COURT OF JUSTICE
OF THE EUROPEAN UNION

THE COURT OF JUSTICE
AND EQUAL TREATMENT

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INTRODUCTION

Since 1952, the Court of Justice of the European Union has monitored the Member States' application and implementation of EU law. Numerous judgments of the Court of Justice have found that the prohibitions relating to discrimination laid down in EU law have not been complied with and have strengthened them. This brochure presents a selection of key judgments of the Court of Justice grouped by categories of discrimination.

Discrimination on Grounds of Nationality

The prohibition of discrimination on grounds of nationality is the cornerstone of European integration: any citizen of the Union lawfully resident in a Member State of which he or she is not a national can rely on the prohibition of discrimination on grounds of nationality in all situations which fall within the scope of EU law. Such discrimination may be direct in the sense that a difference in treatment is directly related to nationality, or indirect where the treatment depends, for example, on the country of residence. The matter has been brought before the Court on multiple occasions.

In 1989, the Court considered that a British **tourist** seriously injured following an assault suffered by him on the Paris metro by persons unknown has the same right to compensation from the French State as a French national. Such a tourist must be entitled to receive services outside his or her country of origin and can therefore rely on the prohibition of discrimination on grounds of nationality (judgment of 2 February 1989, *Cowan*, 186/87).

In the well-known *Bosman* judgment of 1995, the Court held, inter alia, that the prohibition of discrimination on grounds of nationality precludes the application of rules laid down by sporting associations, under which, in matches in competitions which they organise, **football** clubs may field only a limited number of professional players who are nationals of other Member States (judgment of 15 December 1995, *Bosman*, C-415/93).

In 1998, the Court established the principle that nationals of a Member State can rely on their European citizenship for protection against discrimination on grounds of nationality by another Member State. Accordingly, the Court held that a Spanish mother lawfully resident in Germany can rely on the prohibition of discrimination on grounds of nationality where that Member State refuses to grant her the German **child-raising allowance** on the ground that she is not in possession of a residence permit, when German nationals are not required to produce such a document (judgment of 12 May 1998, *Martinez Sala*, C-85/96).

In 2004, the Court held that a Member State discriminates against **holders of secondary education diplomas** obtained in other Member States when it does not allow them to gain access to higher education under the same conditions as holders of secondary education diplomas obtained in that Member State (judgment of 1 July 2004, *Commission* v *Belgium*, C-65/03).

Discrimination on Grounds of Language

The use of 24 official languages in the EU has inevitably raised the question of linguistic discrimination that the Court has addressed in its case-law.

In 2012, the Court held that the publication in three languages (German, English and French) of **notices of competitions** for the recruitment of European Union officials and the obligation to sit selection tests in one of those three languages constitutes discrimination on the ground of language (judgment of 27 November 2012, *Italy* v *Commission*, C-566/10 P).

Furthermore, the Court has held on several occasions that the principle of non-discrimination precludes any requirement that the **linguistic knowledge** required by reason of the nature of the post to be filled must have been acquired in the Member State in question or must be evidenced by means of a certificate issued by that Member State (judgment of 28 November 1989, *Groener*, C-379/87 and judgment of 6 June 2000, *Angonese*, C-281/98).

In addition, the Court considered that a Member State cannot require, on pain of nullity, all **cross-border employment contracts** concluded with a resident undertaking to be drafted in the official language or languages of that Member State (judgment of 16 April 2013, *Las*, C-202/11).

Discrimination on Grounds of Ethnic Origin

EU law fights against discrimination related to racial and ethnic origin, in particular in the workplace and with regard to access to goods and services. The Court has had the opportunity to define the scope of this type of discrimination in its case-law.

In 2008, the Court found there to be direct discrimination where an employer publicly states that it will not recruit employees of a certain ethnic origin. The case originates in the remarks of a director publicly confirming that his company **did not wish to recruit** foreigners because its customers were reluctant to give them access to their private residences for the installation of garage doors (judgment of 10 July 2008, *Feryn*, C-54/07).

