



The EU legal framework of equality

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Applying EU anti-discrimination law
Seminar for practitioners
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Plan of the presentation

- Concepts of equality
- Sources of EU equality law
(EU Charter, EU Treaties, EU Directives on equal treatment)
- Sources of equality law in international law
(CoE, UN, ILO)

Concepts of equality

- Formal equality
- Substantive equality
- Equal opportunities v. equal outcomes
- Unequal treatment v. discrimination

Formal equality

- Aristotelian notion:
- „treat likes alike, unlikes unlike”
- Q: who is alike?
- Problem: formal equality ignores difference

Substantive equality

- Substantive equality takes difference into account
- Requirements of distributive (remedial) justice
- „treat unlikes alike”
- Justifies positive action aimed to compensate substantive (*de facto*) differences (past injustice, social disadvantages)
- Positive measures rank from inclusionary policies, outreach measures, preferential treatment/quotas
- These measures are often regarded as violation of formal equality

Equal opportunities v. equal results

- Equal opportunities – the concept which refers to the initial position (of candidates, applicants, etc.)
- Equal results – the concept which refers to the final outcome (of a competition, election, appointment process, etc.)

Unequal treatment v. discrimination

- unequal treatment = discrimination

if there is no OBJECTIVE justification for a less favourable treatment

C-149/10 Zoi Chatzi, para.63-4 („comparable situations must not be treated differently and (...) different situations must not be treated in the same way unless such treatment is objectiveley justified”)

- In some cases – unequal (special) treatment is required by law
- Positive actions / affirmative actions
- Special treatment (of pregnant women)
- Reasonable accommodation (of persons with disabilities)
- Religious accommodation

Sources of EU equality law

Hierarchy of EU equality law:

- General principles of law – the principle of equality
- Primary Sources:
 - Treaty of European Union
 - Treaty on the Functioning of the European Union
 - Charter of Fundamental Rights of the EU
- Secondary law: EU Equality Directives

General principle of equality

- filling the gaps of the EU equality law when applied to EU institutions
- when applied to MS the general principle of equality only enhances the prohibition of discrimination expressed in EU equality directives
- when applied to MS the general principle of equality does not expand the material scope of EU directives

C-13/05 Navas (sickness)

C-167-12 X. and C-363/12 Z. (surrogacy leave)

- General principle of equality and the prohibition of discrimination with regard to gender
 - against EU institutions in staff cases: *C-20/71 Sabbatini*; *C-21/74 Airola*
 - with regard to MS not applicable if outside the scope of EU directives: *C- 149/77 Defrenne III*

General principle of equality and the EU Charter

- After the adoption of the Charter in 2000 the CJEU uses the following formulation:
- the principle of non-discrimination with regard to xxx (age) must be regarded as the general principle of EU law
- the principle of non-discrimination with regard to xxx is given expression in the Directives and the EU Charter
- *C-555/07 Küçükdeveci*
- the general principle of equality together with the prohibition of discrimination expressed in the Charter used against the EU institutions to invalidate the EU secondary law
- *C-236/09 Test Achats*

Primary sources: EU Treaties

- Art. 2 TEU – equality as a value common to all MS
- Art. 3(3) TEU - equality as a goal for EU
- Art. 8 TFUE („in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”).
- Art. 10 TFUE (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination **based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**”)
- Art. 18(1) TFUE - prohibition of discrimination on the basis of nationality (applying to all fields of the EU law)
- Art. 19 (1) TFUE (formely 13 TEC) – competence provision – a legal basis of EU Equality Directives – restricted to combating discrimination **based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**
- Article 157 (1) and (2) TFUE (formely 119 TEEC, and 141 TEC) - equal pay of men and women – *C 45/75 Defrenne*

Primary sources: EU Charter

- Art. 20 CFR - equality before the law
- Art. 21 CFR - prohibition of discrimination
- Art. 23 CFR - equality of men and women
- Art. 24 CFR – rights of the child
- Art. 25 CFR – rights of the elderly (principles)
- Art. 26 CFR – integration of persons with disability (principles)

- but Art. 51 (1) CFR – the application of the Charter to EU institutions whenever they act, and to MS whenever they implement EU law (or act within its scope)
- *C -617/10 Akerberg Fransson*

Use of the EU Charter in preliminary references

- **Request for a preliminary ruling from the Arbeitsgericht Verden (Germany) lodged on 27 June 2016 — Ute Kleinsteuber v Mars GmbH (Case C-354/16)**
- *Is the relevant EU law, in particular the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in particular Articles 1, 2 and 6 thereof, to be interpreted as precluding national statutory provisions or practices which provide for an occupational old-age pension in the amount corresponding to the ratio of the employee's actual length of service to the time from the beginning of his employment up to his reaching the normal retirement age under the statutory pension scheme (calculated on the basis of the *pro rata temporis* principle) and in so doing apply a maximum limit of reckonable years of service, with the result that employees having completed their period of service in an undertaking at a younger age receive a smaller occupational pension than their colleagues who completed their period of service at an older age, even though both sets of employees completed an equal length of service in the undertaking?*

