

Tackling the challenges of (im)migration: EU anti-discrimination law and its influence on the Member States' legal orders

Aleksandra Szczerba-Zawada, PhD
Jacob of Paradies University in Gorzów Wielkopolski/JM
Module EUIncSo

3rd EUMIGRO Conference “Migration and integration in the European Union – facts, figures, challenges and policy responses”, 26.03.2019, SGH Warsaw School of Economics



Co-funded by the
Erasmus+ Programme
of the European Union

Tackling (im)migration challenge: The EU anti-discrimination law

Tab. 1. Respondents who personally felt discriminated against in the past 12 months, by grounds of discrimination, and EU Member State (%)

	AT	BE	DE	DK	ES	FR	HU	IT	NL	PL	SE	UK	12 country average
Religion or belief	20	25	37	24	26	20	8	17	27	35	17	17	21
Age	9	8	12	10	12	12	15	10	16	17	16	13	13
Sex/Gender	17	9	21	11	15	12	8	13	8	24	16	10	12
Ethnic origin or immigrant background	15	12	27	15	21	8	4	5	13	23	13	9	11

Source: Experiences and perceptions of antisemitism. Second survey on discrimination and hate crime against Jews in the EU, Luxembourg: Publications Office of the European Union 2018, s. 60.

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ The EU anti-discrimination law → the set of legal norms guaranteeing the right to equality.
- Equality requires that individuals in similar situations shall be treated alike unless otherwise justified
- ❑ Article 21 of the Charter of Fundamental Rights of the European Union

Non-discrimination

1. Any discrimination based on any ground such as sex, *race*, colour, *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.

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
 - First EU anti-discrimination directive adopted on the basis of art. 19 TFEU (former Art. 13 TEC - successful EU attempt to shift competence to the EU with regard to the integration of migrants)
 - First legally binding instrument of EU anti-racism policy
 - Twofold aim:
 - Economic: „Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity” (recital 9)
 - Political: „To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services” (recital 12).

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
 - Purpose: to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment (Art. 1).
 - Obligation of the MSs to ensure that:
 - any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
 - any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Prohibited forms of unequal treatment:
 - Direct discrimination - occurs 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 (Art. 2 (2)(a))
 - Feryn Case (C-54/07):

„The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin (third-country nationals – ASZ), something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim of that discrimination”.

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Prohibited forms of unequal treatment:
 - Indirect discrimination - 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 (Art. 2 (2)(b))
 - CHEZ Razpredelenie Bulgaria case (C-83/14):

„(..) a practice such as that at issue in the main proceedings would be capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that practice did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that practice prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly”.

