

# EU legal framework on equality

Assoc. prof. Kristīne Dupate  
University of Latvia

## Presentation

- **The concepts:**
  - Non-discrimination
  - Equal treatment vs. equal opportunities
- **Primary law**
- **Secondary law**
  - Scope
  - Non-discrimination grounds
  - Types of discrimination
- **The effects of Article 21 of the Charter of the Fundamental Rights of EU**

## Principle of non-discrimination

- **The term**
  - Equality (positive expression) = non-discrimination (negative expression)
- **The content** (Aristotelian paradigm):
  - persons in similar situations must be treated similarly
  - persons in substantially different situations must be treated differently, according to their difference
- **Non-discrimination traits:**
  - Unchangeable personal characteristic
  - Unchangeable status
- **Discrimination** = less favourable treatment on the basis on non-discrimination trait (-s)
- **Equal treatment vs. equal opportunities**

## Effects of the principle of non-discrimination

- **Protection from discrimination in public (vertical) relationships:**
  - In principle, in all fields
- **Protection from discrimination in private (horizontal) relationships:**
  - Only in the fields defined by the law (for example, protection of discrimination on the grounds of race in employment; no protection against discrimination on the grounds of age with regard to the access to goods and services)

# EU primary law

## *The Treaty on the Functioning of the European Union*

- **Article 19 (ex13)**
- 1. *Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*
- **Article 157 (ex 141)**
- 3. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*
- Articles 19 and 157(3) – provides the competence, not material rights

# EU primary law

## *The Treaty on the Functioning of the European Union*

- **Article 157 (ex 141)**
- 1. *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.*
- 2. *For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*
- *Equal pay without discrimination based on sex means:*
  - (a) *that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*
  - (b) *that pay for work at time rates shall be the same for the same job.*
- 3. *The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*
- Article 157 (1) and (2) - the only material rights under the TFEU

# EU primary law

*The Treaty on the Functioning of the European Union*

- **Article 8 (ex 3(2))**
- *In all its activities, the Union shall eliminate inequalities, and to promote equality, between men and women.*
- **Article 10**
- *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.*
- Articles 8 and 10 - **mainstreaming** obligation

# EU primary law

*The Treaty on the Functioning of the European Union*

- **Article 157 (ex 141)**
- *4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*
- The right of the Member States to adopt positive measures

# EU primary law

Charter of Fundamental Rights of the EU

- **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.

- **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 favour of the under-represented sex

- **NOTE: Article 51. Field of application** – only within the scope of EU competence

## Secondary Law

- **Sex/gender**

- Employment - Directive 2006/54/EC

(codifies 75/117/EEC; 76/207/EEC; 86/378/EEC; 97/80/EC; 2002/73/EC)

- Self-employment - Directive 2010/41/EU (repeals 86/613/EC)

- Social security - Directive 79/7/EEC

- Work - life balance - Directive 2019/1158 (repeals 2010/18/EU);

- Pregnancy and maternity protection in employment -  
Directive 92/85/EC

- Access to and supply of goods and services - Directive  
2004/113/EC

## Secondary Law

- **Race/ethnic origin**
  - Directive 2000/43/EC
- **Disability, age, religion or belief, sexual orientation**
  - Directive 2000/78/EC

## Scope of the EU non-discrimination law

Non-discrimination trait/ field	Employment	Social security	Education	Housing	Goods and services
Sex/gender	X (access to self-employment; extension of the business)	X (limited)	- (except vocational training)	-	X
Race/ethnic origin	X (access to self-employment; extension of the business)	X	X	X	X
Disability, age, religion or belief, sexual orientation	X (access to self-employment; extension of the business)	-	- (except vocational training)	-	-

## Scope of the EU non-discrimination law

- Employment (also self-employment)
- Article 3(1) of Directive 2000/78/EC

*'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the **public and private** sectors, including public bodies, **in relation to:***

- *(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*
- *(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*
- *(c) employment and working conditions, including dismissals and pay;*
- *(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.[...]*

## Scope of the EU non-discrimination law

- The CJEU in case C-356/21 J.K.

*'Article 3(1)(a) and (c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.'*

## EU law. Non- discrimination grounds

- **Sex/gender** also transsexual persons (C-13/94)
- **Race and ethnic origin** – formal/social. More social than legal concept – ethnicity depends on traditions rather than officially defined ethnic origin
  - *[...] the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds [...]* (C-83/14, p.46)

## EU law. Non- discrimination grounds

- **Age** – protects against discrimination on grounds of any age (young and old persons)
- **Sexual orientation** – protects persons of any sexual orientation
- **Religion or belief** – religion and philosophical views
  - *'[...] the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons having a particular religion or belief and those who do not.'* (Joined cases C-804/18 and C-341/19), para.49)
  - *'[...]that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance [...]* (C-188/15)

## EU law. Non- discrimination grounds

- **Disability** – concept defined in case C-13/05:
  - *“the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”*
  - *“a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78”*

## EU law. Types of discrimination

- Direct discrimination
- Indirect discrimination
- Specific exceptions from principle of non-discrimination
- Harassment
- Sexual harassment
- Instruction to discriminate
- Discrimination by association

## Article 21 of CFREU

- Effect of EU primary legal norms
  - Direct effect (*Van Gend Loos 26/62*)
    - Sufficiently clear, precise and unconditional norm has horizontal direct effect
- Effect of CFREU
  - Article 51. Field of application
    - only within the scope of EU competence
    - addressed to EU institution and MS when implementing EU law

## Article 21 of CFREU

- The CJEU (Egenberger C-414/16):

*'76. 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 [...].*

*77. 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 [...].*

*78. Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection 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.*

*79. Consequently, [...] the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles **by disapplying if need be any contrary provision of national law.**'*