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The EU Legal Framework of Equality

ERA GENDER EQUALITY SEMINAR FOR LEGAL PRACTITIONERS

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1

Plan of the presentation

- I. Sources of equality law
- II. Definitions of discrimination
- III. Equality and non-discrimination in the EU treaty law
- IV. EU equality directives
- V. Charter of Fundamental Rights in practice

2

(I). Sources of equality law

International law

EU law

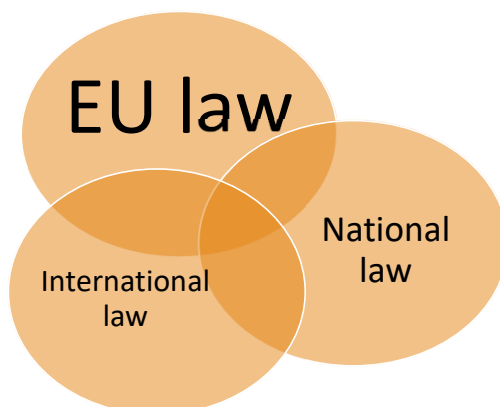
National law

QUESTIONS:

- primacy of EU law v. supremacy of national constitutions – what prevails?
- who decides about conflicting interpretations?
- when does a case fall within the ambit of the EU law?
- if a case is regulated by the national law, is this law implementing the EU law (directive)?
- If yes, which part of the EU law?
- Is the national law attaining the objectives set in the EU directive?

3

(I). Multiple centers of legal protection



- common values
- separate legal orders / separate processes of law making
- separate sources of interpretative authority
- interrelated, but mostly independent
- partly overlapping
- often cross-referencing and cross-fertilizing
- potentiality of conflicts
- „forum shopping“ (ECtHR v. CJEU)

4

(I). Sources of equality law

INTERNATIONAL LAW

- **United Nations human rights treaties**, including
 - Convention on the Elimination of All Forms of Discrimination Against Women
 - Convention on the Rights of People with Disabilities
- **ILO Conventions**
- **Council of Europe treaties**, including
 - European Convention of Human Rights evolving in the case-law of the European Court of Human Rights
 - Istanbul Convention Istanbul Convention on preventing and combating violence against women and domestic violence

EUROPEAN UNION LAW (EU Treaties, Directives, and Treaties ratified by the EU)

NATIONAL LAW (Constitution, laws, including laws implementing EU law)

5

(II). UN treaty definition of discrimination

CEDAW: „discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CRPD: „Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.



6

(II). Prohibition of discrimination in the ECHR

Article 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.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

7

(II.) Prohibition of discrimination in the EU law

No treaty-based definition of discrimination

Equality understood both as **equal treatment** and **substantive equality** (including positive measures aimed to redress existing inequalities)

Discrimination takes place when:

two same subjects are treated differently, or two different subjects are treated equally

and

There is no justification for such a treatment

Justification requires:

- a legitimate aim;
- proportionate means to attain it.



8

(II.) Definition of discrimination in CJEU case-law

C-356/12 *Glatzel* [2010]

„The principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression. According to settled case-law, that principle requires the EU legislature to ensure, in accordance with Article 52(1) of the Charter, that **comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (...)**. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned (...).”

9

(III.) Equality and non-discrimination in the EU treaty law

value common to the Member States - Art. 2 TEU

objective of the EU - Art. 3(3) TEU

task of the EU:

- to promote equality, including external relations - Art. 21(1) TUE
- to eliminate inequalities, and to promote equality, between men and women, in all its activities – Art. 8 TFUE
- to combat discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**, in defining and implementing its policies and activities - Art. 10 TFUE

area of regulatory competence - to harmonize laws combating discrimination based on the closed list of grounds: **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation** - Art. 18(2) and 19 TFUE

10

(III.) Protected characteristics in the EU treaty law

Prohibition of discrimination on these grounds is harmonized in EU secondary laws:

sex

nationality

racial or ethnic origin,

religion or belief,

disability,

age

sexual orientation

Art. 21 of the Charter of Fundamental Rights prohibits discrimination – in case of EU MS only in the area of implementation of EU law with regard to an open list of grounds, including:

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 ...

See *C-528/13 Leger* – prohibition of discrimination with regard to sexual orientation must be ensured in national laws implementing the EU Directive (on blood safety).

11

(III.) Prohibition of discrimination with regard to nationality in EU treaty law

Art. 21(1) TFUE - prohibition of discrimination on the basis of nationality (applying to all fields of the EU law)

Art. 40(2)(2) TFUE - prohibition of discrimination in the Common Agricultural Policy

Art. 45(2) TFUE - prohibition of discrimination in regard to freedom of movement

Art. 49 TFUE - prohibition of discrimination with regard to freedom to provide services

Art. 56(1) TFUE - prohibition of discrimination with regard to freedom of establishment

Art. 110 TFUE - prohibition of discrimination with regard to taxation of goods



12

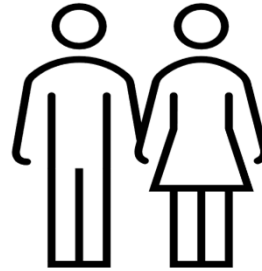
(III.) Gender equality in EU treaty Law

Art. 2 and 3(2) TUE – promotion of equal treatment between men and women

Art. 157(1) TFUE (ex-Art. 119 TEEC, Art. 141 TEC) – **equal pay for men and women for the same work or work of equal value**

Defrenne II [1976] direct horizontal effect of the principle of equal pay

Defrenne III [1978] the prohibition of discrimination based on sex is the general principle of the Community law



Art. 157(4) TFUE – **positive measures**

13

(III). Equality in the Charter of Fundamental Rights

Art. 20 CFR - equality before the law

Art. 21 CFR - prohibition of discrimination

Art. 23 CFR - equality of men and women

Art. 24 CFR – rights of the child

Art. 25 CFR – rights of the elderly (principles)

Art. 26 CFR – integration of persons with disability (principles)

Art. 33 (2) CFR – protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child

Art. 34 CFR – right to social security benefits in case of maternity

14

Art. 21 CFR Prohibition of 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.

