

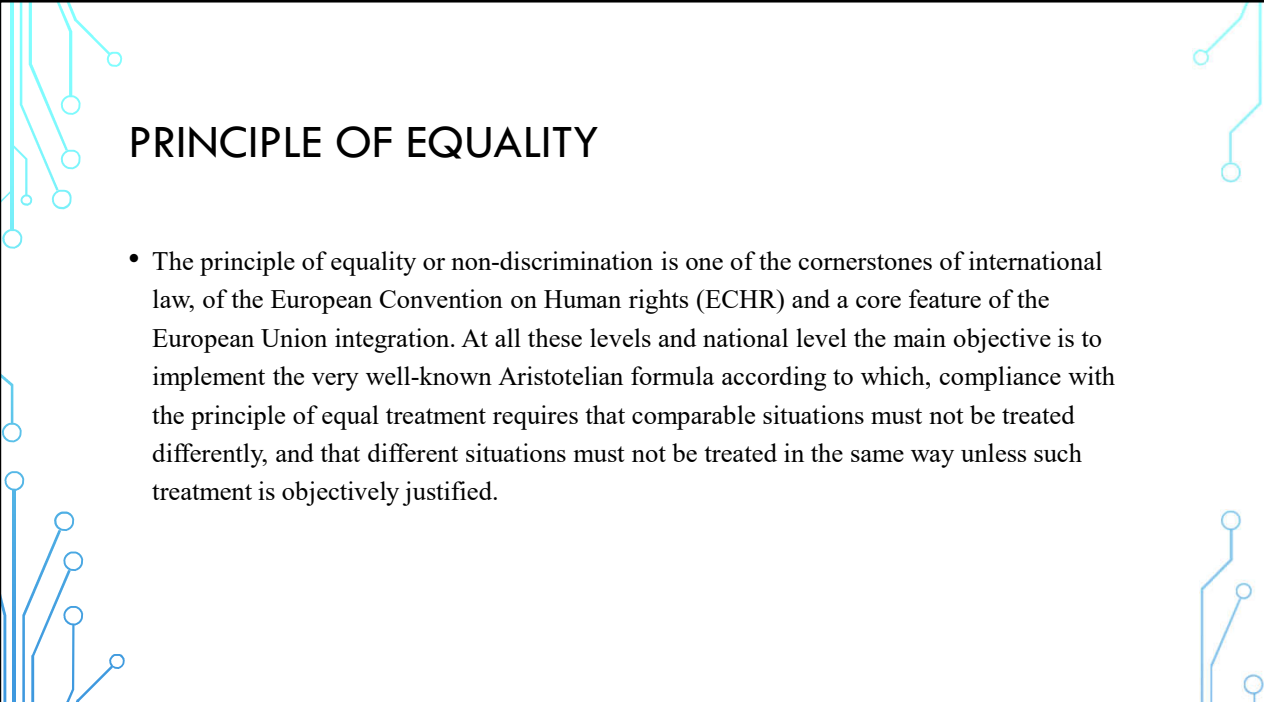
ACADEMY OF EUROPEAN LAW

***THE EU LEGAL FRAMEWORK ON EQUALITY
WITH SPECIAL ATTENTION TO THE EU CHARTER
OF FUNDAMENTAL RIGHTS, ITS LEGAL VALUE
AND THE ISSUE OF HORIZONTAL DIRECT EFFECT
OF ARTICLE 21 IN THE CJEU CASE LAW***

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PRINCIPLE OF EQUALITY

- The principle of equality or non-discrimination is one of the cornerstones of international law, of the European Convention on Human rights (ECHR) and a core feature of the European Union integration. At all these levels and national level the main objective is to implement the very well-known Aristotelian formula according to which, compliance with the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified.

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UNIVERSAL DECLARATION OF HUMAN RIGHTS

- **Article 1(3) UN Charter of 1945** which includes among the purposes of the UN *'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'* .

- **Article 2 UDHR of 1948** which provides, *'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'* .

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1966 CONVENTIONS ON CIVIL AND POLITICAL AND ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- **ARTICLE 2:** *'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'* .

