

# **EU LAW: NON-DISCRIMINATION**

GENERAL INTRODUCTION EU LAW AND BEYOND

Dr. Markus Frischhut, LL.M.

## OVERVIEW

# EU LAW: NON-DISCRIMINATION

1. Questions
2. Definition
3. Affirmative action
4. Criteria in two different fields

EU law: non-discrimination

# GUIDING QUESTIONS



- How to define discrimination?
- Discrimination based on which criteria can be against EU law?
- Where do those rules apply?
- In which fields can we often observe discrimination?

EU law: non-discrimination

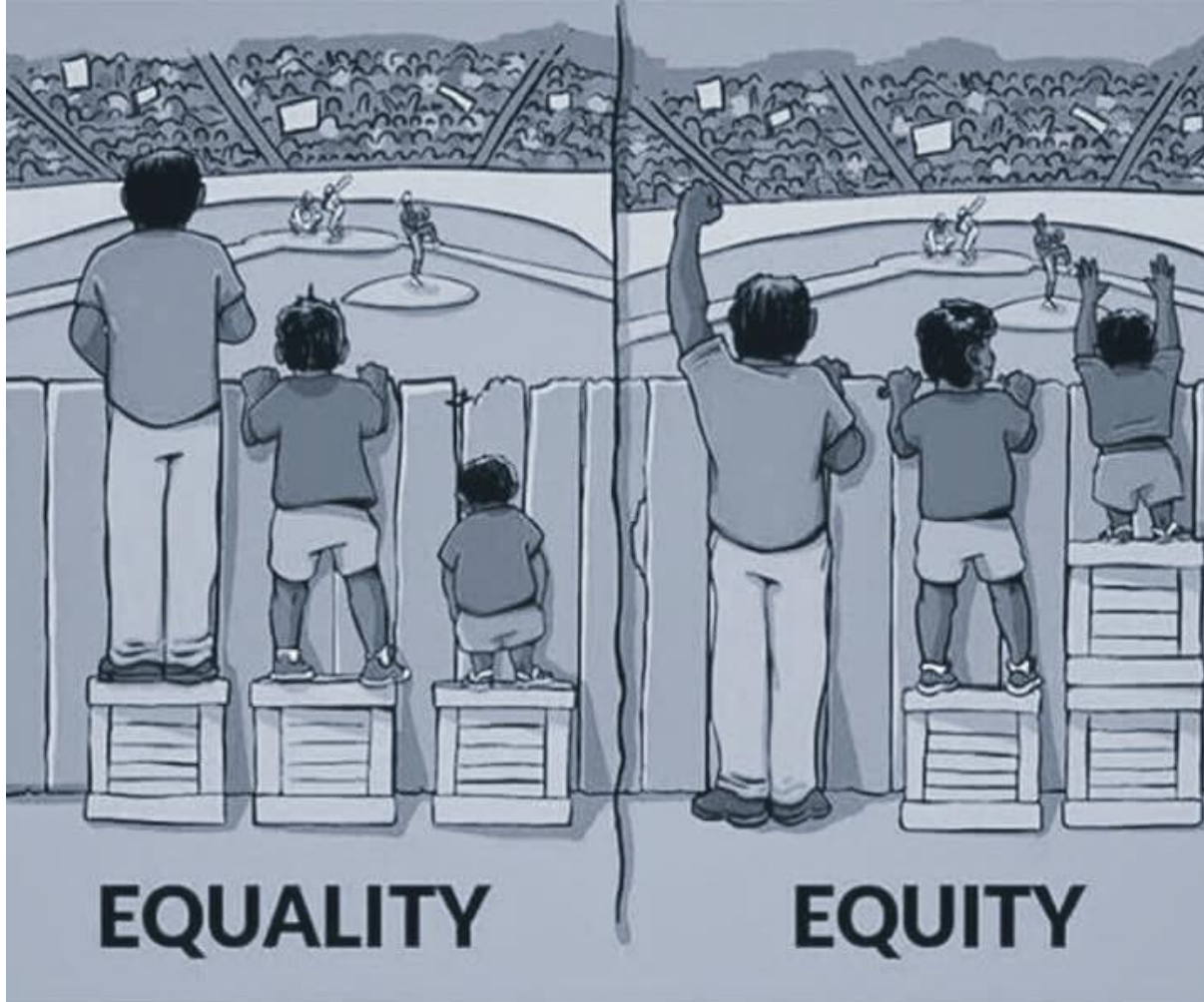
# Equal justice under law



US Supreme Court, Washington D.C.  
(Picture credit: Frischhut)

EU law: non-discrimination

# Equality vs. equity (one perspective)



## Questions

What is your answer on these following questions?

