

# The EU legal framework on equality

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\*THIS PRESENTATION REFLECTS SOLELY THE OPINION OF THE AUTHOR



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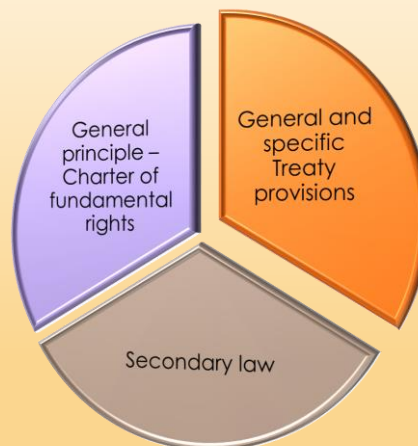
# THE ORIGINS OF EU EQUALITY LAW

Treaty Foundations: Equality as an instrument of functionalism and economic integration

- ▶ Fundamental Freedoms
  - non discrimination on grounds of **nationality**
  - first case law on nationality discrimination setting the conceptual ground
  
- ▶ Article 119 TCEE : Equal pay for equal work
  - Case law: Defrenne v. Sabena saga
  - Shifting from the economic to the social perspective
  - Direct effect of the prohibition of discrimination

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# The structure of EU equality law



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## The Treaty Legal framework

- **Nationality** discrimination
  - ❖ fundamental freedoms
  - ❖ EU citizenship
  - ❖ Third country nationals and immigration policy?
- **Gender** equality:
  - ❖ Art 2 TUE > founding value
  - ❖ Art 3(3) TUE > objective
  - ❖ Arts 8, 9 and 10 TFEU > transversal provisions
  - ❖ Article 154 TFEU > equal pay for equal work ... and much more!
- Legal Basis for general equality policy:
  - ❖ Article 19 TFEU : **sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation**
- **Other** manifestations of equality / non-discrimination all throughout the Treaty (equality between Member States (and their languages), social law, agricultural policy, competition law, etc)

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## Equality and non-discrimination as a Principle

- Equality as a principle well before the Charter (Mangold)
- Codification in the Charter:
  - **Article 20 : Equality**
    - Everyone is equal before the law
  - **Article 21: non-discrimination**
    - (1) Any discrimination based on any ground such as sex, race, color, 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**
    - 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 favor of the underrepresented sex

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## Secondary law

- **Nationality discrimination:** free movement law (and to some extent, immigration and asylum law instruments which contain equal treatment provisions)
- **Sex discrimination**
  - The 70s Directives: employment, social security
  - 86 Directive on self-employed (replaced in 2010)
  - Directive 2004/113 access to and supply of goods and services
  - Directive 2006/54 'recast' directive in the field of employment
  - Social protection directives: pregnant workers; parental leave; work-life balance Directives
- Discrimination on the basis of **race** in the field of employment: Directive 2000/43
- Discrimination on the basis of **protected grounds** the field of employment: Directive 2000/78
- **Other** equality and non-discrimination manifestations: non-discrimination between different types of workers (part-time, fixed term...)

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## Sex Discrimination as the flagship of EU anti-discrimination policy

- The first **true EU law fundamental rights policy** (E. Muir)
- Innovative **case-law** of the ECJ since the 70 transforming sex equality from an economic principle into a social principle (e.g. the Defrenne saga)
- **Instruments** beyond the prohibition of discrimination and formal equality: positive discrimination; burden of proof; prohibition of harassment; sanctions; remedies
- A field still full of **challenges:**
- (just some examples)
  - ❖ The application of sex discrimination principles to gender reassignment – *Case C-451/16 MB v Secretary of State for Work and Pensions*
  - ❖ The challenges attached to the special condition of women during maternity: *Case 184/83 Hofmann* and *Case C-463/19 Syndicat CFTC*
  - ❖ The potential misuse of social discrimination E.g. *Case C-450/18 Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*
  - ❖ Genuine and determining occupational requirements or perpetuating social stereotypes?

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## Discrimination grounds: differentiation or hierarchy?

- Different regulation of different suspect grounds in secondary law
- Broader scope : race Directive (beyond employment and training, also covers social protection and social advantages ,education, access to goods and services
- Justifications and exceptions
  - ❖ Narrower for race and ethnicity
  - ❖ Broader justifications and exceptions possible with regard to age (art. 6 of Dir. 2000/78: direct discrimination allowed if justified b legitimate aim, including employment policy, labor market; retirement ages)
- Reasonable accommodation (only for disability)

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## The Charter of Fundamental Rights

- Same **legal value** as the Treaties
  - e.g. standard of legality for EU acts: *Case C-236/09 Association Belge des Consommateurs Test-Achats*
- **Scope** of application:
  - Difficult determination according to Article 51(1) of the Charter.
  - The Equality directives trigger the Charter principles of equality and non-discrimination, but not only...
- All the **attributes** of EU law: primacy, conform interpretation; **direct effect**. BUT – problematic issue of distinction between rights and principles

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# The Charter of Fundamental Rights

## - Horizontal Direct Effect:

- Banned with regard to the Equality Directives (due to the features of directives)
- Recognised in *Case C-144/04 Mangold* on the basis of the principle of non-discrimination on the basis of **age**
- confirmed in *Cases C-555/07 Küçükdeveci* and *C-441/14 Dansk Industri (Ajos)* (also age cases)
- generalized with regard to other "protected grounds": religion in *C-414/16 Egenberger*; *C-68/17 IR* and *C-193/17 Cresco Investigation*
- What about other articles of the Charter? Is Article 21 special?
  - ❖ Also article 47 and article 31 *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871) and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874).
  - ❖ Not all provisions of the Charter: Article 27 - *Case C-176/12, Association de médiation sociale*