

Deusto Journal of Human Rights

Revista Deusto de Derechos Humanos

No. 11/2023

DOI: <https://doi.org/10.18543/djhr122023>

ARTICLES / ARTÍCULOS

The Court of Justice of the European Union on Ethnic and Racial Discrimination: An Analysis of the Application of Directive 2000/43/EC

El Tribunal de Justicia de la Unión Europea en el ámbito de la discriminación étnica y racial: un análisis sobre la aplicación de la Directiva 2000/43/CE

Nacho Hernández Moreno

<https://doi.org/10.18543/djhr.2906>

E-published: December 2023

Copyright (©)

Deusto Journal of Human Rights / Revista Deusto de Derechos Humanos is an Open Access journal; which means that it is free for full and immediate access, reading, search, download, distribution, and reuse in any medium only for non-commercial purposes and in accordance with any applicable copyright legislation, without prior permission from the copyright holder (University of Deusto) or the author; provided the original work and publication source are properly cited (Issue number, year, pages and DOI if applicable) and any changes to the original are clearly indicated. Any other use of its content in any medium or format, now known or developed in the future, requires prior written permission of the copyright holder.

Derechos de autoría (©)

Deusto Journal of Human Rights / Revista Deusto de Derechos Humanos es una revista de Acceso Abierto; lo que significa que es de libre acceso en su integridad inmediatamente después de la publicación de cada número. Se permite su lectura, la búsqueda, descarga, distribución y reutilización en cualquier tipo de soporte sólo para fines no comerciales y según lo previsto por la ley; sin la previa autorización de la Editorial (Universidad de Deusto) o la persona autora, siempre que la obra original sea debidamente citada (número, año, páginas y DOI si procede) y cualquier cambio en el original esté claramente indicado. Cualquier otro uso de su contenido en cualquier medio o formato, ahora conocido o desarrollado en el futuro, requiere el permiso previo por escrito de la persona titular de los derechos de autoría.

Deusto Journal of Human Rights

ISSN: 2530-4275 • ISSN-e: 2603-6002, No. 12/2023, Bilbao

© Universidad de Deusto • <http://djhr.revistas.deusto.es/>

The Court of Justice of the European Union on Ethnic and Racial Discrimination: An Analysis of the Application of Directive 2000/43/EC

El Tribunal de Justicia de la Unión Europea en el ámbito de la discriminación étnica y racial: un análisis sobre la aplicación de la Directiva 2000/43/CE

Nacho Hernández Moreno 

Universitat de València. Spain

nacho.hernandez@uv.es

<https://doi.org/10.18543/djhr.2906>

Submission date: 22.05.2023

Approval date: 18.11.2023

E-published: December 2023

Citation / Cómo citar: Hernández Moreno, Nacho. 2023. «The Court of Justice of the European Union on Ethnic and Racial Discrimination: An analysis of the application of Directive 2000/43/EC.» *Deusto Journal of Human Rights*, No. 12: 137-166. <https://doi.org/10.18543/djhr.2906>

Sumario: Introduction. 1. Discrimination. 1.1. Direct discrimination. 1.2. Indirect discrimination. 2. Scope of application. 2.1. Employment and working conditions, including dismissals and pay. 2.2. Education. 2.3. Access to and supply of goods and services which are available to the general public, including housing. 2.4. Nationality. 2.4.1. The concept of nationality 2.4.2. Ethnicity, race and nationality: inherently intertwined. 2.4.3. The CJEU and nationality under the Directive. 3. Burden of proof . 4. Sanctions. Conclusions. References

Abstract: Xenophobia, racism, and the resulting discrimination in practice hinder the path towards achieving regulated equality and the prohibition of discrimination, aiming for a society where all individuals can enjoy substantial equality. Specifically, Directive 2000/43/EC was developed within the framework of the European Community to protect migrants and individuals belonging to ethnic minorities who are more likely to be victims of such discriminatory acts and may find themselves in a situation of greater vulnerability due to structural circumstances. This study examines the various areas of application of the Directive that have been addressed judicially by the Court of Justice of the European Union. To accomplish this, a critical analysis is conducted of the limited number of pronouncements despite more than two decades having passed since the Directive's entry into force.

Keywords: human rights, racial discrimination, ethnic discrimination, Directive 2000/43/EC, nationality

Resumen: La xenofobia, el racismo y la consecuente discriminación en la práctica dificultan el camino hacia la consecución de la igualdad y la prohibición de la discriminación reguladas normativamente; es decir, hacia una sociedad en la que todas las personas puedan gozar de una igualdad sustancial. En concreto, la Directiva 2000/43/CE fue desarrollada en el marco comunitario con el objetivo de proteger a personas migrantes o pertenecientes a minorías étnicas que tienen una mayor probabilidad de ser víctimas de ese tipo de actos discriminatorios y que, por circunstancias estructurales, pueden hallarse en una situación de mayor vulnerabilidad. El presente trabajo examina los diversos ámbitos de aplicación de la norma que han sido abordados jurisprudencialmente por parte del Tribunal de Justicia de la Unión Europea. Para ello, se realiza un análisis crítico de los escasos pronunciamientos existentes a pesar de haber pasado más de dos décadas desde la entrada en vigor de la normativa.

Palabras clave: derechos humanos, discriminación racial, discriminación étnica, Directiva 2000/43/CE, nacionalidad

Introduction

Directive 2000/43/EC serves as the embodiment of the European Union's (EU) commitment to combat racial and ethnic discrimination, establishing the principle of equal treatment for all individuals regardless of their racial or ethnic background.

und. Commonly referred to as the Racial Equality Directive (RED), it was adopted by the European Parliament and the Council of the European Union shortly after the Treaty of Amsterdam came into effect. The RED aims to promote equality across various domains, including employment, education, social protection, and access to goods and services.

Article 19 of the Treaty on the Functioning of the European Union serves as the legal foundation for the adoption of anti-discrimination legislation by the EU. It empowers both the Council of the EU and the European Parliament to take appropriate measures to combat discrimination based on various grounds, such as sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Consequently, RED and Directive 2000/78/CE, also known as the Employment Equality Directive (EED), were established. While sharing some similarities, the EED addresses discrimination related to religion or belief, disability, age, or sexual orientation, whereas RED specifically focuses on race and ethnicity. Both represent significant advancements in the EU's efforts to combat discrimination by providing a legal framework for the protection of individuals and groups. They also afford the highest level of protection in comparative anti-discrimination law (Belavusau and Henrard 2019, 635-636). However, it is worth noting that neither cover discrimination based on nationality.

The prohibition of racial discrimination stands as a foundational principle within the realm of human rights, enshrined in all major universal human rights treaties. One such treaty, the International Convention on the Elimination of All Forms of Racial Discrimination, notably focuses on this issue. It is regarded as a peremptory norm of international law (*jus cogens*) (McDougall 2021, 6),¹ thereby underscoring its paramount significance. Paradoxically, racial or ethnic discrimination persists in our societies, often disregarded, normalized, forgotten, and at times, erroneously deemed resolved.

¹ Also stated by the International Law Commission in Report of the International Law Commission (2019). Seventy-first session, Chapter V. Peremptory norms of general international law (*jus cogens*), A/74/10, pages 146-147.

Nevertheless, the extant structural racial or ethnic discrimination within the European Union, coupled with contemporary populist narratives on immigration and asylum that scapegoat racialized migrants for the social and economic challenges faced by Member States, needs a meticulous examination of the existing tools within the EU legal framework to combat discrimination and preempt the latent animosity that underlies its various manifestations.

