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PRINCIPLE OF NON-DISCRIMINATION IN THE EUROPEAN UNION:

the horizontal effect of the directives in the light of the
jurisprudence of the ECJ¹

*Fabiana Félix Ferreira*²

ABSTRACT: At the European level, the principle of non-discrimination is expressly stated first and foremost in Article 2 of the TEU. In the context of the EEC, this principle exclusively reflected the rejection of any protectionist policy that might hinder, not only the creation of the common market, but more broadly the realization of any form of free trade. With the transition to the EU and, above all, the institution of European citizenship, on the other hand, the prohibition of non-discrimination becomes part of this restricted group of principles that characterize the profound purpose of the new European project - that is, the assimilation of the citizens of the member states - becoming an instrument for the affirmation of the EU as a unitary space based on identity. The research that is conducted concerns the Principle of non-discrimination within the European Union and the attribution of horizontal direct effects in the jurisprudence of the Court of Justice of the European Union.

KEYWORDS: Principle of non-discrimination; European Union; Court of Justice of the European Union.

EL PRINCIPIO DE NO DISCRIMINACIÓN EN LA UNIÓN EUROPEA: EL EFECTO HORIZONTAL DE LAS DIRECTIVAS A LA LUZ DE LA JURISPRUDENCIA DEL TJUE

RESUMEN: A nivel europeo, el principio de no discriminación está consagrado expresamente, en primer lugar, en el artículo 2 del TUE. En el contexto de la CEE, este principio reflejaba exclusivamente el rechazo a cualquier política proteccionista que pudiera obstaculizar, no solo la creación del mercado común, sino más ampliamente, la realización de cualquier forma de libre comercio. Con la transición a la UE y, sobre todo, con la institución de la ciudadanía europea, por otro lado, la prohibición de la discriminación pasa a formar parte de este reducido grupo de principios que caracterizan el propósito fundamental del nuevo proyecto europeo —es decir, la asimilación de los ciudadanos de los Estados miembros—, convirtiéndose en un instrumento para la afirmación de la UE como un espacio unitario basado en la identidad. La investigación que se lleva a

1. F. F. Ferreira, "Principle of non-discrimination in the European Union: the horizontal effect of the directives in the light of the jurisprudence of the ECJ," *Latin American Journal of European Studies* 5, no. 1 (2025): 305 et seq.
2. Research fellow at the Alma Mater Studiorum - University of Bologna. International PhD in Legal Sciences from the University of Perugia, Italy, curriculum in Public Law. Lawyer and researcher. <https://orcid.org/0009-0006-6680-6332>.

cabo aborda el principio de no discriminación en la Unión Europea y la atribución de efectos directos horizontales en la jurisprudencia del Tribunal de Justicia de la Unión Europea.

PALABRAS CLAVE: Principio de no discriminación; Unión Europea; Tribunal de Justicia de la Unión Europea.

SUMMARY: Introduction; 1. Reconstruction of the European Directives concerning the Principle of Non-Discrimination; 1.1 The prohibition of discrimination on grounds of sex; 1.2 Directive 2000/78/EC on a general framework for equality in employment and occupation; 1.2.1 The prohibition of discrimination on grounds of disability; 1.2.2 The prohibition of discrimination on grounds of age; 1.2.3 The prohibition of discrimination on grounds of sexual orientation; 1.2.4 The prohibition of discrimination on grounds of religion and belief; 1.3 Directive 2000/43/EC implementing the principle of equality between persons irrespective of racial or ethnic origin; 1.4 Discrimination on grounds of nationality; 2. Final considerations; References.

INTRODUCTION

As is well known, the fundamental objective of the Constitutive Treaty of a common Europe was the formation of a single economic market. For this reason, the precepts on equality were aimed solely at the free movement of workers between Member States, ensuring fair competition between companies in the various states and preventing countries with cheaper labor from having a lower production cost.³

Therefore, the European Community was characterized by a purely economic logic, in which it was intended to favor the free movement (only) of workers⁴ as factors of production, on the assumption of the benefits that this would bring in terms of a better allocation of workers and, consequently, a better functioning of the market.

3. Mark Bell, *Antidiscrimination Law and the European Union* (Oxford: Oxford University Press, 2002). Mark Bell, "Equality and the European Union Constitution," *Industrial Law Journal* 33, no. 3 (September 2004): 242–260. <https://doi.org/10.1093/ijl/33.3.242>. Marzia Barbera e Silvia Borelli, "Principio di eguaglianza e divieti di discriminazione," in *La tutela antidiscriminatoria: Fonti strumenti interpreti*, ed. Marzia Barbera e Alberto Guariso (Torino: Giappichelli, 2020), 33. Luca Giacomelli, *Ripensare l'eguaglianza: Effetti collaterali della tutela antidiscriminatoria* (Torino: Giappichelli, 2018), 66. Marzia Barbera, ed., *Il nuovo diritto antidiscriminatorio* (Milano: Giuffrè, 2007), XIX.

4. Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, *Official Journal of the European Communities* L 257 (19 October 1968): 2–12.

The “common market” and the “approximation of the economic policies of the member states” were the two fundamental instruments through which the Community pursued its own long-term objectives.⁵

The European Economic Community was founded on a liberal outlook, which saw market mechanisms as instruments capable of guaranteeing long-term freedom and social prosperity. Its political project aimed, therefore, at building a common European market based on free competition between companies and on the free movement of workers from one Community country to another. It is through the creation of such a market that an improvement in the living conditions of the citizens of the member states could be achieved. From this functionalist perspective, the Treaties that founded the European Common Market in 1957 deal with discrimination only in those aspects that can interfere with the proper functioning of the market.⁶

In the Community system, equality⁷ ended up playing mainly the role of favoring economic integration and market access, rather than its other typical commutative and participative functions, and even less its redistributive function.⁸

However, it should be noted that the creation of a European labor market dates back to the late 1970s, when social concerns arose, with the aim that workers would have a minimum uniform treatment in the various states, and when the first directives on the free movement of workers were introduced. Over the years, the scope of this principle has been extended to the form that we know today.

The principle of non-discrimination,⁹ starting from a merely functional connotation, in an exclusively economic perspective, for the realization of the single

5. Massimo V. Benedettelli, *Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità Europee* (Padova: CEDAM, 1989), 12.

6. Marzia Barbera and Silvia Borelli, *Principio di eguaglianza*, 22. Oreste Pollicino, *Discriminazione sulla base del sesso e trattamento preferenziale nel diritto comunitario: Un profilo giurisprudenziale alla ricerca del nucleo duro del new legal order* (Milano: Giuffrè, 2005), 7.

7. Bernard Williams, “The Idea of Equality,” in *Philosophy, Politics and Society*, 2nd ser., ed. Peter Laslett and W. G. Runciman (Oxford: Blackwell, 1962), 110. Ian Carter, *L'idea di eguaglianza* (Torino: Feltrinelli, 2001), 24.

8. Marzia Barbera e Silvia Borelli, *Principio di eguaglianza*, 23. Chiara Favilli, *Non-discrimination in the Law of the European Union* (Bologna: 2008).

