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United in Diversity

The Judicial Toolbox Against Discrimination

TEAM ITALY

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1. Introduction

Next year we will be celebrating seventy years from the famous Schuman Declaration of 9 May 1950, with its most famous quote: "*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a* de facto *solidarity*". In these difficult times, in which we are struggling to maintain and foster even the *de facto* solidarity, we must recognize the fundamental role that the judiciary has played in turning a *de facto* into a *de iure* solidarity. In the meantime, new legal developments are increasing the role of civil justice in implementing and strengthening EU law provisions that protect citizens and enhance the solidarity between them and between Member States.

The crucial role of civil justice in maintaining and developing a "Union in Diversity" emerged ever since the European Communities were but an area of free trade, with virtually no impact on the protection of the rights of individuals. Currently, anti-discrimination law (in a broad sense) is the balance point between unity and diversity, because the latter is a great value in a multi-cultural legal order, such as the European one. Therefore, diversity needs to be protected in order to prevent unity to be reached by fighting differences instead of setting them off. At the same time, anti-discrimination rules ensure that under no circumstances can differences between people and between States be used to jeopardize the effectiveness of the common European rules and to prevent European citizens from enjoying the rights granted by those rules under equal conditions.

The principle of equality and the prohibition of discriminations have always been an important part of the constitutional traditions of all Member States and the European Court of Justice (hereinafter "ECJ") has considered them a cornerstone of the European construction since the very early decades of the Community's existence. According to the most widespread opinion, the principle of non-discrimination was first affirmed at a European level in the famous judgment in the case of *Costa v Enel*[1], in 1964, in which the Court of Justice underlined the absolute prohibition to discriminate "*between nationals of member states regarding the conditions in which goods are procured and marketed*", leaving it up to the national courts to implement such fundamental rules.

Twelve years later, the ECJ newly remarked on the essential role of the civil judge and the *remedies* in order to reach *unity in the diversity* in the *Rewe* judgment[2]: the national legal orders (and, in the end, the national judges) are free to determine the procedures "*intended to ensure the protection of the rights which citizens have from the direct effect of community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature*".

[1] Case C-6/64 *Costa v ENEL [1964]*, ECLI:EU:C:1964:66.
[2] Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976]*, ECLI:EU:C:1976:188.

In this way, the Court underlined the prohibition to discriminate between national provisions and European ones, when it comes to their implementation.

The gradual evolution from an economy-based international organization to the present shape of the European Union, centred on its citizens, is a well-known point. During this long process, case law has increased the importance of the principle of non-discrimination and defined its central position in ensuring the coexistence of *unity* and *diversity*, as we will remark upon in the following pages. However, until the Amsterdam treaty, anti-discriminatory legislation had a very narrow legal basis, limited to employment discrimination grounded on sex reasons. Only after 1999, the Union expanded its competence in this field and from that point on secondary legislation against different forms of discrimination flourished.

The further developments towards the formal recognition of human rights as part of EU law, starting from the Treaty of Maastricht and until the present version of the Treaties after Lisbon, ensured that the principle of non-discrimination has the constitutional importance that it deserves. Article 2 TEU identifies this principle as one of the founding values of the EU. Article 6 Treaty of the European Union (hereinafter "TEU") gives the Charter of Fundamental Rights of the European Union of 7 December 2000, whose Article 21 includes a prohibition against discrimination, the same value of the Treaties. The same Article 2 also mentions the European Convention of Human Rights (hereinafter "ECHR"), whose Article 14 secures that rights under the Convention are granted without any discrimination, while Protocol no. 12 introduces a general prohibition of discrimination, even though the Protocol has not been ratified by all the States parties to the ECHR. Many other provisions of the EU Treaties and secondary legislation address various forms of discriminations in several fields. In the next pages, we will try and identify the main areas of application of European anti-discriminatory law.

The following comments will analyse the role of civil justice in the implementation of anti-discrimination law at EU level, and eventually of the principle of solidarity among European citizens and States.

To that purpose, in the first place we will identify the scope of application of anti-discrimination law in this context, starting from a general definition of discrimination; the two faces called "direct" and "indirect" discrimination will therefore be addressed. We will then move to the substantive scope of application, in order to check the main areas where the mentioned rules must be implemented. Hence, we will focus on employment, welfare and social protection, education, supply of goods and services, access to justice, and private life.

This brief analysis will allow us to move to the procedural rules and principles which ensure that the judge is able to grant an effective remedy against unlawful discriminations. Traditionally, the main

procedural tools originated in the EU anti-discrimination law have consisted of a special regulation of the burden of proof and the standing of representative entities to sue. Following our aim to study the tools available to the judge, we will focus on the former.

However, in recent decades, European case law has increasingly stressed the duty of the judge to raise *ex officio* points of law in matters of public interest, when a provision with direct effect is applicable. This has mainly taken place in the fields of competition and consumer protection, which are directly related to the functioning of the internal market.