- Should women earn as much as men?
- Should women pay equally less at the hairdressers, such as men?
- Should Germans pay the same price for skiing in Austria, and Austrians the same price for swimming in Germany?
- Should homosexuals be treated in the same way as heterosexuals (e.g. also have access to assisted reproductive technologies, such as IVF, surrogacy)?
- Should young workers earn as much as older ones?
- Should Italians be treated like French people (i.e. they get cheaper tickets) in Disneyland Paris?

## Definition

“In that respect, it should be noted that, according to settled case-law, **discrimination** can arise only through the application of **different rules to comparable situations** or the application of the **same rule to different situations** [...].”

CJEU judgment of 14 June 2012, *Commission v the Netherlands (three out of six years' rule)*, C-542/09, EU:C:2012:346, para. 41

“It should be recalled that the requirement relating to the **comparability of the situations** for the purpose of determining whether there is a breach of the principle of equal treatment must be **assessed in the light of all the elements which characterise them** [...].”

CJEU judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, para. 89

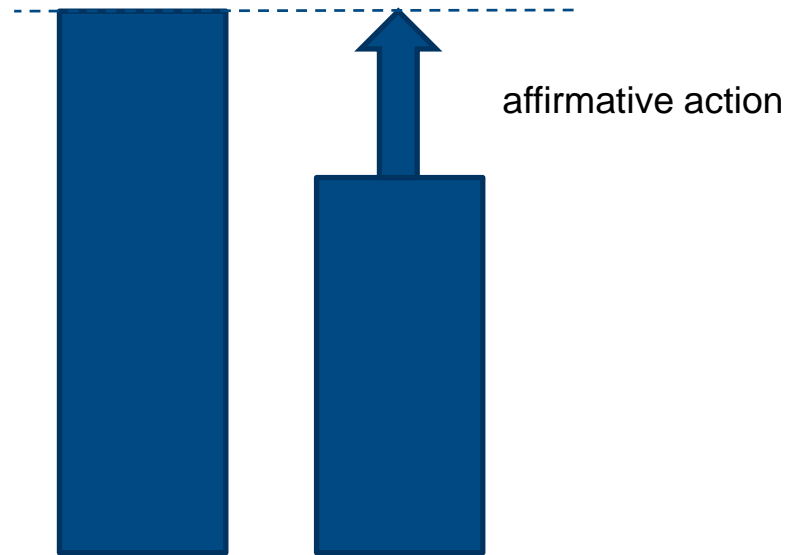
$A = B \Rightarrow$  treat A like B

$A \neq B \Rightarrow$  don't treat A like B

- Should women earn as much as men?
- Should women pay equally less at the hairdressers, such as men?
- Should Germans pay the same price for skiing in Austria, and Austrians the same price for swimming in Germany?
- Should homosexuals be treated in the same way as heterosexuals (e.g. also have access to assisted reproductive technologies, such as IVF, surrogacy)?
- Should young workers earn as much as older ones?
- Should Italians be treated like French people (i.e. they get cheaper tickets) in Disneyland Paris?

EU law: non-discrimination

# Affirmative action





EU law: non-discrimination

# Criteria in two different fields

- Fundamental freedoms & EU citizenship

Persons	Freedom of establishment	self-employed	long term
	Freedom of services	self-employed	short term
	Free movement of workers	employed	long term
	<i>Posting of workers Directive 96/71/EG, <a href="#">Link (amended)</a>; Enforcing Directive 2014/67/EU, <a href="#">Link</a></i>	<i>employed</i>	<i>short term</i>
Products	Free movement of goods		
Capital	Free movement of capital and payments		



Picture source: EU in slides

- Harmonization of national law

- Secondary law

- **Regulations:** general application, binding in its entirety and directly applicable in the MS
    - **Directives:** binding, as to the result to be achieved; leaves choice of form and methods of implementation
    - Decision: binding for addressee
    - Recommendations and opinions: no binding force



## Criteria in two different fields

- Fundamental freedoms & EU citizenship

Article 45 para. 2 TFEU (freedom of **workers**):

Such freedom of movement shall entail the abolition of **any discrimination based on nationality** between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Article 18 TFEU (EU **citizenship**):