- **ARTICLE 26 of International Covenant on Civil and Political Rights:** *'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'*

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INTERNATIONAL CONVENTIONS

- Convention on the Elimination of Racial Discrimination (CERD 1965);
- Convention on the Elimination of Discrimination Against Women (CEDAW 1979);and
- Convention on the Rights of Persons with Disabilities (CRPD 2006).
- Convention No 111 of 1958 prohibits discrimination in the field of employment and occupation (ratified by all the EU Member States and it is central in the ILO's 1998 Declaration on Fundamental Rights and Principles at Work).

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- **Article 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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*.
- Unfortunately, the **Art 14 ECHR has no independent existence** since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by the Convention.

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12TH PROTOCOL TO THE ECHR

To overcome this problem a **12th Protocol to the ECHR has been negotiated** and Article 1 of this, agreed in 2000 and entered into force in 2005, states:

1. *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
2. *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

Unfortunately, to date this Protocol has been ratified by only 10 of the EU Member States.

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COUNCIL OF EUROPE MAIN CONVENTIONS AGAINST DISCRIMINATION

- **the 1961 European Social Charter (ESC), revised in 1996**, provides that its substantive rights should be enjoyed without discrimination, the latter expanding the range of named rights to include, for example, health and association with a national minority and making clear that the enumerated grounds **are non-exhaustive**.
- Article 4(1) of the **1995 Framework Convention for the Protection of National Minorities (FCNM)** provides that *'[t]he Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited'*.
- **the 1997 Council of Europe Convention on Human Rights and Biomedicine** (Article 11 of which provides: *'Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited'*).
- **the 2011 Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence**, signed by all 27 EU Member States and the EU and ratified by 21 Member States. The Istanbul Convention aims to contribute to the elimination of discrimination against women by specifically providing a framework for combating different forms of violence against women.

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EUROPEAN UNION

The pursuit of equality among the EU Citizens is at the core of the Democratic principles (art.9 TEU) people and one of the main EU missions is to “...*combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.*” (art.3.3 TEU).

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EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

Art. 21:

- 1. 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.***
- 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those treaties, any discrimination on grounds of nationality shall be prohibited.***

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ART. 21: TWO LIMBS (STATUS/NATIONALITY)

- **Article 21 has two limbs, a status discrimination limb (Art 21(1)) and a nationality discrimination limb (Art 21(2)).**
- Although nationality can also be viewed as a status ground, the very two-limb structure of Article 21 of the Charter, whereby nationality discrimination is treated separately, and differently, from discrimination on other status grounds, signals the distinctive contours nationality discrimination has been given in the EU. In order to highlight and interrogate that difference, all the grounds other than nationality will be referred to as ‘ status discrimination ’, covered by Article 21(1), whilst nationality discrimination, covered separately in Article 21(2), will be considered as a special category in EU law.

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ART. 21 (1) FIRST LIMB: STATUS DISCRIMINATION

- **Article 21(1)** of the Charter links to the large body of EU equality and anti-discrimination legislation on a range of **status** grounds (race, gender, sexual orientation, disability, religion and belief, and age). This large body of legislation, (see below) mainly contained in directives, is required to be transposed at national level.
- Yet Article 21(1) EUCFR is expressed in much more expansive terms than these legal bases, in two different ways. First, it expressly names many more status grounds than those covered in the TFEU’s legal bases: to give two examples, genetic features and membership of a national minority. Second, through its use of the phrase ‘such as’, Article 21(1) EUCFR creates an open-ended rather than a closed list of “status” discrimination grounds, so that it can extend to any ground of “status” discrimination. Moreover the CJEU has recognized in 2018 that Article 21 has also horizontal direct effect .
- **Case C-414/16 Egenberger - Judgment of 17 April 2018, Grand Chamber).**

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ART. 21(2) SECOND LIMB: NATIONALITY

- In the case **Kamberaj**, the Court of Justice was asked about the compatibility with EU law of a regional Italian law discriminating between EU citizens and third-country nationals in the availability of housing benefit. The national court framed its questions around two centrally relevant Charter provisions, Articles 21 and 34. Yet, while finding in favor of the TCNs, the Court firmly turned down this invitation to use Article 21 as a means of dealing with the discrimination between EU citizens and TCNs. Instead, it based itself on the equal treatment guarantee for third-country nationals found in the 2003 Long-Term Residents Directive, Article 11(1)(d) of which provides that long-term residents are to enjoy equal treatment with nationals as regards social security, social assistance and social protection, as those concepts are defined by national law. Its willingness to use Article 34 of the Charter in this case serves to highlight its reluctance to use Article 21 in the context of TCNs.

