



**Legal Seminar 6 October 2009  
on the implementation of EU law on equal opportunities and anti-discrimination**

**DISCUSSION PAPER  
BALANCING EQUALITY OF TREATMENT AND OTHER FUNDAMENTAL RIGHTS**

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**Introduction**

Fundamental rights, as derived from the European Convention on Human Rights and other international human rights instruments binding on the EU Member States and from the common constitutional traditions of the Member States, form part of the general principles of EU Law which the European Court of Justice ensures respect for.<sup>2</sup> Therefore, the EU Member States must implement Directive 2000/43/CE of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive)<sup>3</sup> and Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)<sup>4</sup> in compliance with the requirements of fundamental rights. The Employment Equality Directive recognizes this explicitly.<sup>5</sup>

In general, the position of the European Court of Justice is that, while the EU Member States are obliged to implement the directives addressed to them taking into account the requirements of fundamental rights, it is for these States, rather than for the European legislator itself, to strike the balance between competing fundamental rights.<sup>6</sup> However, a comparison between the approaches adopted by the different EU Member States with respect to the balancing between equality of treatment and other conflicting fundamental rights may facilitate mutual learning in this regard and enhance the exchange of good practices. It can also lead to the conclusion that, given the plurality of methods in use to deal with such conflicts and the divergent solutions which may result, the EU Member States may require further guidance.

Specific conflicts arising in the implementation of the Racial Equality and Employment Equality Directives should be discussed, using both the instruments of international and European human rights law, in particular the case-law of the European Court of Human Rights, and examples from the implementation of the directives by the EU Member States.

These conflicts chiefly concern the right to respect for private life, freedom of association, freedom of expression and freedom of religion.

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<sup>2</sup> Art. 6(2) of the EU Treaty.

<sup>3</sup> OJ L 180 of 19.7.2000, p. 22.

<sup>4</sup> OJ L 303 of 2.12.2000, p. 16.

<sup>5</sup> See Recitals 1 and 5 of the Preamble.

<sup>6</sup> Case C-101/01, *Lindqvist*, judgment of 20 November 2003 ; Case C-540/03, *Parliament v Council*, [2006] ECR I-5769.

## 1. Potential conflict with the right to respect for private life

The rule of equality of treatment may enter into conflict with the right to respect for private life in several respects.

- First, one may wonder to which extent the right to respect for private and family life, as protected under Article 8 of the European Convention on Human Rights, may constitute an obstacle to imposing the requirements of the directives in certain settings, particularly in the context of private relationships and for private households.<sup>7</sup>
- Second, a similar tension may occur with the interaction between reasonable accommodation measures for persons with disabilities and the right to respect for private life. According to Article 7 of the Employment Equality Directive, reasonable accommodation means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training. However, the implementation of such measures requires that the needs of the individual with a disability be known to the employer. How is this to be reconciled with the right to respect for private life, which includes, in particular, the protection of personal data relating to health and to disability<sup>8</sup>?
- Third, the issue of the protection of personal data is of tremendous importance in the context of fighting against indirect discrimination, on the one hand, and of positive action measures, on the other hand. As to certain instances of indirect discrimination, the need of statistics for allowing the shift of the burden of proof<sup>9</sup> is raising the question of the protection of sensitive data (e.g., ethnic discrimination cases). The Racial Equality Directive and the Employment Equality Directive leave to the EU Member States a broad margin of appreciation as regards the adoption of positive action schemes. They are authorized to maintain or adopt positive action measures, “with a view to ensuring full equality in practice”. But they are at liberty whether or not to do so, and they may choose which forms of positive action to implement.<sup>10</sup> Where a State does opt for granting specific (‘preferential’) treatment to individuals, for instance on grounds of their race or ethnic origin, data linking specific individuals to the relevant categories will need to be collected and processed. Which safeguards must be complied with in this regard, under Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,<sup>11</sup> Article 8 of the European Convention on Human Rights<sup>12</sup> and the 1981 Council of Europe Convention (No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>13</sup>?

<sup>7</sup> See, eg, Case 165/82, *Commission v. United Kingdom*, [1983] ECR 3431, as well as the preparatory works of Protocol no. 12 to the European Convention on Human Rights

<sup>8</sup> On the protection of data relating to health under Article 8 ECHR, see Eur. Ct. HR (4<sup>th</sup> sect.), *I. v. Finland* judgment of 17 July 2008 (Appl. 20511/03) (final on 17.10.2008).