9. See, among others: Richard Plender, “Equality and Non-Discrimination in the Law of European Union,” *Pace International Law Review* 7, no. 1 (Winter 1995): 57; Gráinne de Búrca, “The Role of Equality in European Community Law,” in *The Principle of Equal Treatment in EC Law: A*

market, was enriched, in fact, by other elements, taking on the social protection needs of community workers to go beyond the limits of labor, to cover areas such as education, social protection, including social security and health, to finally constitute, even going beyond the social dimension, the necessary element for the very survival of the community system.¹⁰

The Directives referring to the principle of non-discrimination within the EU will be analyzed below.

1. RECONSTRUCTION OF THE EUROPEAN DIRECTIVES CONCERNING THE PRINCIPLE OF NON-DISCRIMINATION

1.1 The prohibition of discrimination on grounds of sex

The prohibition of discrimination¹¹ based on sex is, together with the prohibition of discrimination based on nationality, one of the first and most important achievements of the European Union's legal system. Equal treatment between women and men and non-discrimination based on sex are fundamental principles of EU law. The European Union's approach to equality has evolved considerably over time, and the initial emphasis on equal pay and on preventing

Collection of Papers by the Centre for European Legal Studies, ed. Alan Dashwood and Siofra O'Leary (London: Sweet & Maxwell, 1997), 13. Mark Bell, *Antidiscrimination Law and the European Union*. Mark Bell, "The Principle of Equal Treatment: Widening and Deepening," in *The Evolution of EU Law*, 2nd ed., ed. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011), 611. Sacha Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Them", *Common Market Law Rev* (2004): 533; Evelyn Ellis, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2005). Luisa Azzena, "La costruzione del principio di uguaglianza nell'ordinamento comunitario," *Diritto pubblico comparato ed europeo* (2007): 1419. Marzia Barbera, ed., *Il nuovo diritto antidiscriminatorio* (Milano: Giuffrè, 2007). Dagmar Schiek and Victoria Chege, eds., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge, 2009). Isabelle Chopin and Eirini-Maria Gounari, *Developing Anti-Discrimination Law in Europe: The 27 EU Member States Compared* (Luxembourg: Publications Office of the European Union, 2010). Sandra Fredman, *Discrimination Law* (New York: Oxford University Press, 2002), 106. Francesco Basenghi, "Indirect Discrimination: The Italian Choice," *Hamline Law Review* 20, no. 3 (Spring 1997): 605. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed. (Oxford: Oxford University Press, 2015), 936-37.

10. Oreste Pollicino, *Discriminazione sulla base del sesso e trattamento preferenziale nel diritto comunitario*, 295.

11. Antonio D'Aloia, *Discriminazioni, eguaglianza e azioni positive: il diritto diseguale* (Reggio Emilia: Diabasis, 2008), 201. Antonio D'Aloia, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale* (Cedam, Padova, 2002; Luigi Ferrajoli, "Eguaglianza e non discriminazione nella Costituzione europea," in *Il principio di uguaglianza nella Costituzione europea: diritti fondamentali e rispetto della diversità*, ed. Alessandro Galasso (Milano: Franco Angeli, 2007).

distortions of competition between Member States has given way to a concern with equality as a fundamental right. This is demonstrated by the attention given to equality in the Treaty establishing the European Union, in the Charter of Fundamental Rights of the European Union.¹²

By virtue of the community order for the purposes of economic integration and the elimination of barriers to development, one of the greatest obstacles to economic growth that the Union has always had to face has been represented by inequalities between men and women in the world of work.

The development of gender-based protection has served both an economic and a political purpose and remains one of the European Union's fundamental tasks. The recognition of the social and economic importance of ensuring equal treatment has been further consolidated by the priority given to respect for this principle in the Charter of Fundamental Rights.

Equal treatment of men and women¹³ is one of the main objectives not only of the European Union's actions since the Treaty of Rome, but it is also one of the Union's most important values, expressly provided for in Article 2 of the Treaty on European Union, which are part of the constitutional identity of the EU.

It is interesting to note that among the values concerning equality, equal treatment of men and women is the only one described with a positive meaning. Among the values in article 2, non-discrimination in general is mentioned, and then equality between men and women is specified. Such a statement brings us to the essential content of the prohibition of gender-based discrimination within the European Union, which consists not only in refraining from any discrimination between men and women, but also in actively promoting equality, which may take the form, under certain conditions, of a series of positive discriminations.

12. On the concept and scope of sex discrimination, see Linda Senden, "Conceptual Convergence and Judicial Cooperation in Sex Equality Law," in *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, ed. Sacha Prechal and Bert van Roermund (New York: Oxford University Press, 2008), 370-373. Massimo V. Benedettelli, *Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità Europee*, 60.

13. Anna Lorenzetti and Barbara Pezzini, "Il principio di parità tra uomo e donna nell'integrazione europea: costruzione del genere e costruzione dell'uguaglianza," in *Politica e diritti sociali nell'Unione europea: Quale modello sociale europeo?*, ed. Pietro Gargiulo (Napoli: Editoriale Scientifica, 2011), 81-113.

Positive discrimination provides that the member states of the Union may establish behaviors (as seen in the previous chapter, so-called positive actions) that benefit a certain category of subjects against other categories. This possibility has been “constitutionalized” within the Charter of Fundamental Rights of the European Union, which, in addition to providing a particularly broad notion of equal treatment between men and women in Article 23 paragraph 1 and paragraph 2, fully incorporates the category of positive discrimination. However, it should be noted that the scope of the Charter is still narrower than that of the Treaties.¹⁴ The importance of the case law on the principle of non-discrimination on the basis of gender dates back to the 1970s, due to the inclusion of Article 119¹⁵ in the Treaty establishing the European Economic Community (later 141 EC and now 157 TFEU), which regulated equal treatment between men and women in the world of work, with particular reference to remuneration.¹⁶

Since the mid-twentieth century, the commitment of the European institutions has been imminent in trying to ensure effective gender equality between men and women in a wide variety of fields, from social security, to services, to pay, to maternity and vacations, etc.

14. Anna Lorenzetti, “Il diritto antidiscriminatorio europeo: genesi ed evoluzione,” in *La costruzione del genere: norme e regole, studi*, ed. Barbara Pezzini (Bergamo: Bergamo University Press; Sestante, 2012), 107.

15. Anna Lorenzetti, “Il diritto antidiscriminatorio europeo,” 101.

16. *Defrenne v. Sabena*, Case 43/75, EU:C:1976:56. On this legal basis, Ms. Defrenne brought before the Court of Justice legislation that discriminated significantly against women in relation to men. The three judgments were triggered by an appeal brought by a flight attendant against Belgian legislation on retirement pensions applicable to that category. In fact, the national regulation provided for the termination of the employment contract for women when they reached the age of 40, with consequences in terms of the value of their pension. On this occasion, the European Commission, which appeared before the court, specified however that the principles of Community law, and in particular that of Article 119, can generate subjective rights only with respect to the member state, and not with respect to private citizens. The Court has gone far beyond the limits set by the Commission, going so far as to state that Article 119 expresses a principle of a mandatory nature. The role of principles is therefore not only that of being instruments of interpretation, as established by international and common law doctrine, but that of being true «constitutional principles», which generate rights for individuals. The application of the principle, again in the words of the Court, does not apply only to public authorities, but can be extended to contracts between individuals, thus going so far as to provide for a hypothesis of application of the so-called horizontal direct effect. However, the Court does not deny the direct application of Article 119. On the other hand, it admits that the scope of Article 119 cannot go beyond the interpretation of its literal concept, which refers to equal treatment in remuneration and not to other discrimination related to the terms of the employment contract. The dichotomy between rights and principles has not been resolved even by the most recent case law.