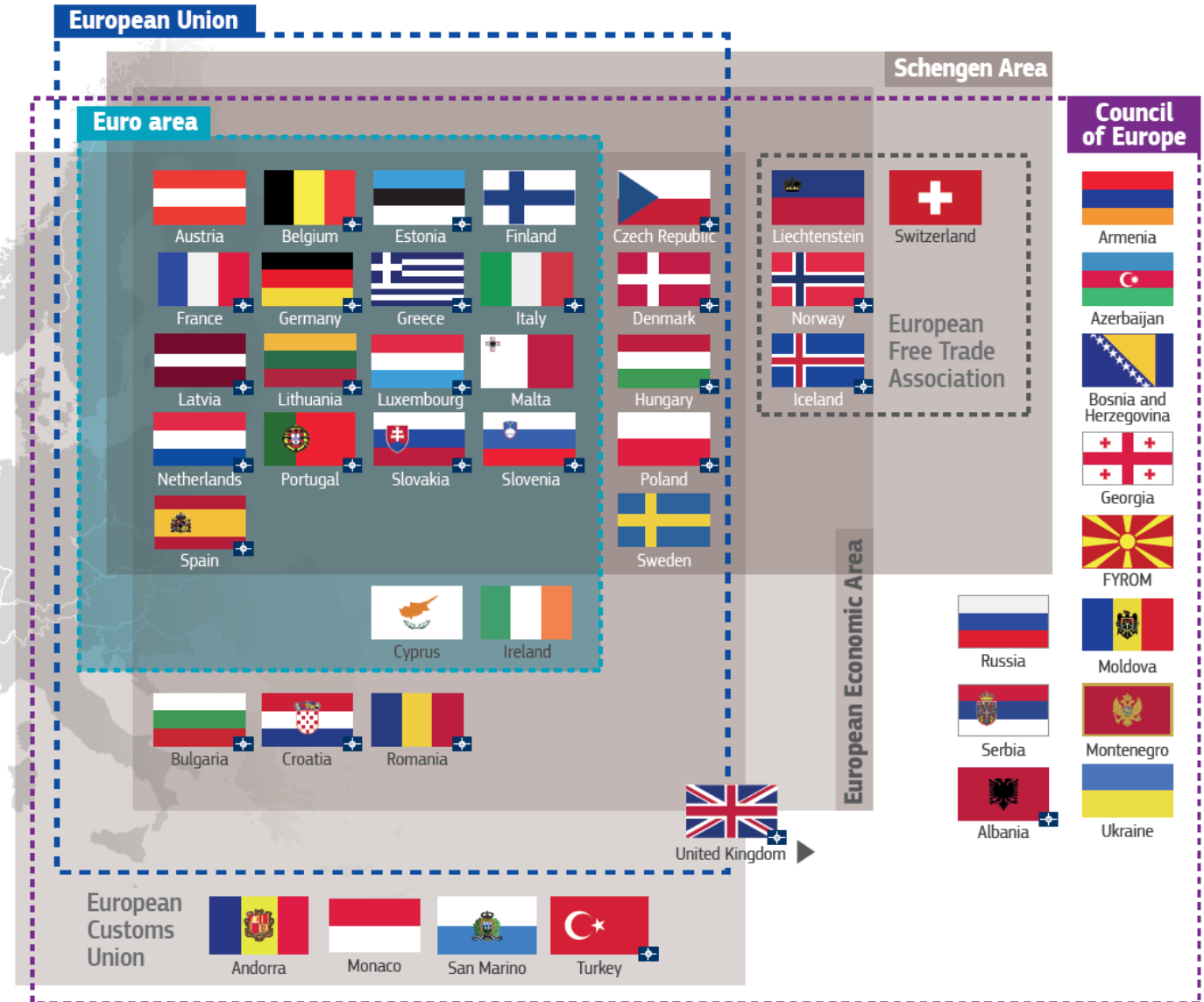
Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination **on grounds of nationality** shall be prohibited

- Harmonization of national law

Article 19 para. 1 TFEU: “[...] combat discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**”