15

Art. 23 CFR Gender equality

1. Equality between women and men must be ensured in all areas, including employment, work and pay.
2. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

16

(IV.) EU gender equality directives

Council Directive (EEC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975]

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] as amended

Council Directive (EEC) 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979]

Council Directive (EEC) 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986]

Council Directive (EEC) 86/613 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 [1986]

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]

Council Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex [1998]

Council Directive (EC) 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC—Annex: Framework Agreement on part-time work [1998]

17

(IV.) EU equality directives

Directive 79/7/EEC – Statutory Social Security Schemes

Directive 1992/85/EEC – Pregnant Workers

Directive 2010/118/EU (repealing 96/34/EC) - Parental Leave

Directive 1997/8/EC – Part-Time Work

Directive 1999/70/EC – Fixed-Term Work

Directive 2003/109/EC – Third-Country Nationals

Directive 2010/41/EU (repealing 86/613/EEC) - Self-Employment

Directive 2019/1158 (repealing 2010/18/EU) - Work-Life Balance

18

(IV.) 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 2000/78/EC – Framework Equality Directive (prohibiting discrimination on the basis of religion, age, disability and sexual orientation in employment and occupation)

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); Directive 76/207/EEC (equal treatment of men and women in employment) as amended; Directive 86/378/EEC (occupational social security pension schemes) as amended; and Directive 97/80/EC (the burden of proof).

19

(IV.) Hierarchy of the protected grounds

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

20

(V.) Charter in practice

Art. 51 Field of application of the Charter

- EU institutions and bodies
- Member States only when implementing the EU law

The Charter applies to EU institutions whenever they act and to MS whenever they implement EU law (or act within its scope)

C -617/10 Akerberg Fransson

„The Court has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court [...] must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.”

„national authorities and courts remain free to apply national standards [...], provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”

21

(V.) Charter in practice

Art. 52 Scope and interpretation of the Charter

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter **must be provided for by law and respect the essence of those rights and freedoms**. 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 Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

(...)

22

(V.) Charter in practice

The Charter does not expand the material scope of EU directives when applied to MS, for example

C-13/05 Navas (sickness)

C-167-12 X. and C-363/12 Z. (surrogacy leave)

The Charter reaffirms the fundamental value of equality and non-discrimination recognized as the general principle of the EU law

- The general principle of gender equality as confirmed in the Charter and can be used against the EU institutions to invalidate the EU secondary law

C-236/09 Test Achats (insurance premiums and benefits)

Recent case-law confirms that prohibition of discrimination enshrined in Article 21 has direct horizontal effect

23

(V.) Horizontal application of the principle of equal treatment / Article 21 of the Charter

C-144/04 Mangold [2005]

- objective justification for using fixed-term contracts (unless over 58), private employment relationship
- prohibition of discrimination with regard to age => „the principle of non-discrimination on grounds of age“; „the principle of equal treatment in respect to age“ => recognized as the general principle of EU law and applicable even before the deadline for transposition of the EU Directive (2000/78/EC)

„It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.“

C-555/07 Küçükdeveci [2010]

- calculation of the period of notice no account of employment before the age of 25
- after the deadline for transposition
 - „In those circumstances, it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, *Mangold*, paragraph 77).“

24

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Küçükdeveci

„Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (...)”

Milkova [2017]

„a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category (...). That obligation persists regardless of whether or not the national court has been granted competence under national law to do so (...).

25

(V.) Charter in practice

C-414/16 *Egenberger* [2018]

- „The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).”
- „As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals”

C-193/17 *Cresco Investigation* [2019]

- „Article 21 of the Charter must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to public holiday pay where the employer has refused to approve such a request.”

C-804/18 *WABE* [2021]

- „An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers”
- „the mere desire of an employer to pursue a policy of neutrality – while in itself a legitimate aim – is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate”

26

(V.) Charter in practice

see also C-176/12 *Association de médiation sociale (AMS)* [2004] – the CJEU did not confirm the horizontal effect of Article 27 of the Charter concerning the workers' right to information and consultation within the undertaking; in this case an injured party can claim before the national court to compensation for damage suffered due to the lack of transposition of EU law (Frankovich principle)

27

Practical notes

A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act.

The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

- purposive interpretation of the principle of equality:

C-192/18 *European Commission v. Poland: different retirement age for judges and prosecutors*

- pension scheme for public servants falls within the scope of the principle of equal pay set out in Article 157 TFEU if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, that condition being satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary

C- 356/21 *TV*

- „the concept of 'conditions for access to employment, to selfemployment or to occupation', which restricts the occupational activities falling within the scope of Directive 2000/78, must be construed broadly, covering the access to any occupational activity, whatever the nature and characteristics of such activity. That interpretation not only follows from the text of Directive 2000/78, but is also confirmed by its objectives. In that respect, the Court notes that Directive 2000/78 seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided. Nevertheless, since activities consisting of the mere provision of goods or services to one or more recipients do not fall within the scope of that directive, the Court specifies that occupational activities falling within the scope of Directive 2000/78, must be genuine and be pursued in the context of a legal relationship characterised by a degree of stability'

28

THANK YOU FOR YOUR ATTENTION!

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