



# The EU legal framework on equality

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1

1



# Overview

- **Equality in Union Law**
  - Primary law
  - Secondary law
  - Charter of Fundamental Rights
  - Side note: Relationship between National law and Union Law
- **International Instruments**

2

2



- Sources of EU Law
  - Primary Law
  - Secondary Law
- EU as a new legal order of international law/ a legal order sui generis

3

3

## Historical development



- Equal pay as an element ensuring the Single Market (harmonisation of production costs)
- Article 119 of the EEC Treaty [Article 141 EC, now: Article 157 of the TFEU] "equal pay ... for equal work or work of equal value" (since the Treaty of Rome)
  - Defrenne decisions of the ECJ; Judgment of 8 April 1976, Defrenne-II (Case 43/75): The Court recognised the direct effect of the principle of equal pay for men and women and ruled that the principle applies not only to the action of public authorities, but also extends to collective agreements intended to regulate paid labour.
- First Directives on implementation of equality:
  - 75/117/EEC (equal pay for men and women)
  - 76/207/EEC (equal treatment in access to employment and working conditions)
  - [- 86/378/EEC (equal treatment in occupational social security schemes)
  - 97/80/EC (burden of proof in cases of discrimination based on sex)]
  - All four now brought together and recast in Directive 2006/54

4

4

## Historical development



Treaty of Amsterdam, 1999: Article 13 of the EC treaty (now Article 19 of the TFEU):

Introduction of the power to take action to combat discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

With this, extension of the legislation in the area of equal treatment

5

5

## Primary law today



- Treaty on European Union (TEU): Articles 2 (the Union's values) and 3 III (the aim is to promote equality between women and men)
- Treaty on the Functioning of the European Union (TFEU): Articles 8 (aim), 10, 19 und 153 (legislative powers), 157 (equal pay and legislative powers).

6

6

## Secondary law



Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

The concepts of direct and indirect discrimination, harassment and sexual harassment is legally defined in this Directive. Employers are required to take preventive measures to combat sexual harassment. Sanctions against discrimination are strengthened, and provision is made for the creation of public bodies in Member States to promote equality between women and men.

Judgment C-167/12, CD (Maternity leave for mothers of surrogate children)

Discrimination criteria: sex

Personal Scope: All natural and legal persons in the EU, employers and the self-employed, public and private employers, civil servants

Material scope: Employment and occupation

7

7

## Secondary law



Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Directive 2019/1158/EU of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

8

8

## Secondary law



Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;

Judgment, Test Achats, C-236/09

Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, and repealing Council Directive 86/613/EEC

9

9

## Secondary law



Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Discrimination criteria: race or ethnic origin

Personal scope: persons, as regards both the public and private sectors, including public bodies

Material Scope: very broad, i.a. employment, self-employment, social protection, education, access to and supply of goods and services

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Discrimination criteria: Religion or belief, age, disability, sexual orientation

Personal Scope: all persons, as regards both the public and private sectors, including public bodies

Material Scope: Employment and Occupation

10

10

## Charter of Fundamental Rights



A. The EU Charter and its legal value

B. The scope of application and interpretation in national legal orders

C. The issue of horizontal direct effect of Article 21 of the Charter and the evolution of the CJEU case-law

11

11

## Overview



A. The EU Charter and its legal value

- Historical Development:
  - General Principles of EU law
- The Charter of Fundamental Rights
- Legal value of the Charter

12

12

## Historical development



### Historical development of fundamental rights in EU law

Fundamental rights as general principles of EU law

- Constitutional traditions common to Member States
- European Convention on Human Rights

Nold, case 4/73; Stauder, case 29/69; Internationale Handelsgesellschaft, case 11/70

13

13

## Historical development



- Charter of Fundamental Rights was drafted by the European Convention

- Solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000

14

14

## Charter of Fundamental Rights



- With the Treaty of Lisbon (2009) the Charter was given the status of binding EU primary law and has the same legal value as the Treaties (Article 6 para. 1 TEU).

