

Overview of the existing EU legislation on equality and definitions of key concepts

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Structure of the presentation

- 1) Key concepts of equality
- 2) Sources of EU equality law
- 3) Key concepts of EU equality law

Key concepts of equality

- Formal v. substantive equality
- Equal opportunities
- Equal outcomes
- Discrimination

Key concepts of equality

- The concept of law based on distinctions
- Equality is not IDENTITY
- Requirements of moral justice
- Aristotelian notion of FORMAL EQUALITY „treat like cases alike”
- FORMAL EQUALITY TEST: „treat likes alike, unlikes unlike”
- it is irrational to treat equal cases unequally without sufficient reasons
- Q: **who is alike? When the two cases are equal?**
- Numerical equality: treat all humans according to the same measure
- Formal equality ignores DIFFERENCE

Key concepts of equality

- SUBSTANTIVE EQUALITY takes DIFFERENCE into consideration
- Requirements of redistributive (remedial) justice
- „treat unlike cases alike”
- EQUAL OPPORTUNITIES: remedy at the start (of a race)
- EQUAL OUTCOMES: even the result (of a race)
- Substantive equality supports positive action aimed to compensate substantive (*de facto*) social disadvantages
- Substantive equality gives justification for inclusionary policies, outreach measures, preferential treatment/quotas (which as such could be regarded as violation of formal equality)

Key concepts of equality

- Discrimination is a prohibition of unequal treatment
- Non-discrimination and equal treatment often used interchangeably
- Discrimination is a violation of the principle of equality/equal treatment/non-discrimination when unequal treatment of alike cases (or equal treatment of unlike cases) does not have an OBJECTIVE (unbiased) JUSTIFICATION
- C-149/10 *Zoi Chatzi*, para.63-4 („comparable situations must not be treated differently and (...) different situations must not be treated in the same way unless such treatment is objectively justified”)

Sources of EU equality law

Hierarchy of EU equality law:

- General principles of law – the principle of equality
- Primary Sources:
 - Treaty of European Union
 - Treaty on the Functioning of the European Union
 - Charter of Fundamental Rights of the EU
- Secondary law: EU Equality Directives

Sources of EU equality law

- General principle of equality
- filling the gaps of the EU equality law when applied with regard to EU institutions
- with regard to MS it is required that the case falls within the scope of EU law (i.e. falling within the material scope of a directive – *C-13/05 Navas* (sickness); *C-167-12 X. and C-363/12 Z.* (surrogacy leave).
- General principle of equality with regard to a particular ground:
 - **Gender:** *C-20/71 Sabbatini*; *C-21/74 Airola* – applicable in EU staff cases against the EU institutions; not with regard to MS - against the state and private parties - when there is no applicable EU equality law - *C- 149/77 Defrenne III*
 - but the general principle of gender equality may be used together with the Charter provisions to invalidate the EU secondary law (against EU institutions) – *C-236/09 Test Achats*
 - **Age:** *C-144/04 Mangold*; *yet – C-Kçükdeveci*; *C-447/709 Prigge* - the general principle of non-discrimination is given expression in the Directives and the Charter
 - **Sexual orientation:** *C-147/08 Römer*
 - ...

Primary sources of EU equality law

Treaties

- Art. 2 TEU – equality as a value common to all MS
- Art. 3(3) TEU - equality as a goal for EU
- Art. 8 TFUE („in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women“).
- Art. 10 TFUE (“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.**“)
- Art. 18(1) TFUE - prohibition of discrimination on the basis of nationality (applying to all fields of the EU law)
- Art. 19 (1) TFUE (formerly 13 TEC) – competence provision – a legal basis of EU Equality Directives – restricted to combating discrimination **based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**
- Article 157 (1) and (2) TFUE (formerly 119 TEEC, and 141 TEC) - equal pay of men and women – *see C 45/75 Gabrielle Defrenne*

Charter

- Art. 20 CFR - equality before the law
- Art. 21 CFR - open-ended prohibition of discrimination
- Art. 23 CFR - equality of men and women
- Art. 51 (1) CFR – the application of the Charter to EU institutions whenever they act, and to MS whenever they implement EU law (or act within its scope) - *see C-617/10 Akerberg Fransson*

Secondary sources of EU equality law

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

Hierarchy of the protected grounds in the EU equality law

| | 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 | | | |

Sources of EU equality law

- 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

Questions for a national judge

Q: which law is applicable

- 1). Does the case fall in the scope of the EU law?
- 2) Which source of the EU law applies?
 - C- 221/13 *Macellani* (Gender or Part-Time Directive?)
- 3) Is there a national law implementing the EU law?
 - In absence of national law, shall the judge apply directly the EU law? or
 - In case of doubt as to the compatibility between the national law and the EU equality law, shall the judge ask for the preliminary ruling, or perhaps first challenge the constitutionality of the national law before the constitutional court?
 - In case there is an established interpretation of EU law - the EU equality standard set by the CJEU in the case-law, shall the judge directly apply this standard in a domestic case?