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ART. 21 HORIZONTAL EFFECT

- **For many years the Court did not attribute horizontal direct effect to Article 21 of the Charter**. Instead, **from the 2005 case Mangold onwards**, it used general principles to attribute horizontal direct effect, first to age (Case C-144/04 Mangold [2005] ECR I-9981) and later to other status-discrimination grounds (Case C-147/08 Römer (Judgment of 10 May 2011, Grand Chamber). The core innovation of Mangold was that the Court first ‘uncovered’ a **general principle of non-discrimination** on grounds of age, an unwritten source, and placed it at the center of its judgment. Rather than asking whether such a general principle should be enforceable against a private individual, the Court reasoned that because the general principle was supreme, the national court was obliged to set aside any national law that conflicted with it. In subsequent cases, the Court confirmed this new function of the general principle.
- In **Kücükdeveci from 2010**, after affirming the existence of unwritten general principles which prohibit discrimination, the Court added that Article 21 ‘should also be noted’. Finally, **in 2018 in Egenberger** the Court made the leap to fully equate the Charter with the non-discrimination guarantees in the treaties so that the former should also be horizontally directly effective.

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DIRECT AND INDIRECT DISCRIMINATION

- Discrimination has a well-established EU law grammar, with distinctive configurations in relation to particular grounds.
- Its core components consist of the concepts of **direct and indirect discrimination** which are already framed in EU Directives .
 - Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the [prohibited] grounds ' : Art 2(2)(a) (Directive 2000/78) and (Directive 2000/43); Art 2(1)(a) (Directive 2006/54).
 - 'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a [prohibited status] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ' : Art 2(2)(b) (Directive 2000/78) and (Directive 2000/43); Art 2(1)(b) (Directive 2006/54)

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- In the classical structure, **direct discrimination** can usually not be justified, or is subject to stricter and often legislatively defined justification — including requirements to possess a certain status to carry out given jobs— as compared to **indirect discrimination**, where a broader range of 'objective justifications' are generally permitted.
- Consideration is also given to departures from symmetrical equal treatment in relation to the disadvantaged group; this may range from requiring only the disadvantaged group to be covered by the discrimination protection (eg **disability in EU law**) to **permitting certain kinds of positive action** as a tightly construed exception to an otherwise symmetrical application of the status discrimination prohibition.
- Other features of the EU Anti-discrimination Directives include protecting complainants through special burden of proof regimes and victimization protection as well as requirements for special equality agencies and constructing harassment as a specific form of discrimination.
- Importantly, this family of discrimination concepts, although broadly shared, is also differentiated across the much broader set of grounds protected in EU legislative instruments since the millennium. In the EU, disability discrimination alone contains the obligation of ' reasonable accommodation '.
- More generally there is a broader set of exceptions, justifications and derogations for the grounds other than race. **Direct age discrimination, for example, is given a broad justification defense.**

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INTERSECTIONAL DISCRIMINATION

- More broadly, the multiplication of prohibited grounds of discrimination in EU law, including within the Charter, has led to the need to consider within EU law the phenomenon of intersectional discrimination. By this is meant the specific disadvantage borne by those discriminated against on more than one ground. Importantly, it is not simply a matter of adding together the grounds of discrimination: hence a black woman suffers discrimination which is a distinctive melding of race and gender, at their intersection. Currently EU law does not expressly provide for intersectional discrimination protection. Article 21 of the Charter could potentially provide an important overarching resource for the adaption of EU discrimination legislation to the specificities of intersectional discrimination.

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ART. 19 OF THE EUROPEAN TREATY ON *THE FUNCTIONING OF THE EUROPEAN UNION*

THE LEGAL BASIS FOR "HORIZONTAL" DIRECTIVES ON DISCRIMINATION

- *Article 19 confers power on the Union to adopt legislative acts, including harmonization of the Member States' laws and regulations to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers.*

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DIRECTIVE 2000/43/EC [2000] OJ L180/22 (THE RACE EQUALITY DIRECTIVE, OR RED)

- **Directive 2000/43/EC [2000] OJ L180/22 (the Race Equality Directive, or RED)** whose main aim is to combat discrimination on the grounds of racial or ethnic origin. It lays down minimum requirements for implementing the principle of equal treatment between persons in the European Union (EU). By discouraging discrimination, it should help to increase participation in economic and social life and reduce social exclusion. This directive is based on the principle of equal treatment between persons. It forbids both direct* and indirect* discrimination, harassment*, instructions to discriminate and victimization*.
- The directive applies to all persons and to all sectors of activity, regarding: access to employment, working conditions, including promotion, pay and dismissals, access to vocational training, involvement in workers' or employers' organizations, and in any professional organization, access to social protection and to healthcare, education, social advantages, access to and supply of goods and services, including housing

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DIRECTIVE 2000/78/ EC [2000] OJ L303/16 (THE FRAMEWORK EQUAL TREATMENT DIRECTIVE, OR FETD).