In 2015, the Court held that discrimination on grounds of ethnic origin may be established where, in a district densely populated by Roma, electricity meters are installed at an inaccessible height (between six and seven metres), whereas the same meters are placed at an accessible height in other districts. Such a **practice** not only makes it extremely difficult, if not impossible, for the parties concerned to check their electricity meters for the purpose of monitoring their consumption, but is also **offensive and stigmatising**. The Court noted, on that occasion, that the principle of equal treatment applies not only to persons who have a certain ethnic origin but also to persons who, although not themselves a member of the ethnic group concerned, suffer, together with the former, less favourable treatment (judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14).

Discrimination on Grounds of Sex

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The principle of equal treatment between men and women has led the Court to develop an abundant case-law.

Discrimination on Grounds of Sex

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Discrimination against women in the workplace: general principles

As early as 1976, the Court held that the principle of equal pay between men and women provided by EU law has **direct effect** so that it may be relied upon by an individual against their employer (judgment of 8 April 1976, *Defrenne*, 43/75).

The Court held that the exclusion of part-time employees from an occupational pension scheme may constitute **indirect discrimination** against women if that exclusion affects a far greater number of women than men and therefore could not be explained by objectively justified factors unrelated to any discrimination on grounds of sex (judgment of 13 May 1986, *Bilka*, 170/84).

Lastly, the Court has accepted the possibility of giving priority to the promotion of female candidates, where qualifications are equal, in sectors of the public service in which fewer women than men are employed in the relevant higher grade post in the relevant career bracket ('**positive discrimination**'), as long as the advantage is not automatic and male candidates are guaranteed to be assessed without a priori exclusion of their application (judgment of 11 November 1997, *Marschall*, C-409/95).

Discrimination on Grounds of Sex

Discrimination against women in the workplace: pregnant employees

In 1990, the Court held that both the **refusal to employ** a woman on account of pregnancy and the dismissal of a female worker for the same reason constitute discrimination on grounds of sex (judgments of 8 November 1990, *Dekker*, C-177/88 and *Handels- og Kontorfunktionaerernes Forbund*, C-179/88). The Court subsequently clarified that the prohibition of **dismissal** of a female worker based on her pregnancy applies to both employment contracts for an indefinite period and fixed-term contracts. In the same vein, the Court has established that **non-renewal** of a fixed-term employment contract is discriminatory if motivated by the worker's state of pregnancy (judgments of 4 October 2001, *Jiménez Melgar*, C-438/99, and *Tele Danmark A/S*, C-109/00). The Court also held that the dismissal of a female worker during her pregnancy as a result of absences through **pregnancy-related illness** is unlawful discrimination on grounds of sex (judgment of 30 June 1998, *Brown*, C-394/96). The Court has, moreover, stated that the dismissal of a female worker on the grounds of pregnancy and/or the birth of a child is unlawful even if it is notified after her return from maternity leave (judgment of 11 October 2007, *Paquay*, C-460/06).

In addition, the Court held that the dismissal of a female worker who is at an advanced stage of **in vitro fertilisation** treatment and is, for that reason, temporarily absent, constitutes direct discrimination on grounds of sex, since such treatment affects only women (judgment of 26 February 2008, *Mayr*, C-506/06).

Discrimination on Grounds of Sex

Other examples of discrimination on grounds of sex: insurance and the armed forces

The Court considered, in 2011, that taking into account the sex of the policyholder as a risk factor in **insurance contracts** constituted discrimination. That is the reason why, since 21 December 2012, premiums and benefits are calculated within the EU without distinction on the basis of the sex of the policyholder (judgment of 1 March 2011, *Association belge des consommateurs Test-Achats and Others*, C-236/09).

