

The EU legal framework on equality

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Applying Anti-Discrimination Law

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From the objectives ...

Article 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 (3) TEU: The Union shall combat social exclusion and discrimination and shall promote social justice and protection and equality between women and men.

Article 8 TFEU: In all its activities, the Union shall aim to eliminate inequalities and promote equality between women and men;

Art. 10 TFEU: In defining and implementing its policies and activities, the Union shall aim to combat discrimination on grounds of sex;

...to the prohibitions....

Article 18 TFEU: Prohibition of discrimination on grounds of nationality

Article 19 TFEU: The Council may take appropriate action to combat discrimination based on sex...;

Article 153 TFEU: The EU shall support and complement the activities of the Member States in the area of equality between men and women with regard to labour market opportunities and treatment at work;

Article 157(1) TFEU: 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.

... The EU Charter of Fundamental Rights

- *Article 20* **Equality 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 Treaties and without prejudice to any specific provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited
- Horizontal direct effect
 - AM&S

...through secondary legislation.

- Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Directive 2000/43/EC)
- Directive establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC)
- Directive 2006/54/EU implementing the principle of equal treatment between men and women in matters of employment and occupation

...and the general principle of EU law

- Defrenne 1976
- Mangold 2005
- Kucdeveci 2010
- Dansk Industri 2016

International law

- ECHR
 - Art. 14 and Prot. 12
- ILO conventions
- UN Convention 1965 against Racial Discrimination
- UN Convention 1979 on the Elimination of All Forms of Discrimination against Women

PROHIBITION OF DISCRIMINATION AND THE GENERAL PRINCIPLE OF EU LAW

- Economic/social value
- Imperative constraint limiting the action of both public and private actors
 - Direct vertical and horizontal effect
 - Even when the rule is written in a directive but is an expression of a general principle of EU law

ANTI-DISCRIMINATION LAW

- System of protection
 - Effectiveness of rights
 - Judgement of discrimination
 - DEFINITIONS
 - BURDEN OF PROOF
 - CAPACITY TO BRING LEGAL PROCEEDINGS
 - SANCTIONS

System of protection

- Notions
 - Direct and indirect discrimination
 - Harassment
- Less favourable treatment than even a hypothetical tertium comparationis
- No relevance of intention
- Objective justification

Protection system

- Right to legal protection against discrimination
 - administrative/judicial procedures as provided for by the individual legal systems
 - Procedural autonomy: Article 19 TEU; ...
- Collective/representative redress: right of action by associations, organisations on behalf of or in support of the victim and with his/her consent.
- Burden of proof: partial reversal
- Protection of victims
- Sanctions - effective, proportionate and dissuasive

Indirect discrimination - Objective justification

- Legitimate aim
- Appropriate and necessary tool
- Proportionate
- Exceptions: e.g. armed forces, police, prisons

Inadmissible justification

- Saving costs without any other reason can never be a legitimate justification for discrimination

ECtHR

- There is no difference between direct and indirect discrimination
- The Court always assesses whether there is a difference in treatment and whether it can be justified
- Almost always considered legitimate, in particular by recognizing a wide margin of appreciation for the States

Feryn Case 2008

- Employer posts an advertisement stating that he will not employ foreign workers
- Feryn sells and installs rolling and sectional garage doors; it has noted a reluctance on the part of its customers to have the doors installed by foreigners
- " I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!"

ACCEPT 2013

- The alleged homosexuality of a football player prevented the conclusion of a contract of employment with the football club Steaua Bucuresti
- Known former Romanian footballer and manager of the club says that in his team will never employ homosexual players
 - "rather than hiring a footballer presented as being homosexual, Mr Becali would have preferred to hire a player from the junior team"

ACHBITA 2017

- **Neutrality policy**
 - An internal rule which treats all the employees of the company in the same way, imposing on them, in a general and indiscriminate manner, in particular, a neutrality of clothing which prevents them from wearing those signs.
- **Indirect discrimination**
- **Justifiable**
 - **Legitimate purpose**
 - The desire to display a policy of political, philosophical or religious neutrality must be considered legitimate
 - An employer's wish to project an image of neutrality towards customers is part of the freedom to conduct a business recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in the pursuit of that aim only those workers who are required to come into contact with the employer's customers.
 - Consistent with ECHR
- **Appropriate character: neutrality policy actually pursued in a systematic and consistent manner**
- **Proportionate and necessary means employed**
 - Narrow requirements: e.g. only workers who come into contact with customers
 - Possible alternative to dismissal?

Bouagnaoui 2017

- **Direct discrimination**
- **In the absence of an internal company rule, we are faced with direct discrimination**
- **Justifiable if it was a genuine and determining occupational requirement**
 - Is an employer's willingness to take the client's wishes into account a genuine and determining occupational requirement?

Genuine and determining occupational requirement

- The Court has clarified that it is not the ground on which the difference in treatment is based which constitutes a genuine and determining requirement but a characteristic linked thereto
- Only in very limited circumstances it may be admitted and only because of the nature of the work or the context in which it is carried out
- A requirement that is objectively dictated by the nature or context in which the work is carried out and does not cover subjective considerations, such as the employer's willingness to take account of the particular wishes of the client.