*, ECR 1986/2/00773,

⁴⁰ *Ibidem*

⁴¹ CJEU judgment of 26 June 2000 in case C-322/98, *Kachelmann*, ECR 2000/8-9B/I07505

The Court of Justice of the European Union made frequent reference to this definition⁴² and assumed its broad understanding. For example, it stated that under Directive 2000/78 categories of pay under Article 141 TEC (presently 157 TFEU) should include the survivor's benefit granted under an occupational pension scheme managed by the pension fund of a specified category of workers, when such a system is stipulated in the collective agreement and when its purpose is to supplement social benefits due under generally binding national regulations, when the system is financed exclusively by the workers and employers of a given sector and there is no public financial contribution to it and when its beneficiaries, according to collective agreement, include the concerned category of workers and when the amount of the pension is determined by reference to the period in which the beneficiary's spouse was insured and the full amount of the contributions paid by that worker.⁴³

As regards collective agreement, the directives in question express a prohibition of discrimination with reference to membership of and involvement in an organization of workers or employers or any other organization whose members carry on a particular profession, including the benefits provided for by such organizations (Article 3(1)(d) of Directives 2000/43 and 2000/78 and Article 14(1)(d) of Directive 2006/54. The material scope of the prohibition of discrimination comprises prohibition in the positive and in the negative sense, which means that nobody can be discriminated against on grounds of membership or involvement and also on grounds of non-membership and non-involvement. This is of key importance from the point of view of union freedom, which is one of workers' personal rights.

The material scope of Directives 2000/43 and 2006/54 also comprises the prohibition of discrimination related to social security (Article 3(1)(e) of Directive 2000/43 and Article 7 of Directive 2006/54). Equal treatment in the area of social security has not been regulated in Directive 2000/78, mainly because the latter relates to equal treatment in employment and occupation. The inclusion of equal treatment in Directive 2000/43 is proof that its material scope is broader since it comprises also social protection, including all other legal instruments which do not fit the concept of social security. The differentiation of "social security" from "healthcare" in the directive in question indicates that healthcare has been excluded from the system of social security. An analysis of the provisions in question, including in particular the regulations of the ILO Convention on the minimum standards of social security, as well as the provisions of the Regulation of the European Parliament

⁴² e.g. CJEU judgment of 30 March 2004 in case C-147/02, *Alabaster*, ECR 2004/3B/I-03101; CJEU judgment of 30 March 2000 in case C-236/98, *JämO*, ECR 2000/3/I-02189; CJEU judgment of 16 June 1999 in case C-218/99, *Abdoulaye*, ECR 1999/8-9A/I-05723

⁴³ CJEU judgment of 1 April 2008 in case C-267/06, *Maruko*, 2008/I-1757

and the Council (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems⁴⁴ (and the executive regulation) leads to the conclusion that the words used in both directives as well as the semantics used are not consistent. Healthcare is an element of social security in the understanding of Regulation 883/2004 since the regulation covers health benefits both in kind and in cash. Social protection should be understood as including social and medical assistance, which are excluded in principle from the coordination regulation (Article 3(5) of Regulation 883/2004). This does not change the fact that the material scope of the prohibition of discrimination in the context of Directive 2000/43 and 2006/54 relates to a broadly understood social right, comprising social security (in the understanding of the coordination regulation and the ILO regulation), social and medical assistance (excluded from the coordination regulation). Furthermore, we should not forget about Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.⁴⁵ This means that the prohibition of discrimination in social security is recognized in the context of equal treatment on grounds of racial and ethnic origin and sex. It must be noted that Article 4 of Regulation 883/2004 contains a general principle of equal treatment, without any reference to any criterion. Therefore, if we assume that Regulation 883/2004 regulates social security in a comprehensive manner, then equal treatment derived from it is broader than prohibitions of discrimination derived from Directives 2000/43 and 7/79.

Additionally, only under Directive 2000/43, the prohibition of discrimination relates also to social benefits, education and access to and supply of goods and services which are available to the public, including housing (Article 3(1(f-h)). Therefore, it can be concluded that equal treatment irrespective of racial and ethnic origin relates to any sphere of state activity governed by social policy aimed at solving a specific social problem.

4. Discrimination criteria

A short comment on discrimination criteria is in place. The analysis of the directives in question reveals that they include sex (2006/54), racial and ethnic origin (2000/43) and religion or belief, disability, age and sexual orientation (2000/78).

The sex criterion is beyond dispute since basically the equal treatment of men and women is at stake. However, the CJEU stated that discrimination on grounds of transsexuality is a case of discrimination on grounds of sex. In the Court's view the protection of transsexuals' results from the need to

⁴⁴ OJ 2004 L 166, p. 1.

⁴⁵ OJ 1979 L 6, p. 24, Directive 7/79

respect the principle of dignity being at the foundation of equal treatment.⁴⁶ It should be noted that sexual orientation is not related to the sex criterion and so only Directive 2006/54 does not provide for the prohibition of discrimination on the grounds of sexual orientation.