A remarkable observation in the field of EU non-discrimination law is the discrepancy in the number of cases addressed under RED compared to EED. While the latter has been the subject of over a hundred cases brought before the Court of Justice of the European Union (CJEU), as of May 2023, only a limited number of eleven cases have been resolved under RED. Additionally, a search on the Court's database reveals four cases in which RED was mentioned but not applied to provide a preliminary ruling.

The Fundamental Rights Agency (FRA) has identified several factors contributing to this disparity, raising concerns about the effective achievement of the objectives outlined in RED. The first points to a lack of awareness of equality legislation, which is deemed to be the one of the reasons why 82% of victims fail to report incidents of discrimination. Denial of discrimination and resignation further contribute to such underreporting. Moreover, the high legal costs work as a significant deterrent for victims to seek legal remedy in some Member States. Social partners complain about the difficulties to effectively implement the Directive and criticism has been raised against its focus on punishing discriminatory behavior rather than addressing prejudicial attitudes through awareness-raising and education, which were seen as more effective approaches to promoting equality. Furthermore, RED was deemed inadequate in effectively addressing discrimination against entire groups (FRA 2012, 19-22). Additionally, certain countries, particularly those in Central and Eastern Europe, have encountered difficulties in the application and enforcement of EU antidiscrimination law. The transposition of the RED in these countries occurred late and with minimal effort, resulting in unsatisfactory application and enforcement (Havelkova 2016, 629). As will be discussed the following pages, several other factors serve as substantial impediments to the implementation of the Directive. Notably, the exclusion of nationality-based discrimination and the requirement that it must be exclusively targeted at a particular ethnic group restricts the ability of the CJEU to examine cases of racial discrimination in situations where the contentious measure is directed, for instance, at third-country nationals or multiple ethnic groups.

Given these challenges, it is crucial to examine CJEU's case law on racial discrimination. This text aims to scrutinize the diverse judgments delivered by the CJEU within the framework of the RED. It seeks to conduct an in-depth exploration of the interpretations accorded by the CJEU to the RED, as delineated within its sections. To this end, a comprehensive analysis will be undertaken of all cases that have been brought before the CJEU and have culminated in a preliminary ruling. This examination will encompass an exploration of the distinct elements of the Directive that have been subject to judicial review. Such elements include the concepts of direct and indirect discrimination, its scope of application with a more intricate examination of nationality as an exclusionary clause and the challenges inherent in its definition and delimitation as well as the lack of coherence in its application by the CJEU, the burden of proof, and the sanctions applicable in cases of non-compliance.

1. Discrimination

According to Article 2(1) of RED, equal treatment is related to the absence of "direct or indirect discrimination based on racial or ethnic origin". Article 2(2) states that whereas direct discrimination takes place when a person, in a comparable situation, receives a less favorable treatment than other based on their racial or ethnic origin, a situation may constitute indirect discrimination when an apparently neutral provision, criterion or practice places people of a racial and ethnic origin at a particular disadvantage compared to others, unless it is duly justified by adopting adequate and necessary means to achieve a legitimate aim. Protection from harassment related to racial or ethnic origin is then regulated under Article 2(3).

The CJEU is yet to rule on the latter, although the case of *Afari* which will be later reviewed presented a case in which a former employee of the European Central Bank (ECB) was allegedly harassed by a coworker on grounds of her race. However, here the Court was not asked to decide on whether there was harassment but only if the ECB violated Articles 7, 8 and 9 of the Directive as it will be seen. What follows is an analysis of the interpretation and arguments made by the Court when it dealt with either direct or indirect discrimination.

1.1. *Direct discrimination*

As Article 2(2)(a) sets out, direct discrimination must occur in a comparable situation where less favorable treatment is attributed to the ethnic or racial origin of the victim. This type of discrimination is based on objective factors and cannot be justified unless expressly and exceptionally permitted (Esteve 2013, 35).

The CJEU was faced with allegations of direct discrimination in *Feryn*, *Finans* and *CHEZ*. In the first case, the director of Firma Feryn, a company specializing in the sale and installation of doors made public statements expressing the company's reluctance to hire non-nationals due to customer preferences regarding access to their private homes during work execution. In particular, he manifested in a newspaper interview that they were recruiting but that they were not "looking for Moroccans," the only ones that according to him had applied for the job offered. He later appeared on national television stating that their customers would not want "these people" to enter their homes to install their products, so he had to "do it the way the customer wants it done."² The Centre for Equal Opportunities and Opposition to Racism in Belgium, an organization established to promote equal treatment under Article 13 of the Directive, filed a claim to declare the company's hiring policy discriminatory.

Initially, the Brussels Social Court of First Instance dismissed the claim, stating that there was no evidence or presumption of racial or ethnic discrimination in relation to job applications and hiring decisions. However, the Belgian equality body appealed to the Brussels Social Court of Appeal, seeking clarification from the CJEU on whether public expression by an employer of the intention not to hire foreign individuals constitutes direct discrimination, even in the absence of a directly affected or identifiable complainant.

According to the CJEU, direct discrimination can be established in such circumstances. In the specific case of Firma Feryn, the employer openly stated in a newspaper interview that they were not seeking to hire Moroccans, the very individuals who had applied for the job. The employer further appeared on national television, asserting that their customers would not want individuals of a particular ethnic origin entering their homes for installation purposes. The CJEU concluded that such public expressions of the intention not to hire individuals of a

² Opinion of Advocate General Poiares Maduro (12 March 2008), *Feryn*, Case C-54/07, paragraphs 3-4.

specific ethnic or racial origin amount to direct discrimination, regardless of the absence of an identifiable complainant or directly affected victim.

The Court emphasized that such conduct strongly discourages potential candidates from participating in the recruitment process and hinders their effective inclusion in the labor market.³ Although the Court did not dispute the first instance court's finding that no individual had personally been rejected by Firma Feryn, the employer's statements conveyed a different message, suggesting discriminatory practices.

Therefore, the CJEU's ruling establishes that public expressions by employers indicating an intention not to hire individuals based on their ethnic or racial origin constitute direct discrimination, irrespective of the lack of an identifiable complainant or directly affected victim. This decision recognizes the harmful impact of such statements on potential candidates and the need to foster equal treatment and inclusion in the labor market.

In *Finans* the Court followed a different approach as it used the nationality exclusion clause. In this case, a Bosnian-born Danish citizen and his Danish partner purchased a used car financed in part by a loan from Jyske Finans, a credit institution specializing in car financing. During the loan application process, the company requested additional proof of identity from the Bosnian-born individual based on his country of birth, while no such requirement was imposed on his Danish partner. The individual argued that this request amounted to discrimination and filed a complaint, which resulted in compensation for indirect discrimination. The Viborg District Court upheld the decision but ruled that direct discrimination had occurred.

Jyske Finans defended its request by citing obligations under anti-money laundering regulations. The referring court sought clarification from the CJEU on whether the Directive prohibited a bank from requiring additional identification documents, such as a passport or residence permit, from non-nationals of the European Economic Area (EEA) with driving licenses issued in non-EEA countries. The court also inquired whether such a practice constituted direct discrimination when the country of birth is not directly linked to a particular ethnic origin. The Court responded negatively, stating that unfavorable treatment based solely on nationality does not amount to racial or ethnic discrimination.

³ Judgement of 10 July 2008, *Feryn*, Case C-54/07, EU:C:2008:397, paragraph 28.