However, in recent years, the protection afforded to this type of discrimination is no longer achieved by legislative and jurisprudential means alone, but through the active promotion of gender equality policies within the European Union and individual member states.¹⁷

The instrument is still widely used in both politics and business to compensate for the chronic shortage of women in leadership positions in the world of work.¹⁸

In this sense, there is the Directive 2002/73/EC, of September 23rd, 2002, of the European Parliament and the Council, amending Directive 76/207/EEC, of February 9th, 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which aims to achieve the implementation of the principle of equality and non-discrimination on the grounds of sex in companies, requiring the Member States, in its article 8, to adopt appropriate measures to encourage social dialogue between employers and employees on equal treatment in order to promote its application. It requires the Member States, in article 8, to take appropriate measures to encourage social dialogue between employers and workers on equal treatment in order to promote its application, placing greater emphasis on collective bargaining as an instrument for the implementation of the principle of equality, and the Member States are called upon to encourage employers to implement and promote equality in companies in a planned, systematic, and crosscutting way.

With regard to Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, the European Parliament's Committee on Women's Rights and Equal

17. The activism of the Court in the period from the early 1960s transformed the principle of equal pay, which initially had a vertical dimension, pertaining to relations between the European Community and member states, into a principle with horizontal effects, capable, that is, of acting on inter-private relations. Marzia Barbera e Silvia Borelli, *Principio di eguaglianza*, 26-29.

18. *Eckhard Kalanke v. Freie Hansestadt Bremen*, Case C-450/93, EU:C:1995:322, regarding Directive 76/207/EEC on equal treatment between men and women on national measure that would give a woman an advantage over a man (establishment of quotas). See also *Badeck and Others*, Case C-158/97, EU:C:2000:163, and *Marshall*, where it was stated that measures favoring women in relation to men are compatible with Directive 76/207/EEC.

Opportunities had repeatedly urged the Commission to present a proposal for a directive to prohibit discrimination based on sex in areas other than employment.

Even with resistance from various interest groups, the proposal was finally adopted on November 5, 2003. However, due to the strong resistance it encountered, its scope was reduced so that it only covers access to and supply of goods and services, leaving out other areas such as media content and advertising, education, and decision-making processes.

The proposal is unequivocally based on article 13 of the EC Treaty, which must be interpreted in the light of articles 2 and 3 of the Treaty.

These articles oblige the Community not only to combat discrimination based on sex, but also to eliminate inequalities and to promote gender equality in all its activities. On July 5, 2006, the European Parliament and the Council adopted 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. This Directive consolidates and modernizes the EU acquis in this area by merging previous Directives and introducing some new elements. It is based on Article 157(3) of the Treaty on the Functioning of the European Union (TFEU).

Directive 2006/54/EC basically aims to consolidate European Union legislation with regard to Equal Treatment between genders, simplifying some provisions of previous directives and incorporating the case law of the Court of Justice of the European Union. However, the obligation to transpose the Directive applies only to those provisions that constitute substantive changes, which concern the definition of remuneration; the express extension of the application of equal treatment in occupational social security schemes to pension schemes applicable to specific categories of workers, such as civil servants; the express extension of the horizontal provisions to occupational social security schemes; and the express reference to discrimination resulting from gender reassignment.

1.2 Directive 2000/78/EC on a general framework for equality in employment and occupation

With the Amsterdam Treaty, in addition to the existing competence to legislate on discrimination based on nationality, the Union was given specific competence to take action to combat discrimination based on age, gender, race, religion, disability, and sexual orientation.¹⁹

In particular, a role of primary importance is played by Directives 2000/78/EC and 2000/43/EC,²⁰ backed by the current Article 19 TFEU,²¹ constituting the first attempt to harmonize the framework on a variety of types of discrimination in anti-discrimination law. The previous pieces of legislation, in fact, mainly covered the areas of discrimination based on sex and nationality. However, the abundance of legislative texts does not diminish the important role played by case law over these years.

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19. Lisa Waddington and Aart Hendriks, "The expanding concept of employment discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination," *International Journal of Comparative Labour Law and Industrial Relations* 18, no. 4 (2002): 403–428, DOI. 10.54648/5113464.
20. On these directives see Elspeth Guild, "European Developments: The EC Directive on Race Discrimination—Surprises, Possibilities and Limitations," *Industrial Law Journal* 29, no. 4 (December 2000): 416, <https://doi.org/10.1093/ijl/29.4.416>. Paul Skidmore, "European Development: EC Framework Directive on Equal Treatment in Employment—Towards a Comprehensive Community Anti-Discrimination Policy?" *Industrial Law Journal* 30, no. 1 (March 2001): 128, <https://doi.org/10.1093/ijl/30.1.126>. Pasquale Chieco, "Le nuove direttive comunitarie sul divieto di discriminazione," *Rivista Italiana di Diritto del Lavoro* 21, no. 1 (2002): 75. Mark Bell, "Beyond European Labour Law? Reflections on the EU Racial Equality Directive," *European Law Journal* 8, no. 3 (2002): 384–399; Gregor Thüsing, "Following the U.S. Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC," *The International Journal of Comparative Labour Law and Industrial Relations* 19, no. 2 (2003): 187. Timothy Jones, "The Race Directive: Redefining Protection from Discrimination in EU Law," *European Human Rights Law Review*, no. 5 (2003): 515.
21. Article 19: 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

1.2.1 The prohibition of discrimination on grounds of disability

As far as the prohibition of discrimination based on disability is concerned,²² the first initiative was established by the entry into force of the Charter of Fundamental Rights of the European Union in 2001. The Charter provides, in addition to the inclusion of the ground of disability in Article 21,²³ a specific provision (Article 26)²⁴ that was born with an eminently programmatic character and, after the entry into force of the Lisbon Treaty, constitutes a legally binding obligation for the institutions of the European Union and for the member states when they implement Union law.

Article 26 can also be considered as a source of inspiration for secondary legislation, since the obligation to find reasonable accommodation for persons with disabilities in terms of workplace accessibility and to maintain employment is also contained in the provisions of Directive 2000/78/EC.

Subsequently, Directive 2000/78/EC came into force, which implements the provisions contained in Article 19 TFEU by ensuring a framework protection against discrimination on the basis of disability, regulating in particular those situations where accessibility to the workplace must be balanced with the needs of the employer.

The purpose of Directive 2000/78/EC with regard to disabled people is made explicit in Recital 16: "The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability".

