

The EU legal framework on equality

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Content

- EU Charter and Treaties (constitutional level)
- EU Directives (statutory level)
 - Scope
 - Effect
- International Instruments (ECHR)
- Normative 'sources'

EU Treaty

- Art 119 of the EEC (Rome Treaty); today 157 TFEU
 - 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.

Aims

- Case 43/75 *Defrenne II*. (1976)
 - Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a **competitive** disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.
 - This provision forms part of the **social objectives** of the Community, which is not merely an economic union, but is at the same time intended...to ensure social progress and seek the constant improvement of the living and working conditions.
- Case 50/96 *Deutsche Telekom AG v Schröder* (2000) (57) – social aim primary
- Case 149/77 *Defrenne III*
 - 'The elimination of discrimination based on sex forms part of those fundamental rights.'

EU Charter

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.

Equality as a general principle

- A judge-made source of law – ‘general principles’
 - C-144/04 *Mangold* (2005) “...Directive 2000/78 does not itself lay down the principle of equal treatment ...the source of the actual principle underlying the prohibition of those forms of discrimination being found... in various international instruments and in the constitutional traditions common to the Member States. (74)
 - The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law... (75)

Effect of equality as a constitution right

- EU needs to observe it in its own actions (C-236/09 *Test-Achats*)
- It also applies to Member State action within the scope of EU law (here it's important for filling in gaps left by the directives)
- The Treaty and the general principles are capable of horizontal application
 - Treaty – *Defrenne II*
 - General principles - *Mangold*

Directives - Sex

- Started with equal pay (75/117/EEC) and equal treatment (76/207/EEC)
- Statutory social security schemes (Directive 79/7/EEC)
- Self-employment (Directive 2010/41/EU)
- Access to and the supply of goods and services (Directive 2004/113/EC)
- Pregnancy Directive (92/85/EEC)
- Burden of proof (97/80/EC)
- Part-time Work Directive (97/81/EC)
- Parental Leave Directive (2010/18/EU)
- **Recast Directive (2006/54/EC)**

Directives – Other grounds

- The Racial Equality Directive (2000/43/EC)
 - scope includes employment, social protection and social advantages, education, and goods and services available to the public, including housing
- The Framework Directive (2000/78/EC)
 - field of employment and occupation only, but covers the grounds of religion or belief, disability, age and sexual orientation

Patchwork - grounds

- Widest coverage – **Race** - applies to employment and occupation as well as goods and services
- Medium coverage - **Sex** – applies to employment and occupation as well as goods and services, but limitations: 'should not apply to the content of media or advertising nor to public or private education.'
- Lowest coverage – **Other grounds** – employment and occupation only

Toolkit

- Direct discrimination
- Indirect discrimination
- Harassment on ground/sexual harassment
- Instruction to discriminate; victimization
- Discrimination by association (*Coleman*)
- Objective liability (*Dekker*)
- Hypothetical comparator
- Allows for positive action
- Shift of burden of proof
- Penalties must be 'effective, proportionate and dissuasive' (Art 25 Recast Directive)

Effect of directives

- Vertical direct effect (against the state) -> disapplication
- Horizontal direct effect not possible, BUT
- Indirect effect
- Direct applicability – national courts have to apply

Role of CJEU

How do cases get to the CJEU?

- Commission action
 - Transposition vs implementation
- Preliminary reference
 - In a pending case before a 'court or tribunal'
 - Typically no chance to ask for an equality body
 - Nor for administrative bodies (Labour Inspectorates)
 - But even with court litigation
 - The decision to ask is in the hands of the court, not litigants
 - And strictly speaking only last instance courts have to ask

ECHR

- Art 14: “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.”

ECHR

- Art 14 – non-autonomous right, but wide ambit test; not in horizontal relations
- Protocol 12 – general prohibition of discrimination (independent); not in horizontal relations
- Domestic courts do not apply directly (in most jurisdictions)

Normative sources

The equality project suffers from a 'no problem' problem (Deborah Rhode):

- Denial of inequality
- Denial of injustice (nature, choice)
- Denial of responsibility
- Anti-discrimination law is premised on recognizing all three, but it often clashes with extra-legal assumption which have not caught up.

The Anti-
Goldilocks
Understanding
of Anti-
Discrimination
Law in Czechia



