



# The EU legal framework on equality

„Applying EU Antidiscrimination Law – Seminar for Members of the Judiciary“

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## Overview

- **Equality in Union Law**
  - Primary law
  - Secondary law
  - Charter of Fundamental Rights
  - Side note: Relationship between National law and Union Law
  
- **International Instruments**

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# Historical development



- Equal pay as an element ensuring the Single Market (harmonisation of production costs)
- Article 119 of the EEC Treaty [Article 141 EC, now: Article 157 of the TFEU] “equal pay ... for equal work or work of equal value” (since the Treaty of Rome)
  - Defrenne decisions of the ECJ; Judgment of 8 April 1976, Defrenne-II (Case 43/75): The Court recognised the direct effect of the principle of equal pay for men and women and ruled that the principle applies not only to the action of public authorities, but also extends to collective agreements intended to regulate paid labour.
- First Directives on implementation of equality:
  - 75/117/EEC (equal pay for men and women)
  - 76/207/EEC (equal treatment in access to employment and working conditions)
  - 86/378/EEC (equal treatment in occupational social security schemes)
  - 97/80/EC (burden of proof in cases of discrimination based on sex)]
  - All four now brought together and recast in Directive 2006/54

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# Historical development



Treaty of Amsterdam, 1999: Article 13 of the EC treaty (now Article 19 of the TFEU):

Introduction of the power to take action to combat discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

With this, extension of the legislation in the area of equal treatment

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## Primary law today



- Treaty on European Union (TEU): Articles 2 (the Union's values) und 3 III (the aim is to promote equality between women and men)
- Treaty on the Functioning of the European Union (TFEU): Articles 8 (aim), 10, 19 und 153 (legislative powers), 157 (equal pay and legislative powers).

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## Secondary law



Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

The concepts of direct and indirect discrimination, harassment and sexual harassment is legally defined in this Directive. Employers are required to take preventive measures to combat sexual harassment. Sanctions against discrimination are strengthened, and provision is made for the creation of public bodies in Member States to promote equality between women and men.

Judgment C-167/12, CD (Maternity leave for mothers of surrogate children)

Discrimination criteria: sex

Personal Scope: All natural and legal persons in the EU, employers and the self-employed, public and private employers, civil servants

Material scope: Employment and occupation

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## Secondary law



Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Directive 2019/1158/EU of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

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## Secondary law



Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;

Judgment, Test Achats, C-236/09

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, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, and repealing Council Directive 86/613/EEC

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## Secondary law



Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Discrimination criteria: race or ethnic origin

Personal scope: persons, as regards both the public and private sectors, including public bodies

Material Scope: very broad, i.a. employment, self-employment, social protection, education, access to and supply of goods and services

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Discrimination criteria: Religion or belief, age, disability, sexual orientation

Personal Scope: all persons, as regards both the public and private sectors, including public bodies

Material Scope: Employment and Occupation

## Charter of Fundamental Rights



- Same status as the Treaties (Art. 6 para. 1 TEU)

- **Equality provisions in Chapter III**

### Article 21 (1) Non-discrimination

“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.”

## Charter of Fundamental Rights



- Article 23 (Equality between men and women)
- Article 33 (Maternity leave and parental leave)

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## Charter of Fundamental Rights



- Scope of Application: Article 51 (1)
- “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”
  - Implementation of EU Law = national legislation which falls within the scope of European Union law, see Judgement of 26 February 2013, Åkerberg Fransson, C-617/10

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## Charter of Fundamental Rights



CJEU takes into consideration the judgments of the ECtHR, Article 52(3) of the Charter – Homogeneity Clause

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

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## Charter of Fundamental Rights



▪ Article 53 of the Charter – Level of protection:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

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## Relationship between National Law and Union Law



- Primacy of Union Law
- Direct Effect of Union Law
- Indirect Effect of Union Law
- State Liability

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## Primacy



- Union Law has primacy over national law, even over national constitutional law
- Only *precedence of application* not precedence of validity (problem: possible reverse discrimination against own nationals)
- Conflicting national law is not to be applied by the national judge

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## Direct effect I



- Judgment *van Gend en Loos* (Rs. 26/62)
- ...enables individuals to directly invoke a European law provision before a national Court

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## Direct effect II



### Direct effect of primary law

Fundamental freedoms

„equal pay for equal work“ *Gleicher Lohn* (art. 157 TFEU)

### Direct effect of secondary law

Regulations: yes

Directives: direct effect only in exceptional cases

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## Direct effect III



- Direct effect of Directives
  - Conditions:
    - Expiration of the deadline for transposition
    - „Unconditional and sufficiently precise“
    - Not to the detriment of an individual

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## Direct effect IV



- In principle only vertical direct effect (state-citizen)
- Exception: horizontal direct effect (between individuals)
  - Primary legislation
    - (Art. 157 AEUV „equal pay for equal work“)
    - Fundamental freedoms: trade unions, sports federations

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## Direct effect IV



- Direct effect of Charter provisions
  - ECJ, C-555/07, Küçükdevici
  - ECJ, C-414/16, Egenberger

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## Indirect effect



- Duty to interpret national law in such a way as to comply with EU law
  - „This obligation permits national courts to ensure the full effectiveness of European Union law when they determine the disputes before them.“ (e.g. C-282/10, Dominguez, para. 24)
  - No interpretation *contra legem*

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# State liability



## ■ Conditions

- Legislation of EU law intends to confer rights on individuals
- Sufficiently serious breach
- Direct causal link between the breach and the loss suffered

judgments *Frankovich u. Bonifaci* (Rs. C-6/90 u C-9/90); and state liability for not introducing a reference for a preliminary ruling to the ECJ *Köbler* (Rs. 224/01).

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# International Instruments



- Council of Europe:
  - ECHR (Article 14 und Protocol No. 12) and the European Social Charter; the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)
- United Nations:
  - Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
  - Convention on the Elimination of all Forms of Racial Discrimination (CERD)
  - Convention on the Rights of Persons with Disabilities (CPWD)
- International Labour Organization (ILO):
  - e.g. Conventions no. 100 (equal remuneration) and no. 111 (Equal treatment in employment)

## Relationship between International Law and Union Law



- International Conventions ratified by the EU form an *'integral part'* of EU law, insofar as the subject matter of a Convention falls within the EU's powers. (Air Transport Association of America, C-366/10)
- For example: United Nations Convention on the Rights of Persons with Disabilities, ratified by the EU, hence Directive 2000/78 "must, as far as possible, be interpreted in a manner consistent with that convention", cf. judgment of 11 April 2013, Ring, C-335/11
- See also Opinion of AG Wahl, Mascellani (C-221/13) regarding the ILO Convention

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Thank you very much for your attention!

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