Because of this powerful judicial instrument, we will inquire whether it may be available in the anti-discrimination area where economic values are so strictly connected with fundamental rights. However, in spite of its importance, such a tool should be handled carefully to avoid collision with the adversarial and fundamental principle of party disposition. Therefore, an accurate analysis of the necessary conditions for its use will be necessary before drawing any conclusion in this respect.

2. Discrimination: definitions, legal context and categories

1. What's a discrimination?

It is common to think about discrimination in negative terms, as a bad treatment of an individual or a group based on certain characteristics with the result of assigning them an "inferior status in society"[3]. Because of its illegitimacy, the concept of discrimination has become crucial in contemporary legislations, aimed at promoting the equality of every individual under the law "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[4]. The protection against discrimination practices has thus progressively reached all continents, following the numerous UN human rights treaties which have inspired national and supranational laws. This is the case for the European Union, whose both primary and secondary legislations have been deeply influenced by international agreements fighting for equality and against any type of discrimination.

2.2. What is it protected under European law?

2.2.1. General principles

As per general rules, discrimination is condemned not only by Article 20 of the European Charter of Fundamental Rights (hereinafter "the EU Charter"), which states the general principle of equality before the law, but also by its Article 21, that explicitly proclaims the prohibition of discrimination "based on any ground"[5]. Following this latter provision, Title III of the EU Charter contains several other articles relating to equality and non-discrimination, such as Article 22 which protects cultural, religious and linguistic diversity, or Article 23 aimed at promoting equality between men and women.

On the same level, Article 18 TEU prohibits "*any discrimination on the grounds of nationality*" and Article 14 of the European Convention on Human Rights (hereinafter "The Convention") guarantees equality in the "enjoyment of the rights and freedoms set forth" in its text. This last provision is also completed by Protocol n. 12[6] which states at its first Article a general prohibition of discrimination relating to "the enjoyment of any rights set for by the law", thus reaffirming with a

[3] G.HALFDANARSON, *Discrimination and tolerance in historical perspective*, Pisa University Press, 2008, p. 43.
[4] Art. 2, *Universal Declaration of Human Rights*, proclaimed in Paris on 10th December 1948 by the United Nations General Assembly.
[5] Even before the adoption of the EU Charter, the Court of Justice of the European Union had already recognized that the principle of equality is "one of the fundamental principles of Community law" and thus requires "that similar situations shall not be treated differently unless differentiation is objectively justified" (see CJEU, C-117/76 and 16-77, *Albert Ruckdeschel & Co.* and *Hansa-Lagerhaus Ströh & Co*., 19.10.1977).
[6] Protocol n. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome by the member States of the Council of Europe on the 4th November 2000.

broader scope the principle of non-discrimination guaranteed by the Convention of 1950. Furthermore, as a counterpart of the Convention which is based on civil and political rights, the Council of Europe adopted in 1961 the European Social Charter, providing for a broad range of social and economic rights related to everyday life and which must be guaranteed without discrimination[7].

In light of the general rules, European secondary law has subsequently adopted a certain number of legal instruments, promoting the principle of equality in specific areas and for particular groups.

2.2.2. The protected areas

Employment is certainly one of the main fields where the prohibition of discrimination has been broadly applied. In fact, this area is not only covered by the Racial Equality Directive 2000/43/EC which prohibits, above all, discrimination based on the grounds of race and ethnicity in the access to employment, but also by the Employment Equality Directive 2000/78/EC, that reaffirms the promotion of equality in the working context by prohibiting discrimination on the basis of sexual orientation, religion and belief, age and disabilities. Anti-discrimination in the context of occupation is also ensured by the Gender Goods and Services Directive 2004/113/EC and the Gender Equality Directive (recast) 2006/54/EC, which both guarantee protection against sex discrimination within the European Union. This legal protection is finally completed by the interpretative role of the European Supranational Courts: on one side the European Court of Justice[8]; on the other side the European Court of Human Rights, which prohibits discrimination in the working field on the basis of Article 8 of the Convention (right to private life) in conjunction with its Article 14[9].

However, employment is not the only area protected by the European anti-discrimination law.

The Racial Equality Directive indeed provides for equality in the access of welfare system and social security, together with the Gender Equality Directive (recast) and the previous Social Security Directive 79/7/EEC both protecting equal treatment in matters of social security[10].

Anti-discrimination law has moreover been extended to other areas such as the supply of goods and services, in accordance with the Racial Equality Directive and the Gender Goods and Service Directive that prohibits in its Preamble any kind of discrimination related to goods and services "*which are available to the public […] and which are offered outside the area of private and family life*" (par. 13).

[7] See esp. article E of the European Social Charter.