As regards the criterion of racial and ethnic origin it should be emphasized that these are not criteria that relate to state origin (citizenship) although a close relation can exist between the two criteria. A similar relation can exist with respect to the criterion of religion. It is worth noting that the European Union rejects all the theories leading to the statement of the existence of separate human races (Recital 6) and prohibition of discrimination on the grounds of citizenship has been expressed *expressis verbis* in TFEU. Linguistically speaking, the concept of race denotes a group of people who have a specific group of features inherited from their predecessors. The word “ethnic” indicates membership of some nation. In this light the prohibition of discrimination comprises predominantly ethnic groups, e.g. the Roma community.

There are no doubts about the criterion of religion or belief. As regards religion, it should be understood as a specific faith in the existence of God or gods, origin and aim of human life, creation of the world and related rites, moral principles and organizational forms. Beliefs can relate to religious and other aspects of social life. There is no doubt that also discrimination on the grounds of the lack of any religion (atheism) is prohibited.

Discrimination on grounds of sexual discrimination means equal treatment irrespective of the preferences in the choice of partner. In this context we are talking about the discrimination of hetero- and homosexual people. The directive does not relate to any questions connected with family status or related benefits, leaving these problems in national legislations. Insofar as equal treatment of homosexual people does not give rise to such doubts as in the past, problems connected with the possible understanding and definition of the concept of sexual orientation seem to be problematic. A question arises whether the protection extends to other preferred sexual behaviours (e.g. behaviour aimed at achieving sexual satisfaction with the involvement of animals or children).⁴⁷

There is much controversy and many practical problems connected with the criteria of disability and age. In the case of disability, the CJEU ruled that this term should be understood as a limitation, which results in particular types of physical, mental or psychological impairments and which hinders

⁴⁶ CJEU judgment of 30 April 1996 in case C-13/94, *P. v. S.*, ECR 1996/4-5/I-02143

⁴⁷ This problem is addressed by K. Riesenhuber, *Europäisches Arbeitsrecht*, Heidelberg 2009, p. 244

the participation of the person concerned in professional life.⁴⁸ The separation of disability from sickness is particularly important – in principle disability is long term. Sickness in the understanding of EU law should be understood as a short term inability to provide work. In the case of disability there is a permanent impairment of a person's physical, mental or psychological capability, which makes participation in social life, including employment, impossible or considerably restricts it. An additional problem is connected with the degree of disability as well as with the occurrence of specific disabilities which, although they do not impair the capabilities of the body permanently, do not have to leave to exclusion from or considerable restriction of participation in social life (the hearing impaired, obese or visually impaired people).

In the case of discrimination on grounds of age, which is stipulated in Directive 2000/78, it is not the protection of elderly people that is intended. For example, Article 6(1)(a) stipulates justification for the different treatment of young people.⁴⁹ The CJEU examined the problem of discrimination on grounds of age with reference to 1) determination of a relative age (regulation which permits acquisition of the right to the survivor's pension if the widow(er) was at least 15 years younger than the deceased worker⁵⁰ or 2) determination of the retirement age at which, under law, employment is terminated.⁵¹

5. Key concepts of the antidiscrimination law

For the purpose of the directives in question, the principle of equal treatment means lack of any forms of direct or indirect discrimination. The key concepts of the European antidiscrimination law include direct discrimination, indirect discrimination as well as harassment and sexual harassment. The concept of multiple discrimination, which derives from the complex identity of each person, deserves a separate discussion. This type of discrimination occurs when a given person experiences discrimination or harassment for a few reasons, which are part of that person's identity.

Direct discrimination (Article 2(2)(a)) as defined in Directives 2000/43, 2000/78 and 2006/54 is taken to occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to in each of the directives. The prohibited discrimination criterion is the departure point in each case. The concept of direct discrimination is based on the necessity to compare a specific actual situation with a hypothetical situation where discrimination does not occur. Consequently, a person must be treated less favourably than another

⁴⁸ CJEU judgment of 11 July 2006 in case C-13/05, *Chacón Navas*, Item 43, ECR 2006/7A/I-06467

⁴⁹ CJEU judgment of 18 June 2009 in case C-88/08, *Hütter*, www.eur-lex.europa.eu

⁵⁰ CJEU judgment of 23 June 2008 in case C-427/06, *Bartsch*, www.eur-lex.europa.eu

⁵¹ CJEU judgment of 16 October 2007 in case C-411/05, *Palacios de la Villa*, ECR 2007/10A/I-08531

person only on grounds of the discrimination criterion (e.g. a man in comparison with a woman, a disabled person in comparison with an able person, a person with heterosexual preferences with a person with homosexual preferences). As regards discrimination on grounds of sex, typical examples of direct discrimination include job announcements favouring single sex candidates⁵², but also differentiation within one sex for reasons of maternity or pregnancy.⁵³ In the context of Directive 2000/43, direct discrimination includes an employer's announcement in which he/she stated that he/she would not be employing workers of foreign origin.⁵⁴

Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation 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 (Article 2(2)(b) of Directive 2000/43 and 2000/78, and Article 1(1)(b) of Directive 2006/54), or as regards persons with a particular disability, the employer or any person or organisation to whom Directive 2000/78 applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice. Consequently, indirect discrimination consists of unjustified differentiation of the status of specific groups as a result of a seemingly neutral decision. It is worth noting, however, that not each seemingly neutral decision is discriminatory since it is necessary to additionally prove that the decision was not justified (the aim is legal and the measures are appropriate and necessary). So it is necessary to meet two conditions to deem a specific conduct discriminatory. As regards equality on grounds of sex, the CJEU has ruled that a specific action is direct discrimination if it applies to a proportionally larger number of women than men.⁵⁵

Once Directives 2000/43 and 2000/78 have entered into force, the definition of harassment has appeared in a legal text (Article 2(3) of Directives 2000/43 and 2000/78). A similar definition can be found in Directive 2000/6/54, which additionally introduces the term of sexual harassment (Article

⁵² CJEU judgment of 8 November 1990 in case 177/88, *Dekker*, ECR 1990/10/I-03941; CJEU judgment of 10 March 2005 in case C-196/02, *Nikoloudi*, ECR 2005/3A/I-01789; CJEU judgment of 22 April 1997 in case C-180/95, *Draehmpaehl*, ECR 1997/4/I-02195

⁵³ e.g. CJEU judgment of 11 October 2007 in case C-460/06, *Paquay*, ECR 2007/10A/I-08511; CJEU judgment of 20 June 2007 in case C-116/06, *Kiiski*, ECR 2007/8-9B/I-07643; CJEU judgment of 16 February 2006 in case C-294/04, *Herrero*, ECR 2006/2A/I-01513

⁵⁴ CJEU judgment of 10 July 2008 in case C-54/07, *Feryn*, www.eur-lex.europa.eu

⁵⁵ CJEU judgment of 12 October 2004 in case C-313/02, *Wippel*, ECR 2004/10A/I-09483; CJEU judgment of 6 April 2000 in case C-226/98, *Jørgensen*, ECR 2000/4/I-02447; CJEU judgment of 26 June 2000 in case C-322/98, *Kachelmann*, ECR 2000/8-9B/I-07505; CJEU judgment of 9 June 2003 in case C-25/02, *Rinke*, ECR 2003/8-9A/I-08349

2(1)(c) and (d). Harassment is deemed to be a form of discrimination within the meaning of paragraph 1 when unwanted conduct related to any of the grounds referred to in Article 1 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 order to occur, harassment must necessarily satisfy two conditions: 1) there must be unwanted conduct (unwanted from the point of view of the person at whom it is directed) and 2) the conduct must violate the dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. It is not clear whether harassment must be intentional with a specific (direct or indirect) intent. It seems that it is not a necessary condition. In the case of sexual harassment, on the other hand, the conduct must be of a sexual nature, verbal, non-verbal or physical with the purpose of leading to the same effect as in the case of harassment.

6. Conclusion

In conclusion a few general comments are in place. First of all, it is necessary to continue the codification of work connected with the consolidation of some prohibitions of competition and their presentation in a single legal document. A question arises whether it is necessary to extend antidiscrimination measures to areas outside the field of employment. The Social and Economic Committee made a reference to this problem in its opinion on 'Extending anti-discrimination measures for areas outside employment and the case for a single comprehensive anti-discrimination directive'⁵⁶ and in its opinion on the "Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation".⁵⁷

Action suggested in these opinions are a preliminary attempt at putting some order to the existing discussion on the relation between the treaty prohibitions of discrimination and those stipulated in the secondary law as well on the elimination of doubts as to their legal character. This is also underlined by EESC when it says that maintenance by the European Union of a system of legislation based on the obligation to combat discrimination on six specific grounds within the framework of which there are differences in the level of protection, lesser protection against discrimination on some grounds and more restricted guarantee of equal treatment in such cases is not justified. The lack of a binding obligation to observe a common EU norm means the lack of actual encouragement for the member states to legislate regulations providing for cohesive rights for the individual motives of discrimination. This is of particular importance when equality is the fundamental right of EU law,

⁵⁶ OJ 2009 C 77, p. 102

⁵⁷ OJ 2009 C 182, p. 19

including also in the area of employment. In the EESC opinion, the present inconsistent and hierarchical community system of protection measures against discrimination makes the achievement of EU aims more difficult.

Irrespective of the above, it also seems necessary to start action pertaining to the relation of prohibition of discrimination in the labour law to social security, both as regards the terminology used and the definition of the material scope of social security with relation to social assistance or broadly understood social law.

It is also necessary to re-edit the directives in question so as to remove the existing interpretation doubts as well as introduce some systematic order to the problems in question.