22. According to Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD): "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

23. Article 21 - Non-discrimination: 1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

24. Article 26 - Integration of persons with disabilities: The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Thus, Directive 2000/78/EC deals with the accessibility of services exclusively for people with disabilities²⁵ and is the existing secondary legislation in the EU for the protection of people with disabilities. The Directive contains a number of provisions protecting the specific position of people with disabilities in an attempt to harmonize the protection offered at different levels within member state legislation and to diversify it to recognize the specificity of this type of discrimination. However, Directive 2000/78/EC applies only to the scope of employment. Consequently, the protection offered to disabled people by EU legislation remains restricted mainly to this scope and cannot be extended to those other services that are not related to it, such as education.

It is important to note that Directive 2000/78/EC applies not only to disabled people who are discriminated against, but also to family members or relatives of disabled people who are stigmatized because of their disability.

It also notes the existence of a legal obligation for member states to undertake positive action in support of people with disabilities, including the restructuring or adaptation of workplaces. This obligation is even clearer in article 5²⁶ of the directive, which regulates the so-called reasonable accommodation for disabled people.

1.2.2 The prohibition of discrimination on grounds of age

The principle of non-discrimination on the grounds of age²⁷ is governed, in addition to the provision of the Treaties, by Directive 2000/78/EC (Art. 4.1 and 6). The development of case law on this specific feature of discrimination has

25. For a more in-depth study on disability, see Anna Lorenzetti, "Dis-eguaglianza e disabilità," in *La dis-eguaglianza nello Stato costituzionale*, ed. Michele Della Morte (Napoli: Editoriale Scientifica, 2016), 174.

26. Article 5 - Reasonable accommodation for disabled persons: In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This 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, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

27. Olivia Bonardi, "Le discriminazioni basate sull'età," in *Il nuovo diritto antidiscriminatorio: il quadro comunitario e nazionale*, ed. Marzia Barbera (Milano: Giuffrè, 2007), 125 and following.

been so relevant that it has led to the declaration of the horizontal direct effect of the principle of non-discrimination even without the condition of expiry of the deadline of the directive for the activation of direct effect having been met²⁸ (in this case, the deadline for the transposition of the directive had not yet expired).

The prohibition of age discrimination is certainly one of the grounds of discrimination on which case law has made the most progress towards the constitutionalization of the principle of non-discrimination.²⁹

The first judgment to address the issue of age discrimination under Directive 2000/78/EC was *Mangold*,³⁰ as will be detailed below when the Court's jurisprudential evolution with respect to the application of horizontal direct effect will be addressed. The *Mangold* case is distinguished mainly because it involves two private parties and, therefore, involves analyzing the ability of the non-discrimination principle to produce direct horizontal effects from a supporting standard, the directive, which, as seen earlier, is not able to produce this type of effect by its very nature as a legal instrument that confers rights and not obligations on individuals.

Case law on the prohibition of age discrimination has contributed substantially to the development of the non-discrimination principle as such. While *Mangold* was the first judgment to enshrine the direct horizontal effect of the non-discrimination principle, *Kücükdeveci* is particularly important because it confirms *Mangold's* jurisprudential direction. The result that could be achieved

28. With regard to the rule giving rise to direct effect, using Article 157 as a basis in the *Defrenne II* case, in the *Mangold* case the basis is Directive 2000/78/EC. However, as the Court specified in *Mangold*, the application of the prohibition of discrimination does not depend on the legal instrument, but on its nature as a general principle of law.

29. In this sense, see Silvia Borelli, "La Corte di Giustizia (ancora) alle prese con discriminazioni in ragione dell'età," *Rivista critica del diritto del lavoro* 4 (2009): 934; Fabrizio Amato, "Discriminazione per età: Cenerentola troverà la sua scarpetta?," *D&L: Rivista critica di diritto del lavoro* (2009): 87. Laura Calafà, "Le discriminazioni fondate sull'età: sequenza giurisprudenziale recente del fattore di rischio 'emergente'," *Rivista italiana di diritto del lavoro* 29, no. 4 (2010): 993-1001. Marco Falsone, "La discriminazione per età nella giurisprudenza recente della Corte di giustizia," *Questione Lavoro* 1 (2014): 14-27. Massimo Roccella and Daniela Izzi, *Lavoro e diritto nell'Unione europea* (Padova: CEDAM, 2010).

30. *Werner Mangold v. Rüdiger Helm*, Case C-144/04, EU:C:2005:709.

by these decisions is the strengthening of the possibility of giving direct horizontal effect to directives.³¹

Recital 18 of Directive 2000/78/EC suggests that, at least in principle, it is possible to invalidate the prohibition of age discrimination where it constitutes an essential and determining characteristic (e.g., art. 4.1) for the exercise of the functions assigned, using the armed forces and public security forces as an example, however, case law has already confirmed that the prohibition of age discrimination can take precedence even over the requirements of public security.

The ground of age discrimination³² is one of the last to become part of the Union's legal system (it was only with the Treaty of Amsterdam that it was introduced among the grounds for discrimination in the legal basis of the then Article 13 of the EC Treaty). Despite this, the development of the prohibition of age discrimination has occurred in harmony with the significance attached to this principle in the order of the member states, and this is mainly due to the large number of exceptions to the rule provided for in secondary legislation. It should also be recognized that member states often hide discriminatory or punitive intentions behind reasons such as rebalancing employment between generations or setting a specific age as a requirement for admission to or participation in a public competition.

1.2.3 The prohibition of discrimination on grounds of sexual orientation

Originally, the Treaty of Rome provided only for the prohibition of discrimination on the grounds of sex, in particular by forbidding member states to prohibit any pay gap between men and women, in order to ensure competition between

31. José Antonio Barciela Pérez, "El efecto directo de las Directivas en las relaciones entre particulares," *Noticias de la Unión Europea* (May 2010): 304.

32. Prohibition of age discrimination: on this subject see Fausta Guarriello and Federica Minolfi, "Da cenerentola a leading case: discriminazione per età e Carta dei diritti fondamentali," in *Diritti, Lavori, Mercati* 1 (2011): 103-107. Valerio Lubello, "Discriminazione basata sull'età e deroghe ammesse per obiettivi di politica del lavoro, mercato del lavoro e formazione professionale," in *Diritto pubblico comparato ed europeo* (2009): 1928-1932. Marco Pacini, "Il principio generale europeo di non discriminazione," *Giornale di diritto amministrativo* 8 (2010): 779-787.

companies and prevent an economic operator from taking advantage of the fact that it employs women rather than men. It was only later that the Amsterdam Treaty, reformulating Article 19 TEC, and the Charter of Fundamental Rights, with the provision of Article 21, made reference to sexual orientation, introducing in the prohibition of discrimination a focus no longer simply on the biological fact of belonging to one of the two sexes, but also on the profile of interpersonal and affective relationships.³³

The principle of non-discrimination on the basis of sexual orientation³⁴ is included from the outset in the Charter of Fundamental Rights of the European Union. Protection against such discrimination is provided primarily by Framework Directive 2000/78/EC, although limited to the field of employment relationships, as well as by the EU Charter of Fundamental Rights and the text of the Treaties.

