The EU legal framework of equality

EU Gender Equality Law
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Plan of the presentation

• Equality protection in the EU Charter and EU Treaties
• EU Directives on equal treatment – overview and scope
• International instruments (CoE, UN, ILO)
Equality in EU law

- general principle of EU law
- value common to the Member States (Article 2 TEU)
- objective of the EU (Article 3(3) TEU)
- task of the EU
- field of regulatory competence (Article 13 TFUE)
- fundamental right (Chapter III in the Charter of Fundamental Rights)

Concepts of equality

- Formal equality – equal treatment
- Substantive equality – unequal treatment for the achievement of de facto equality
- Equal opportunities – equal “starting” conditions
- Equal outcomes – equal results (require re-distribution)
- Positive action (positive measures, known also as affirmative action) – remedies aimed to provide for equal opportunities or outcomes (inclusionary policies, outreach measures, preferential treatment, quotas)
Discrimination

Unequal treatment which is not objectively justified

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 objectively justified")

Under EU equality directives discrimination is constituted by:
• direct direct discrimination
• indirect discrimination
• harrassment
• sexual harrassment
• instruction to discriminate
• lack of reasonable accommodation

Equality protection in EU law

General principle of law
• the principle of equal treatment and non-discrimination with regard to... (prohibited ground) as expressed in EU equality directive (xxx) and Article 21 of the Charter
• It means that...
• for the purposes of the directives, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to

Treaty law
• 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

- General principle of equality / equal treatment / non-discrimination
  C-144/04 Mangold (2005)
- filling the gaps of the EU equality law when applied to EU institutions
- Yet, it does not expand the material scope of EU directives when applied to MS
  C-13/05 Navas (sickness)
  C-167-12 X. and C-363/12 Z. (surrogacy leave)

General principle of equality between men and women

- General principle of equality and the prohibition of discrimination with regard to gender expands the protection of EU law (beyond Article 157 TFUE, formerly 141 TEC and 119 TEEC) if applied to EU institutions in staff cases:
  C-20/71 Sabbatini (expatriation allowance)
  C-21/74 Airola (expatriation allowance).
  Not applicable to MS beyond the scope of EU directives:
  C-149/77 Defrenne III (working conditions beyond pay)
- General principle of equality and the prohibition of discriminatin with regard to gender as confirmed in the Charter used against the EU institutionas to invalidate the EU secondary law
  C-236/09 Test Achats (insurance premiums and benefits)
EU Treaties (nationality)

• Article 21(1) TFUE - prohibition of discrimination on the basis of nationality (applying to all fields of the EU law)
• Article 40 (2)(2) TFUE - prohibition of discrimination in the Common Agricultural Policy
• Article 45(2) TFUE - prohibition of discrimination in regard to freedom of movement
• Article 49 TFUE - prohibition of discrimination with regard to freedom to provide services
• Article 56(1) TFUE - prohibition of discrimination with regard to freedom of establishment
• Article 110 TFUE - prohibition of discrimination with regard to taxation of goods

EU Treaties (gender)

• Article 2 and 3(2) – promotion of equal treatment between men and women
• Article 157(1) TFUE (former Article 119 TEEC, Article 141 TEC) – equal pay
• Article 157(4) TFUE – positive measures
EU Charter

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

- but Article 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)
- \textit{C-617/10 Akerberg Fransson}

EU Charter

- \textit{Principle of equality / equal treatment / non-discrimination - not a right}
- but needs to be understood as a right (right claim) because
- provides directly enforceable individual protection
- subject to limitations if in conflict with other rights or freedoms or public interests
  \textit{C-528/13 Léger}
- conflicts of rights (freedoms) need to be resolved by application of the proportionality (means-ends) analysis, which requires that
- the adopted measures must not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives, and when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued.
**C-528/13 Léger (permanent contraindication to blood donation for men who has had sex with other men)**