The Court's ruling emphasized that the country of birth alone cannot be considered as a basis for presuming a particular ethnic or racial origin. In this specific case, where the requirement was applied to all individuals born outside the EU and the EEA solely based on their country of birth, the Court concluded that it did not constitute direct discrimination. The ruling underlines the importance of considering the specific circumstances and factors involved to determine whether a practice or requirement qualifies as discriminatory, focusing on the connection between the treatment and the protected characteristics of race or ethnicity.⁴ The requirement that a measure must be directed towards or linked to a specific ethnic origin implies that if a behavior or act affects various ethnic minorities or groups of diverse ethnic backgrounds, there would be no discrimination. In other words, if it negatively impacts more than one group –for instance, as it was the case in *Finans*, all non-nationals of the EEA–, such a measure would be deemed in compliance with anti-discrimination standards. This poses a significant hurdle in the efforts to combat racial or ethnic discrimination and also hampers the application of the Directive with the same objective.

As for *CHEZ*, the case involved a complaint by a Bulgarian shop owner, Ms. Nikolova, who alleged that the electricity company CHEZ RB had installed her electricity meter at a height of six to seven meters, while meters in other areas were installed at a height of 1.70 meters. Ms. Nikolova argued that this differential treatment was discriminatory, as her shop was located in a neighborhood primarily inhabited by people of Roma origin. She claimed that the higher placement of the meter hindered her ability to monitor her electricity consumption accurately and resulted in overpriced bills.

Initially, the Commission for Protection Against Discrimination (CPD) found that CHEZ RB had violated the prohibition on indirect discrimination under Bulgarian antidiscrimination law. However, this decision was later overturned by the Supreme Administrative Court, which argued that the CPD had not specified the nationality of the individuals in relation to whom Ms. Nikolova had been discriminated against.

The CPD subsequently issued a new decision, this time finding that Ms. Nikolova had been subjected to direct discrimination by CHEZ RB, in violation of the relevant national regulation. CHEZ RB appealed this

⁴ Judgement of 6 April 2017, *Finans*, Case C-668/15, EU:C:2017:278, paragraphs 20-23 and 39.

decision, and the case was referred to the CJEU by the Sofia Administrative Court.

The CJEU was asked whether the installation of electricity meters at a height of six to seven meters in neighborhoods primarily inhabited by people of Roma origin constituted discrimination based on ethnic origin under EU law. In response, the CJEU referred to its previous ruling in the case of *Belov*⁵ and stated that this situation could potentially amount to both direct and indirect discrimination based on racial or ethnic origin.

In contrast to *Finans*, the CJEU's interpretation in *CHEZ* recognized that the complainant in the case did not belong to a particular ethnic origin. Importantly, the fact that ethnicities other than Roma could have been affected did not deter the court from arriving at such a determination (Atrey 2018, 10). However, it emphasized that the discriminatory treatment was based on the Roma origin of the neighborhood and the stereotypical assumptions and prejudices held towards the Roma community by the electricity companies deemed as a "faceless, 'othered' group" (Farkas 2017, 89). The Court recognized that all end consumers of electricity who receive their supply from the same company within the same urban area should be considered in a comparable situation, regardless of their shared ethnicity. The significant difficulty or impossibility faced by residents in those areas to monitor their electricity meters and control their consumption was deemed as unfavorable treatment. Ultimately, the CJEU concluded that direct discrimination existed in the case, irrespective of whether the situation affected individuals of a specific ethnic origin. The criterion for differential treatment was based on ethnic or racial origin, and such origin influenced the decision to establish disparate treatment, thereby establishing the presence of discrimination.⁶

CHEZ identifies the presence of discrimination by association within the realms of race and ethnicity, extending beyond the initial concept elucidated by the CJEU in *Coleman*,⁷ wherein the complainant was required to have a personal connection with the individual possessing

⁵ In *Belov*, an analogous situation was brought to the CJEU. However, the Court never analyzed the merits of the case as it declared its incompetence to rule as it pointed out that the referring body (CPD), although created according to Article 13 of Directive 2000/43/EC as an equality body, was not acting in this instance with the judicial character needed for a body to ask the CJEU for a preliminary ruling. Vid. Judgement of 31 January 2013, *Belov*, C-394/11, EU:C:2013:48, paragraphs 51 and 54.

⁶ Judgement of 16 July 2015, *CHEZ*, Case C-83/14, EU:C:2015:480, paragraphs 59-60, 84 and 87.

⁷ Judgement of 17 July 2008, *Coleman*, Case C-303/06, EU:C:2008:415.

the protected characteristic. Notably, *CHEZ* introduces a novel dimension by recognizing discrimination by association not only in cases of direct discrimination but also in cases of indirect discrimination (Benedi 2016, 811). In that regard, McCrudden (2016, 5) observes that Member States mandating that an individual must belong to a discriminated group to claim racial or ethnic discrimination would be in contravention of the Union *acquis*. As interpreted by the CJEU in this context, these regulations do not require that the victim is a part of the group targeted by the discriminatory conduct; rather, they only demand that the individual is adversely affected by a measure intentionally directed at that particular community rooted in racial or ethnic considerations. However, as Cahn (2016, 123-124) contends, the CJEU in this instance dangerously approaches incorporating back intent into anti-discrimination law by introducing a criterion where a measure is deemed directly discriminatory if it is introduced or maintained for reasons related to ethnic origin while intent “is explicitly not a matter for evaluation” in the context of anti-discrimination law.

The issue of structural discrimination remains unaddressed within the national legislations of European Union Member States and is only sporadically acknowledged in their jurisprudence (Crowley 2022, 90). Similarly, the CJEU has dealt with individual cases of racial discrimination. However, *CHEZ* presents a distinct dynamic in this regard and can be deemed the seminal case that may pave the way for recognizing structural and collective discrimination against ethnic minorities in the future. In fact, the same author points out that the RED provides an opportunity to address structural racial discrimination, albeit without specific reference, as its focus primarily centers on evaluating the individual dimension through a framework of individual rights and complaints (Crowley 2022, 44). As previously mentioned, *CHEZ* addresses structural racism, particularly the discrimination experienced by the Roma population in Bulgaria. By doing so, it underscores the importance of considering the structural nature of cases of racial or ethnic discrimination. If the Court had not addressed the long-standing issues met by the Roma community, it would have been faced with serious difficulty in determining whether the non-Roma complainant was indeed discriminated against on grounds of race or ethnicity.

As seen from above, the CJEU had only ruled on the existence of direct discrimination when either there was no identifiable victim or when they were not of a particular ethnic group but were affected by a decision which was taken based on the criterion of ethnicity. The other case, *Finans*, allows for a more in-depth analysis regarding the

nationality exclusion clause that will be later discussed when dealing with the scope of application of the Directive.

1.2. *Indirect discrimination*

According to Article 2(2)(b), indirect discrimination includes three elements that must be met. First, there should be an “apparently neutral provision, criterion or practice”; that is, a situation which does not seem to discriminate. Second, its result should place people from a certain racial or ethnic origin “at a particular disadvantage compared to other persons.” Lastly, that consequence cannot be justified by a legitimate aim which is been pursued by adequate and necessary means. As Esteve (2013, 35-36) points out, it is for national courts to ascertain if a measure that indirectly discriminates people based on their race or ethnicity can be justified, but the different interpretations given by each create legal insecurity in terms of knowing precisely which type of reasonings are allowed. Following De Vos (2020, 71), justification further depends on the protected characteristic, the parties involved and the disputed measures.