<sup>9</sup> Such a need has been highlighted in the case law of the European Court of Justice with respect to gender.

<sup>10</sup> Article 5 of the Racial Equality Directive; Article 7 of the Employment Equality Directive.

<sup>11</sup> OJ L 28 of 23.11.1995, p. 31.

<sup>12</sup> The European Court of Human Rights has interpreted this provision as protecting the individual from the processing of data, whether relating to his or her private or public activities, which may be traced back to an identified or identifiable individual (Eur Ct HR (GC), *Rotaru v Romania*, judgment of 4 May 2000 (Appl. No. 28341/95), at para. 43 (noting in particular that “public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities”)).

<sup>13</sup> This Convention has been opened for signature on 28 January 1981.

## **2. Potential conflict with the rights to freedom of religion, association and expression in the context of ethos-based organisations**

The rule of equality of treatment may also enter into conflict with the rights to freedom of religion, freedom of association or even freedom of expression, especially in the context of ethos-based associations.

Article 4 of the Racial Equality Directive and Article 4(1) of the Employment Equality Directive provide in similar terms that Member States may provide that a difference of treatment which is based on a suspect characteristic related to a protected ground shall not constitute discrimination 'where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. Article 4(2) of the Employment Equality Directive provides that, under certain conditions, differences of treatment on grounds of religion or belief may be allowed in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief. Taking into account the requirements of fundamental rights, what is the exact scope of these exceptions? Specifically, may organisations other than ethos-based organisations invoke their freedom of expression or their freedom of association in order to justify selecting employees on the basis of certain characteristics such as race or ethnic origin, sexual orientation, religion or belief, or age? Although Article 4(2) of the Employment Equality Directive suggests that the Member States may allow ethos-based organisations to take into account religion or belief, is this in fact an obligation under the requirements of fundamental rights, particularly under Article 9 of the European Convention on Human Rights<sup>14</sup>? Would this provision or other fundamental rights (particularly freedom of expression and freedom of association), require that churches or other organisations whose ethos is based on religion or belief be allowed to also rely on criteria other than religion or belief, such as sexual orientation<sup>15</sup>?

The relevance of Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty should be addressed in this context. This Declaration states that the EC Treaty does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. Is this Declaration a consequence of Article 9 ECHR? To which extent should this Declaration influence the interpretation of Article 4 of the Employment Equality Directive?

<sup>14</sup> See Eur. Commiss. H.R., Appl. n°12242/96, *M. Rommelfanger v. Germany*, decision of 6 September 1989, *D.R.*, 62, p. 151, p. 171.

<sup>15</sup> See, eg, Cass. fr. (soc.), 17 avril 1991, *Painsecq c. Assoc. Fraternité Saint Pie X, Dr. Soc.*, juin 1991, p. 489 ; or, in the case-law of the U.S. Supreme Court, *Boy Scouts of America et al. v. J. Dale*, 530 U.S. \_\_\_\_ (2000).

### **3. Potential conflict with the right to freedom of religion, in other context than ethos-based organisations**

Finally, the rule of equality of treatment may enter into conflict with the right to freedom of religion in other contexts than the issue of ethos-based organisations.

In this respect, a case decided on 15 April 2008 by the Dutch Equal Treatment Commission (ETC) is explicit. The ETC stated that the refusal to employ civil servants, who refuse to conduct a marriage between two people of the same sex for conscientious/religious objections, does not constitute a breach of the Dutch Equal Treatment Act. Only if certain strict criteria are met, there might be room for local authorities to give in to the conscientious or religious objections of civil servants who perform more tasks than to conduct marriages only. Although this kind of situation does not fall under the scope of application of the existing directives, it raises a broader issue: what is the relationship between religious conscientious objection and the requirements of equality of treatment?

### **Conclusion**

*To sum up, the purpose of this presentation is to discuss*

- 1) which conflicts could emerge between the prescriptions of the directives and the requirements of competing fundamental rights?;*
- 2) whether these conflicts are different in nature and which typology could be built to address them?;*
- 3) in particular, whether a conflict between the non-discrimination principle and another human right raises different issues compared to a conflict between two other human rights?;*
- 4) what are (or could be) the solutions to deal with these situations and the way of balancing those competing rights and freedoms?;*
- 5) and finally, are there various methods through which competing fundamental rights are balanced and do they vary depending on the national authority in charge of balancing those rights, i.e. the legislator or the judge?*