

# The Hierarchy in EU Equality Law and the Protection of Vulnerable Minorities

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## Legal provisions in the EU

- **Race Directive:** Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22
- **Employment Equality Directive:** Directive 2000/78/EC of 27 Nov. 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16: covers: religion or belief, disability, age and sexual orientation
- **Recast Directive:** Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23: gender
- **Gender Goods and Services Directive:** Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37

## Differences between the Directives 1

- Protection against racial and ethnic origin discrimination stronger than protection against discrimination on grounds of religion or belief, disability, age and sexual orientation:

### MATERIAL SCOPE

- **Employment Equality Directive** (Art. 3): employment and occupation
- **Race Directive** (Art. 3): employment and occupation, social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services that are available to the public, including housing

Many Member States have extended the protection against discrimination on the grounds covered by the Employment Equality Directive in areas outside employment and occupation

## Differences between the Directives 2

- Protection against racial and ethnic origin discrimination stronger than protection against discrimination on grounds of religion or belief, disability, age and sexual orientation:

### DUTY TO DESIGNATE EQUALITY BODY/BODIES

- **Race Directive** (Article 13): duty to designate body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin
- **Employment Equality Directive**: no such duty

Many Member States have Equality Bodies which cover all the grounds of discrimination prohibited by the national law

## Differences between the Directives 3

### EXCEPTIONS ALLOWED

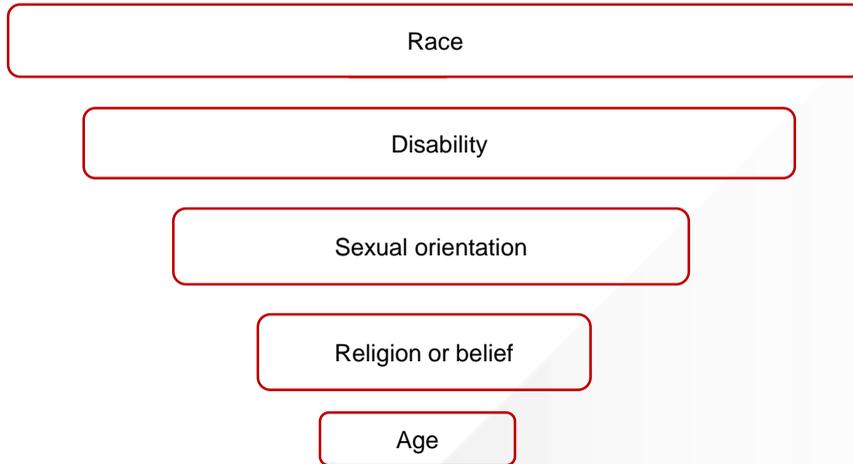
- **Race Directive:** justification direct discrimination: genuine and determining occupational requirement (Art. 4); positive action (Art. 5)
- **Employment Equality Directive:** genuine and determining occupational requirement (Art 4(1)); positive action (Art. 7); exception for churches / other organisations with an ethos based on religion or belief (Art. 4(2)); reasonable accommodation for people with a disability (Art. 5); justification of direct age discrimination (Art. 6); general justification(Art. 2(5)):

This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others

## Proposal

- **Proposal COM (2008) 426** for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation:
  - Covers all areas covered by Race Directive
  - Imposes duty to designate a body or bodies for the promotion of equal treatment
- Not adopted yet, needs unanimity
- Commission in Communication with proposal (COM (2008) 420, 2.2))
  - 'when it comes to protection against discrimination there can be no hierarchy'
  - proposed Directive, 'will bring to an end any perception of a hierarchy of protection'

## Hierarchy of discrimination grounds



## Expansion of protection 1

Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397

- a policy where members of certain racial or ethnic groups are not considered for employment is **directly discriminatory**
- under EU law, a complaint can be made **without there being a direct individual victim**
- The statements made in public were enough for a **presumption of discrimination**, thus burden of proof shifted to employer who had to prove that recruitment policy was not discriminatory (Article 8 Race Directive)
- Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275

## Expansion of protection 2

- Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* ECLI:EU:C:2015:480

ethnicity has its origin in idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds

- (confirmed in: Case C-668/15 *Jyske Finans A/S v Liegebehandlingsnaevnet* ECLI:EU:C:2017:278)
- Discrimination by association covered: (Case C-303/06: *Coleman v Attridge Law/Steve Law*, ECLI:EU:C:2008:415)
- includes both direct and Indirect discrimination and harassment (*Coleman* and *CHEZ*)

## Expansion of protection 3: disability

concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers; and, the impairment must be long-term.