[8] See for example CJEU, C-81/12, *Asociaţia Accept v. Consiliul Naţional pentru Combaterea Discriminării*, 25 April 2000, concerning homophobic remarks made by the financial patron of a football club.

[9] See for example ECHR, *I.B. v. Greece, n. 552/10*, 3 October 2013, where the applicant had been dismissed from his job following complaints made by colleagues that he was HIV-positive.

[10] See for example CJUE, C-32/75, *Anita Cristini v. Société nationale des chemins de fer français*, 30 September 1975, where the Court gave a broad interpretation of the terms of "social advantages" in a case concerning an Italian complainant whose husband had been a worker for the French railways.

Protection of discrimination has furthermore been ensured in access to education, especially on the grounds of Article 14 of the European Charter which guarantees the right to education and access to vocational and continuing training[11].

This same Charter also permitted condemning discrimination practices in access to justice on the basis of Article 47, which provides for the right to an effective remedy and to a fair trial. Similarly, the prohibition of discrimination in accessing a tribunal was guaranteed by the European Court of Human Rights on the grounds of Article 13 of the European Convention (right to an effective remedy), combined with its Article 6 (right to a fair trial) and its Article 14[12].

Finally, the principle of equality has also recently been extended to the personal sphere, in the name of the respect of private and family life, as guaranteed by Article 8 of the European Convention and Article 7 of the European Charter. In this context, an example can be seen in the case *Cusan and Fazzo v. Italy*[13], concerning the possibility of a married couple to give their child the mother's surname when domestic legislation allows for the automatic taking of the father's surname at birth. According to the Court of Strasbourg, the impossible derogation of a national rule requiring only the father's surname when registering a new child's birth was "*excessively rigid and discriminatory towards women*", thus violating Article 14 of the Convention, in combination with its Article 8.

This brief overview thus proves that, unlike the past where differences between groups or individuals were socially and often legally admitted, our contemporary societies protect and promote the related principles of equality and fairness in accessing every opportunity of life. Therefore, anti-discrimination laws act in a double way: on the one hand by prohibiting situations where, in identical scenarios, an individual or a group are treated differently and less favourably compared to others; on the other hand, by preventing from an identical treatment in cases where a person or a group need a different action.

Nonetheless, discrimination has multiple facets and it is not always easy to identify, prove and thus eradicate it. This is why the concept of discrimination is usually separated into distinct categories.

[11] Both the European Court of Justice and of the European Court of Human Rights have examined a large number of cases relating to equal access to educational institutions inside the European Union and equal access to education funding (for an analysis of case-law in this field, see in particular the "*Handbook on European non-discrimination law*", 2018 Edition, pp. 129 s., edited by the European Union Agency for Fundamental Rights and by the Council of Europe).

[12] See for example ECHR, *Paraskeva Todorova v. Bulgaria*, n. 37193/07, 25 March 2010, where the Court of Strasbourg found that the refusal of a national court to execute a recommendation for a suspended judgment because of cultural reasons violated the applicant's right to a fair trial guaranteed by Article 6 of the Convention, in conjunction with Article 14 prohibiting discriminations.

[13] ECHR, *Cusan and Fazzo v. Italy*, n. 77/07, 7 January 2014.

2.3. Categories of discriminations: direct and indirect discriminations

Traditionally, discrimination is divided into two different groups: direct discrimination, on the one hand, and indirect discrimination on the other.

2.3.1. What is direct discrimination?

Direct discrimination is today defined not only in the legislation of the European Union, but also by the case law of the European Court of Human Rights. Indeed, according to Article 2, paragraph 2, of the Racial Directive, 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*". In the same way, the European Court of Human Rights stated in the recent case of *Biao v. Denmark*[14] that for the application of Article 14 "*there must be a difference in the treatment of persons in analogous, or relevantly similar, situations*".

As a consequence, direct discrimination needs three different elements to occur. Firstly, a less favourable treatment[15], which is normally easy to identify even though, as stated by the European Court of Human Rights, such a condition is not only the result of a different treatment in the same scenario but can also occur when national legislations "fail to treat differently persons whose situations are significantly different[16]". As a result, to avoid a possible direct discrimination, a separate and diverse treatment should be accorded when a different action is needed because of the particularity of a group or an individual.

Secondly, for a direct discrimination to occur, the less favourable treatment must be analysed in comparison with someone in similar situations. Let's take the example of same sex-partners who ask for special benefits usually accorded by the bank to its employees on the occasion of marriage. If the bank refuses such benefits in the case of a same-sex civil partnership, partners will be treated less favourably than persons in a married couple, since only these latter will meet the conditions required for obtaining the benefits offered. Therefore, it is through the comparison between a civil partnership and a married couple acting in a similar situation that we will prove a direct discrimination based, in a such a case, on the sexual orientation of the claimants[17].