Secondary sources of EU equality law

- Directive 2000/43/EC – Racial Equality Directive (prohibiting discrimination on the basis of racial and ethnic origin in employment and occupation, social protection, education, access to goods and services, including housing)
- Directive 2000/78/EC – Framework Equality Directive (prohibiting discrimination on the basis of religion, age, disability and sexual orientation in employment and occupation)
- Directive 2004/113/EC Goods and Services Directive (prohibiting gender discrimination in the access to and supply of goods and services)
- Directive 2006/54/EC – Gender (Recast) Directive (prohibiting gender discrimination in employment and occupation, including occupational pension schemes)
- Note that Directive 2006/54/EC repealed a number of gender equality directives:
- Directive 75/117 (equal pay); 76/207/EEC (equal treatment of men and women in employment) as amended; 86/378/EEC (occupational social security pension schemes) as amended; and 97/80/EC (the burden of proof).

Secondary sources of EU equality law

- Directive 79/7/EEC – Statutory Social Security Schemes
- Directive 1992/85/EEC – Pregnant Workers
- Directive 2010/118/EU (repealing 96/34/EC) - Parental Leave
- Directive 1997/8/EC – Part-Time Work
- Directive Directive 1999/70/EC – Fixed-Term Work
- Directive 2003/109/EC – Third-Country Nationals
- Directive 2010/41/EU (repealing 86/613/EEC) - Self-Employment

Equality and non-discrimination in the EU law

- General principle, Value, Aim, Area of Legislative Competence and Fundamental right (the right not to be subject of discrimination on a specific ground)
- Non-discrimination as the general principle, value, aim and a right corresponds to a number of obligations of EU institutions and MS acting within the scope of EU law
- Non-discrimination as a fundamental right is specified in EU equality directives as a prohibition of direct and indirect discrimination, harassment and incitement to discriminate
- Non-discrimination is the core of EU citizenship

Hierarchy of the protected grounds in EU equality law

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

Promises, failures and challenges in EU equality law

- Discrimination by association – C-303/06 *Coleman*
- Discrimination by assumption – C-54/07 *CHEZ*
- Establishing the prima facie case – C-415/10 *Galina Meister* („it cannot be ruled out that a defendant’s refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.”)
- Problems to address structural discrimination – C-246/97 *Gruber* (access to child care)
- No progress in the adoption of the horizontal directive
- Objections to the adoption of the gender balance directive
- Intersectionality – C-157/15 *Samira Achbita* (pending); C-188/15 *Asma Bougnaoui* (pending)
- Limits of the scope of the EU law

Other international sources of equality law

UNITED NATIONS

- International Covenant of Civil and Political Rights (1966) + individual complaint to the Human Rights Committee
- Convention on Elimination of Racial Discrimination (1965) + individual complaint to the Committee on Racial Discrimination
- other UN treaties: CEDAW, CRPD, CRC, etc
- no special treaty regarding protection against religious discrimination and intolerance
- no special treaty regarding protection against discrimination with regard to sexual orientation

Other international sources of equality law

CoE

- European Convention of Human Rights (1950)
- Protocols to the Convention, including Protocol no. 12 (2000)
 - + individual complaint to European Court of Human Rights
- European Social Charter (1996)
 - + collective complaint to European Committee of Social Rights

Prohibition of discrimination in the ECHR

- Non-discrimination is not a self-standing right
- The prohibition of discrimination applies only with regard to unequal conditions of exercising other Convention rights or freedoms

- Art. 14 ECHR

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- Protocol No. 12

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ILO Conventions

- Equal Remuneration Convention (No. 100)
- Discrimination (Employment and Occupation) Convention (No. 101)
- Workers with Family Responsibilities Convention (No. 156)
- Part-Time Work Convention (No. 175)
- Maternity Protection Convention (No. 183)

- Q: the level and scope of protection?

Opinion by AG Wahl in *Mascellani* (2014)

- „43. Clause 5 of the framework agreement appears to be inspired by Articles 9 and 10 of Convention No 175 of the International Labour Organisation (ILO) concerning Part-Time Work (‘the ILO Convention’). (...) Indeed, the EU legislature acknowledged that account must be taken of the principles of the ILO Convention. (...) In addition, the Recommendation adopted to complement the ILO Convention (...) — which should, according to point 1 thereof, be considered in conjunction with the provisions of the convention — contains, in points 17 to 19 thereof, provisions which are fairly similar to those of the framework agreement.
- 44. In this regard, it has been argued — convincingly, to my mind — that the general level of protection afforded to part-time workers under Directive 97/81 is lower than that under the ILO Convention and the accompanying Recommendation. (...) If so, I find it even more difficult to imagine how Clause 5.2 of the framework agreement could allow a worker who has previously worked part-time to refuse being transferred to full-time work, when the wording of a corresponding provision in the instrument of international law that had prompted the framework agreement does not explicitly provide for such a right either.”

- Thank you for your attention!

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