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**APPLYING EU
ANTI-DISCRIMINATION LAW
WEBINAR FOR MEMBERS OF THE JUDICIARY
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**Relation between EU law and ECHR on
anti-discrimination**



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Legal framework in BOTH systems:

- **Legal basis for implementation of the Principle of Non-discrimination – in International treaties (of different kind):**
- - **The European Union (The EU)** - The Treaty on European Union (*inter alia* Articles 2, 3, 6, 9); The Treaty on the Functioning of the European Union (**special Title II**, Articles 8, 10, very important Article 18 (prohibition of discrimination on the ground of nationality, Article 19, etc.);
- and Charter of Fundamental Rights of the European Union (**special Title III – Equality** – Articles 20, 21, 22 ,23).
- - **Council of Europe** – The Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14) and Protocol to the Convention No. 12.

Legal framework:

- **In the EU law –**
- **non-discrimination - is a common principle of the EU law** applicable in all spheres of the activities of the EU (see Art. 2 of the Treaty on EU, and, also, specific reference to Art. 9 (of the same Treaty)- the principle of the equality of its citizens);
- See also Art. 10 of the Treaty on the Functioning of the EU (**In defining and implementing its policies and activities, the Union shall aim to combat discrimination <...>**).
- **In the European Convention on Human Rights system –**
- Art. 14 applicable in conjunction with another Convention right or freedom;
- Protocol No. 12 – general prohibition of discrimination (in national law).

Consolidated version of the Treaty on European Union:

- Article 2
- The Union is founded on the values of respect for human dignity, freedom, democracy, **equality**, the rule of law and respect for human rights, **including the rights of persons belonging to minorities**.
- These values are common to the Member States in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and **equality between women and men** prevail.

Consolidated version of the Treaty on European Union:

- Article 3
- (ex Article 2 TEU)
- 3. The Union **shall establish an internal market**. <...>
- It **shall combat social exclusion and discrimination**,
- and shall promote social justice and protection,
- **equality between women and men, [...]** and
- protection of the rights of the child.

Consolidated version of the Treaty on European Union:

- Article 6 (ex Article 6 TEU)
- 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU <...>,
 - which shall have the same legal value as the Treaties.
- 2. The Union shall accede to the European Convention on Human Rights.
- 3. Fundamental rights, as guaranteed by the European Convention on Human Rights [...], shall constitute general principles of the Union's law.

Consolidated version of the Treaty on European Union:

- TITLE II - PROVISIONS ON DEMOCRATIC PRINCIPLES
- Article 9
- In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.
- Every national of a Member State shall be a citizen of the Union. <...>.

Consolidated version of the Treaty on the Functioning of the European Union:

- TITLE II PROVISIONS HAVING GENERAL APPLICATION
- Article 8 (ex Article 3(2) TEC) (1)
- In all its activities, the Union **shall aim to eliminate inequalities, and to promote equality, between men and women.**
- Article 10
- 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.**

Consolidated Version of the Treaty on the Functioning of the European Union:

- PART TWO NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION
- Article 18 (ex Article 12 TEC)
- <...> **any discrimination on grounds of nationality shall be prohibited.**
- The European Parliament and the Council [...] **may adopt rules designed to prohibit such discrimination.**
- Article 19 (ex Article 13 TEC) 1.
- [...] the Council <...> **may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**

Charter of Fundamental Rights of the European Union (further – Charter of FR):

- TITLE III - EQUALITY
- *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 22* - Cultural, religious and linguistic diversity
 - **The Union shall respect cultural, religious and linguistic diversity.**
- *Article 23* - Equality between women and men
 - **Equality between women and men must be ensured in all areas, including employment, work and pay.**
- The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

1950 Convention for the Protection of Human Rights and Fundamental Freedoms (further - ECHR or the Convention):

- Article 14
- Prohibition of discrimination.
 - **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 to the ECHR:

- **ARTICLE 1. General prohibition of discrimination**
- **1. 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.**
- **2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.**

