

EU non-discrimination legal framework

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I. EU treaties and EU charters

1. EU-treaties (TEU and TFEU)

a) Equality: a component of a common foundation of values

Art. 2 of TEU: 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.

Regulatory background

- The Treaty of Rome (1957) only banning discrimination on the grounds of nationality (Art. 7 of the Treaty of Rome, now Art. 18 of the TFEU) and gender (Art. 119 of the Treaty of Rome, now Art. 157 of TFEU)
- Maastricht treaty (1993, Art. F, Para. 1 TEU, previous version) with reference to the European Convention on Human Rights (1950)
- Amsterdam treaty (1999) banning discrimination on the basis of gender; objectives (Art. 2 and 3 of the Treaty of Rome, now Art. 8 of the TFEU); competencies (Art. 13, now 19 of the TEU) against discrimination on the basis of gender, race, ethnic origin, religion/views, disability or age)
- Lisbon treaty (2009) Founding of values Art. 2 (from the failed EU Constitution of 2004), competencies: Art. 19, Art. 10 of the TEU: horizontal clause for all forms of discrimination

Background on regulations in Art. 2 of TEU

- Regulatory content:
- The EU pledges to achieve these values if member-states commit “serious” violations of these values
- Art. 7 of TEU -> Suspension of rights, e.g., voting rights in the Council
- Candidate countries must adhere to these values (Art. 49 of TEU)

b) Values in concrete terms

TFEU:

aa) Art. 8 TFEU: the “horizontal clause”: Pledge of a general objective for action (both TEU and TFEU in all areas of competence)

“In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”

Background on the standard

- Background ECJ case law from the 1990s (e.g., 17.10.1995 C-450/93 Kalanke, absolute preference of women is against EU law; elimination of de facto inequalities)
- However, no subjective law (other than Art. 157, Para. 1 of TFEU) binds EU member-states alone

bb) Art. 10 of TFEU:

“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.”

- Objectives for EU institutions
- No mandate for discriminatory measures in favour of minorities (argument based on the special regulation in Art. 157 IV of TFEU)

cc) Art. 19 of TFEU

Competencies of the Council to ***“take appropriate action” (“may take”*** under EU competency and with the European Parliament’s consent), ***action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”***

- Previously Art. 13 EU (now, a strong role for the European Parliament)
- Only within the framework of legislative powers (Art. 288 of TFEU) of the EU (narrower than Art. 18)
- Anti-Racism Directive 2000/43/EC, Anti-Discrimination Directive 2000/78/EC, Equal access by gender to goods and services (2004/113/EC)

dd) Art. 18 of TFEU

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.”

- A hallmark of the internal market
- Immediate applicability in subjective law, binding on EU institutions and member-states; standards for competencies

2. EU-charters

How do European basic rights work?

Under Art. 6 I of TEU (charters and treaties are of equal rank) as part of European primary law

So how does the Charter of Fundamental Rights of the European Union (CFR) work?

E.g., Art. 21 of CFR (non-discrimination), Art. 23 of CFR (gender), and Art. 25 of CFR (age)

Art. 51 of CFR is important:

Only effective with regards to EU institutions, bodies and agencies (e.g., when transposing directives) and with regards to member-countries when implementing EU law

That rules out appeals under CFR for collective bargaining violations, for example (e.g., forced retirement at age 57); in this case, what would be the proper legal approach?

More on Art. 51 of CFR

But Art. 21 of CFR applies to national courts under ECJ 11.9.2018 C-68/17 Margin no. 69 et seq.:

“The prohibition ... now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law (...) Accordingly, in the main proceedings, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision.