[14] ECHR, *Biao v. Denmark*, n. 38590/10, 25 May 2016, par. 89.
[15] See for example CJEU, C-81/12, *Asociaţia Accept v. Consiliul Naţional pentru Combaterea Discriminării* (supra, footnote n. 11). In this case concerning the possible transfer of a professional footballer, the Court found that the statements made by the President of a Romanian football club, according to whom it would have been preferable to hire a player from the junior team rather than a footballer presented as being homosexual, were manifestly contrary to Article 2, paragraph 2, of the Racial Directive.
[16] ECHR, *Pretty v. the United Kingdom*, n. 2346/02, 29 April 2002, par. 88.
[17] See CJUE, C-256/01, *Frédéric Hay v. Crédit Agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 September 2013.

Finally, a cause must justify the less favourable treatment given to a person or a group. For this purpose, a specific question has been developed by the rule of practice: would a person have been treated less favourably if he/she had been of a different sex, of a different religion, of a different age, or of a different sexual orientation?[18] If the answer is positive, direct discrimination has clearly taken place and the less favourable treatment will be justified on particular protected grounds. However, another situation could occur: what would happen if an individual was treated less favourably not because he/has the protected characteristic but because he/she directly linked with a person with such a particularity? In such a case, usually qualified as "discrimination by association", both the European Court of Justice and the European Court of Human Rights adopted the same reasoning used in normal hypothesis of direct discriminations, thus developing a broad interpretation of the concept of "protected grounds"[19].

This brief analysis thus shows that protection against direct discrimination requires the proof of three connected conditions, some of which are common to the second macro-category of discrimination: indirect discrimination.

2.3.2. What is indirect discrimination?

Similarly to the direct one, indirect discrimination is defined both in European legislation and in the European Court of Human Rights case law. Concerning the European Union, the legal source is the same as that for direct discrimination, Article 2, paragraph 2, of the Racial Directive, which provides that indirect discrimination occurs "where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared to other persons". Likewise, the European Court of Human Rights, defined indirect discrimination as a "difference in treatment" that "may take the form of a disproportionately prejudicial effects of a general policy or a measure which, though couched in neutral terms, discriminates against a group".

Following this definition, three requirements are necessary for indirect discrimination. If two of them have already been considered for direct discrimination, a comparative and a less favourable treatment affecting a particular group or a particular person, the third one is exclusive to indirect discrimination.

In fact, as it clearly appears in the definition given by European law and the European Courts, the first condition required for indirect discrimination to occur is the so-called "PCP", an apparently

[18] *Handbook on European non-discrimination law*, p. 49.

[19] See for example ECHR, *Guberina v. Croatia*, n. 23682/13, 22 March 2016, where the European Court stressed that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristic.

neutral provision, criterion or practice[20]. Therefore, while in direct discrimination the less favourable treatment is evident and clearly addressed to a particular person or group because of the protected grounds, in indirect discrimination the rule is applied to everyone but, if we look at its results, it causes a significantly more negative effect on a protected group or person. Thus its general application is only apparent, since the comparison between the particular group and those in similar situation shows a manifest discrimination in the treatment given to the first one.

This fundamental requirement was clearly explained by the European Court of Justice in the famous case of *CHEZ*[21]. The Grand Chamber was indeed asked to interpret the meaning of indirect discrimination provision given by the Racial Directive at its Article 2 and, particularly, the terms "*apparently neutral practice*" and "*put persons of a racial or ethnic origin at a particular disadvantage compared to others*". In this context, the Court first recalled its previous case law, according to which indirect discrimination "*may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put in a disadvantage*"[22]. Consequently, the Court of Luxembourg made it clear that for a measure to be capable of falling within the meaning of indirect discrimination, "*it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage*"[23].

Proof of the PCP criterion is thus crucial for an alleged victim of indirect discrimination, exactly like the demonstration of a less favourable treatment in alleged cases of direct discrimination. However, the complainant might often be in no position to prove that the respondent has directly or indirectly adopted a discrimination practice. This is why the European law, together with the interpretation developed through the European case law, has provided special rules and practices in relation with the burden of proof.

[20] S.FREDMAN, *The Reason Why: Unravelling Indirect Discrimination*, in *Industrial Law Journal*, vol. 45, n. 2, July 2016, p. 231.
[21] CJUE, C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashita ot diskriminatsia*, 16 July 2015.
[22] Ibidem, par. 94.
[23] Ibidem, par. 97

3. Remedies against discrimination

3.1 The burden of proof

The distribution of the probative burden in favour of the victim of discrimination constitutes, in European law, a first important instrument of protection recognized by case law. It is flanked, as a further judicial protection technique, by the direct and *ex officio* application of European principles in subject, which will be examined subsequently.

The issue of the allocation of the burden of proof lends itself to being examined from a dual perspective. On the one hand, it is necessary to take as a starting point the less recent case law, which has set the guidelines on the point. On the other hand, it is necessary to look at the most recent pronouncements, which allow one to perceive the evolution of the issue.