The Charter of FR and the ECHR:

- **Two very important documents in both systems;**
- **The Charter should be interpreted in line with the ECHR - *Article 52* (Scope and interpretation of rights and principles):**
- **3. 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.**
- **The same principle is applicable for the application and interpretation of the principle of non - discrimination.**

Textual differences in the Charter of FR and Art. 14 of the ECHR:

- **In the Convention** – only **one Article (Art. 14)** – in which **less grounds** on which discrimination is prohibited established, BUT
- Art. 14 **provides for non – exhaustive list** of grounds (entails - “or other status”);
- **The Charter of FR** – has a **special Title III – Equality (Articles 21-26)** – Art. 21 § 1 – general prohibition of discrimination) - more grounds provided as in the Convention (*e.g.* genetic features, age or sexual orientation), BUT - **an exhaustive list of grounds established.**

Art. 14 of the Convention:

- Art. 14 complements the other substantive provisions of the Convention and the Protocols thereto.
- **It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms”** of the Convention.
- It is sufficient – and also necessary – for the facts of the case to fall “within the ambit” of one or more of the Convention Articles
- (see *Stec and Others v. the UK* (dec.) [GC], nos. [65731/01](#) and [65900/01](#), § 39; *Burden v. the UK*, GC, no. 13378/05, judgment of 29 April 2008, § 58).

Art. 14 of the Convention/general principles:

- The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee.
- It applies also to those additional rights, falling within the general scope of any Convention article, for which the Contracting State has voluntarily decided to provide (It was expressed for the first time in the Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (Merits) (judgment of 23 July 1968, § 9).
- Only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56).
- In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175);
- Such a difference of treatment is discriminatory if it has no objective and reasonable justification.
- The Contracting State enjoys a margin of appreciation in this field (*Burden v. the UK* [GC], § 60).

SOME EXAMPLES of the Case law of the European Court of Human Rights (further – ECtHR) in the field of employment:

- **No (separate) right to work in the text of the Convention –**
- **BUT** – the right to be employed in the private sector – has been construed within Art. 8 of the Convention – the right to respect for private life:
- - case *Sidabras and Džiautas v. Lithuania*, appl. Nos. 55480/00 and 59330/00, Judgment 27.7.2004 [Section II]
- **Law: Article 14 in conjunction with Article 8 – Applicability/Imposition of employment restrictions on former employees of the KGB:**
- The applicants had been treated differently from other persons in Lithuania who had not worked for the KGB; their possibilities to pursue various professional activities and to develop relationships with the outside world had been adversely affected- Art. 8 (private life) applicable.
- Given the wide-ranging scope of the employment restrictions, which had consequential effects on the applicants’ “private life”, Article 14 was applicable in conjunction with Article 8.
- **A violation of Article 14 of the Convention taken in conjunction with Article 8.**

ECHR in the social sphere/NO such rights in the text of the Convention:

- **NO existence of such (social) rights in the text of the Convention;** BUT they can be derived from another Articles of the Convention (e. g. Article 8).
- *Nitecki v. Poland* (no. 65653/01, Decision of 21/03/2002 – **inadmissible**; concerning the „life saving“ drugs, not fully compensated by the social security scheme (refunded up to 70% of its cost by the Health Insurance Fund);
- *Ozbas v. Turkey* case – **inadmissible**; impossibility to benefit from the work accident insurance scheme after the accident in the working place;
- **No obligation on a State** under Art. 1 of Prot. No. 1 (Protection of property) **to create a welfare or pension scheme** (*Carson v. the UK* case, GC);
- The ECHR does not guarantee, as such, a right to a pension of a certain amount.
- Disputes concerning social rights can be examined under Art. 6 („Civil“ nature) – see cases *Mennito v. Italy*, (no. 33804/96); *Svetlana Naumenko v. Ukraine* (no. 41984/98), etc.

