



ERA Seminar: APPLYING EU ANTI-DISCRIMINATION LAW

Trier, 19/02/2018

The EU legal framework on equality:

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This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.



Issues to address

- Which are the main legal instruments fighting discrimination at supranational level? Overview & Scope
- Differences and similarities among international, EU and national law.
- How is the international/EU legislation implemented at national level?
- Differences between various grounds of discrimination



Introduction.

- **General Concepts and provisions**
- Equality as a general principle of EU law (Cordero Alonso C-81/05; Mangold C-144/04; Danks Industri C-441/14)
- Equality as a value/aim/corollary duty of States?
- Right to equality – absence of discrimination on several grounds: sex, age, disability, religion, belief, sexual orientation and race/ethnicity.(Different scopes)
- Right to equality for atypical/flexible workers.(limited scope)



Overview: International and EU equality law legislation

- **International level - CoE, UN, ILO**
- **EU level**
- Treaties (TEU, TFEU, Charter of fundamental rights of the EU)
- **Secondary Law – Directives:**
 - Directive 2000/43 (on race);
 - Directive 2000/78 (Framework);
 - Gender Directives 2006/54/EC (recast), 79/07/EEC (social security), 92/85/ECC (maternity), 2004/113/EC (goods & services), and 2010/41/EC (self-employment).



New Developments in EU law

- The European Pillar of Social Rights initiative – One of the three main categories:
 - Equal opportunities and access to the labour market;
- 'New Start' initiative to address the work-life balance challenges faced by working parents and careers. – Legislative proposal:
- Reforming Directive 2010/18: parental leave, paternity leave, flexible working arrangements...



International level

- ICCPR 1966 - International Covenant on Civil and Political Rights (Article 26)
- ICESCR 1966 - International Covenant on Economic, Social and Cultural Rights (Articles 2 & 7)
- CEDAW 1979 -The Convention on the Elimination of All Forms of Discrimination against Women
- UN Convention on the Rights of Persons with Disabilities 2006
- ILO Conventions
 - Equal Remuneration Convention, 1951 (No. 100)
 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
 - Workers with Family Responsibilities Conv. 1981, N.156



Council of Europe

- Article 14 ECHR
- The European Social Charter (Articles 4, 20 & 27)
- Relationship EU – Council of Europe – Fundamental rights/general EU law principles

Article 6 TUE

- 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
- 3. 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.



EU level – Historical Developments

From **economic reasoning** (preventing social dumping) to a **social aim**: protection of a fundamental right – Schröder, C-50/96 Main objective.

- The Treaty of Rome: sex equality (Article 119 TEEC) & prohibition on discrimination based on nationality.
- Defrenne cases
- Directives 75/117 EEC (equal pay), 76/207/EEC (employment & occupation), 79/7/EEC (social security).
- Directives 96/34/EC (currently Directive. 2010/18/EU on balancing family and working life) and 97/80/EC (burden of proof).
- Treaty of Amsterdam (1997): competence to prohibit discrimination on other grounds.
- Directives 2000/43 (on race) 2000/78 (Framework), 2006/54 (Recast Directive - gender equality).
- Equality for flexible workers (Directive 97/81/EC and 1999/70)
- Treaty of Lisbon - Charter of Fundamental Rights of the EU (Same value as the Treaties)



EU Legal Framework – Treaty provisions

- **Article 3 TEU** (The EU shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men...)
- **Article 8 Treaty on the Functioning of the EU, TFEU** In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
- **Article 19 TFEU** (Treaty basis – for measures combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation)



Main Treaty provision- **Article 157 TFEU:**

- 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. (...)
- 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.
- 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.



Charter of Fundamental Rights of the EU (Chapter III - Equality):

- **Article 20** Equality before the law
 - Everyone is equal before the law.
- **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 Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.



Charter of Fundamental Rights of the EU:

- **Article 23 - Charter:**
 - '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.'



Charter of FFRR of EU

- Article 26

Integration of persons with disabilities

- The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.