Regarding the first of the aforementioned elements, the CJEU was asked in *CHEZ* whether the phrase “apparently neutral practice” had to be understood as if the practice must be “obviously neutral” or is it enough that it seems “neutral at first glance”, in other words, “ostensibly neutral”. The Court favored the second interpretation following the Advocate General’s opinion. She expressed that the term “apparently” in Article 2(2)(b) should be understood as referring to a provision, criterion, or practice that seems “neutral at first glance”. However, it shouldn’t be interpreted to mean that the provision, criterion, or practice must be “obviously” neutral. That would lead to the strange situation where no finding of indirect discrimination could be made if the provision, criterion, or practice is found to be less neutral than it initially appeared. This interpretation would create a gap in protection against discrimination, which is clearly not the intention of the provision.⁸

The second element can be divided into two components: individuals of “a racial or ethnic origin” and the “particular disadvantage” they experience in comparison to others. In the case of *CHEZ*, it was determined that the “particular disadvantage” cannot solely stem from a

⁸ Opinion of Advocate General Kokott (12 March 2015), *CHEZ*, Case C-83/14, paragraph 92.

“serious, obvious, and significantly particular case of inequality.” According to the Court’s doctrine, the burden to establish indirect discrimination follows the principle that such discrimination can be found when a neutrally formulated measure “works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it,” an interpretation which aligns better with the aim and objective of the Directive. In the specific case of *CHEZ*, the “particular disadvantage” arose from the offensive and stigmatizing nature of the measure to install meters at a height of six to seven meters. This made it extremely difficult for individuals in a neighborhood primarily inhabited by Roma people to monitor their electricity consumption.⁹

CHEZ offers a view on the second component, but other decisions have also provided an in-depth analysis of the racial or ethnic origin of the victims such as in *Maniero*, *Finans*, and *Land Oberösterreich*. The measure must affect a specific ethnic group and for that matter the Court held that there was indirect discrimination in *CHEZ* as the practice targeted an area primarily inhabited by persons of Roma origin. However, the same principle was applied in *Maniero*, *Finans* and *Land Oberösterreich* with a different outcome. In neither of those found the Court that a specific ethnic group had been discriminated against.

In *Maniero*, a German foundation required applicants for a scholarship to have passed a German law exam. An Italian national who held a law degree from a university in Armenia sued the foundation after being deemed ineligible for the scholarship due to not passing the required exam. He argued that this requirement constituted indirect discrimination, making it harder for individuals with ethnic or social origins outside Germany to be eligible for the scholarship. Nevertheless, the Court held that such a requirement did not affect a particular group as it was meant for everyone. Indeed, the measure posed an obstacle to those who had not passed the exam, but the Court concluded that this situation could impair the intention of obtaining the scholarship of people from different backgrounds and ethnicities, not just one in particular.¹⁰

In *Finans*, the Court reached the same conclusion when it was asked whether requesting additional proof of identity to people not born in the EU or in the EEA amounted to racial or ethnic discrimination. As the measure was applied irrespective of a particular

⁹ Judgement of 16 July 2015, *CHEZ*, Case C-83/14, EU:C:2015:480, paragraphs 99, 101-102 and 108.

¹⁰ Judgement of 15 November 2018, *Maniero*, Case C-457/17, EU:C:2018:912, paragraph 50.

ethnic origin but to all people born abroad, even if they had later acquired Danish nationality, the conduct did not constitute indirect discrimination based on racial or ethnic origin.

More recently, in *Land Oberösterreich*, the CJEU further added that indirect discrimination requires that the disputed provision, criterion or practice generate a particular disadvantage for people of a particular ethnic group. In this case, a Turkish national had been residing in Austria with his family since 1997 and had previously received a housing subsidy until the end of 2017. However, a new requirement was introduced stating that third-country nationals must demonstrate basic knowledge of the German language to qualify for the subsidy. The individual failed to provide the necessary certificates, resulting in the denial of his housing subsidy. While acknowledging that the requirement imposed a condition on the individual's eligibility for the housing subsidy, the CJEU determined that it did not constitute discrimination based on ethnic origin, as this requirement did not specifically target any particular ethnic group. Moreover, the nationality exclusion clause played a significant role in shaping the court's decision in this case.¹¹

As mentioned in the beginning of this subsection and as stated in Article 2(2)(b) an apparently neutral measure placing a certain ethnic or racial group at a particular disadvantage constitutes indirect discrimination, unless it can be objectively justified by a legitimate aim and the adequacy and necessity of the practice to achieve that purpose. Again, *CHEZ* provides with some insight into this issue. The electricity company argued that the installation of meters at six to seven meters high in neighborhoods inhabited by a majority of persons of Roma origin was carried out to fight against the damages and manipulations of the meters and the illegal connections that had been made previously in those areas. On whether there was a legitimate aim, the Court responded following the Advocate General's conclusions that preventing those damages and the manipulation of the electricity meters amounts to an objective accepted by EU law. However, even if the measure could be deemed adequate for the purpose of pursuing that aim, it may not be necessary if, as in the case at hand, there are less onerous alternatives, and it may lack the required proportionality as it may harm in excess the legitimate interest of the final consumers.¹²

¹¹ Judgement of 10 June 2021, *Land Oberösterreich*, Case C-94/20, EU:C:2021:477, paragraphs 51, 55 and 57.

¹² Judgement of 16 July 2015, *CHEZ*, Case C-83/14, EU:C:2015:480, paragraphs 121 and 128.

2. Scope of application

Article 3(1) of the Directive delineates the scope of its provisions, encompassing various domains such as employment, working conditions, vocational training, participation in workers' or employers' organizations, social protection, social benefits, education, and access to goods and services, including housing. It applies to "all persons" in both the private and public sectors, including public administration. Recital 16 explicitly emphasizes the importance of safeguarding the rights of "all natural persons," indicating that the Directive extends its coverage to third-country nationals residing lawfully or unlawfully in any of the EU Member States, albeit with certain limitations imposed by their legal status (Bell 2002, 19).

However, Article 3(2) of RED restricts its applicability by excluding discrimination based on nationality and disparities in treatment towards third-country nationals or stateless persons due to their legal status. This section will first elaborate on the enumerated areas covered by the Directive and subsequently delve into the provision that excludes nationality-based discrimination.

2.1. *Employment and working conditions, including dismissals and pay*

Agafiței and Others is a case in which the CJEU was referred to preliminary rule on the alleged discrimination suffered by some magistrates who claimed they had been wronged by a difference in treatment regarding their salaries due to their professional status. The referring court used Article 3(1)(c) of RED, among others, to substantiate its questions for the Court.

However, it never reached a decision on whether their situation fell within the scope of "employment and working conditions, including dismissals and pay" as it held that the discrimination was not based on race or ethnicity, but on their professional category to which they belonged.¹³ If their ethnic origin had been the deciding factor, this provision would have allowed the Court to rule on the merits of the case.

¹³ Judgement of 7 July 2011, *Agafiței and Others*, Case C-310/10, EU:C:2011:467, paragraph 32.