Key concepts of EU equality law

- **Direct discrimination**
- where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation
- Less favourable treatment on a particular prohibited ground is prohibited unless:
 - it is not less favourable;
 - it is not expressly permitted as an exception (genuine and determining occupational qualifications, religious institutions, positive actions)
- Problem of a comparator (C-256/01 *Allonby*) – why do we need a comparator?
- Not required in pregnancy cases (C-177/88 *Dekker*)

Key concepts of EU equality law

- **Indirect discrimination**
- where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary
- Direct discrimination - problem with proving discriminatory intent
- Indirect discrimination - focus on discriminatory impact
- Apparently neutral – part-time work/gender (*C-170/84 Bilka*); suitability test/ethnic origin (ECtHR – *D.H. v. Czech Republic*)
- Establish a presumption / a prima facie case of discrimination
- Problem of statistical evidence
- Problem of justification – proportionality test: 1) a legitimate aim, 2) the means are appropriate to achieve the aim, 3) there are no less restrictive means to achieve this aim, 4) the measure is not excessive (there has been a fair balance struck between disadvantages caused by the measure and the gains from achieving the aim).
- A legitimate must not be related to discrimination (back to direct discrimination)

Key concepts of EU equality law

- *C-167/97 Seymour-Smith and Perez* – establishing a prima facie case of discrimination and justification of indirect discrimination
- „In order to establish whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119 of the Treaty, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.
- If a considerably smaller percentage of women than men is capable of fulfilling the requirement of two years' employment imposed by the rule described (...), it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim.’
- Doubts whether the state can show a legitimate aim: „Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.” (par. 77)

Key concepts of EU equality law

- C-83/14 - *CHEZ Razpredelenie Bulgaria (Nikolova)* – justification of indirect discrimination – up for the national court to evaluate the facts of the case

„such a measure would be capable of being objectively justified:

(1) by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption

only if that measure did not go beyond what is:

(2) appropriate and

(3) necessary to achieve those legitimate aims and

(4) the disadvantages caused were not disproportionate to the objectives thereby pursued.

That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist – (3) or, in the absence of such other means, that that measure prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly (4).”

Key concepts of EU equality law

- Other forms of discrimination:
- **harassment:** where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment
- **sexual harassment:** where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment
- No objective justification possible, no comparator needed
- Harassment in national law
- *Bączkowski v. Poland* (2007); *Paraskeva Todorova v. Bulgaria* (2010)
- **Instruction to discriminate**

Key concepts of EU equality law

- Exceptions (subject to narrow interpretations):
- **GDOQ** – „a difference of treatment which is based on a characteristic related to any of the prohibited grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.“
- C-207/98 *Mahlburg*; C-248/83 *Commission v. Germany* (male-only prisons); C-318/86 *Commission v. Germany* (firearms in police)
- **Religious institutions** - Article 4(2) and (3) Framework Equality Directive
- „Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
- Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.“
- ECtHR and national case-law

Key concepts of EU equality law

- Reasonable accommodation – Art. 5 Framework Equality Directive
- „In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.“
- Article 2 (c) and (d) of the UN Convention of Rights of People with Disabilities (ratified by the EU in 2011)
- „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
- "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

Key concepts of EU equality law

- Justifications of unequal treatment with regard to age – Article 6 Framework Equality Directive
- „(...), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

Key concepts of EU equality law

- Effective remedies
- Prohibition of victimization
- Burden of proof
- Sanctions

Promises, failures and challenges in EU equality law

- Discrimination by association – C-303/06 *Coleman*
- Discrimination by assumption – C-54/07 *CHEZ*
- Establishing the prima facie case – C-415/10 *Galina Meister* („it cannot be ruled out that a defendant’s refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.”)
- Problems to address structural discrimination – C-246/97 *Gruber* (access to child care)
- Hierarchy of equality grounds
- No progress in the adoption of the horizontal directive
- Objections to the adoption of the gender balance directive
- Intersectionality – C-157/15 *Samira Achbita* (pending); C-188/15 *Asma Bougnaoui* (pending)
- Conflict of values: veil debate, reasonable accommodation of conscientious objectors ...
- Limits of the scope of the EU law

Short References:

- The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality. Introduction – available at:
<http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf>
- EU Gender Equality Law. Update 2013 – available at:
http://ec.europa.eu/justice/gender-equality/files/your_rights/eu_gender_equality_law_update2013_en.pdf
- Handbook on European Non-Discrimination Law – available at:
http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf

Thank you for your attention!