The Court stated, in 1999, that the organisation and administration of the armed forces must comply with the principle of equal treatment between men and women even if access to certain units may be reserved exclusively for men because of the **specific conditions for deployment** of those units (commando assault units for example) (judgment of 26 October 1999, *Sirdar*, C-273/97). In any event, women cannot be barred outright from military posts involving **the use of arms** (judgment of 11 January 2000, *Kreil*, C-285/98).

Discrimination on Grounds of Sex

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Discrimination on grounds of gender reassignment

In 1996, the Court held that a **dismissal based on the gender reassignment** of a person or the intention to undergo gender reassignment constitutes discrimination, since that person is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment (judgment of 30 April 1996, *P.* v *S.*, C-13/94).

In 2004, the Court held that national legislation which, in failing to recognise **transsexuals' new identity**, denies them the right to marry and is contrary to EU law if its effect is to deprive them of a survivor's pension (judgment of 7 January 2004, *K.B.*, C-117/01). In the same vein, the Court held, in 2018, that a person who has changed gender cannot be required to annul the marriage which he or she entered into before that change in order to be entitled to receive a retirement pension at the age provided for persons of the sex which he or she has acquired (judgment of 26 June 2018, *MB*, C-451/16).

Discrimination on Grounds of Sexual Orientation

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In 2015, the Court held that the permanent deferral of **blood donation** for men who have had sexual relations with another man can constitute discrimination, unless it can be scientifically established that there is a high risk, for those persons, of contracting severe infectious diseases such as, inter alia, HIV and that the principle of proportionality is respected. Accordingly, a Member State must first examine whether there are other effective techniques for detecting HIV which are less onerous than a permanent contraindication for those persons despite the existence of a period which follows a viral infection during which the biological markers used in testing donated blood remain negative despite the donor being infected ('the window period'). In addition, a questionnaire and an individual interview with blood donors could make it possible to identify more precisely the type of sexual behaviour presenting a risk (judgment of 29 April 2015, *Léger*, C-528/13).

The Court also held that an employee who concludes a **civil solidarity pact** (PACS) with a person of the same sex must be allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to heterosexual employees on the occasion of their marriage, where marriage is not legally possible for same-sex couples and the PACS arrangement has the same legal value as marriage for the purposes of the special leave in question (judgment of 12 December 2013, *Hay*, C-267/12).

Discrimination on Grounds of Disability

Whilst it is true that in 2006 the Court set out, for the first time, a definition of 'disability', that definition was revised in 2013 to include the definition provided for by the United Nations Convention on the Rights of Persons with Disabilities, ratified by the EU in 2009. The Court has had the opportunity to examine several cases of discrimination on grounds of disability relating, in general, to dismissal.

The Court defines disability as a limitation which results in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. The Court has also stressed that an illness cannot simply amount to a disability. By contrast, in cases where the illness or other health problem meets that definition (such as, for example, obesity), they must, regardless of their nature or origin, be regarded as a disability.

A person who is **dismissed** for reasons related to such an illness is therefore a victim of discrimination on grounds of disability (judgments of 11 July 2006, *Chacón Navas*, C-13/05; of 11 April 2013, *Ring and Skouboe Werge*, C-335/11 and C-337/11; and of 18 December 2014, *FOA*, C-354/13).

Moreover, the Court held, in 2008, that EU law protects employees who suffer from discrimination on grounds of the **disability of their child**. The prohibition on direct discrimination is not limited only to disabled people but also covers employees who must care for their disabled child (judgment of 17 July 2008, *Coleman*, C-303/06).

Discrimination on Grounds of Age

The principle of non-discrimination on grounds of age applies, in essence, in the field of employment and labour, whether in terms of recruitment, the exercise of activity or pension rights.

Since 2010, the Court has held, on several occasions, that it is not generally possible to set an age limit for recruitment of **certain professions**. It may be otherwise when the possession of particular physical capacities is a genuine and determining occupational requirement for the pursuit of the profession (such as in the case of firefighters who are directly involved in fighting fires or police officers whose duties require the use of physical force) (judgments of 12 January 2010, *Wolf*, C-229/08 and C-341/08; of 13 November 2014, *Vital Pérez*, C-416/13; and of 15 November 2016, *Salaberria Sorondo*, C-258/15).