2.2. Education

In *Maniero*, the CJEU interpreted whether a scholarship awarded by a registered association with the intention to promote research projects and studies abroad was covered by the concept of “education” as stated in Article 3(1)(g). In particular, it analyzed whether that term, within the meaning of that provision, included access to education and whether the scholarship in question fell under that concept. Applying the plain meaning rule, the Court held that the term “education” has the meaning conveyed in everyday language in the sense that it refers to “acts or processes by which is transmitted or acquired, inter alia, information, knowledge, understanding, attitudes, values, skills, competences and behaviors,” but does not include, *prima facie*, access to education or financial aid. However, Article 3(1)(g) read jointly with recital 16 and 12 of the Directive which state the aim of the regulation to protect all natural persons from ethnic and racial discrimination and to ensure the development of democratic and tolerant societies, allowed the Court to make teleological interpretation that made it to conclude that the disputed measure fell within the concept of “education” if “there is a sufficiently close link between the assigned financial payments and participation in those research projects or studies which, themselves, fall within the concept of ‘education’.”¹⁴

2.3. Access to and supply of goods and services which are available to the general public, including housing

The CJEU made an extensive interpretation of Article 3(1)(h) of the Directive in *Runevič-Vardyn and Wardyn*, but it still concluded that the disputed measure did not fall within its scope of application. A Lithuanian woman belonging to the Polish minority sought to have her name and surname spelled according to Polish rules (*Małgorzata Runiewicz*). However, her Lithuanian birth certificate and passport displayed her name and surname in Lithuanian script (*Malgožata Runevič*). She later received a Polish birth certificate from the Warsaw Civil Registry, which reflected her name and surname according to Polish spelling rules. Upon marrying a Polish citizen by the surname of Wardyn, their marriage certificate issued by the Vilnius Civil Registry

¹⁴ Judgement of 15 November 2018, *Maniero*, Case C-457/17, EU:C:2018:912, paragraphs 31-36 and 44.

utilized Lithuanian spelling rules for her name and surname (*Runevič-Vardyn*), while Wardyn's name was transcribed without Polish diacritics. The complainants argued that the national law in Lithuania which prevented them from having their names spelled according to the rules of their language amounted to a difference in treatment based on their Polish ethnicity which in turn denied them the effective enjoyment of their rights to access to services.

However, the Court held that national laws regulating the language used in civil status documents cannot be considered a "service" and thus are not included within the scope of the relevant provision. The Court based its decision on the fact that during the preparatory work of RED, the Council of the European Union explicitly rejected an amendment proposed by the European Parliament to include the exercise of functions by any public body, including police, immigration, criminal and civil justice authorities, within Article 3(1). Such an inclusion could have potentially encompassed laws similar to the one in question.¹⁵

2.4. Nationality

The Charter of Fundamental Rights of the European Union prohibits "any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion, belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation", as stated in its Article 21(1). It does not mention nationality, although its second paragraph declares nationality-based discrimination as illegal "within the scope of application of the Treaties and without prejudice to any of their specific provisions." This must be read in conjunction with Article 18 of the Treaty on the Functioning of the European Union (TFEU) which bans discrimination based on nationality. However, this set of prohibitions related to a difference in treatment due to the nationality of the person is linked to the free movement of workers as one of the most important rights provided to individuals in the EU, which is regulated in Article 45 of the TFEU and in Article 45 of the Charter.

EU law does not address nationality-based discrimination except for EU citizens, which means that all nationals EU Member States must be

¹⁵ Judgement of 12 May 2011, *Runevič-Vardyn and Wardyn*, Case C-391/09, EU:C:2011:291, paragraphs 38-46.

treated equally, while third-country nationals are not protected against unfavorable treatment based on their nationality under any of the non-discrimination Directives (RED and EED) in relation to conditions of entry and residence, access to employment or to any related to their legal status, although their protection is equaled in broadly the same areas if they are long-term residents. The lack of coverage in the Directive regarding the treatment stemming from the legal status of third-country nationals and stateless persons, as mentioned in Article 3(2), is particularly concerning. If this provision is interpreted and applied broadly, it could result in the exclusion of vulnerable individuals from the Directive's protection against racial discrimination in different areas of life. This expansive interpretation would fundamentally question the Directive's applicability to third-country nationals, explicitly acknowledged in recital 13 (Fennelly and Murphy 2021, 319).

2.4.1. THE CONCEPT OF NATIONALITY

The term "nationality" refers to the legal and political bond between an individual and a sovereign state, where the individual demonstrates allegiance while the state accepts and acknowledges their membership in the political and administrative community. This connection entails specific rights and obligations (Hernández Moreno 2022a, 39). "Nationality" primarily encompasses the civic or political aspect, representing an objective and verifiable link between the individual and the state. In contrast, when "nationality" is used ethnically, it signifies an individual's association with a community or nation sharing linguistic, religious, or other commonalities (Hernández Moreno 2022b, 65-66).

In regions where "nationality" denotes ethnicity, the term "citizenship" is employed to express the political relationship with the state. However, using "nationality" in an ethnic sense could pose challenges in the application of Article 3(2) of the Directive, blurring the distinction between nationality and ethnicity to the extent that it would entail excluding ethnic discrimination from its scope. Nevertheless, even if referring to nationality in its political or civic nature, its distinction from race and ethnicity is still problematic.

2.4.2. ETHNICITY, RACE AND NATIONALITY: INHERENTLY INTERTWINED

Ethnicity and race are dynamic and to some extent indeterminate concepts because they are social constructs that do not correspond to

an objective reality independent of an individual's personal identification or external categorization by others (De Shutter 2016, 34-35). In fact, just as Anderson (2006, 46) describes a nation as an imagined community made possible by the convergence of capitalism and the printing press, which allowed large groups to imagine a community among strangers through a common language, Bulmer and Solomos (1998, 822) applies the same notion to assert that race and ethnicity are also imagined communities defined by the groups themselves or externally. They are therefore artifacts, fictional and subjective elements that serve to identify, provide a sense of belonging, and categorize, making them prone to being used as a tool of exclusion.

The Directive does not provide any specific definitions for these concepts, and their categorization will depend on the different realities of each Member State, resulting in diverse and controversial outcomes (European Commission 2008, 10). However, De Schutter (2016, 36) states that the term "race" is primarily used to refer to situations of discrimination based on observable physical characteristics. On the other hand, "ethnicity" refers to membership in a group that shares common characteristics such as language, shared history or tradition, or geographical origin, which are externally manifested through practices or lifestyles that its members identify with.

These public acts, such as language or the external manifestation of traditions, are also related as possible defining characteristics of nations in nation-states, which is why the concept of nationality, under certain circumstances, can overlap with race or ethnicity (FRA and CoE 2018, 197). The United Nations Committee on the Elimination of Racial Discrimination also expressed this when it concluded that there is a close relationship between racial or ethnic discrimination and discrimination based on nationality, stating that in some cases the latter can serve as a proxy for discrimination based on race.¹⁶

2.4.3. THE CJEU AND NATIONALITY UNDER THE DIRECTIVE

The clause excluding the application of the Directive in relation to nationality-based discrimination has been employed by the CJEU on three occasions. However, in this analysis, those three cases are

¹⁶ Committee on the Elimination of Racial Discrimination, *Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997, CERD/C/54/D/10/1997, paragraphs 9.3 and 9.4.

presented alongside the case of *Feryn*, which is particularly relevant for examining a situation where the nationality of the affected individuals was not taken into account as an excluding criterion for protection.

The *Feryn* case involved an employer who, in a newspaper interview, stated that only Moroccans had responded to their job offer, but they were not looking for Moroccans because their customers did not want them. Subsequently, the employer reiterated this position in a television interview, without explicitly mentioning Moroccans, but referring to immigrants as people whom their customers would not want to open the door for to install the doors sold by the company.¹⁷ As previously seen in the section on direct discrimination, the CJEU concluded that such public statements constituted discriminatory practices based on racial or ethnic grounds, even though the employer initially referred to a specific nationality (Moroccan) and later to the non-national collective (immigrants) in their second public statement.

In the following cases presented before the CJEU, where nationality was a relevant factor for differential treatment, the outcomes were completely different. In all these cases, it was concluded that the disputed situation did not fall within the scope of the Directive or that the contested measure did not constitute racial or ethnic discrimination.