D.H. and Others v. the Czech Republic, GC, No. 57325/00, judgment of 13/11/2007 – **discrimination in the field of education**

- **VIOLATION of Art. 14 (Discrimination)** taken in conjunction with **Art. 2 of Prot. No. 1 (Right to education)**
- **Placement of Roma gypsy children in “special” schools: Violation**
- The difference in treatment between Roma children and non-Roma children as regards their placement to „special“ schools was NOT objectively and reasonably justified [...].
- 209. [...] the relevant legislation as applied in practice **had a disproportionately prejudicial effect on the Roma community; the applicants as members of that community necessarily suffered the same discriminatory treatment** (NO individual assessment needed).

Case law of the ECtHR **in the social field/property** – *Burden v. the United Kingdom*, GC, No. 13378/05, judgment of 29 April 2008/payment of Inheritance tax:

- The applicants (two sisters) complained under Art. 14 of the Convention taken in conjunction with Art. 1 of Prot. No. 1 that,
 - **when the first of them died, the survivor would be required to pay inheritance tax on the dead sister's share of the family home,**
- whereas the survivor of a married couple or a homosexual relationship registered under the Civil Partnership Act would be exempt from paying inheritance tax in these circumstances.
- 66. <...> **the applicants, as cohabiting sisters, cannot be compared to a married or Civil Partnership Act couple.**
- There has been **no discrimination; NO violation of Article 14 taken in conjunction with Art. 1 of Prot. No. 1.**

Carson and Others v. the UK, GC, No. 42184/05, judgment of 16/03/2010 – **Social field/property:**

- **NO VIOLATION of Art. 14 (Discrimination) taken in conjunction with Art. 1 of Prot. No. 1 (Protection of property).**
- Absence of right to index-linking for pensioners resident in overseas countries which had no reciprocal arrangements with the United Kingdom: **NO violation**
- **Pensions were only index-linked if the recipient was ordinarily resident in the UK or in a country having a reciprocal agreement with the UK.**
- Those resident elsewhere continued to receive the basic State pension, but their rate payable was frozen.
- **ECtHR** - the applicants who live outside the UK in countries which are not party to reciprocal social security agreements with the UK providing for pension uprating **were not in a relevantly similar position** to residents of the UK or of countries which were party to such agreements.

Carson and Others v. the UK case, GC/very important statement:

- 64. [...] **there was no obligation on a State under Article 1 of Protocol No. 1 to create a welfare or pension scheme,**
- if a State did decide to enact legislation providing for the payment as of right of a welfare benefit or pension -
- **that legislation had to be regarded as generating a proprietary interest under Art. 1 of Prot. No. 1 for persons satisfying its requirements** (Stec and Others, (Dec.) § 54).
- 65. The Grand Chamber agrees with this finding, which is not, moreover, disputed by the Government.

Vallianatos and Others v. Greece, GC, appl. Nos. 29381/09 and 32684/09, judgment of 7 November 2013/discrimination based on sexual orientation:

- **VIOLATION of Article 14 (Discrimination) taken in conjunction with Article 8 (Right to respect for private and family life)**
- **Exclusion of same-sex couples from “civil unions”:** Violation
- Law no. 3719/2008 - an official form of partnership for unmarried couples - a “civil union” – restricted to different-sex couples, **thereby expressly excluding same-sex couples from its scope.**
- ECtHR - the applicants’ relationships fell within the notion of “private life” and that of “family life”, just as would the relationships of different-sex couples in the same situation.
- Art. 14 taken in conjunction with Article 8 was therefore applicable.

The Charter of FR and the ECHR/uniform interpretation is needed:

- **Two very important documents in both systems;**
- The Charter should be interpreted in line with the ECHR – *Art. 52* (Scope and interpretation of rights and principles):
- 3. As Charter contains rights which correspond to rights guaranteed by the ECHR, 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.
- The same principle is applicable for the application and interpretation of the principle of non - discrimination.
- **Conclusion – Non-discrimination principle should be guaranteed in both systems.**



**Thank you very much for your
attention**

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