- This directive sets out a general framework to ensure equal treatment of individuals in the European Union (EU) **at the workplace regardless of their religion or belief, disability, age or sexual orientation**.
- The directive aims to ensure that persons of a particular religion or belief, disability, age or sexual orientation do not suffer from discrimination and instead enjoy equal treatment in the workplace. It covers both **direct discrimination** (differential treatment based on a specific characteristic) and **indirect discrimination** (any provision, criterion or practice which is apparently neutral but puts the people in the above categories at a disadvantage compared to others). Harassment, which creates a hostile environment, is deemed to be discrimination. **The directive applies to all individuals, whether they are working in the public or private sectors**, in relation to: conditions of access to employed or self-employed activities (including selection criteria and recruitment conditions and including promotion), vocational training, employment and working conditions (including dismissals and pay), membership of and involvement in an organization of employers or workers or any other organization whose members carry out a particular profession. The directive does not cover differences of treatment based on nationality or payments of any kind made by State schemes, including State social security or social protection schemes. EU countries are obliged to ensure that judicial and/or administrative procedures are available to all people who consider themselves wronged by a failure to apply the principle of equal treatment to them. This still applies even after the relationship in which the discrimination is alleged to have occurred has ended. Further details about remedies and enforcement can be read in Chapter II of the directive.

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COUNCIL 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 (OJ L 373, 21.12.2004, P. 37).

- Before a tribunal support the presumption of the existence of discrimination, it falls to the defendant to prove that there has been no infringement of the directive aims to implement equal treatment of men and women with a view to extending the principle of equal treatment beyond the sphere of the employment market and professional life to other areas of everyday life. Ban on discrimination in the field of goods and services: in principle, the directive prohibits: any less favorable treatment of men or women by reason of their gender, any less favorable treatment of women due to pregnancy or maternity, harassment, sexual harassment or any incitement to discriminate with regard to the offer or supply of goods or services. Differential treatment can only be accepted if it is justified by a legitimate objective such as, for example protection of victims of sexual abuse (in the case of creating women's refuges), freedom of association (in the context of membership of unisex private clubs) or organization of unisex sporting activities. Any limitation must be appropriate and necessary. The principle of equal treatment does not preclude taking affirmative action to prevent or compensate for gender inequalities in the area of goods and services. The directive establishes only minimal requirements to allow EU countries to be able to maintain higher or more extensive levels of protection.
- **Application to the field of insurance:** the directive prohibits taking gender into consideration when calculating insurance premiums and benefits in insurance agreements signed after 21 December 2007. Nonetheless, the directive provided for the option for EU countries not to apply this prohibition in cases where gender was a determining factor in risk assessment and based on relevant actuarial and statistical data. In any case, the costs associated with pregnancy and maternity must not lead to differences in terms of premiums and benefits.
- **Bodies promoting equal treatment:** each EU country charges one or several bodies with promoting and monitoring equal treatment of men and women at national level. These bodies are responsible for (i) offering victims independent assistance, (ii) carrying out independent studies, (iii) publishing independent reports and making recommendations.
- **Defending victims' rights:** the directive obligates EU countries to ensure that victims have access to a judicial and/or administrative procedure to safeguard their rights, and that victims can obtain the appropriate reparation or compensation. Associations, organizations and other legal persons with a legitimate interest are also able to engage in a judicial and/or administrative procedure to allow victims to safeguard their rights and to obtain reparation or compensation. When facts presented principle of equal treatment (rebuttal of the charge). Furthermore, EU countries must put in place sanctions in case of infringement of the principle of equal treatment.
- In 2008 the Commission has submitted **another draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**

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DRAFT COUNCIL DIRECTIVE ON IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RELIGION OR BELIEF, DISABILITY, AGE OR SEXUAL ORIENTATION

- In 2008 the Commission has submitted **another draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation** The purpose of the draft Directive is, therefore, in respect of the grounds it covers, to extend the degree and the form of protections against discrimination beyond the areas of employment into the specific areas set out in this Directive. Thus, Union legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including access to social protection, access to education and access to and supply of goods and services, including housing. Services should be taken to be those within the meaning of Article 57 of the TFEU.