In the *Kamberaj* case, the issue at hand pertained to housing, which is explicitly covered under Article 3(2)(h) of RED. However, the CJEU rejected the claim on different grounds. In this case, an Albanian national with an indefinite residence permit in Italy had received housing assistance in the autonomous province of Bolzano from 1998 to 2008. However, his request for an extension of the assistance was denied in 2009 due to the depletion of the budget allocated for aid to third-country nationals. For that reason, he argued that the denial constituted discriminatory treatment contrary to Directives 2000/43/EC and 2003/109/EC, as non-EU nationals received less favorable treatment in terms of housing assistance compared to EU citizens. The autonomous province of Bolzano justified the allocation of assistance based on linguistic groups present in the province, aiming to maintain social harmony among applicants for social assistance. According to provincial regulations, the population was divided into two categories: EU citizens, regardless of their nationality, who needed to declare their affiliation with one of the three linguistic groups to access aid, and third-country nationals who were exempt from this requirement.

¹⁷ Vid. Note 2.

Regarding the budget, over 90 million euros were allocated in 2009 for assistance to EU citizens, while approximately 11 million euros were allocated for third-country nationals, including long-term residents. The referring court sought clarification from the CJEU on whether a national provision that attributes relevance to nationality in the context of housing assistance, resulting in unfavorable treatment for long-term resident non-EU nationals or stateless individuals compared to EU citizens, is contrary to the Directive. The CJEU responded by stating that this type of nationality-based discrimination falls outside the scope of RED due to the nationality clause that serves as an exception under Article 3(2) of the Directive. However, the CJEU concluded that such unfavorable treatment was contrary to Directive 2003/109/EC. This directive prohibits limiting equal treatment for third-country nationals with long-term residence permits in the field of housing assistance, without the State in question being able to invoke the application of the exclusion provided for in Article 11(4) of that Directive.¹⁸

The *Land Oberösterreich* case bears similarities to the previous one, as the CJEU also considered that it did not fall within the scope of the Directive when it deemed the requirement imposed by the administration to demonstrate a basic level of German language proficiency in order to obtain housing subsidies for third-country nationals as a nationality-based differential treatment excluded from the protection of the Directive.¹⁹

In *Finans*, the CJEU understood that the requirement imposed by the financial institution on individuals born outside the EU or the EEA to provide additional proof of identity did not constitute racial or ethnic discrimination because such differential treatment was based on the country of birth. It used this category as a key element to determine that the Directive does not apply to situations where the differential treatment is based on nationality, linking nationality with country of birth. This is erroneous since nationality is not always acquired by birth in the territory of a state under *jus soli*, and it may happen that a person is born in one state, has the nationality of another, and is identified with an ethnicity of a third.

To justify its position, the CJEU referred to *CHEZ* to determine that the concept of 'ethnicity' is rooted in the notion of societal groups

¹⁸ Judgement of 25 April 2012, *Kamberaj*, Case C-571/10, EU:C:2012:233, paragraphs 90 and 93.

¹⁹ Judgement of 10 June 2021, *Land Oberösterreich*, Case C-94/20, EU:C:2021:477, paragraphs 56-57.

characterized, in particular, by common nationality, religious faith, language, cultural, and traditional origins. It further emphasized that although a person's country of birth is not explicitly listed as a criterion, the phrase "in particular" indicates that the list is not exhaustive, leaving open the possibility that a person's country of birth could be considered among these criteria. Nevertheless, even if that were the case, it is important to note that country of birth is just one of several factors that may be considered when determining membership in an ethnic group, and it is not decisive in this regard. Additionally, the CJEU stated that it cannot be presumed that each sovereign state has one and only one ethnic origin. Therefore, it cannot be concluded that the requirement for additional identification in the main proceedings, even if classified as "unfavorable treatment," was directly based on ethnic origin, as it applied to all individuals born outside the territory of an EU Member State without distinction.²⁰ However, in this case, it is worth noting that the affected person was indeed born in a country outside the EU, specifically Bosnia and Herzegovina, but he had subsequently acquired Danish nationality and was, therefore, a EU citizen. It could be argued that there could be a possible discrimination in this case, not based on ethnicity or race, but rather on differential treatment between EU citizens, which is prohibited by the TFEU and the Charter, as mentioned earlier.

This case does not align well with the CJEU's decision in the *Feryn* case, where the Court identified direct discrimination on racial or ethnic grounds due to the exclusion of Moroccans and immigrants from the recruitment process of a company. Neither in Morocco is there only one ethnic group, nor does the collective of immigrants or non-nationals refer to a specific ethnic group. Furthermore, as discussed above, it also does not properly correspond with the court's stance in *CHEZ*, wherein, it is worth recalling, the court identified discrimination despite the victim's non-Roma ethnicity, emphasizing that the victim could have belonged to any other ethnic group, not exclusively a specific one.

Both the nationality exclusion clause and the requirement that a measure must specifically target individuals of a racial or ethnic origin, as stated in Article 2(2)(b), reinforce one another in significantly hindering the application of the Directive in numerous cases of discrimination in which the measure is directed at third country

²⁰ Judgement of 6 April 2017, *Finans*, Case C-668/15, EU:C:2017:278, paragraphs 21, 25, 29 and 39.

nationals in general or certain ethnic minorities. This impedes effective efforts to combat racial or ethnic discrimination as intended by the Directive itself.

3. Burden of proof

Article 8(1) of the Directive establishes a system that is sometimes referred to as a reversal of the burden of proof,²¹ but in reality, it imposes a shared burden on both parties.²² The defendant is responsible for demonstrating that the principle of equal treatment has not been violated, while the plaintiff must initially provide evidence of facts that give rise to a presumption of direct or indirect discrimination. This requirement is outlined in the provision, which mandates Member States to implement measures enabling individuals who believe they have been treated unfairly in violation of the principle of equal treatment to present facts that support such an assumption. Subsequently, it is the defendant's responsibility to demonstrate the absence of discrimination in the given case.

The first case in which CJEU addressed the issue of burden of proof was also the first case related to the Directive that it handled. That was the case of *Afari*, in which a former employee of the European Central Bank (ECB) claimed to have experienced racial discrimination by a coworker and reported this to her superiors. She initially complained about the treatment to her head of division and superiors, but an amicable resolution could not be reached. This led to an external investigation by a consultant. She further claimed that the bank's management had intimidated and pressured her to withdraw her accusations, accusing them of fostering xenophobia and racist behavior in the workplace. In response to the ECB's request for evidence, she sent a memorandum intending to substantiate her claims. However, the external consultant's report concluded that no harassment or discrimination was found in the colleague's behavior, attributing the

²¹ Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'). COM/2021/139 final, p. 8.

²² Although the CJEU considers it is indeed a reversal of the burden of proof (*vid. Afari*, paragraph 157; *Feryn*, paragraphs 20 and 29; *CHEZ*, paragraph 91), other authors state that it is shared (Esteve 2013, 39; FRA 2008, 22).

tensions between them to personal and professional disagreements unrelated to race or ethnicity. In response to the report, the ECB initiated disciplinary proceedings against her, accusing her of making unfounded racism allegations against her coworker and the bank's management. The ECB argued that its standards prohibited unprofessional and disrespectful behavior towards colleagues, necessitating the disciplinary action against her.

Dissatisfied with the burden of proof placed on her during the ECB's investigation, she alleged that she had provided evidence of the discrimination. However, according to the CJEU, upon examination, her documentation did not meet the criteria of specific and objective evidence required to establish the existence of discrimination under legal standards. Consequently, the Court determined that she failed to produce any evidence demonstrating or even raising a reasonable suspicion that her accusations against her colleague were well-founded. Therefore, there was no breach of Article 8. The Court also dismissed the lawsuit considering the alleged violations under Articles 7 and 9 of the Directive. With regards to Article 7, which obligates providing administrative or judicial remedies to individuals claiming discriminatory treatment, the Court determined that the ECB had not remained inactive but had initiated an investigation in response to Afari's complaints. Finally, concerning Article 9, which safeguards complainants from further victimization, the Court found that Afari's disciplinary action was not motivated by her complaints but rather by her unsubstantiated accusations of racism against her colleague and superiors at the ECB.²³

Feryn provides an explanation regarding the types of elements that can serve as evidence to trigger the presumption of discrimination, which the defendant must then demonstrate as not being an unfavorable act based on racial or ethnic grounds. As mentioned earlier, in this case, an employer openly expressed a desire not to hire individuals of Moroccan origin, claiming it was to appease clients who supposedly would not welcome immigrant workers into their homes. The Court noted that such a recruitment policy was discriminatory under Article 2(2)(a). However, the Court was also asked whether these public statements by an employer, stating their refusal to hire individuals from a specific ethnic group, were sufficient to presume the existence of a discriminatory recruitment policy under Article 8(1).