Currently, the European Court of Human Rights[24] and the Court of Justice [25], using a principle of EU legislation [26], have relieved the victim of discrimination of the proof of discriminatory conduct, allowing him/her to demonstrate only the suitable facts on the basis of a presumption of discrimination. Therefore, in such a field burden of proof has been assigned to the other party, the alleged perpetrator, who must demonstrate that any discrimination occurred.

To reach this goal, however, a previous stage needs to be undertaken: whether the claimed conduct is direct or indirect discrimination.

In fact, the victim of direct discrimination has to prove, firstly, the facts constituting the presumption of unequal treatment. Secondly, he or she has to establish, albeit in a circumstantial manner, a link between the discriminatory conduct and the possession of peculiar personal characteristics that would have caused the discrimination. As a result, he/she is called to a double proof. Precisely, on the one hand, he/she must demonstrate being in a similar situation of another person which is respectively subject to a differentiated treatment. On the other hand, this person must prove that in the absence of certain personal characteristics, the discrimination would certainly not occurred. Instead, there is no need for evidence regarding the psychological reason (for example, racial prejudice) that caused the discriminatory conduct[27].

As regards the proof of the author of direct discrimination, his/her goal will be to overcome the presumption unfavourable to him/her. Consequently, this person must show that the discriminatory conduct did not exist, proving that the unequal treatment was not unreasonable and justified by a

[24] *Timishev v. Russia* nos. 55762/00 and 55974/00 (ECHR, 13 December 2005); *Nachova and Others v. Bulgaria* nos. 43577/98 and 43579/98 (ECHR, 6 July 2005).
[25] CJEU, Case C-381/99 *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961; CJEU, Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NY,* [2008] ECR I-5187.
[26] EU Burden of Proof Directive (97/80/EC); Racial Equality Directive (2000/43), art. 8 (1).
[27] S. Fredman, 'The Reason Why: Unravelling Indirect Discrimination' (2016) 45 Industrial Law Journal 231, 233.

legitimate criterion. In this sense, the alleged perpetrator has to prove that the treatment given to the other party would not have been different even if the latter had not had those specific personal characteristics.

Finally, as an *extrema ratio*, the author of the conduct can claim the existence of a legitimate aim allowed by the European secondary legislation, thus excluding the illegitimacy of its conduct.

Considering indirect discrimination, the probative division is slightly different[28].

In this case, according to the case law of the Court of Justice, the victim of disparity must justify the presumption that the provision, clause or practice (*provision*, *criterion* or *practice*), although *prima facie* neutral, have had a discriminatory impact. To this end, this party will actually have to demonstrate that he/she has found her/himself in a position of unjustified disadvantage compared to other individuals. This proof, according to a consolidated orientation, can also be offered through the use of statistical data which certifies, on an abstract and probabilistic level, a correlation between the personal characteristics of a group of individuals and the disadvantageous situation due to the clause or adopted practice. However, the statistical coefficient needed to establish the presumption cannot be defined in the abstract[29]. Instead, it has to be identified from time to time according on the particularities of the concrete case.

The author of the conduct is responsible for proving that the discriminatory effect has not occurred. Alternatively, this party may provide the dual proof that he/she has pursued a legitimate purpose by its conduct and that the practice, provision or criterion, are proportionate to that purpose[30].

Conclusively, the victim of indirect discrimination must adequately prove the facts that justify the alleged existence of a discriminatory situation, as in the case of direct discrimination. Unlike the latter hypothesis, the party must not prove, even by presumption, the existence of a causal link between the conduct of the counterpart, individually considered, and the existence of a specific personal characteristic. This proof is in fact replaced by the statement of the statistical data, which does not consider the positions of the two parts in their singularity, but an indefinite series of similar cases.

It may therefore be noted that the burden of proof, already favourable to the victim in the hypothesis of direct discrimination, is even more advantageous for this party when indirect discrimination occurs.

The foregoing statement allows the examination of the most recent case law, which has modified the relationships between the two forms of discrimination. In fact, as mentioned above, the respective

[28] CJEU, C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] 1 CMLR 14 (Grand Chamber).
[29] S. Fredman, 'The Reason Why: Unravelling Indirect Discrimination'(2016) 45 Industrial Law Journal 231, 235.
[30] *Handbook on European non-discrimination law*, 2018 Edition, 129.

notions have recently been extended to guarantee greater protection to discriminated subjects. In conjunction with this trend, there has been a progressive osmosis between the two types, potentially capable of determining in the future a progressive expansion of the application area of indirect discrimination.

As a consequence, in terms of the distribution of the burden of proof, the current system moves towards an increasingly stronger reinforcement of the protection offered to the victim of discriminatory conduct.

3.2 Raising anti-discrimination law issues *ex officio*?

What happens if none of the parties have invoked the discriminatory nature of a clause or practice? In such a case, can the national judge detect it automatically by applying the EU law?.