15

15

## Current Fundamental Rights Protection



1. Article 6 para. 1 TEU: Charter of Fundamental Rights
2. Article 6 para. 2 TEU: Accession to ECHR
3. Article 6 para. 3 TEU: General Principles of EU law  
„Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.“

16

16



# Charter of Fundamental Rights



- PREAMBLE
- DIGNITY
- FREEDOMS
- EQUALITY
- SOLIDARITY
- CITIZENS' RIGHTS
- JUSTICE
- GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

17

17

# Charter of Fundamental Rights



- Charter contains Rights and Principles
- Article 52 para. 5:
  - “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”
- ECJ, Dominguez, C-282/10; Glatzel; C-356/12

18

18

## Charter of Fundamental Rights



- Antidiscrimination in the Charter:  
Chapter III provisions relating to equality  
Article 21 para. 1 non-discrimination

"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."

19

19

## Charter of Fundamental Rights



### B. Scope of application and interpretation in national legal orders

20

20

## Charter of Fundamental Rights



- Scope of Application: Article 51 para 1

"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the **Member States only when they are implementing Union law.** They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

21

21

## Charter of Fundamental Rights



- Article 6 para. 1 TEU and Article 51 para 2 Charter:

The Charter does not extend the competences of the EU as defined in the treaties or the field of application of EU law beyond the powers of the Union or establish any new power or task for the Union.

22

22

# Charter of Fundamental Rights



- Scope of Application: Article 51 para 1
  - Institution and Bodies of the Union
    - ECJ, Ledra Advertising, C-8/15 P
    - ECJ, Test-Achats, C-236/09
    - ECJ, Digital Rights Ireland, C-293/12
  - Member States?

23

23

# Charter of Fundamental Rights



- Application to Member States?
- Article 51 para 1: „implementation“
- Different language versions:
  - English: „implementing“
  - French: „mise en oeuvre“
  - German: „Durchführung“ (execution)
  - Italian: „nell'attuazione“
  - Spanish: „cuando apliquen“

24

24

## Charter of Fundamental Rights



- Meaning of Art. 51 para. 1?
- Explanations to the Charter (OJ C 303, 14.12.2007, p. 17–35)
- Case-law of the ECJ before the existence of the Charter

25

25

## Charter of Fundamental Rights



First decision of the ECJ after entry into force of the Charter (26.02.2013, Åkerberg Fransson, C-617/10):

- Art. 51(1) confirms the Court's case-law
- Fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations
- if national legislation falls within the scope of European Union law, the Charter applies and the Court, when requested to give a preliminary ruling, must provide all the guidance as to the interpretation needed
- The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter

26

26

## Charter of Fundamental Rights



- Factors proving existence of a national measure 'implementing EU law'
  - EU law places one or several specific obligations on the Member State, or the national situation is covered by a specific rule of EU law
  - Obstacle to or restriction of an EU right or denial of the genuine enjoyment thereof, e.g. restriction of a fundamental freedom (e.g. free movement of goods)

27

27

## Charter of Fundamental Rights



- EU law places one or several specific obligations on the Member States, or the national situation is covered by a specific rule of EU law
  - ECJ, 21.12.2011, N.S., C-411/10
  - ECJ, 10.07.2014, Julian Hernández a.o., C-198/13
  - ECJ, 06.03.2014, Siragusa, C-206/13
  - ECJ, 01.12.2016, Daoudi, C-395/15
  - ECJ, 16.05.2017, Berlioz Investment Fund, C-682/15

28

28

## Charter of Fundamental Rights



- ECJ, Siragusa, C-206/13
  - Is the national legislation intended to implement a provision of EU law?
  - What is the nature of that legislation?
  - Does the legislation pursue objectives other than those covered by EU law, even if it capable of indirectly affecting EU law?
  - Are there specific rules of EU law on the matter or capable of affecting it?