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SOCIAL PROTECTION

- Social protection, within the meaning of that draft Directive, should cover social security, social assistance, social housing and health care. Consequently, the Directive should apply with regard to all rights, entitlements and benefits which are derived from general or special social security, social assistance and healthcare schemes, and which are statutory or provided either directly by the State, or by private parties. In this context, the Directive should apply with regard to benefits in cash, benefits in kind and services, irrespective of whether the schemes involved are contributory or non-contributory. The abovementioned schemes include, for example, the branches of social security defined by Regulation (EC) No 883/2004[3] of the European Parliament and of the Council,, as well as schemes providing for benefits or services granted for reasons related to the lack of financial resources or risk of social exclusion. This Directive also applies to supplementary pensions covered by Directive 2014/50/EU.

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DISABILITIES : THE NEW DRAFT DIRECTIVE ON THE BASIS OF ART. 19 TFEU

- As of 23 December 2010, the Union is a party to the Convention on the Rights of Persons with Disabilities (UNCRPD).The provisions of UNCRPD form, in accordance with Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), an integral part of the European Union legal order and Union legislation should therefore be interpreted in a manner that is consistent with the UNCRPD. In particular, the UNCRPD includes, in its Article 2, the denial of reasonable accommodation in its definition of discrimination and, in its Article 9, obligations on accessibility. Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. The definition of "long term" in relation to the concept of disability should be seen in the light of the case law of the Court of Justice of the European Union, in particular its judgement in Case C-395/15. [4] **The principle of accessibility** is established in the United Nations Convention on the Rights of Persons with Disabilities. The Convention provides in this respect that to enable persons with disabilities to live independently and participate fully in all aspects of life, Member States as State Parties are to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public both in urban and in rural areas.

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MEASURES TO ENSURE ACCESSABILITY FOR PERSONS WITH DISABILITIES

- Measures to ensure accessibility for persons with disabilities, on an equal basis with others, to the areas covered by this Directive play an important part in ensuring full equality in practice. Such measures should comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers. Measures to ensure accessibility for persons with disabilities should not impose a disproportionate burden. **Accessibility should be considered to have been achieved in a proportionate manner** if persons with disabilities are able, effectively and on an equal basis with others, to access the services that particular buildings, facilities, transport services and infrastructure are meant to supply or offer to the public, even if they cannot have access to the entire building, facility or infrastructure concerned.
- Such measures should aim at achieving accessibility including with regard to, inter alia, the physical environment, transportation, information and communication technology and systems, and services, within the scope of this Directive. The fact that access might not always be possible to achieve in full equality with others may not be presented as a justification for not adopting all measures to increase as far as possible accessibility to persons with disabilities.

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COMPLEMENTARY LEGAL BASIS FIGHTING DISCRIMINATION

- It is worth noting that art.19 TFEU still requires the Unanimity at Council level and this may explain why until today only few “horizontal” legislative measures have been adopted on this legal basis whereas the parity of treatment has been possible thanks to other more specific legal basis not requiring the Council unanimity albeit focused on specific domains.
- A clear example is the promotion of **gender equality**.
- **It was already a protected ground of discrimination in EU law since the Rome Treaty’s guarantee of equal pay for equal work between women and men.** Not surprisingly this very notion is still mirrored in the EU Treaties (art.157 TFEU) according to which “*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*” and the EU Co-Legislator “*..shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*” Hopefully, in successive treaty revisions, the EU ’s commitment to gender equality has been substantially enriched by covering also domains other than the economic ones.
 - Directive 2004/113/EC [2004] OJ L373/37 (Gender Equality in Goods and Services Directive);
 - Directive 2006/54 [2006] OJ L204/23 (the Gender Equality in Employment Directive, or GEED);
 - Directive 79/7 on gender equality in social security [1979] OJ L6/24;
 - Directive 2010/41/EU on gender equality in self-employment [2010] OJ L180/1.

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