The issue, which has never been examined in depth by the Court of Justice, is of considerable practical importance. Let's take the example, not infrequent in practice, where the worker claims a dismissal because it was carried out in violation of procedural rules. Will the judge be able, after a first examination of the case, to qualify this conduct as discriminatory under European law?

In some countries of the European Union, including Italy, the protection granted in case of discriminatory dismissal is particularly strengthened compared to the other hypothesis of dismissal. In fact, in contrast to these latter, the first situation may determine the re-employment of the worker.

Therefore, the issue of the *ex officio* application of European anti-discrimination law by national judges requires a double examination. First and foremost, it is necessary to ask whether the prohibition of discrimination, enshrined in the European legislation, has direct effect in relationships between private subjects (*direct horizontal effect*). Only in the affirmative case will it be possible to analyse whether the judge can raise *ex officio* questions concerning European discrimination law.

As regards the direct effects, we must firstly identify the source of prohibition of discrimination. If we look at the case law of the European Court of Justice[31] it is easy to see that such a principle not only pre-exists the directives governing the specific forms of discrimination, but it is also explicitly provided by Art. 21 of the Charter cited above. Its importance has furthermore increased considering that the Charter is now incorporated into the primary EU legislation through art. 6 TEU.

Given all the above, it is necessary to ask whether the general principles of the European Union have a direct effect in relations between private parties.

[31] CJEU, Case C-144/04 *Mangold v Helm* [2005] ECR I-09981.

In a first approach, the general and abstract nature of the rules contained in the above-mentioned articles of the Charter induces to doubt of their suitability to confer rights on individuals, and consequently of their applicability in a dispute between private individuals[32].

Nevertheless, the Court of Justice has repeatedly affirmed the direct horizontal effectiveness of the aforementioned art. 21. The argumentative path winds through two steps.

Firstly, the case law has established the compatibility of the general principles of EU law with the main requirement for the direct horizontal effect, which is its receptivity. In this regard, reference may be made to the conclusions of the Advocate General of the Court of Justice in the case "*Dominguez v. Centre informatique du Centre Ouest Atlantique*"[33] (concerning art. 31 of the Charter). After a detailed analysis of the Court's judgments, this document identifies the criterion allowing direct effect to be attributed to EU general principles: the direct effect must be affirmed where its non-recognition would determine the impossibility of protecting the rights enshrined in the Charter. The importance for an effective protection therefore constitutes not only the foundation of the direct horizontal effects but, at the same time, the limit for its application.

Further conditions for the recognition of direct effect are the suitability of the EU provision to confer rights on the individual and the precise and unconditional nature of his content.

Secondly and more specifically, the Court of Justice has recognized the direct effect of art. 21 CFR, applying the parameters just mentioned. Indeed, it has ruled on specific violations of the provision, such as age discrimination [34], but it has reached the conclusion that the prohibition of discrimination, in its general meaning, has the horizontal direct effect.

First of all, according to the case law the need to guarantee an effective protection is irrefutable, with regard to the above-mentioned article. In fact, in the cases in which this provision must apply, the discriminated subject is often in a position of greater weakness and fragility, on an economic and contractual level, with respect to the author of the discrimination. It therefore follows that if it were not possible to directly apply the art. 21 in the dispute between private individuals, the discriminated subject would be prevented from asserting the protections recognized to him by the legal system.

Furthermore, the Court of Justice[35] has found that the aforementioned provision is suitable for conferring a right to the private individual - the right to receive fair and non-discriminatory treatment – and that is sufficiently precise and unconditional.

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[32] T. Papadopoulos, 'Criticizing the horizontal direct effect of the EU general principle of equality', E.H.R.L.R. Issue 4 [2011], 437-447, 438.
[33] CJEU, C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique and another* [2012] EUECJ (24 January 2012).
[34] Leading cases: CJEU, Case C-144/04 *Mangold v Helm* [2005] ECR I-09981; CJEU, Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG,* 16 Columbia Journal of European Law (2010) 3, 497-519.
[35] CJEU, C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* [2014], paragraph 47.

Consequently, our first question can be positively concluded: the horizontal direct effect principle applies to the prohibition of discrimination.

Following this statement, a second question must now be answered: can a judge, regardless of a specific allegation or request of the parties, detect on his/her own initiative the discriminatory nature, under EU law, of a rule or practice? Such an issue raises two distinct questions that must be examined separately.

The first problem concerns the relationship between the judge's power to raise legal questions concerning the application of European Union law and the principle of national procedural autonomy[36]. Following a famous decision of the European Court of Justice [37], it is up to Member States to establish the procedural modalities for jurisdictional protection of the rights that EU gives to private individuals. In this context, it is necessary to investigate whether the attribution of an office detection power does not conflict with the discretion recognized to national legislators.