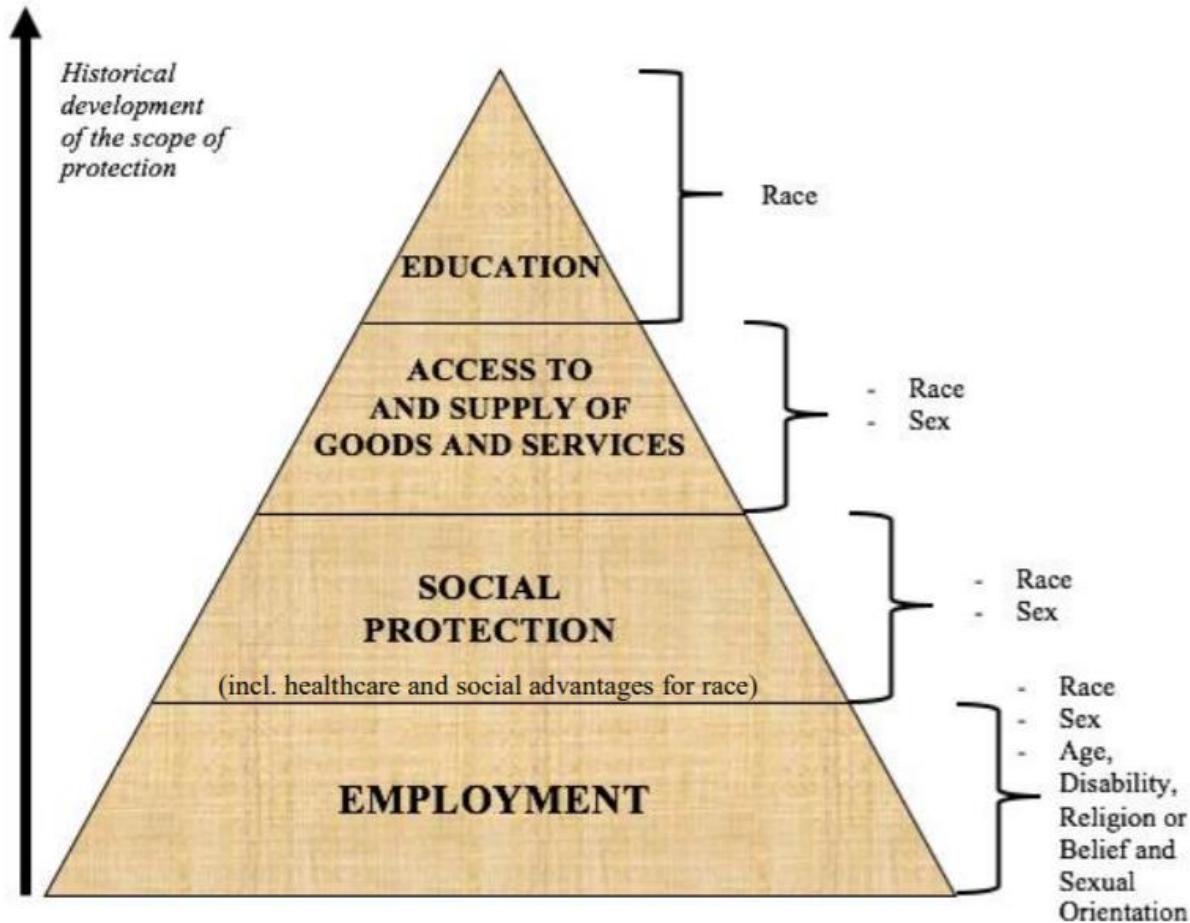
Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Prohibited forms of unequal treatment:
 - Harrassment: 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 (Art. 2 (2)(c));
 - An instruction to discriminate against persons on grounds of racial or ethnic origin (Art. 2 (2)(d)).

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Material scope of application:
 - conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - employment and working conditions, including dismissals and pay;
 - membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
 - social protection, including social security and healthcare;
 - social advantages;
 - education;
 - access to and supply of goods and services which are available to the public, including housing

Tackling (im)migration challenge: The EU anti-discrimination law



R. Xenidis, Shaking the Normative Foundations of EU Equality Law: Evolution and Hierarchy Between Market Integration and Human Rights Rationales, „EUI Working Paper” 2017/04, p. 25.

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Obligation of the MSs to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals rights (Art. 13);
- Obligation of the MSs to introduce effective, proportionate and dissuasive sanctions, which may comprise the payment of compensation to the victim (Art. 15).

Tackling (im)migration challenge: The EU anti-discrimination law

- ❑ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Exemption: „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” (Art. 3 (2)).
 - Explicit exclusion of migration law from the substantive scope of application of the directive 2000/43;
 - Discrimination of third-country nationals based on their nationality acceptable under the directive.

Tackling (im)migration challenge: The EU anti-discrimination law

❑ Concluding remarks

- The EU anti-discrimination law is potentially powerful tool for managing relations between majority group from host Member State and the migrant minority group;
- The aim of the EU anti-discrimination law is the social inclusion of the migrants what requires eradication of harmful stereotypes.

EUIncSo

Tackling (im)migration challenge: The EU anti-discrimination law

□ Literature

- Amiraux V., Guiraudon V., Discrimination in comparative perspective: policies and practices, “American Behavioral Scientist” 2010, v. 53, is. 12, p. 1691-1714.
- Muir E. , Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test, „Maastricht Journal of European and Comparative Law” 2011, v. 18, is. 1-2, p. 136-156.
- Xenidis R. , Shaking the Normative Foundations of EU Equality Law: Evolution and Hierarchy Between Market Integration and Human Rights Rationales, „EUI Working Paper” 2017, No. 04.
- Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22-26.
- Judgment of the Court of 23 November 2017, CHEZ Elektro Bulgaria, Joined Cases C-427/16 and C-428/16, EU:C:2017:890.
- Judgment of the Court of 10 July 2008, Feryn, C-54/07, EU:C:2008:397.



Co-funded by the
Erasmus+ Programme
of the European Union

Thank you very much for your attention!

- www EUINCSO <http://ajp.edu.pl/o-projekcie-euincso.html>
- FB EUINCSO <https://www.facebook.com/EUIncSo/>
- szczerbera.aleksandra@gmail.com

EUIncSo