Directives – equal treatment for men & women

- 2006/54/EC, in employment & occupation (recast)
- 79/07/EEC, in social security matters
- 92/85/ECC, safety and health at work of pregnant workers
- 2004/113/EC, in access to goods and services
- 2010/41/EC, in self-employment



A closer look at Directive 2006/54/EC (recast – equality for men & women in employment)

Art. 2 definitions - concept of discrimination.

- Art. 3 positive action.
- Art. 4 remuneration
- Art. 5 occupational social security.
- Art. 6 personal scope equal pay (employees, civil servants & self-employed)
- Arts. 7-8 material scope equal pay
- Art. 14 access to employment & working conditions
- Art. 15-16 return from maternity leave, paternity and adoption leave
- Articles 17- 19 remedies and enforcement.
- Articles 20-22 promotion of equal treatment
- Articles 23-30 general horizontal provisions (compliance, prohibition of victimisation, gender mainstreaming...)



Exceptions to equal treatment rule:

- **Characteristic related to sex – genuine and determining occupational requirement (Article 14.2 Recast Directive):**
- Restricted interpretation, periodical evaluation of the professions concerned;
- ECJ case law: **Kreil** C-285/98 (against principle of equal treatment to exclude women from the armed forces) and **Sirdar** C-273/97 (allowed exclusion from special military units).



Exceptions to equal treatment rule:

- **Protective legislation for women:** pregnancy and maternity.
- Allowing national provisions guaranteeing women specific rights on account of pregnancy and maternity (i.e., maternity leave).
- ECJ case law: Legitimacy of protecting a woman's biological condition during and after pregnancy and second, of protecting the special relationship between a woman and her child. (**Hofmann**, Case 184/83)
- **Roca Alvarez**, C-104/09, access of men to 'breastfeeding leave'- men and women same status of parents and comparable role on children's education. (equality on parental leave)



Exceptions to equal treatment rule:

- **Positive action** measures ensuring **full equality in practice** between men and women (Art. 3 Recast Directive); Strict requirements & compliance with proportionality principle.
- **Case C-450/93 Kalanke:** National rules giving an 'automatic priority' on a promotion to women are not allowed.
- **Case C-409/95 Marschall:** If the candidatures are subject to an 'objective assessment' which will take into account all criteria specific to the individual candidates ('saving clause') the affirmative action measure complies with EU law.
- **Case C-158/97 Badeck:** a rigid quota for women in the access to training, invitation to an interview and membership of the employees' representative bodies and/or administrative and supervisory bodies is accepted, as long as it is not leading to an 'absolute rigidity'.
- **Case C-407/98, Abrahamsson,** the appointment of a female worker who has sufficient qualifications for a post instead of a male candidate who is better qualified is precluded by EU law (Breach of proportionality principle).



Race - Directive 2000/43 – Overview of main Provisions

Art. 1 purpose

Art. 2 concept of discrimination (Direct, Indirect, Harassment)

Art. 3 scope (employment, self-employment, occupation, vocational training, social protection, including social security and healthcare; education; access to and supply of goods and services, including housing.)

Art. 4 occupational requirements

Art. 5: positive action.

Art. 7-16: remedies and enforcement – sanctions & implementation

- Burden of proof (Art. 8)

19



Framework Directive 2000/78 – Overview of main Provisions

Art. 1 purpose

Art. 2 concept of discrimination (Direct/ Indirect/Harassment)

Art. 3 scope (employment & occupation)

Art. 4 occupational requirements

Art. 5: disability -“reasonable accommodation”.

Art. 6: age - different ways of dealing with justifications

Art. 7: positive action

Art. 9-14 + 17: remedies, sanctions and enforcement

20



New proposal

- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final
- Article 3: Scope
- Discrimination based on religion or belief, disability, age or sexual orientation is prohibited by both the public and private sector in:
 - - social protection, including social security and health care;
 - - social advantages;
 - - education;
 - - access to and supply of goods and services which are available to the public, including housing.