'reasonable accommodation' must be defined widely; includes not only material but also organisational measures; a reduction in working hours can be a form of reasonable accommodation

Cases C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* and C-337/11 *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation*

## CJEU and sexual orientation discrimination

- Case C-267/06 *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* ECLI:EU:C:2008:179
- Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286
- Case C-124/11 *Dittrich*, C 125/11 *Klinke* and C 143/11 *Muller v Bundesrepublik Deutschland* ECLI:EU:C:2012:771
- Case C-267/12 *Frédéric Hay v Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823

### CONCLUSION

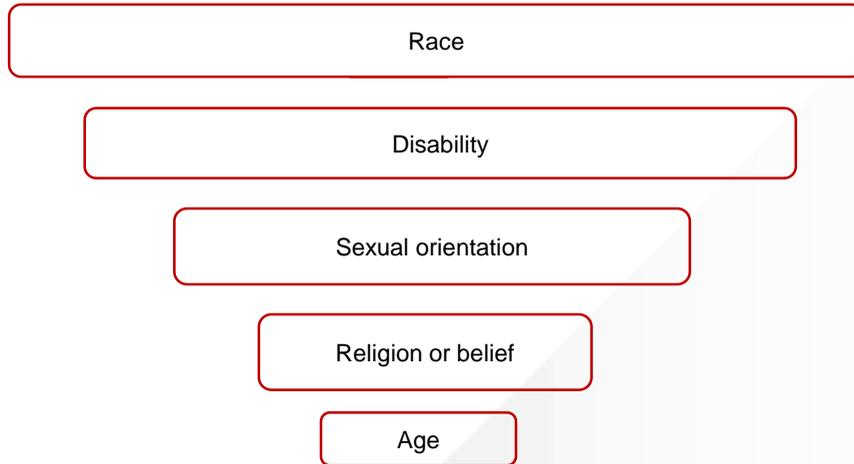
- Member States remain free to decide whether or not to institute and recognise legally recognised same-sex partnerships
- However, once national law recognises such relationships as comparable to that of spouses then the **principle of equal treatment applies**

## Expansion of protection: sexual orientation

Case C-673/16 *Coman and Others v Romania*  
ECLI:EU:C:2018:385

CJEU: in relation to residence rights, Member States must recognise a same-sex marriage which has been contracted in a valid way in another Member State

## Hierarchy of discrimination grounds

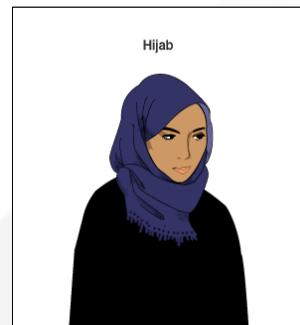


## CJEU: religion or belief discrimination

Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203

Case C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*  
ECLI:EU:C:2017:204

Both cases: the term 'religion'  
must be interpreted in a broad sense



## Grand Chamber CJEU in *Achbita*

- no direct discrimination
- Up to referring court whether direct or indirect discrimination
- CJEU gave **guidance on indirect discrimination**:
- neutrality policy was **legitimate aim**: part of the freedom to conduct a business (Article 16 EUCFR)
- **Justified if**:
  - rule was genuinely pursued in a consistent and systematic manner
  - rule did not make a distinction between different religions or different (religious, philosophical or political) beliefs
  - rule was limited to customer-facing employees; and,
  - employer had considered whether the employee could be moved to a job without contact with customers, taking into account the inherent constraints to which the undertaking is subject, and without the employer being required to take on an additional burden

## Religion or belief low in hierarchy

- No strict proportionality test applied: no balancing of needs of employer and disadvantage of employee and their right to freedom of religion as guaranteed by Art. 10 EU Charter
- Prohibition held to be limited to what is strictly necessary if limited to employees who interact with customers
- leaves very large group of workers exposed to negative effects of a ban on religious clothing or symbols
- The burden on the employer of offering the employee a non-customer facing role not very onerous

Confining the protection for religious expression to non-visible or back room roles does not promote equality for religious minority groups. It restricts not only employment opportunities but also the broader inclusion of these groups and thus it creates invisibility for religious minorities

## Religion or belief low in hierarchy

- Applying more lenient justification test not in line with previous case law of the CJEU
- CJEU: exceptions to the principle of equal treatment must be interpreted narrowly
- CJEU: justification test for indirect sex discrimination in Case C-170/84 *Bilka Kaufhaus v. Karin Weber von Harz* EU:C:1986:204:
- Justification test has three parts:
  - the means chosen must correspond to a real need;
  - they must be appropriate to achieving the objective pursued; and
  - they must be necessary to that end
- Justification test in *Achbita* does not apply any of these three

## Conclusion

- Art. 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, **including the rights of persons belonging to minorities**
- Preambles Race/Employment Equality Directives refer to:
  - need to foster a labour market favourable to **social integration**;
  - importance of employment in contributing strongly to the **full participation** of citizens in economic, cultural and social life;
  - discrimination undermines the achievement of, among other issues, **economic and social cohesion and solidarity**;

*Achbita* and *Bougnaoui* show:  
religious equality in the workplace across Europe is  
looking like a rather strange kind of equal

## More information

This presentation is based on the following article:

- Erica Howard (2018) 'EU Anti-discrimination Law: Has the CJEU Stopped Moving Forward?', 18, 2-3, *International Journal of Discrimination and the Law*, 60-81

For more information and the critique levelled against the *Achbita* and *Bougnaoui* cases see:

- Erica Howard (2017) 'Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui*', 24, 3, *Maastricht Journal of European and Comparative Law* 348-366