

The EU legal framework on equality



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Outline

I. The origins of EU equality Law

II. The structure of EU equality Law

- a. Treaty law
- b. General principle
- c. Secondary law

III. The Charter and equality/non-discrimination

- a. Equality provisions
- b. Legal Value
- c. Scope
- e. Horizontal direct effect of Article 21 of the Charter

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THE ORIGINS OF EU EQUALITY LAW

Treaty Foundations: Equality as an instrument of functionalism and economic integration

Fundamental Freedoms

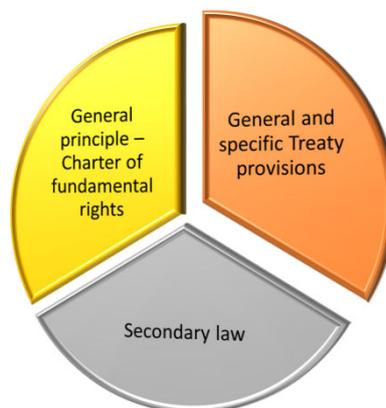
- non-discrimination on grounds of **nationality**
- first case-law on nationality discrimination setting the conceptual ground

Article 119 TCEE : Equal pay for equal work

- Case law: *Defrenne v. Sabena* saga
- Shifting from the economic to the social perspective
- Direct effect of the prohibition of discrimination

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The structure of EU equality law



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The Treaty Legal framework

- **Nationality** discrimination
 - ❖ fundamental freedoms
 - ❖ EU citizenship
 - ❖ Third country nationals and immigration policy? >> “Fair treatment”
- **Gender** equality:
 - ❖ Art 2 TUE > founding value
 - ❖ Art 3(3) TUE > objective
 - ❖ Arts 8, 9 and 10 TFEU > transversal provisions
 - ❖ Article 154 TFEU > equal pay for equal work ... and much more!
- Legal Basis for general equality policy:
 - ❖ Article 19 TFEU : **sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation**
- **Other** manifestations of equality / non-discrimination all throughout the Treaty (equality between Member States (and their languages), social law, agricultural policy, competition law, etc.)

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Equality and non-discrimination as a Principle

- ❑ Equality as a principle well before the Charter (Mangold)
- ❑ Codification in the Charter:
 - **Article 20 : Equality**
 - Everyone is equal before the law
 - **Article 21: non-discrimination**
 - (1) Any discrimination based on any ground such as sex, race, color, 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.

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Equality and non-discrimination as a Principle

□ Codification in the Charter:

➤ **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 favor of the underrepresented sex
- **connected materially with substantive equality regarding specific groups**, such as article 22 on the protection of Cultural, religious and linguistic diversity; article 26 on the integration of persons with disabilities; or article 24 on the rights of the child and article 25 on the rights of the elderly.

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Secondary law

Nationality discrimination:

- free movement law > art 21 TFEU
- to some extent, immigration and asylum law:
 - "fair treatment"
 - instruments which contain equal treatment provisions) E.g. **art. 11 Directive 2004/109**
- Brexit? Not applicable to UK Nationals - *Préfet du Gers I*, C-673/20

Sex discrimination

- The 70s Directives: employment, social security
- 86 Directive on self-employed (replaced in 2010)
- Directive 2004/113 access to and supply of goods and services
- Directive 2006/54 'recast' directive in the field of employment
- Social protection directives: pregnant workers; parental leave; work-life balance Directives

Discrimination on the basis of **race** - Directive 2000/43

Discrimination on the basis of **protected grounds** the field of employment: Directive 2000/78

Other equality and non discrimination manifestations: non discrimination between different types of workers (part-time, fixed term...)

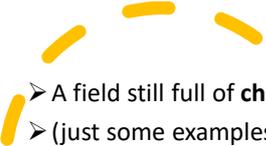
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Sex
Discrimination
as the flagship
of EU anti-
discrimination
policy

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- The first **true EU law fundamental rights policy** (E. Muir)
 - Innovative **case-law** of the ECJ since the 70 transforming sex equality from an economic principle into a social principle (e.g. the *Defrenne* saga)
 - **Instruments** beyond the prohibition of discrimination and formal equality: positive discrimination; burden of proof; prohibition of harassment; sanctions; remedies

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➤ A field still full of **challenges**:

➤ (just some examples)

- ❖ The application of sex discrimination principles to gender reassignment – *Case C-451/16*
- *MB v Secretary of State for Work and Pensions*
- ❖ The challenges attached to the special condition of women during maternity: *Case 184/83 Hofmann* and *Case C-463/19 Syndicat CFTC*
- ❖ The potential misuse of social discrimination
E.g. *Case C-450/18 Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*
- ❖ Genuine and determining occupational requirements or perpetuating social stereotypes?



but many
ongoing
challenges!
(the example of sex
discrimination)

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Directive 2000/78

• Prohibited grounds and different regimes

1. Religion or belief (e.g. case law on head-scarf; or dismissal of religion teachers; public holidays)
 - Art. 17 – status and autonomy of churches / art. 4(2) ethos
2. Disability: interpreted in light of UN 2006 Convention on the Rights of persons with disabilities (e.g. case C-631/22 Ca Na Negreta – TSJ Balears).
 - Including primary carers – C-303/06 Coleman
 - Illness not included- C-13/05 Chacón Navas > but yes if it precludes participating in professional life (C-335/11, HK Danmark). Surrogacy? Obesity? Temporary incapacity?
 - Duty to reasonable accommodation
3. Sexual orientation
4. Age : BUT > art 6(1)
 - not discrimination if the difference in treatment is 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
 - differences of treatment may include, among others, the setting of special conditions on access to employment for young people, in order to promote their vocational integration, or the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

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Directive 2000/78

Scope of application:

- employment and vocational training > interpreted broadly (C-824/19 – Juror in criminal trial)
- Directive Proposal (COM(2008)462) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

Derogations and exceptions

- Public order, health, security, rights and freedoms of others (art 2.5)
- Occupational requirements (art 4.1)
- Churches (4.2.)