²³ Judgement of 16 March 2004, *Afari*, Case T-11/03, EU:T:2004:77, paragraphs 18, 135, 142, 149, 170, 174 and 175.

Indeed, the CJEU answered affirmatively, stating that these public statements in themselves serve as evidence to activate the presumption, and it would be up to the company to demonstrate that the hiring policy is non-discriminatory. For instance, it could rebut the presumption by showing that their actual hiring practices do not align with their statements, such as by employing individuals of Moroccan origin.²⁴

The Court was once again questioned about the burden of proof in *Meister*, a case dealing with a woman of Russian origin residing in Germany who held an engineering degree from Russia recognized in Germany who responded to a job advertisement from a company but was unsuccessful, and she was not provided with a reason for the rejection of her application. The company subsequently reposted a similar job advertisement, and she applied again, with the same result. Believing that she met the qualifications for the job, she claimed that she had received less favorable treatment than another person in a similar situation based on age, gender, and ethnic origin. For this reason, she sued the company, seeking compensation and requesting access to the file of the selected candidate to demonstrate that she was more qualified than the chosen person.

The CJEU received two questions, both related to Article 8(1). The first question asked whether this article, along with Article 19(1) of Directive 2006/54/EC (on gender equality) and Article 10(1) of Directive 2000/78/EC (on equal treatment in employment), both drafted in identical terms, granted the right to an applicant who meets the job requirements to receive information from the employer regarding whether another candidate has been selected and, if so, the criteria for that selection. The answer was negative. However, the referring court posed another question: if the employer fails to provide such information, can it be presumed that there is discrimination against the job applicant? In this case, the CJEU stated that a complete denial of access to requested information by the employer can indeed constitute a presumption of unfavorable treatment. Likewise, the fact that the employer does not deny that the candidate was qualified and yet was not invited for either of the two interviews can also serve as a presumption of discriminatory treatment.²⁵ This position is based on the argument put forth by the Advocate General, which states that in the context of hiring, the employer is the sole possessor of all the

²⁴ Judgement of 10 July 2008, *Feryn*, Case C-54/07, EU:C:2008:397, paragraph 34.

²⁵ Judgement of 19 April 2012, *Meister*, Case C-415/10, EU:C:2012:217, paragraph 49.

information. Therefore, the complete lack of access to this information would place the candidate in a more challenging position to provide evidence that could trigger the presumption of discriminatory treatment, compared to a worker seeking to demonstrate more unfavorable treatment in terms of working conditions or salary.²⁶

In the *CHEZ* case, the CJEU also established a series of elements constituting a presumption of discrimination. According to the Court, installing electricity consumption meters at a height of six or seven meters only in specific areas predominantly inhabited by people of Romani origin constitutes differential treatment compared to residents in other areas who can monitor their consumption more easily and effectively. This difference in treatment is sufficient to presume discriminatory conduct based on racial or ethnic grounds. Similarly, it is also significant that the electricity company states its opinion that the majority of damages and illegal connections through meter manipulation are caused by Bulgarian individuals of Romani origin. Furthermore, the fact that the company asserts this without providing objective data and solely referring to these facts as “common knowledge” can also serve as a factor triggering the presumption. To rebut the presumption, it would be incumbent upon the company to demonstrate that this practice is not based on the fact that these areas are predominantly populated by individuals of Romani origin, but on objective factors.²⁷ However, the arguments presented by the company clearly indicate that the motivation is indeed ethnic.

4. Sanctions

The sanctions provided for in the Directive must be effective, proportionate, and dissuasive, as stipulated in Article 15. However, in line with this provision, in the absence of specific measures imposed by the Directive, it is the Member States who must decide which measures are appropriate to achieve their non-discrimination objectives. In practice, this has resulted in difficulties in implementing the Directive in this regard, such as setting maximum limits for compensation or dealing with cases where there is no identifiable victim. Furthermore, some national courts opt for non-pecuniary compensation or tend to

²⁶ Opinion of Advocate General Mengozzi (12 January 2012), *Meister*, Case C-415/10, paragraph 32.

²⁷ Judgement of 16 July 2015, *CHEZ*, Case C-83/14, EU:C:2015:480, paragraphs 81-83 and 85.

award moderate damages, which can have a dissuasive effect on victims when it comes to pursuing legal action against discriminatory acts.²⁸

The effectiveness, dissuasiveness, and compensatory nature of sanctions were at issue in the *Braathens* case. A Chilean passenger residing in Sweden was subjected to additional security checks during a domestic flight operated by Braathens based on the assumption that he was of Arab descent. Consequently, the Equality Ombudsman sought compensation of 10,000 Swedish kronor (about €1,000) for the affected individual, alleging that he had received unfavorable treatment based on his ethnicity and physical appearance. Braathens agreed to pay the requested amount but did not admit to any discrimination. According to Swedish national law, if the defendant agrees to pay compensation, the court must order them to do so. However, in this case, the defendant can agree to pay without admitting to the alleged discrimination, and the court must issue a judgment solely based on the defendant's agreement to pay. This prevents the court from ruling on the reality of the discrimination alleged, which forms the basis of the compensation claim. The Equality Ombudsman appealed the decision, arguing that the court should have examined the merits of the discrimination claim. The Svea Court of Appeals and the Stockholm District Court both rejected the appeal. The equality body then filed a cassation appeal with the Supreme Court of Sweden, arguing that the lower courts had erred in not examining the merits of the case.

The CJEU established that such a provision contradicts EU legislation as it hinders the effective enforcement of non-discrimination rules. In accordance with Article 15 of the Directive, the mere payment of compensation does not guarantee the effective judicial protection of an individual seeking a determination of a violation of their right to equal treatment, particularly when their main interest is not financial but rather the establishment of the facts and their legal qualification. Moreover, this provision clashes with the compensatory and dissuasive function of the Directive. Monetary payment alone is insufficient to satisfy the demands of the affected person who primarily seeks

²⁸ Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'). COM/2021/139 final, p. 10.

recognition, as a form of redress, that they have been a victim of discrimination. It also lacks a deterrent effect when, as in this case, the company disputes the existence of discrimination but deems it more advantageous in terms of cost and reputation to pay the requested compensation, thereby avoiding a declaration of discrimination by the national court.²⁹

The CJEU appears to have altered its stance regarding economic and moral sanctions as observed in *Braathens*. While in other instances, the CJEU had based its criteria on the premise that an economic compensation would serve as a deterrent against discriminatory behaviors, in this case, it appears to perceive precisely the opposite, namely that those capable of paying a fine may continue to act in a similar manner. Consequently, it acknowledges that moral compensation, which carries reputational consequences, may be more effective in preventing future harm (Wallerman 2022, 167).