It should be noted that, unlike in the European Union, where the EU Charter of Fundamental Rights expressly includes non-discrimination on the basis of sexual orientation among the protected areas, the ECHR does not provide direct protection against this type of discrimination.³⁵

Even the European Convention on Human Rights does not explicitly prohibit discrimination on the basis of sexual orientation. In this case, however, there was no need for a formal amendment of the Convention because the Strasbourg Court, interpreting Article 14, which prohibits discrimination on the basis of sex, held generally that discrimination on the basis of sexual orientation was also covered by the prohibition. The Court, however, did not issue a ruling on the prohibition of discrimination until the adoption of EC Directive 2000/78, which,

33. Angela Pisano, "Divieto di discriminazione sulla base dell'orientamento sessuale: il caso Maruko," in *Il principio di non discriminazione nel diritto dell'Unione europea* (Napoli: Editoriale Scientifica, 2011), 199.

34. See Mark Bell, "Sexual Orientation in Employment: An Evolving Role for the European Union," in *Legal Recognition of Same-Sex Partnerships*, ed. Robert Wintemute and Mads Andenæs (Oxford: Hart Publishing, 2001), 668. Kees Waaldijk and Matteo Bonini-Beraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (The Hague: T.M.C. Asser Press, 2006), 42, 115.

35. Although Article 14 of the ECHR does not explicitly mention «sexual orientation» as a protected characteristic, the ECtHR has expressly stated in a number of cases that it is among the «other» characteristics protected by Article 14.

in implementation of Article 19 TFEU, established a general framework for equal treatment in employment and occupation.³⁶

The Court of Justice recognized discrimination on the basis of sexual orientation for the first time in the case of Tadao Maruko.³⁷

Mr. Maruko took legal action to have his right to a widow's pension recognized by the Vddb, whose refusal, in his view, infringed the principle of equal treatment, since the German legislature, in amending the Social Security Code, had intended to place solidarity on an equal footing with marriage in this area.³⁸

It is important to note that the European Court cannot go so far as to determine whether the domestic legislature should have put marriage and civil partnership on an equal footing, since the regulation of civil status is outside the sphere of competence of the European Union and there is no principle common to the member states that marriage and partnership of a different nature should be placed on an equal footing.³⁹

The Maruko judgment allows us to take into account a few elements. First, the Court applied the principle of equal treatment to persons who not only manifested a different sexual orientation, but who, by virtue of that orientation, had a different legal status: spouse and registered partner. The Court's reasoning allows, however, to identify the distinctive aspect of discrimination based on sexual orientation compared to that based on sex, namely the relational aspect: while sex is a biological characteristic of the individual, sexual orientation is delineated in the relationship between people, coloring a cohabitation with

36. Angela Pisano, "Divieto di discriminazione," 200.

37. *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, case C-267/06, EU:C:2008:179. For an analysis of the judgment see, among others, Marina Nicolosi, "Le discriminazioni per orientamento sessuale: osservazioni a margine della sentenza Maruko," *Argomenti di diritto del lavoro* (2010): 289. L. Laura Calafà, "Unione solidale registrata fra persone omosessuali e pensione superstiti: il caso Tadao Maruko dinanzi alla Corte di Giustizia CE," *Rivista giuridica del lavoro* (2009): 248. Laura Ronchetti, "I due volti dell'Europa: il principio di non discriminazione tra libertà e uguaglianza. A proposito delle sentenze Maruko e Fuffert della Corte di giustizia," *Giurisprudenza italiana* (2009): 564. Daniela Izzi, "La direttiva 2000/78 tutela le aspettative previdenziali del partner omosessuale di un lavoratore deceduto? Il commento," *Lavoro nella giurisprudenza* (2008): 1231.

38. Angela Pisano, "Divieto di discriminazione," 205.

39. Angela Pisano, "Divieto di discriminazione," 206

affectio maritalis and therefore making it worthy of protection that other forms of cohabitation lack.⁴⁰

The competence in matters of civil status, although internal, must be exercised without infringing on community law, so that the member states could not maintain regimes that regulate similar situations differently: if *de facto* union and marriage were considered similar situations, the states could not regulate them differently. But to reach such a claim, there would have to be a rule of European Union law, even in the form of a general principle common to the Member States, requiring that the two situations be considered analogous. In conclusion, European legislation could act as an accelerator in a process that, in any case, as the distribution of powers currently stands, will have to start with the national legal systems.⁴¹

The main consideration supporting this approach is that the prohibition of discrimination, including on the basis of sexual orientation, is present in the Charter of Fundamental Rights, which did not introduce new rights and freedoms, but codified rights and principles already recognized in Community law. According to this approach, the right to equal treatment regardless of sexual orientation would not have been enshrined but only declared in Directive 2000/78/EC, would have existed prior to the latter and could therefore be invoked also for the period before its entry into force. Otherwise, it would be the only element of discrimination described in Article 19 TFEU that does not have the status of a principle of European Union law.

Therefore, national legislation granting a partner in a civil partnership a supplementary pension of a lower amount than a married insured person must

40. The Court's sphere of intervention has intrinsic limitations, linked to the roles assigned by the Treaty to the referring courts and the Court of Justice: the latter cannot establish whether two situations are to be treated analogously (which is the responsibility of the national legislature), nor even whether they are in fact treated analogously in the national legal system (which is the responsibility of the referring court); it can only dictate lines of principle to establish whether or not the two situations deserve the same treatment. The Court cannot and will not interfere in the regulation of marital status to the extent of dictating a European marital status. Therefore, the Union judge can only push for discrimination in an anti-discriminatory sense in systems where elements of equal treatment already exist, but not push for non-discrimination in systems where joint unions are not provided for or are regulated as something completely different from marriage. Angela Pisano, "Divieto di discriminazione," 210.

41. Angela Pisano, "Divieto di discriminazione," 210..

be considered discriminatory, since the same national legislation reserves marriage to partners of different sexes and, at the same time, regulates registered partnerships and marriage in a similar way with regard to the obligation of mutual assistance and community of life, which are the *raison d'être* of the supplementary pension.⁴²

If the road to the recognition of discrimination on the basis of sexual orientation is difficult and tormented in Strasbourg, in Luxembourg, after a difficult start, things are decidedly better.

1.2.4 The prohibition of discrimination on grounds of religion and belief

The protection of discrimination on the grounds of religion is a relatively new phenomenon in EU law and European law in general, and an extremely relevant one.⁴³

In modern constitutions, the protection of religious freedom has always been placed alongside the protection of freedom of thought. The European Union has also accepted and promoted this scheme, including religious freedom under the protection of fundamental rights alongside freedom of thought in Article 10 of the Charter, and repeating the same scheme in Article 21.

As far as the European Union is concerned, its origin, as mentioned above, lies in the integration process in the first decades, which was devoted almost exclusively to economic integration. The religious phenomenon was dealt with more satisfactorily within the states.

However, the increase in immigration processes, together with the progressive increase in the complexity and number of new religions, led to a need for regulation at the European level, mainly to meet the needs of the labor market.