Council Directive 97/81/EC concerning the Framework Agreement on part-time working

- Non-discrimination – Clause 4
 - Part-time workers cannot be treated less favourably than comparable full-time workers solely because they work part-time, unless it can be objectively justified.
- O'Brien C-393/10 - Unequal treatment in access to an occupational retirement pension between full-time judges and part-time judges is precluded by the Directive.
- Elbal Moreno C-385/11 - Directive 79/7/EEC on the principle of equal treatment for men and women in matters of social security offers broader protection for female part-time workers.



Directive 1999/70 – Framework agreement on Fixed-term work

- **Clause 4:** forbids employers to treat fixed-term workers in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless the difference in treatment can be justified on objective grounds.
- **De Diego Porras, C-596/14**
 - “Clause 4 of the framework agreement on fixed-term work annexed to Directive 1999/70 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which fails to provide any compensation for termination of a contract of employment to a worker employed under a temporary replacement contract while allowing such compensation to be granted, inter alia, to comparable workers employed under a contract of indefinite duration. The mere fact that the worker has carried out his work on the basis of a temporary replacement contract cannot constitute an objective ground justifying the failure to grant such compensation to that worker.”



Concept of Equality:

Formal versus substantive equality.

- Formal equality: the Aristotelian way of looking at things. Like should be treated alike.
- Substantive equality: (a) equality of opportunity and (b) equality of results.
 - Several related concepts: affirmative action, preferential treatment, positive action
 - Broad range of proactive measures: Equal opportunities policies quotas and targets (i.e. preferential treatment in job applications)



Equality Concepts:

- **Formal equality (Aristotelian):** 'Equal should be treated equal and unequal in an unequal way.' Individual complaints led model – reactive
- **Protection against discrimination:**
 - A. Direct discrimination (objective & non-justifiable)
 - B. Indirect discrimination (collective & objectively justifiable/proportionality test)
- **Substantive/'de facto' equality:** assure equal opportunities and objective equality in the results.
- **Proactive model:** Promotion of disadvantage groups – Women, persons with disabilities



Substantive equality in EU Law

- **Main Question:**

Is the result pursued by EU law substantive or formal equality?

C-136/95, Thibault;
C-158/97, Badeck;
Case C-407/98, Abrahamsson;
C-342/01, Merino Gómez
- The substantive dimension of equality can be observed, even when restrictively shaped, in the EU legislation and in the CJEU's case law interpreting it.
- Cases C-450/93 Kalanke; C-409/95 Marschall; C-158/97 Badeck; C-407/98, Abrahamsson
- Proposal on female quota



Implementation at national level

- **International Law** – obligations depending on ratification by the States – ILO no sanctions
- **EU Law** – compliance/coercive power
- Member states implement EU secondary law differently.
- Directives provide minimum requirements/No complete harmonization.
- Non regression principle.
- Interactive-multilevel process.
- Strong impact of the ECJ case law (preliminary rulings/infringement procedures)

27



Application of EU equality law at Member State level

- **Direct effect of primary law**
 - art. 157 TFUE (since Defrenne II 43/75 -article 119 TEEC-)
 - Fundamental right & general EU law principle (since Defrenne III, 149/77)
- **Direct vertical effect of Directives (State v. citizens)**
- **Indirect effect of Directives;**
 - Proper implementation?
 - Indirect horizontal effect.
 - Interpretation in conformity with EU law
 - Liability for damages of member states.

28



Conclusions

- Enhanced coherence in the definition of discrimination (for gender and other grounds).
- Recognition of the substantive model of equality
- Increasing importance of the social fundamental rights perspective.
- Low interaction between the international – EU levels / High interaction EU – national levels
- Hierarchy in the protection offered by EU law against the different grounds of discrimination. (Gender equality law at the top – Direct discrimination based on sex can never be justified –Wide range of Directives – “Star of EU social law.”)
- Shortcomings in the implementation at national level. Problems with enforcement of EU equality law at Member States level - See report Burri & Prechal, 2010 and 2017



Can real/substantive equality be actually achieved?

- “So equality is both the most natural of things and the most chimerical.”
 - Voltaire.



- **THANKS FOR YOUR ATTENTION**
- **QUESTIONS?
REMARKS?**