By contrast, the Court acknowledged that the **compulsory retirement** of workers at the age of 65 years may be permissible where it seeks to ensure better distribution of work between the generations and, in particular, for the purposes of checking unemployment and where the workers concerned are entitled to draw an adequate retirement pension (judgment of 16 October 2007, *Palacios de la Villa*, C-411/05). In the same vein, the Court considered that the age limit of 65 years laid down in EU law for **pilots of commercial aircraft engaged in transporting** passengers, cargo or mail is valid. It is justified by the aim of ensuring civil aviation safety (judgment of 5 July 2017, *Fries*, C-190/16). However, the Court held that the total prohibition on **airline pilots** from carrying out their piloting activity after the age of 60 years constitutes discrimination on grounds of age because such a ban goes beyond what is necessary to ensure the protection of air traffic safety (judgment of 13 September 2011, *Prigge and Others*, C-447/09).

In addition, the Court held that the objective of encouraging the integration into working life of **unemployed older workers** does not justify national legislation which authorises, without restrictions, the conclusion of fixed-term employment contracts for *all* workers over the age of 52 years, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment (judgment of 22 November 2005, *Mangold*, C-144/04).

The Court also found there to be discrimination where workers were deprived of **severance allowance** on the ground that they may draw an old-age pension (judgment of 12 October 2010, *Andersen*, C-499/08).

Lastly, the Court noted that, even in disputes between private persons, a national court must ensure compliance with the principle of non-discrimination on grounds of age, **disapplying if need be** any provision of national legislation contrary to that principle (judgment of 19 April 2016, *Dansk Industri*, C-441/14).