42. See Matteo Bonini Baraldi, "La pensione di reversibilità al convivente dello stesso sesso: prima applicazione della direttiva 2000/78/CE in materia di discriminazione basata sull'orientamento sessuale," *Famiglia e diritto* (2008): 666.

43. Laura De Gregorio, *Le religioni nel diritto dell'Unione Europea* (Bologna: Il Mulino, 2012), L.S. Rossi, "Diritto, religioni, diritti fondamentali: la via dell'Unione Europea," in *Laicità e diritto*, ed. Stefano Canestrari (Bologna: Bononia University Press, 2007).

This led to the drafting of a framework directive, a clear example of harmonization that provides a reference point, in addition to the Treaties and the Charter, for protection against religious discrimination.

This directive provides protection against religious discrimination in the workplace. Therefore, the aim is primarily to regulate the relationship between employer and employee in order to prevent discrimination in the execution of employment contracts. This directive is naturally combined with the protection offered at the national level, which is, however, primarily the result of its implementation.

Article 4 of the directive provides that dismissal on religious grounds may occur if circumstances arise that make it impossible to perform the employment contract, that is, if the task to which the person is assigned can no longer be reliably performed by him. As in the case of the European Union, the protection of religious freedom in general, and that of religious autonomy in particular, are areas that have come to the attention of the European Court of Human Rights relatively recently.

The principle of the autonomy of religious organizations, in fact, is stressed as fundamental to the development of a pluralistic society.

1.3 Directive 2000/43/EC implementing the principle of equality between persons irrespective of racial or ethnic origin

The protection against discrimination based on ethnicity and race is one of the first to be introduced, and this is mainly due to the multiplicity of armed conflicts and persecutions aimed at exterminating certain ethnic and racial groups, also to migration and globalization processes, which stimulate the miscegenation of different peoples.⁴⁴

44. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (to which all member countries of the European Union and the Council of Europe are party), created within the UN in 1966, defines racial discrimination as covering the criteria of «race, color, descent, or national or ethnic origin». While EU law does not explicitly refer to language, color and descent as protected characteristics, this does not mean that these characteristics cannot be protected as part of race or ethnic origin, since language, color and descent are closely associated with race and ethnic origin.

The most notable instrument in international law is undoubtedly the 1965 United Nations Convention on the Elimination of All Forms of Racial Discrimination, already in the EU Treaties, the provision regulating discrimination based on racial and ethnic origin is Article 19 TFEU, which provides that Parliament and the Council may adopt measures specifically designed to combat racial and ethnic discrimination.

Reference to racial hatred emerges in the analysis of paragraph 3 of Article 67,⁴⁵ which contains a provision authorizing the Union, in establishing the area of freedom, security and justice, to take the necessary measures to prevent and combat racism and xenophobia.

The secondary legislation of the European Union provides for an *ad hoc* instrument for the protection of the prohibition of discrimination on the grounds of race,⁴⁶ which was adopted on the basis of the powers conferred by Article 19 TFEU. This instrument is Directive 2000/43/EC, which regulates in detail the principle of non-discrimination on the basis of race and ethnic origin.⁴⁷

The directive introduces a specific recital that excludes the use of the word race in support of the many theories about the division of human beings into groups based on certain physical or genetic characteristics:

Whereas (6): The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

The directive, which expresses the principle of equal treatment on the basis of race, is a sister directive to the framework directive on discrimination in employment and occupation, whose adoption was preceded by a few months.

45. Article 67(3) TFEU: The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

46. See M. BELL, *Racism and Equality in the European Union*, Oxford, 2008.

47. On the implementation of the prohibition of discrimination on the basis of race in Union law see Davide Strazzari, *Discriminazione razziale e diritto: Un'indagine comparata per un modello «europeo» dell'antidiscriminazione* (Padova: CEDAM, 2008).

The directive recognizes, in the same way as Directive 2000/78/EC, three different types of discrimination. Direct discrimination, according to which: "Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin".⁴⁸

Indirect discrimination, on the other hand, according to which: "Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".⁴⁹

And harassment, which is described as: "Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States".⁵⁰

Directive 2000/43/EC, unlike the directive previously discussed, 2000/78/EC, is not limited in its material scope.⁵¹ It can therefore be said that the material scope of this Directive coincides almost entirely with that of European Union law, since it applies not only to employment benefits, but also to other areas, such as social benefits, education, access to and supply of goods and services, including housing.

48. Article 2.2 a) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

49. Article 2.2 b) Council Directive 2000/43/EC.

50. Article 2.3 Council Directive 2000/43/EC.

51. See Laura Pignataro, "Il principio di non discriminazione nelle fonti comunitarie primarie e la sua declinazione nella regolamentazione derivata (la Direttiva 2000/78/CE e la Direttiva 2000/43/CE)," in *Diritto del lavoro dell'Unione europea: Commentario*, ed. Franco Carinci and Alberto Pizzoferrato, vol. 9 (Torino: Giappichelli, 2010), 427.

Nor is the Directive limited in its personal scope, i.e. to the individuals to whom it applies. According to Article 3 of the Directive, it applies to all persons, whether in the public or private sector, including bodies governed by public law. This means that Directive 2000/43/EC applies not only to the recruitment and selection of personnel by public and private employers, but also to all situations where a person is subject to discrimination on the grounds of race or ethnicity, regardless of whether this is practiced by private individuals or public authorities. The specific reference to public law bodies is inserted in order to include in the scope of the Directive situations of public-private links. However, it should be specified that this Directive is combined⁵² with the provisions of the Treaties governing the prohibition of discrimination on grounds of nationality⁵³ and the free movement rights of European citizens. Therefore, an important limit to the application of this Directive is the possession of European citizenship and the exercise of the associated rights of movement.

Furthermore, it is clearly specified that it is not possible, through this directive, to derogate from the conditions, which remain fixed by member states, for the entry of third- country nationals into the national territory (with the exception of asylum seekers and long-term residents).

As far as the temporal scope is concerned, Directive 2000/43/EC became applicable in 2003 (the deadline expired on July 19, 2003). It is not subject, as was the case with Directive 2000/78/EC on age and disability, to further extensions that would extend the deadline for its application.

In the same way as Directive 2000/78/EC, but without the same level of complexity, Directive 2000/43/EC also maintains some exceptions for cases in which the racial or ethnic characteristic is an essential and determining requirement for employment. Article 4 provides:

52. Art. 3.2 Directive 2000/43/EC: This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

53. Art. 18 TFEU. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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.

As in Article 4(1) of Directive 2000/43/EC, this provision identifies particular cases where race or ethnic origin can be considered a “genuine and determining characteristic” for employment purposes. However, the Directive subjects this type of exception to a very restrictive test: the aim pursued by the national rule containing the derogation must be legitimate and must follow a proportionality⁵⁴ test (i.e., necessity and appropriateness).

The provision has so far remained unimplemented, in part because it is unclear how restrictive such a provision must be to avoid leading to abuse of the right. That leaves the school example, for which we can at least say that this kind of exception can be activated, of the request for a black actor to play the role of a historical or political figure who is also black.