The Court of Justice has solved the issue by applying the principles of equivalence and effectiveness[38] The first principle (*principle of equivalence*), established the obligation for the national judge to raise *ex officio* a legal question concerning the law of the European Union, whenever the national legal system attributes this duty to it in relation to a legal issue of national law.

In accordance with the second principle (*principle of effectiveness*), European Judges stated that a national provision prohibiting the *ex officio* detectability of a legal question has to be disapplied if it makes the application of European Union law excessively difficult. This evaluation must however consider the mentioned rule in the whole of the procedure, the development of the trial before the national court and the peculiarities of the same.

In another case[39], the European Court of Justice highlighted that the national courts, when using the power of *ex officio* application, cannot go outside the scope of the dispute as defined by the parties. This statement is based on two principles. The first one is the rule that the parties should be heard, which implies that the decision of a case should always take into account the discussion between the claimant and the respondent. The second one is the general principle that the subject matter of a case has to be outlined by the parties, in civil proceedings.

Given the compatibility of the *ex officio* application with the principle of procedural autonomy, the second and more specific question to be examined is whether this power can be recognized to the judge also in the field of discrimination law.

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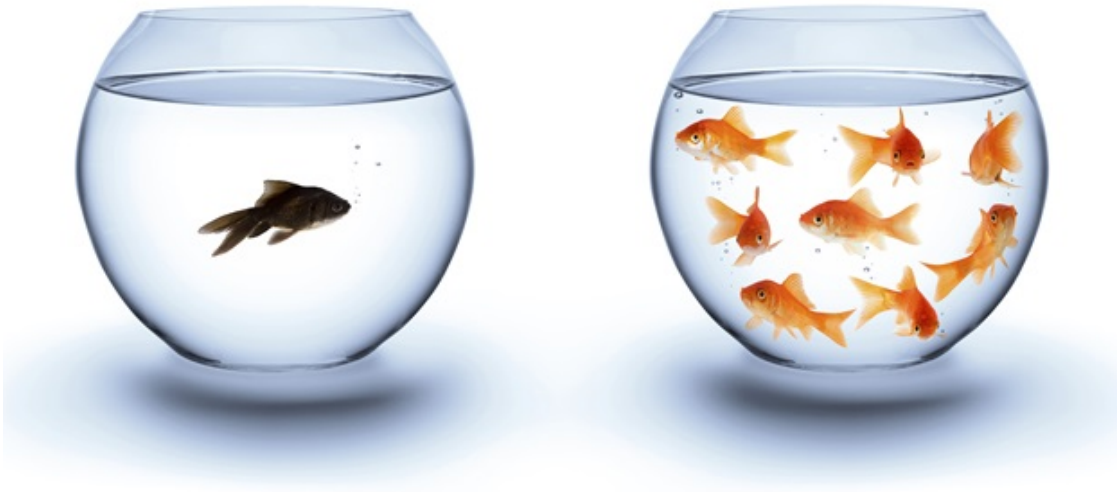
[36] This principle was stated in the famous case Rewe: CJEU, Case C-33/76 *Rewe Centralfi nanz eG and Rewe Central AG v Landwirtschaftskammer f ü r das Saarland* [1976] I-1989 ECLI:EU:C:1976:188.
[37] CJEU, Joined Cases C-430 & 431/93, *van Schijndel & van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] E.C.R 1-4705, paragraph 17.
[38] *Ibid*., paragraph 18.
[39] CJEU, Case C-89/08 *P Commission v. Ireland et al.* [2009] ECR I-11245.

Even if the position is still unclear, the case law of the Court of Justice leads to useful suggestions to solve the *ex officio* issue. In fact, the Court has recognized such a power for national judges exclusively with reference to those sectors[40], where the need to protect European rights is particularly evident. In this way, the criteria used by the Court to select these areas are essentially two: the importance of the matter and the need for effective protection. Both conditions, as we will show in the following paragraph, are fulfilled in matters of discrimination and no obstacles can thus exclude the power of *ex officio* application.

Indeed, as regards the principle of effectiveness, there are no doubts that a discriminated person is in a weak position to defend his/her rights. Therefore, as we saw in the case law mentioned above, there is a clear necessity to protect it as effectively as possible.

Also, considering the object of the claim, recent case law has underlined the importance for *ex-officio* judicial powers to be applied in the protection of a "public interest". In fact, although this instrument has particularly concerned the consumers' area, protection of public interests could equally be extended to other fields like the discrimination area, where the principle of equality still plays a crucial role as part the primary objectives of the European Union.

Therefore, following the path developed in other areas of law, national judges could strengthen the effectiveness of anti-discrimination rules not only through a reversal burden of proof, but also by the *ex officio* application of European principles.