29

29

## Charter of Fundamental Rights



- Obstacle to or restriction of an EU right or denial of the genuine enjoyment thereof
  - ECJ, 30.04.2014, Pflieger, C-390/12
  - ECJ, 13.09.2016, Rendón Marín, C-165/14
  - ECJ, 21.12.2016, AGET Iraklis, C-201/15

30

30

## Charter of Fundamental Rights



### C. The issue of horizontal direct effect of Article 21 of the Charter and the evolution of the CJEU case-law

31

31

## Charter of Fundamental Rights



- Antidiscrimination in the Charter:  
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32

32



## Direct effect I



- Judgment *van Gend en Loos* (case 26/62, 1963)  
EU law may enable individuals to directly invoke a European Law provision before a national Court
- General condition: provision has to be self-executing

33

33

## Direct effect II



### Direct effect of primary law

Fundamental freedoms

„Equal pay for equal work“ (art. 157 TFEU)

### Direct effect of secondary law

Regulations

Directives: direct effect only in exceptional cases

34

34

## Direct effect III



- Direct effect of Directives

Conditions:

- Expiration of the deadline for transposition
- Unconditional and sufficiently precise
- No obligations for individuals

35

35

## Direct effect IV



- In principle only vertical direct effect (state-citizen)

- Exception: horizontal direct effect (between individuals)

- Primary law

- Art. 157 TFEU („equal pay for equal work“)
    - Art. 101 TFEU (cartels prohibition)
    - Fundamental freedoms? Partially: trade unions, sports federations

36

36

## Direct effect V



- Horizontal direct effect of Directives/Fundamental Rights?

*Mangold* (C-144/04)

*Kücükdevici* (C-555/07)

*Dominguez* (C-282/10)

*AMS* (C-176/12)

*IR* (C-68/17)

*Egenberger* (C-414/16)

*Max-Planck-Gesellschaft* (C-684/16)

37

37

## Horizontal Direct Effect



- *Kücükdevici* (C-555/07), para 43:

“...European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78 ...”

38

38

## Horizontal Direct Effect



### ▪ Egenberger (C-414/16)

Prohibition of all discrimination, which is laid down in Article 21(1) of the Charter, is sufficient in itself [and does not need to be made more specific by provisions of EU or national law] to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law

Consequence: guarantee the full effectiveness of those articles by disapplying any contrary provision of national law

39

39

## Horizontal Direct Effect



### ▪ ASM (C-176/12)

Article 27 Charter ('Workers' right to information and consultation within the undertaking')

Wording of Article 27: in order to be fully effective, it must be given more specific expression in European Union or national law.

Difference with Küçükdeveci in so far as "the principle of non-discrimination on grounds of age is sufficient in itself to confer on individuals an individual right which they may invoke as such"

40

40

# Indirect effect



- Means in particular:
  - Duty to interpret national law in compliance with EU law
    - „This obligation permits national courts to ensure the full effectiveness of European Union law when they determine the disputes before them.“ (Dominguez, C-282/10, para. 24)
    - Includes obligation to change established case-law (DI, C-441/14, para. 34)
    - No interpretation *contra legem*
  - State liability

41

41

# State liability



- Conditions
  - Legislation of EU law intends to confer rights on individuals
  - Sufficiently serious breach
  - Direct causal link between the breach and the loss suffered

judgments *Frankovich u. Bonifaci* (Rs. C-6/90 u C-9/90); and state liability for not introducing a reference for a preliminary ruling to the ECJ *Köbler* (Rs. 224/01).

42

42

## Charter of Fundamental Rights



- Art. 52 para. 3 Charta – Homogeneity Clause  
Fundamental rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those.

43

43

## Charter of Fundamental Rights



- Art. 53 Charter – Level of Protection  
"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

13

44

## International Instruments



- Council of Europe:
  - ECHR (Article 14 und Protocol No. 12) and the European Social Charter; the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)
- United Nations:
  - Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
  - Convention on the Elimination of all Forms of Racial Discrimination (CERD)
  - Convention on the Rights of Persons with Disabilities (CPWD)
- International Labour Organization (ILO):
  - e.g. Conventions no. 100 (equal remuneration) and no. 111 (Equal treatment in employment)

45

## Relationship between International Law and Union Law



- International Conventions ratified by the EU form an *'integral part'* of EU law, insofar as the subject matter of a Convention falls within the EU's powers. (Air Transport Association of America, C-366/10)
- For example: United Nations Convention on the Rights of Persons with Disabilities, ratified by the EU, hence Directive 2000/78 "must, as far as possible, be interpreted in a manner consistent with that convention", cf. judgment of 11 April 2013, Ring, C-335/11
- See also Opinion of AG Wahl, Mascellani (C-221/13) regarding the ILO Convention

46

46



Thank you very much for your attention!