II. Anti-discrimination directives (selection)

Various scopes

- **Employment and occupation**
 - 2000/78/EC** (Religion/opinions, disabilities, sexual orientation)
 - 2006/54/EC** (gender)
- **Access to goods and services**
 - 2004/113/EC** (gender)
- **Employment and occupation, access to goods and services, education, social protection**
 - 2000/43/EC** (race, ethnic origin)

Applicability of directives

- Art. 288, Para. 3 of TFEU binds member-states directly to implementing the directives
- Direct application to individuals only with “self-executing norms” after the implementation deadline
- Principle of age discrimination (ECJ C-144/04) as a general legal principle has a direct impact on the individual

Procedure under Art. 256 *et seq.* of TFEU

The most common procedure:

Submission by national courts to the ECJ in accordance with **Art. 267 of TFEU** (interpretation treaties, interpretation and applicability of acts, bodies, institutions and other agencies). The national court of last instance must (Para. II) / court of instance may (Para. 2) submit.

With the exception of actual for annulment (Art. 263, Para. 3 of TFEU), individuals may not appeal to the ECJ.

In practice: the 2018 Fundamental Rights Report of the European Agency for Fundamental Rights

Discrimination remains a reality (selection):

Age discrimination (call for extending the scope of goods and services)

Discrimination on the basis of ethnic origin or religion: EU-MIDIS II 2017: 39% of the Muslim population feels discriminated against, 35% of women feel this is due to the way they dress)

Equal treatment for lesbian, gay, bisexual, trans and intersex persons

Equal treatment for disabled persons, including accessibility (implementation of UN Convention on the Rights of Persons with Disabilities)

Gender pay gap

Examples from case law

- Headscarf ban (ECJ C-157/15 Rs. Achbita, C-188/15 Bougnaoui; case numbers BAG 13.1.2019 10 AZR 299/18)
- Gender pay gap (structural discrimination, Burden of proof: ECJ statistics: 27.10.92 C-127/92 Margin no. 14) : "...when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex."
- Third gender (German Constitutional Court 10.10.2017): Civil status must allow "other"; change in law.

III. International instruments

1. General regulations

a) UN Charter, Art. 1 (26.6.1945)

The United Nations sets out the following goals: ...

3. International cooperation to resolve international economic, social, and cultural problems in a humanitarian manner, and to promote and ensure protection of human rights and basic freedoms for all persons without regard to their race, gender, language or religion; ...

b) Universal Declaration of Human Rights (10 December 1948)

Art. 2 :

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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Background

The legacy of the second world war, Nazism, and a ban on discrimination as a human right



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Meaning

- UN charters are legally binding treaties
- The Universal Declaration of Human Rights is, as such, only a “recommendation”, but has customarily been legally binding and referred as a basis for directives
- But the “International Pact on Civil and Political Rights” is legally binding (1966, taken up in Art. 2 of the Universal Declaration of Human Rights)
- Binding status on member-states

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c) European Convention of Human Rights

- Convention of the Council of Europe, 1950
- Prohibition of discrimination, 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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- Procedure Review of the ECHR, binding on EU member-states (e.g., review of national rulings on violations of the European Human Rights Convention; example of ECHR 21.7.2015 18766/11)

2. Individual agreements

- a) ILO Convention 111 (1958) Equality (race, color, gender, belief, political opinions, national origin, social origin) in employment and occupation**
- ILO, a special UN organisation (1949)
(originally the League of Nations, 1919)
 - international labour standards
 - agreements must be ratified
 - Significance of interpretations of EU law (e.g., EC 4 Directive 2000/78/EC)

b) UN Convention on Persons with Disabilities (2006)

- Ratified in Germany and the EU in 2008 (binding on institutions by virtue of Art. 216 of TFEU)
- According to ECJ (C-335/11 with mental illnesses) applicable to the concept of “disability”

Article 1, Clause 2 of the convention: “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

- Participation rights under Art. 26 *et seq.* of the convention
- Accessibility under Art. 9 of the convention
- Art. 2, Para. 2 of the convention: entitlement to “reasonable accommodation” for participation (amendment, for example, to the German Equal Treatment Act, as well as to new regulations on the EU level)

IV. Summary

- I. A ban on discrimination: a basic human right
- II. Protection against discrimination as a common European value
- III. National responsibility to ensure and institutionalise protection against discrimination