# EU law: non-discrimination

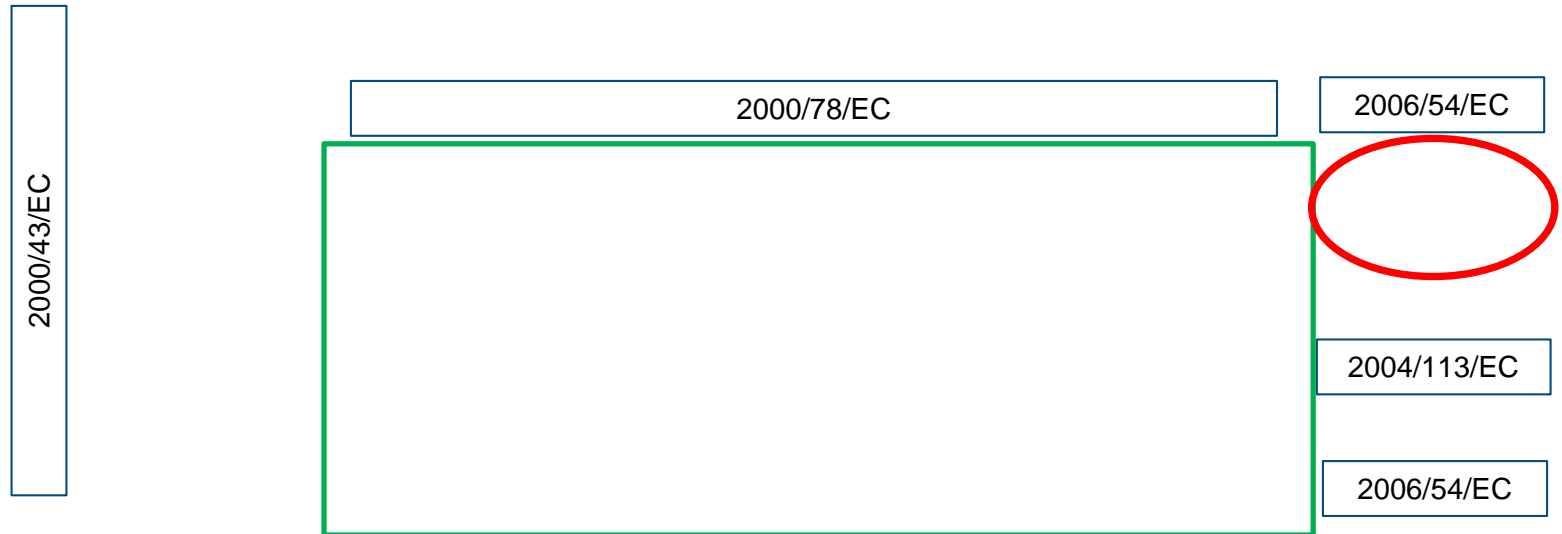
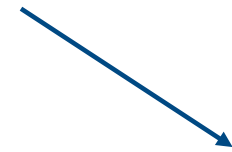
## Further details



Source: European Commission, White paper on the future of Europe, [https://ec.europa.eu/commission/white-paper-future-europe\\_en](https://ec.europa.eu/commission/white-paper-future-europe_en), p. 7.

EU law: non-discrimination  
**Further details**

Directive 2010/41/EU of 7 July 2010 on the application of the principle of **equal treatment** between **men and women** engaged in an activity in a **self-employed** capacity



Source: SEC(2008) 2181 final 2.7.2008, p. 3

**Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final 2.7.2008**

See also Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, OJ 2018 L 167/28 ([Link](#))

EU law: non-discrimination

## Questions | answers

- Should women earn as much as men?
- Should women pay equally less at the hairdressers, such as men?
- Should Germans pay the same price for skiing in Austria, and Austrians the same price for swimming in Germany?
- Should homosexuals be treated in the same way as heterosexuals (e.g. also have access to assisted reproductive technologies (IVF, surrogacy)?
- Should young workers earn as much as older ones?
- Should Italians be treated like French people (i.e. they get cheaper tickets) in Disneyland Paris?

### Grounds | criteria | Field

- Gender | Employment
- Gender | Goods and services
  
- Nationality | Services
  
- Sexual orientation | Services ?
  
- Age | Employment
  
- Nationality | Services



## ❑ How to define discrimination?

- ✓ Application of different rules to comparable situations or the application of the same rule to different situations.
- ✓ Such a different treatment can be justified in case of ‘good reasons’ (reasons of justification).

## ❑ Discrimination based on which criteria can be against EU law?

- ✓ Economic fundamental freedoms of the EU single market: based on nationality (person) or the origin of the product (free movement of goods); also disguised forms of discrimination (e.g. residence instead of nationality) are against EU law.
- ✓ Harmonization of national law via EU law: other criteria, such as gender, ethnic background, religion or belief, disability, age or sexual orientation etc.



❑ Where do those rules apply?

- ✓ EU and European Economic Area (EEA), thus also including Norway, Iceland and Liechtenstein.

❑ In which fields can we often observe discrimination?

- ✓ Mainly Member States trying to discriminate against foreign citizens or products, nowadays also in the field of artificial intelligence (AI); i.e. the 'rubbish in, rubbish out phenomenon'.