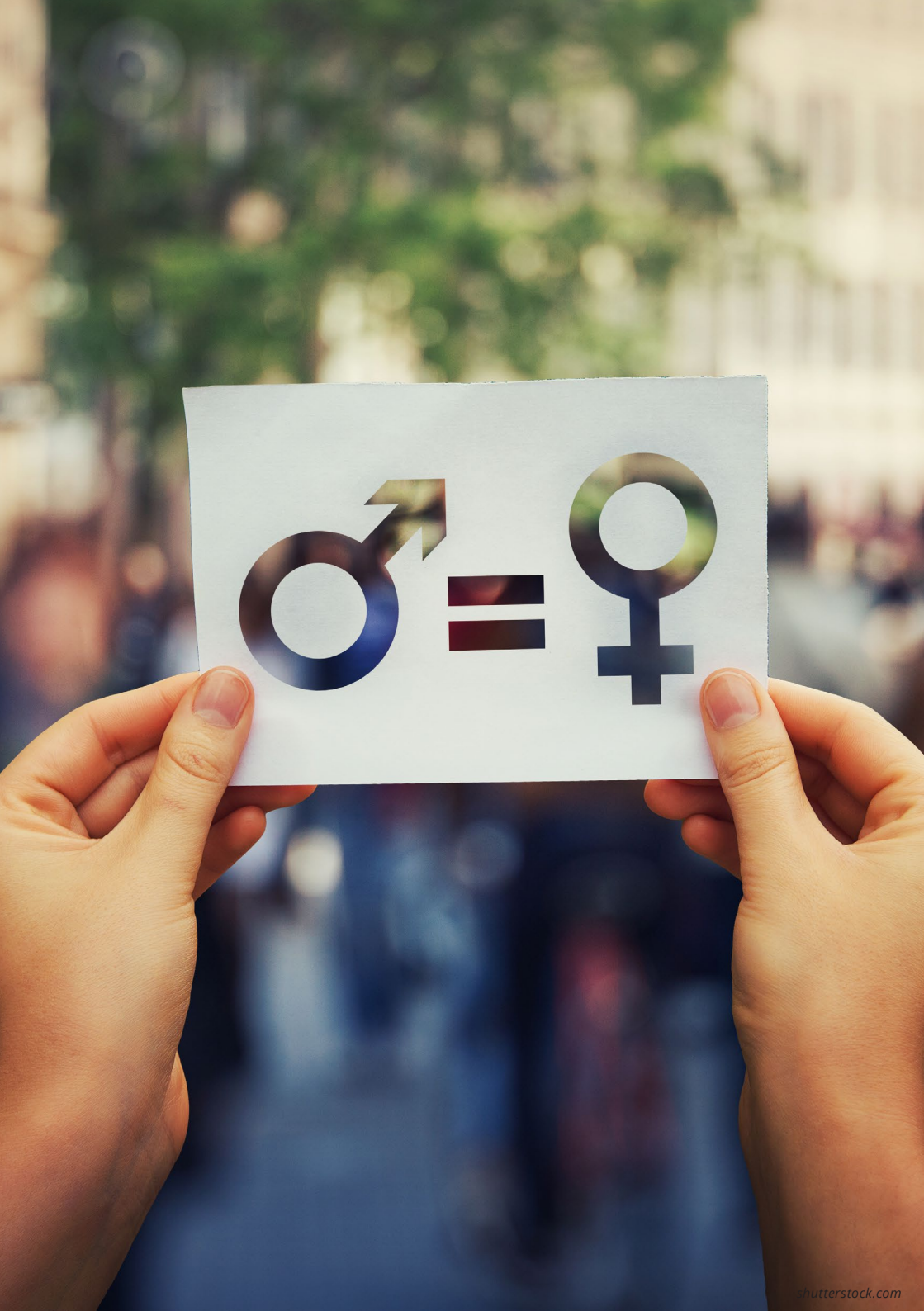
Discrimination on Grounds of Religion

The Court has issued several judgments relating to discrimination on grounds of religion with regard to recruitment and dismissal.

So far as concerns recruitment, the Court held that the **requirement of religious affiliation** for a position in a church or religious organisation must be amenable to effective judicial review by national courts. That requirement must be necessary and objectively dictated, having regard to the ethos of the church or organisation, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and must comply with the principle of proportionality (judgment of 17 April 2018, *Egenberger*, C-414/16).

With regard to dismissal, the Court considered that the dismissal of a senior doctor of the Catholic faith by a Catholic hospital due to his **remarriage** after a divorce may constitute discrimination on grounds of religion. The requirement that a senior doctor of the Catholic faith respect the Catholic Church's notion of marriage as sacred and indissoluble does not constitute a genuine, legitimate and justified occupational requirement. The Court also stated that the prohibition of all discrimination on grounds of religion is a mandatory general principle of law enshrined in the Charter of Fundamental Rights, such that an individual may rely on that prohibition in a dispute arising under EU law (judgment of 11 September 2018, *IR*, C-68/17).

In cases in which employees were dismissed for wearing an **Islamic headscarf at work**, the Court acknowledged that an undertaking can, in principle, by means of an internal rule, prohibit its workers from the visible wearing of any signs of political, philosophical or religious beliefs. Such a general prohibition does not constitute *direct* discrimination. It may, however, constitute indirect discrimination if persons adhering to a particular religion are put at a particular disadvantage. Even in such a case, the prohibition may be justified where the employer pursues, in its relations with its customers, a policy of political, philosophical and religious neutrality and the prohibition covers only workers who have visual contact with customers. Where appropriate, the employer must ascertain whether it can offer the person concerned a post not involving such visual contact. However, the Court stated that the mere willingness of an employer to take account of the wishes of a customer no longer to be served by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement ruling out the existence of discrimination (judgments of 14 March 2017, *G4S Secure Solutions*, C-157/15, and *Bougnaoui*, C-188/15).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