Another exception to the application of the directive is represented by the category of “positive discrimination”, that is, those episodes of discrimination that occur specifically to bridge the persistent gap between two categories of subjects, one discriminated against and the other not, as seen previously. In this regard, the directive expressly⁵⁵ provides for the possibility of including what are defined as “positive actions” among the instruments to protect equal treatment on the basis of race.

Member States must ensure that persons protected by the Directive enjoy the necessary protection before the courts. One of the greatest difficulties in exercising victims’ rights in court is the burden of proof, since most of the time the victim is in a position of subordination to the person perpetuating the discri-

54. Stefano Cognetti, *Principio di proporzionalità. Profili di teoria generale e di analisi sistematica* (Torino: Giappichelli, 2011), 224.

55. Article 5 Directive 2000/43/EC: With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

mination. For this reason, Article 8 of the Directive imposes a duty on member states to provide for national measures that reverse the burden of proof from the victim to the perpetrator.

With regard to penalties, Article 15 of Directive 2000/43 clearly states that Member States must provide for sanctions that are effective, dissuasive and proportionate. Consequently, it is necessary that national legislation provide for an appropriate balance between criminal and administrative sanctions and the opportunity for judicial redress in order to properly implement the Directive.

1.4 Discrimination on grounds of nationality

In the field of application of the Treaty on the Functioning of the European Union, the prohibition of discrimination on grounds of nationality is foreseen in articles 18 and 45, formerly articles 6 and 48 of the 1957⁵⁶ TEC, originally enshrined in the founding treaty to ensure the proper functioning of the common market. Not so common is the observation that this origin also explains why the principle of non-discrimination initially appears, in community law, not so much as a subjective right, but as a rule of objective action.⁵⁷

Thus, discrimination on the basis of nationality, which is laid down both in treaty provisions, in the general principle developed by the Court of Justice, and in implementing provisions, almost always directives. However, there is no secondary legislation expressly implementing the prohibition of discrimination on grounds of nationality by providing for an organic system of protection. In fact, the power provided for in Article 18(2) TFEU has never been exercised to this end and, at the same time, Directive 2000/43/EC implementing equal treatment irrespective of racial or ethnic origin expressly excludes its application to "differences of treatment based on nationality (Article 3), unless there is indirect discrimination based on racial or ethnic origin".⁵⁸

56. As main sources of antidiscrimination law are 18 TFEU and the directive on long-term foreign residents, 2003/119.

57. Marzia Barbera e Silvia Borelli, *Principio di eguaglianza*, 22.

58. Chiara Favilli, "I ricorsi collettivi nell'Unione europea e la tutela antidiscriminatoria: verso un autentico approccio orizzontale," *Il Diritto dell'Unione Europea* 19, no. 3 (2014): 439-63.

Article 18 of the Treaty on the Functioning of the European Union states that any discrimination on grounds of nationality is prohibited within the framework of the Treaties: “within the scope of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”; and paragraph 2 of the same article allows the Parliament and the Council to adopt specific rules implementing the prohibition.

The prohibition of discrimination on grounds of nationality in Community law is formulated in terms of an absolute prohibition in Article 18 of the Treaty; however, this rigidity is mitigated, in the area of free movement, by the provision of a limited and exhaustive number of exceptions. In particular, with regard to the free movement of persons (i.e., the free movement of workers and freedom of establishment), states are allowed to adopt measures providing for special treatment for foreigners for reasons of public policy, public security, and public health. A similar derogation is recognized with respect to the free movement of services by virtue of the explicit reference made in Article 55 of the Treaty.⁵⁹

In EU law, the prohibition of discrimination on grounds of nationality applies in the context of free movement of persons and concerns only citizens of EU Member States. In addition, the non-discrimination directives provide for a number of exclusions from their scope concerning third-country nationals.⁶⁰

The non-discrimination directives expressly exclude from their scope discrimination on the grounds of nationality, which is the subject of the Free Movement Directive.⁶¹ Under the latter, only citizens of EU Member States have the right to enter and reside in other EU Member States. After a period of five years of legal residence in another EU Member State, an EU citizen becomes entitled to permanent resident status, which gives him/her equivalent rights to the category of “worker”. This is particularly important with regard to nationality

59. This provision in fact refers to the rules contained in Article 46 of the Treaty, which provides for exceptions to the principle of non-discrimination with regard to the free movement of workers.

60. Chiara Favilli, “The Application to Third-Country Nationals of the Prohibition of Discrimination on Grounds of Nationality,” in *Scritti sul diritto europeo dell’immigrazione*, ed. Giandomato Caggiano (Turin: G. Giappichelli Editore, 2014), 115.

61. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

discrimination, since EU law is much more restrictive in this regard. Directive 2004/38/EC also codified the case law of the Court of Justice - which is very extensive in this regard and has the constant aim of increasing freedom of movement - by incorporating into the directive a number of principles that the Court had laid down in rulings on the interpretation of EC Treaty provisions and secondary legislation.⁶²

Thus, it is emphasized that EU law prohibits discrimination on grounds of nationality only in the specific context of free movement of persons. In particular, EU law on free movement confers a limited number of rights on third-country nationals.

The principle of non-discrimination on the basis of nationality implies, in turn, that the EU citizen, when deciding to move to another member state, should tend to enjoy the same "social advantages" that the host state grants to its own citizens. Indeed, if this were not the case, this difference in treatment would end up having a negative impact on the effective enjoyment and exercise of freedom of movement.⁶³

Therefore, the right not to be discriminated against on the basis of nationality is configured as a subjective legal situation that derives directly from the status of EU citizen.⁶⁴ It is a right that, at least tends to arise as a result of the exercise of freedom of movement and whose fundamental character guarantees horizontal effectiveness (so-called *drittwirkung*).

62. Adelina Adinolfi, "La libertà di circolazione delle persone e la politica dell'immigrazione," in *Diritto dell'Unione europea - Parte speciale*, ed. Girolamo Strozzi (Turin: Giappichelli, 2017), 67.

63. It should be noted that the principle of non-discrimination on the basis of nationality must be attributed to the content of the status of citizen of the Union. Moreover, it must be regarded as an essential component of European citizenship, the main purpose of which is to enable citizens of the Union «who are in the same situation to obtain, irrespective of nationality and subject to such exceptions as are expressly provided for in this respect, the same treatment in law». This is an exclusive right of Union citizens. Although the article does not expressly say so, the prohibition operates only in relation to persons who are nationals of a Member State. The Court has made it clear that Article 18 TFEU «does not apply in the case of any difference in treatment between nationals of the Member States and third-country nationals». See *María Martínez Sala v. Freistaat Bayern*, Case C-85/96, EU:C:1998:217 and *Rudy Grzelczyk*, Case C-184/99, EU:C:2001:458.

64. In fact, European Union law has seen its scope extended to events that are essentially devoid of a cross-border character, but in which the non-recognition of anti-discrimination protection would have profoundly impaired the effectiveness of the essential core of rights conferred by the status of EU citizen.