Positive discrimination

reasonable accommodation

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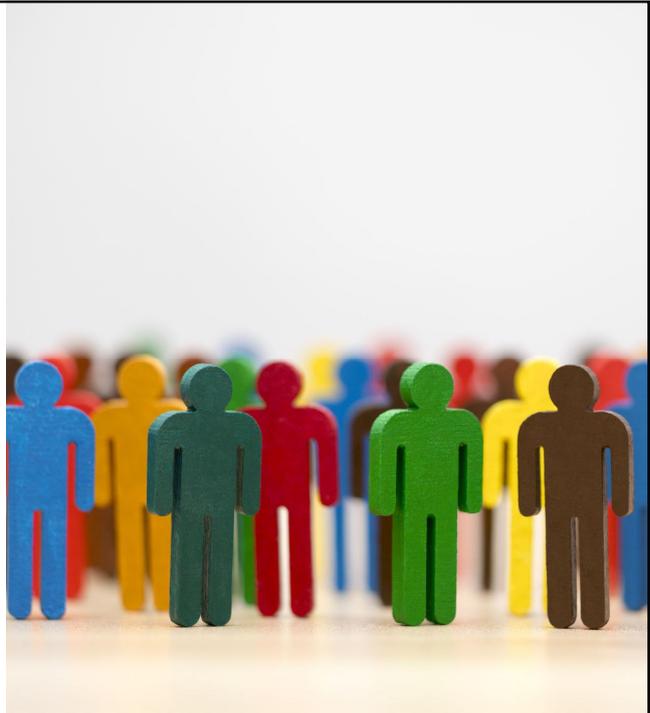
Directive 2000/43

- Suspect ground: racial or ethnic origin
 - nationality not covered (e.g. C-94/20, Land Oberösterreich; C-571/10 Kamberaj; Jyske Finans C-668/15)
 - but – Feryn –c-54/07
 - discrimination by association CHEZ C-83/14
- Scope of application: broader > not only work and training but benefits, education, access to goods and benefits, social protection
- Limitations/derogations
 - occupational requirements – article 4
- Positive action

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Discrimination grounds: differentiation or hierarchy?

- Different regulation of different suspect grounds in secondary law
- Broader scope : race Directive (beyond employment and training, also covers social protection and social advantages ,education, access to goods and services
- Justifications and exceptions
 - ❖ Narrower for race and ethnicity
 - ❖ Broader justifications and exceptions possible with regard to age (art. 6 of Dir. 2000/78: direct discrimination allowed if justified b legitimate aim, including employment policy, labor market; retirement ages)
- Reasonable accommodation (only for disability)



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The Charter of Fundamental Rights

- Same **legal value** as the Treaties
 - e.g. standard of legality for EU acts: *Case C-236/09 Association Belge des Consommateurs Test-Achats*
- **Scope** of application:
 - Difficult determination according to Article 51(1) of the Charter.
 - The Equality directives trigger the Charter principles of equality and non-discrimination, but not only...
- All the **attributes** of EU law: primacy, conform interpretation; **direct effect**. BUT – problematic issue of distinction between rights and principles



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The Charter of Fundamental Rights

- On the problematic issue of distinction between rights and principles
- case Defrenne Sabena :
- “28. ... it is impossible to put forward an argument against [the direct effect of Article 119 EC] based on the use in this article of the word ‘principle’, since, in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions”...
- 29. If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the Coherence of its external relations would be indirectly affected”.

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The Charter of Fundamental Rights

- Horizontal Direct Effect:

- Banned with regard to the Equality Directives (due to the features of directives) – classic position confirmed in *Poplawski II*: “disapplication effect” excluded
- BUT – direct effect of general principles
- “Combined effect: Charter+Directive”
 - The Charter needs the Directive to be applicable
 - The Directive needs the Charter to be directl effective
- Recognized in *Case C-144/04 Mangold* on the basis of the principle of non discrimination on the basis of **age**
- confirmed in *Cases C-555/07 Küçükdeveci* and *C-441/14 Dansk Industri (Ajos)* (also age cases)

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The Charter of Fundamental Rights

- Horizontal Direct Effect:

- generalized with regard to other “protected grounds”: religion in *C-414/16 Egenberger*; *C-68/17 IR* and *C-193/17 Cresco Investigation*
- What about other articles of the Charter? Is Article 21 special?
 - ❖ Also article 47 and article 31 *Bauer and Willmeroth* (*C-569/16* and *C-570/16*, EU:C:2018:871) and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (*C-684/16*, EU:C:2018:874).
 - ❖ Not all provisions of the Charter: Article 27 - *Case C-176/12, Association de médiation sociale*
- ❖ Direct effect through article 47?
- ❖ Discussion of the X case – *C-715/20*

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Thanks for your attention