Conclusions

The CJEU has had few opportunities to apply RED during its 23 years of existence. When it has done so, it has only been able to identify instances of discrimination in two cases, namely *Feryn* and *CHEZ*. This is mainly due to the fact that the other cases presented to the court involved differential treatment based on the nationality status of third-country victims. Although some authors argue that the CJEU's interpretation of RED has been dynamic in protecting human dignity and providing effective judicial remedies, its work has been limited. Furthermore, the future does not appear promising as there is still a lack of clear guidance on the scope and limits of Article 3(2), particularly regarding the extension of protection to non-nationals residing in the European Union (Fennelly and Murphy 2021, 321).

The CJEU's engagement in addressing discrimination against immigrants and the Roma, two of the most pressing issues in the EU, has been facilitated by the activism of equality bodies in bringing relevant cases before the Court (Farkas 2017, 98). The CJEU's decision in *CHEZ* highlighted racial stereotypes, stigmatization, and structural discrimination that had persisted for a significant period. The case involved a non-Roma individual challenging these discriminatory

²⁹ Judgement of 15 April 2021, *Braathens*, Case C-30/19, EU:C:2021:269, paragraphs 47 and 49.

practices by virtue of her business in a segregated Roma settlement. While the Court's focus on the form of discrimination and the associative grounds for protection were important, a deeper analysis of the historical and contextual disadvantages faced by the Roma could have resulted in a more robust stance on direct discrimination. It is crucial for the CJEU to move beyond an emphasis on individual harm and delve into the broader realm of group-based harm and long-standing structural issues, which can only be effectively addressed within a framework of substantive equality (Farkas 2017, 91).

The nationality exclusion clause within the Directive poses a significant obstacle to its potential application and the effective protection of victims of racial and ethnic discrimination. Moreover, the Court has not been coherent. In *Kamberaj*, *Land Oberösterreich*, and *Finans* it found that nationality could not be linked to a specific ethnic group, while in *Feryn* it considered discriminatory the fact that an employer did not want to hire Moroccans and immigrants. The latter was the first among the four, suggesting that the Court initially adopted a more inclusive approach to protection. However, over time, the Court's perspective shifted, accommodating a narrower interpretation of the scope of application. This shift distinguished nationality and ethnicity or race as distinct concepts, thereby dismissing claims of discrimination solely based on nationality as lacking any foundation in racial or ethnic traits. The reality is that the distinction between race, ethnicity and nationality is rather blurry and that, coupled with the explicit justification for nationality-based discrimination, creates a loophole that may allow hidden racial or ethnic-based discrimination to go unnoticed or unprotected. This is evident from the low number of cases utilizing RED in preliminary rulings, with a considerable portion of them being dismissed by the Court due to the nationality exclusion clause. The undermining effect of this clause calls for careful consideration and potential reform to ensure comprehensive protection against all forms of racial and ethnic discrimination.

Addressing the question of multiple affected groups, the CJEU's interpretation currently focuses on the impact on a particular ethnic group as a criterion for discrimination. However, it is essential to acknowledge that discrimination can also occur when one group is favored at the expense of others. Such a perspective broadens the understanding of discrimination to encompass situations where positive treatment of one group results in the unfavorable treatment of others. This interpretation should be cautious, as it may include instances of affirmative action, which seek to address historical

disadvantages. A balanced approach is needed to promote equality while avoiding undue harm to any group.

Lastly, the emphasis on dissuading perpetrators rather than solely protecting victims is crucial. Sanctions play a significant role in deterring discriminatory behavior and promoting a culture of equality and respect. Efforts should be directed toward holding perpetrators accountable and creating an environment where discrimination is actively discouraged. By adopting a strong stance against discrimination and imposing appropriate sanctions, the CJEU can contribute to combating discriminatory practices effectively.

In conclusion, there remains a need for further clarity on the scope and limits of RED, particularly regarding the protection of non-nationals. Revisiting the nationality exclusion clause is essential to prevent hidden forms of racial and ethnic-based discrimination from going unnoticed. The CJEU should consider a more comprehensive analysis of structural discrimination and group-based harm to ensure substantive equality. Additionally, a nuanced understanding of discrimination should encompass both negative and positive differential treatment of groups, with careful consideration given to affirmative action measures. Finally, a focus on dissuading perpetrators and imposing effective sanctions can contribute to preventing discriminatory behavior and fostering a culture of equality within the EU.

References

- Anderson, Benedict. 2006. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Edinburgh: Verso.
- Arey, Shreya. 2018. «Race Discrimination in EU Law.» *Common Market Law Review* 55(2): 625-642.
- Cahn, Claude. 2016. «Court of Justice of the EU Rules Collective and Inaccessible Electrical Metres Discriminate against Roma: CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia (C-83/14).» *European Journal of Migration and Law* 18(1): 112-125.
- Crowley, Niall. 2022. *To name and address the underlying problem: Structural discrimination on the ground of racial or ethnic origin*. Luxembourg: EU Publications Office.
- Belavusau, Uladzislau, and Kristin Henrard. 2019. «A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives.» *German Law Journal* 20(5): 614-636.
- Bell, Mark. 2002. «Combatting racism through European laws: A comparison of the Racial Equality Directive and Protocol 12.» In *Combatting Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further*,

- edited by Isabelle Chopin and Jan Niessen, 7-34. Brussels: Commission for Racial Equality and Migration Policy Group.
- Benedi, Sara. 2016. «Ethnic discrimination, discrimination by association and the Roma community: CHEZ.» *Common Market Law Review* 53(3): 797-818.
- Bulmer, Martin, and John Solomos. 1998. «Introduction: Re-Thinking Ethnic and Racial Studies.» *Ethnic and Racial Studies* 21: 819-837.
- De Shutter, Olivier. 2016. *Links between migration and discrimination*. Brussels: EU Publications Office.
- De Vos, Marc. 2020. «The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law.» *International Journal of Discrimination and the Law* 20(1): 62-87.
- Esteve, Francina. 2013. «La protección frente a la discriminación racial y étnica en Europa.» In *Discriminación racial y étnica. Balance de la aplicación y eficacia de las garantías normativas*, edited by José García Añón, and Mario Ruiz Sanz, 25-56. Valencia: Tirant lo Blanch.
- European Commission. 2008. *The fight against discrimination and the promotion of equality – How to measure progress done*. Luxembourg: EU Publications Office.
- FRA. 2012. *The Racial Equality Directive: application and challenges*. Vienna: EU Publications Office.
- FRA and CoE. 2018. *Handbook on European non-discrimination law*. Luxembourg: EU Publications Office.
- Farkas, Lilla. 2017. *The meaning of racial or ethnic origin in EU law: between stereotypes and identities*. Brussels: EU Publications Office.
- Fennelly, David, and Clíodhna Murphy. 2021. «Racial Discrimination and Nationality and Migration Exceptions.» *Netherlands Quarterly of Human Rights* 39(4): 308-328.
- Havelkova, Barbara. 2016. «Resistance to Anti-Discrimination Law in Central and Eastern Europe—a Post-Communist Legacy?» *German Law Journal* 17(4): 627-656.
- Hernández Moreno, Nacho. 2022a. «La nacionalidad como llave para el ejercicio de los derechos humanos.» *Anuario de Filosofía del Derecho* 38: 37-58.
- Hernández Moreno, Nacho. 2022b. *Apatridia en España. Estatuto jurídico y mecanismos para su prevención*. Valencia: Tirant lo Blanch.
- McCrudden, Christopher. 2016. «The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?» *European Equality Law Review* 1: 1-10.
- McDougall, Gay. 2021. *The International Convention on the Elimination of All Forms of Racial Discrimination*. United Nations, 1-9.
- Wallerman, Anna. 2022. «Remedies for non-material damages: Striking out in a new direction?» *Common Market Law Review* 59(1): 151-170.