- Article 21(1) is a particular expression of the principle of equal treatment, which is a general principle of EU law enshrined in Article 20 of the Charter (see, to that effect, judgments in Römer, C-147/08, EU:C:2011:286, paragraph 59, and Glatzel, C-356/12, EU:C:2014:350, paragraph 43).
- In that connection, taking as a criterion for a permanent contraindication to blood donation the fact of being a ‘man who has had sexual relations with another man’, Table B of Annex II to the Decree of 12 January 2009 determines the deferral from blood donation on the basis to the homosexuality of the male donors who, on account of the fact that they have had homosexual sexual relations, are treated less favourably than male heterosexual persons.
- In those circumstances, the Decree of 12 January 2009 may discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1) of the Charter.
- Therefore, it must be determined whether the permanent contraindication to blood donation provided for in the Decree of 12 January 2009 for a man who has had sexual relations with another man none the less satisfies the conditions laid down by Article 52(1) of the Charter in order to be justified.
- That provision states that any limitation on the exercise of the rights and freedoms recognised by it must be provided for by law and respect the essence of those rights and freedoms. In addition, that article provides that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

**EU gender equality directives (historical overview)**

- Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976]
- Council Directive (EEC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992]
EU equality directives (binding)

- Directive 2010/118/EU (repealing 96/34/EC) - Parental Leave
- Directive 1999/70/EC – Fixed-Term Work

EU equality directives

- 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 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).
Scope of Gender Equality Directive

- applies to public and private sectors
- implements the principle of equal treatment with regard to
  a) access to employment, including promotion, and to vocational training;
  b) working conditions, including pay;
  c) occupational social security scheme
- envisages positive measures
- mandates introduction of effective remedies and sanctions
- shifts the burden of proof
- Includes other horizontal provisions: prohibition of victimization, gender mainstreaming, equality bodies

Autonomous claim of non-discrimination

- Claiming direct or indirect discrimination is not conditional on the violation of other rights or interests

  "The only material factor is that there is less favourable treatment or a disadvantage, irrespective of the object of that treatment or disadvantage, whether rights or interests are infringed and, if so, which rights or interests. What is more, according to the Court's case-law, discrimination is not even dependent on a specific victim of discrimination [citation omitted]. For discrimination to have occurred, it is therefore sufficient that a person or group of persons is treated less favourably than another is, has been or would be treated. The imposition of additional conditions not provided for in Directive 2000/43 is not compatible with the high level of protection desired by the Union legislature."

- Opinion of AG Kokott in Case C-394/11 Belov and Case C-83/14 CHEZ Razpredelenie Bulgaria AD (Anelia Nikolova).
Hierarchy of the protected grounds

<table>
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<tr>
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<th>EMPLOYMENT</th>
<th>SOCIAL SECURITY</th>
<th>GOODS AND SERVICES</th>
<th>EDUCATION</th>
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<tr>
<td>GENDER</td>
<td>2006/54/EC</td>
<td>79/7/EEC</td>
<td>2004/113/EC</td>
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<td>RELIGION DISABILITY</td>
<td>2000/78/EC</td>
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<td>AGE SEXUAL ORIENTATION</td>
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Challenges of EU equality law

• Fragmentation and sectoral approach to protected categories
• Potential collissions with constitutional principles of MS (to be respected as elements of national identity)
• No progres in the adoption of the horizontal directive
• Objections to the adoption of the gender balance directive (corporate quotas)
• Problems to address structural discrimination
  C-246/97 Gruber (access to child care)
• Problems to address intersectionality
  C-157/15 Samira Achbita (veil ban in private employment)
  C-188/15 Asma Bougnaoui (veil ban in private employment)
• Problems to establish 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.”)
• Direct discrimination by association – C-303/06 Coleman
• Indirect discrimination of a person not belonging to the protected group – C-54/07 CHEZ
Other international sources of equality law

UNITED NATIONS

• International Convenant 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
other CoE conventions
• European Charter for Regional or Minority Languages (1992)
• Istanbul Convention on preventing and combating violence against women and domestic violence (2011).
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)
Opinion by AG Wahl in *Masellani* (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.”

• Recommended sources: equalitylaw.eu/legal-developments

• Thank you for your attention!

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