[40] Competition law (leading case on this field is the above-mentioned '*van Schijndel*' case) and consumer protection. In the second field, a very famous and leading pronouncement is the one give in 'Oceano' case, CJEU Joined Cases C-240/98 – C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA José M Sánchez Alcón Prades,José Luis Copano Badillo,Mohammed Berroaneand Emilio Viñas Feli ú*[2000] I-04941 ECLI:EU:C:2000:346.

4. Conclusions

This brief analysis of the evolution of the role of the national judiciaries confirmed both their current and potential importance in protecting fundamental rights in the European context. While enhancing European cooperation thanks to the implementation of the principles of effectiveness and equivalence, the dialogue between European and national courts also strengthened the protection of fundamental rights of the citizens.

Establishing the principles of effectiveness and equivalence represented indeed a historical step in this respect. On the one hand, equivalence prevents national procedures from discriminating against European rules, making their implementation more difficult than the national ones. On the other hand, effectiveness imposes on the judge the duty to ensure that national legislation does not make it impossible or excessively difficult to enforce European rules. These principles have to be applied without exceptions when it comes to the most important provisions of EU law, both with regard to the internal market and to fundamental rights. Furthermore, these principles are one of the most important grounds that justify the *ex officio* raising of points of law by the court[41].

Ex officio raising of points of law is also allowed in matters that fall within European public policy. As it emerged before, this concept is not limited to cases when a public interest is involved. A rule falling within European public policy may also protect private interests, when their protection is of such importance as to constitute a primary objective of the Union. In this way, the European Court of Justice first used this powerful weapon to fight breaches of competition law, and later for consumer protection. As everyone knows, the latter is a matter of private interest with direct influence on the internal market.

Nowadays, the European Treaties are no longer focused only on the internal market: as Schumann predicted in 1950, the establishment of common economic values has led to the development of an area of solidarity, based both on a common market and on the protection of individuals. In this context, the principle of equality and the prohibition of discrimination have had a central role since the very beginning of the process of evolution of the EU, also thanks to the influence of both the UN Universal Declaration of Human Rights of 1948 and the ECHR of 1950. In this way, the scope of application of anti-discrimination principles has widened. From being confined within

[41] AS Hartkamp, '*Ex officio* Application in Case of Unenforceable Contracts or Contract Clauses: EU Law and National Laws Confronted' in L Gullifer and S Vogenauer *English and European Perspectives on Contract and Commercial Law*, Essays in Honour of Hugh Beale (Oxford, Hart Publishing, 2014) 484.

the four (economic) freedoms at the time of *Costa v Enel*, it has now become part of the very roots of the Treaties and must be implemented in any field of the European legal order.

This explains why we are now able to find anti-discriminatory provisions in so many fields, from employment to welfare, access to services, education, access to justice and more. Furthermore, the case law which recognized direct horizontal effect to Article 21 of the European Charter of Fundamental Rights can easily be agreed with. Not only is the principle expressed therein deeply rooted in the constitutional traditions of the Member States, but it is now of general application in EU law.

All these changes in the EU foundations together with the role of the principle of equality and the prohibition of discrimination may lead one to think that something similar to the evolution of consumer protection is happening also in this field: from a matter of private interest with reflections on fundamental rights and the protection of weaker parties, the issue has acquired a public and general importance. As underlined in the previous section, this makes it questionable whether the matter falls within one of the cases when *ex officio* raising of points of law by the judge is allowed. There is no unequivocal response yet in this respect, although the question needs to be posed, since this can be a very effective tool, at least in the fields where an anti-discrimination secondary legislation already exists. The great power of the tool, however, requires that it is only used with adequate safeguards to protect other basic law principles.

From a substantive law point of view, one must always take into account the principle of party autonomy. This implies that, except in cases when the law requires protecting in this way a weaker party or prevents the parties from entering into a certain contractual provision, the judge should refrain from raising *ex officio* points of law that could lead to a contractual relationship being declared void.

Under a procedural law point of view, the judge must always respect both principles of party disposition and contradiction (*audiatur et altera pars*). As a consequence of the former, the power to raise points of law *ex officio* does not imply the power to make investigations *ex officio* on facts that the parties did not allege or try to prove. An exception to this fundamental procedural principle, whose importance is recognised throughout Europe, could be made only when the applicable procedural rules allow the judge to investigate facts *ex officio* to protect a special interest. However, such an exception should not be derived from EU law principles, but only from the applicable national procedural law. In the second place, the judge must always abide by principle of contradiction. As a consequence, the parties must always be given the opportunity to express their views and offer arguments and evidence in case the judge raises a point of law *ex officio*, either on his own motion or following an argument brought forward from a party.

To sum up, while it is impossible to give a final prediction on the outcome of this long path, exploring the new tools offered by European civil law and procedure is a key issue for European integration: while sticking to the respect of the law, civil judges should become on a daily basis more and more aware of their invaluable role in the construction of the solidarity that grounds the construction of Europe.