



The influence of EU law
on national legal orders
in the field of fight against discrimination

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- o 1. The field and scope of application of EU law
- o 1.1. The equality expressed in the Charter of Fundamental Rights of the EU: when is it of importance?

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

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 Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.



Article 23

Equality between women and men

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Article 51

Field of application

1. The provisions of this Charter are addressed to [...] the Member States only when they are implementing Union law. [...]
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52

Scope and interpretation of rights and principles

[...]

5. The provisions of this Charter which contain principles may be implemented by [...] acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

[...]



- o 1.2. The material and temporal scope of application of EU law

*Article 19 FUE Treaty
(ex Article 13 TEC)*

1. [...] within the limits of the powers conferred by them upon the Union, the Council [...] may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council [...] may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

- o 1.2.1. *Bartsch / Küçükdeveci* test

- 18 Article 13 EC [...] cannot, as such, bring within the scope of Community law, for the purposes of prohibiting discrimination based on age, situations which [...] do not fall within the framework of measures adopted on the basis of that article, specifically Directive 2000/78 before the time-limit provided therein for its transposition has expired.

(ECJ judgement of 23.9.2008, C-427/06 Bartsch)



- 23 For the principle of non-discrimination on grounds of age to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law.
- 24 In contrast to the situation concerned in Case C-427/06 Bartsch [...], the allegedly discriminatory conduct adopted in the present case on the basis of the national legislation at issue occurred after the expiry of the period prescribed for the Member State concerned for the transposition of Directive 2000/78 [...].
- 25 On that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.

(ECJ judgement of 19.1.2010, C-555/07 Küçükdeveci)



- o 1.2.2. The limited list of personal features which cannot constitute a basis for unequal treatment prohibited under Directives 2000/43 and 2000/78

- 31 Article 1 of Directive 2000/78 states that the purpose of the directive is to lay down a general framework, as regards employment and occupation, for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation. The purpose of Directive 2000/43, as is apparent from Article 1 thereof, is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin.
- 32 However, it is apparent from the order for reference that the discrimination at issue in the main proceedings is not based on any of the grounds thus listed in those directives, but operates instead on the basis of the socio-professional category, within the meaning of national legislation, to which the persons concerned belong, or their place of work.
- 33 It follows that a situation such as that at issue in the main proceedings falls outside the general frameworks established by Directives 2000/43 and 2000/78 respectively for combating certain forms of discrimination.

(ECJ judgement of 7.7.2011, C-310/10 *Agafitei and others*)



- o 1.2.3. Fields in which the Directive 2000/43 is applicable

- 43 [...] in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, the scope of that directive cannot be defined restrictively.
- 44 It does not follow, however, that national rules governing the manner in which surnames and forenames are to be entered on certificates of civil status must be held to come within the scope of Directive 2000/43.
- 45 Although Article 3(1)(h) of Directive 2000/43 makes general reference to access to and supply of goods and services which are available to the public, it cannot be held, as the Advocate-General stated in point 58 of his Opinion, that such national rules come within the concept of a 'service' within the meaning of that provision.

(ECJ judgement of 12.5.2011, C-391/09 *Wardyn*)



- o 1.2.4. Persons whose rights are guaranteed by the Directive 2000/78

38 [...] it does not follow from those provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. [...]

[...]

56 In the light of the foregoing considerations [...] Directive 2000/78 [...] must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).

(ECJ judgement of 17.7.2008, C-303/06 Coleman)



- o 1.2.5. Procedural aspects of guarantees under the Directive 2000/78

24 Article 9 of the Directive states, firstly, that Member States are to ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them and, secondly, that those obligations of the Member States are without prejudice to national rules relating to time-limits for bringing actions as regards that principle. It follows from that wording that the question of time-limits for initiating a procedure for the enforcement of obligations under the Directive is not governed by European Union law.

25 In accordance with settled case-law, in the absence of European Union rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) [...].

(ECJ judgement of 8.7.2010, C-246/09 Bulicke)



- 2. Duties of a national court in the process of implementation of directives
- 2.1. After the deadline for a transposition of a directive

113 With a view, more specifically, to determining the date from which national courts are to apply the principle that national law must be interpreted in conformity with Community law, it should be noted that that obligation, arising from the second paragraph of Article [4(3) EU Treaty] and Article [288 third paragraph FUE Treaty] and the directive in question itself, has been imposed in particular where a provision of a directive lacks direct effect, be it that the relevant provision is not sufficiently clear, precise and unconditional to produce direct effect or that the dispute is exclusively between individuals.

114 Also, before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law [...].

115 Accordingly, where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.

[...]

124 In light of the foregoing reasoning, the answer to the first question must be that, where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive.

(ECJ judgement of 4.7.2006, C-246/09 Adeneler)



- 2.2. Before the deadline for a transposition of a directive
- 2.2.1. When a national regulation adopted during that period is aimed AT implementing a directive

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with Paragraph 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive [...], and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle [...].

76 Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.

77 In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law [...].

(ECJ judgement of 22.11.2005, C-144/04 Mangold)



- o 2.2.2. When there is no national regulation transposing a directive

24 That latter aspect, moreover, distinguishes this case from that which gave rise to the judgment in Mangold. In that case, the national rules in question were a measure implementing a Community directive [...] by means of which those rules were thus brought within the scope of Community law (see Mangold, paragraph 75). By contrast, the guidelines at issue in the main proceedings do not correspond to measures transposing Community provisions.

25 In view of the above considerations, the answer to the first question must be that the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. No such link arises either from Article 13 EC, or, in circumstances such as those at issue in the main proceedings, from Directive 2000/78 before the time-limit allowed to the Member State concerned for its transposition has expired.

(ECJ judgement of 23.9.2008, C-144/04 Bartsch)



- o 2.3. In a case between individuals

46 In this respect, where proceedings between individuals are concerned, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual [...].

50 It must be recalled here that [...] Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment [...].

51 In those circumstances, it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle [...].

[...]

56 In the light of the foregoing, the answer to Question 2 is that it is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court for a preliminary ruling on the interpretation of that principle.

(ECJ judgement of 19.1.2010, C-555/07 Küçükdeveci)