Art. 18 of the Treaty on the Functioning of the European Union states that any discrimination based on nationality is prohibited as a precondition and condition for the establishment of a free market. However, to consider the principle only instrumental to the process of economic integration would certainly be reductive. Undoubtedly, this type of discrimination developed mainly within the Single Market (supreme value and ultimate goal of the 1957 European Economic Community) both as an attitude to impede the movement of goods from other member states and also as an attempt to hinder the free movement of persons.

The 1957 Treaty of Rome, in art. 7,⁶⁵ prohibited any discrimination on grounds of nationality, while art. 48 provided for the abolition of any discrimination on grounds of nationality as regards employment, pay and other conditions of work between workers of the member states.

The initial economic concerns of the principle of equal pay for men and women and on the basis of nationality, as a corollary to the free movement of workers, have been extended both as to their fields, not limited to matters of pay and access to work, and to protected social groups.

The application of the principle of non-discrimination on the basis of nationality, in fact, provides not only that citizens of member states should not be discriminated against against citizens of other member states, but also that there is a minimum level of application of EU law that must be respected despite the territorial boundaries of member states.

Two examples, of all, are particularly emblematic: the directives on the free movement of citizens and their families within the European Union (2004/38/

65. Article 7 of the Treaty of Rome, now 12, which identifies among the «principles» inspiring the community legal system the prohibition of discrimination on the basis of nationality, highlights Article 48 (2), which reaffirms this prohibition in reference to the free movement of subordinated labor. Article 7 represents a mere programmatic declaration that is substantiated and acquires force only through the other more specific provisions of the Treaty of equality, at other times it is applicable autonomously, but only residually, in order to censor unjustified differences of treatment that are not covered by these provisions. Massimo V. Benedettelli, *Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità europee* (Padua: CEDAM, 1989), 84-85. According to the author, from this point of view, article 7 could certainly be used to censor differentiated treatment on the basis of nationality which is not explicitly prohibited in the more specific sectoral regulations of the Treaty of Rome and which, however, seems unfair in the light of these regulations, just as it could be used for a more accurate and complete interpretation of these regulations.

EC) and the tax policies of Directive 2004/52/EC, provides that residence rights attributable to the EU citizen may only be exercised if the citizen simultaneously exercises his or her freedom of movement.

The exclusion from the scope of the new anti-discrimination legislation⁶⁶ of differences of treatment based on the nationality of third-country nationals, apart from being questionable in itself because of its extent, since it concerns not only the conditions of entry and residence, but “any treatment arising from the legal status of the third-country nationals or stateless persons concerned”, comes up against the same prohibitions based on racial and ethnic origin against foreign immigrants, because of the multiple nature that discrimination tends to take on.⁶⁷ In most cases, national legislation before and after the Directives in question does not make protection against discrimination conditional on nationality or citizenship.⁶⁸

The individual prohibitions contained in the directives and the general principle of non-discrimination derived from the Charter therefore allow the discriminatory nature of measures taken against third-country nationals on the basis of their nationality to be reviewed in EU law as well.⁶⁹

It should also be noted that the prohibition of discrimination on grounds of nationality has direct effect and is therefore likely to create rights for Union citizens which can be protected directly before national courts.⁷⁰

At the national level, moreover, this prohibition concerns not only the acts and conduct of public authorities, but also, to a certain extent, limits the autonomy of private individuals. According to established case law, both the

66. Dagmar Schiek, Mark Bell, and Lisa Waddington, eds., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart Publishing, 2007).

67. Marzia Barbera, ed., *Il nuovo diritto antidiscriminatorio*, XXXIX.

68. Marzia Barbera, ed., *Il nuovo diritto antidiscriminatorio*, XXXIX. Isabelle Chopin, Fiona Palmer, and Mark Bell, *Developing Anti-Discrimination Law in Europe: The 25 EU Member States Compared* (Luxembourg: Publications Office of the European Union, 2007), 8.

69. In Italy, with regard to standing to act against discrimination on the grounds of nationality, both of EU citizens and third-country nationals, the discipline is contained in Legislative Decree 286/1998, which was already in force at the time of the implementation of the anti-discrimination directives and which does not allow such standing. Discrimination on the basis of race and ethnic origin, on the other hand, is regulated by Legislative Decree 215/2003.

70. Adam Roberto and Antonio Tizzano, *Manuale di diritto dell'Unione europea* (Turin: G. Giappichelli, 2007), 392.

discriminatory practices of a company that holds exclusive rights over a certain matter and the rules and conduct adopted in the exercise of its legal autonomy by associations or bodies of a non-public nature. In general terms, therefore, contracts collectively regulating subordinate employment, as well as contracts between private individuals, should be considered covered by the prohibition of non-discrimination on the basis of nationality.⁷¹

FINAL CONSIDERATIONS

The directive is seen as an instrument of harmonization of legislation. When the matter to be legislated on needs to be uniform, the Union acts by means of regulations.⁷² For this reason, regulations always have a direct effect. However, the direct effect of directives is exceptional, since, as a rule, individuals can only make use of the rules contained in directives after they have been transposed into national law. It is therefore quite clear that directives are regulations addressed directly to the member states. The main effect of a directive is to create a transposition obligation for the recipient member state.

Regulations are supranational acts, expressing a relationship of supremacy of Union law over national law. Directives, on the other hand, lack this supremacy, being an eminently cooperative act between the Union and the internal order. However, despite this lack of subordination, during the transposition period, states must refrain from adopting any measures that might compromise the result prescribed by the directives, and national courts are responsible for monitoring the legality of national provisions.

After the deadline for transposition of a directive has passed and yet if the recipient state has remained inactive, the directive enjoys direct effect if it is precise and unconditional. Direct effect appears as a sanction for the state for

71. Adam Roberto and Antonio Tizzano, *Manuale di diritto dell'Unione Europea*, 393.

72. See Sacha Prechal and Bert Van Roermund, eds., *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press, 2008). E. L. Paniagua, "Las fuentes del derecho de la Unión Europea," in *Derecho de la Unión Europea*, ed. P. C. Alonso (Valencia: 2019). Alicia López de los Mozos Díaz-Madroñero, *La directiva comunitaria como fuente del Derecho*, Cuadernos del Congreso de los Diputados (Madrid: Congreso de los Diputados, 2010), 59.

not fulfilling its obligation in a timely or incorrect manner, this occurs when the state transposes a directive incorrectly.

In the 2000s, important directives were adopted regarding the principle of non-discrimination, namely Directives 2000/43/EC and 2000/78/EC, instruments that symbolize a fundamental reference of antidiscrimination law in the EU, allowing individuals a fair and equitable perspective of access to opportunities. Since then, the Court of Justice has expressed itself in several cases on the application of the effects of the directives.

The case law of the Court of Justice, in some specific cases, allows the direct effect of a directive between individuals, that is, it enshrines the horizontal effect, sometimes even before the transposition deadline has passed.

Directives will also have horizontal effect, even before the transposition deadline, when they give effect to general principles of law or fundamental rights. In the area of fundamental rights, the European Union, after the Treaty of Lisbon, is formally bound by the Charter of Fundamental Rights, which has the same legal force as the Treaties. Of course, before the Charter became binding, no violation could be claimed.

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