

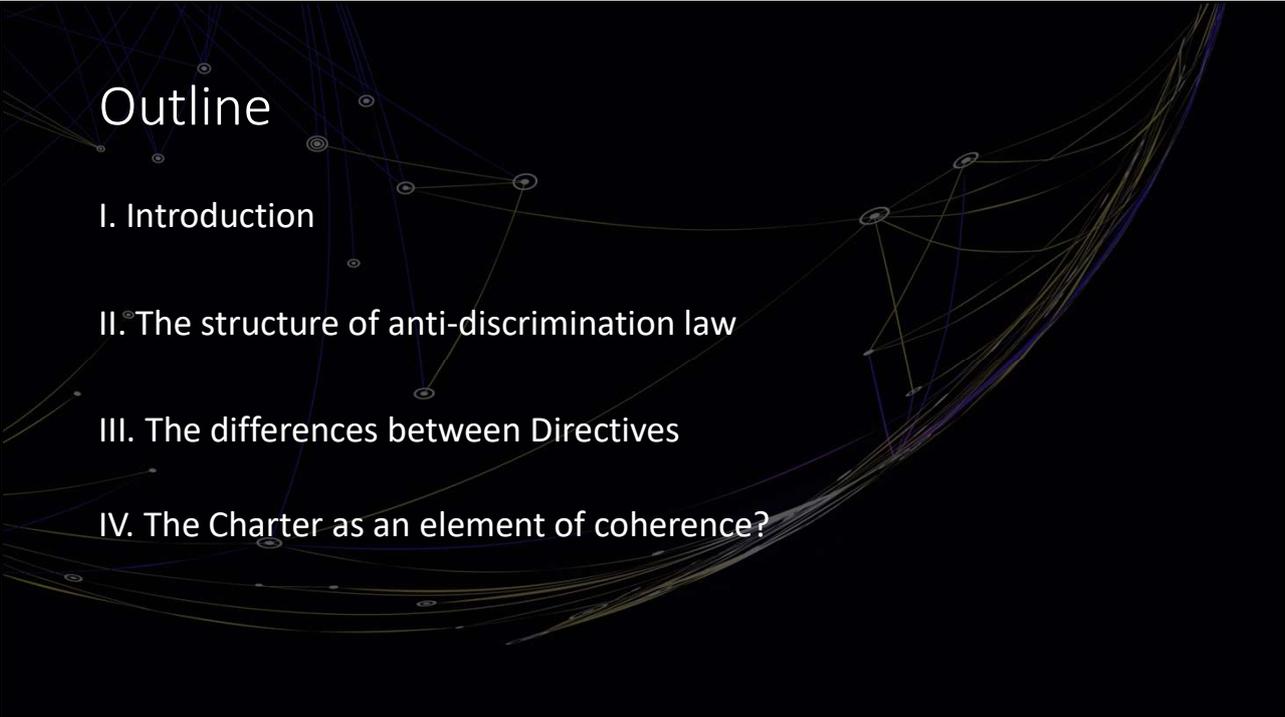


# The Anti-Discrimination Directives: Hierarchy of "suspect grounds"?

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## Outline

I. Introduction

II. The structure of anti-discrimination law

III. The differences between Directives

IV. The Charter as an element of coherence?

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# 1. Introduction

Treaty based and evolving nature

- Non-discrimination on grounds of nationality (fundamental freedoms)
- Equal pay for women and men
- Legal basis for secondary legislation on non-discrimination
- Multiplicity of Charter provisions aimed at different grounds



## 2. A general structure?



SPECIFIC TREATY  
PROVISIONS



SECONDARY LAW



GENERAL PRINCIPLES -  
CHARTER

## 2. The structure of the Treaty

### ❖ Nationality discrimination

Fundamental freedoms  
EU citizenship  
Third-country nationals and immigration policy?

### ❖ Equality between women and men:

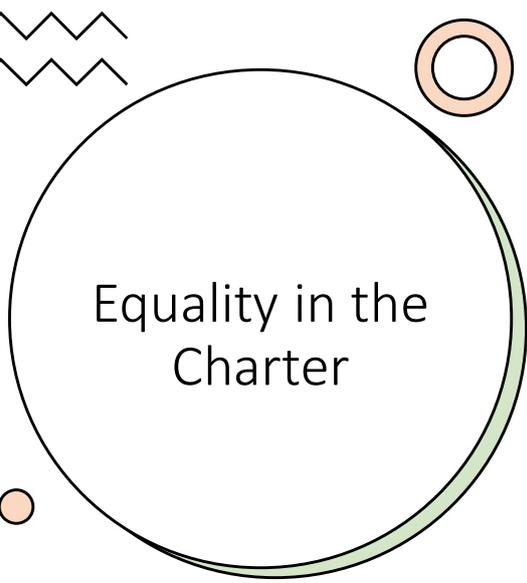
Art. 2 TEU > founding value  
Art. 3(3) TEU > objective  
Arts. 8, 9 and 10 TFEU > cross-cutting provisions  
Art. 154 TFEU > equal pay for work of equal value ... and much more!

### ❖ 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 throughout the Treaty (equality between Member States - and their languages - social law, agricultural policy, competition law, etc.).

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## Equality in the Charter

### ❖ Equality as a principle long before the Charter (Mangold)

### ❖ Codification in the Charter - Title III - equality rights

#### Article 20: Equality

#### Article 21: Non-discrimination

- 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.

- nationality.

#### Article 23: Equality between women and men

Vulnerability: Article 24 (children); Article 25 (elderly); Article 26 (persons with disabilities)

Cultural, religious and linguistic diversity (art 22)



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### 3. Secondary Legislation: Regulatory Scheme

#### Anti-discrimination Directives

- Racial discrimination - Directive 2000/43/EC
- Discrimination on other protected grounds in employment (*age, religion, disability, sexual orientation, etc.*) Directive 2000/78/EC

#### Nationality Discrimination

- Right of free movement
- Immigration and asylum instruments (with equal treatment provisions)

#### Sex Discrimination

- Directives of the 1970s: employment, social security
- Directive 86/613/EEC on self-employed workers (replaced in 2010)
- Directive 2004/113/EC: access to and supply of goods and services
- Directive 2006/54/EC (recast): equality in employment
- New directives: Pay transparency and 'Women on boards'
- Social protection directives:
  - Pregnant workers
  - Parental leave
  - Reconciliation of work and family life

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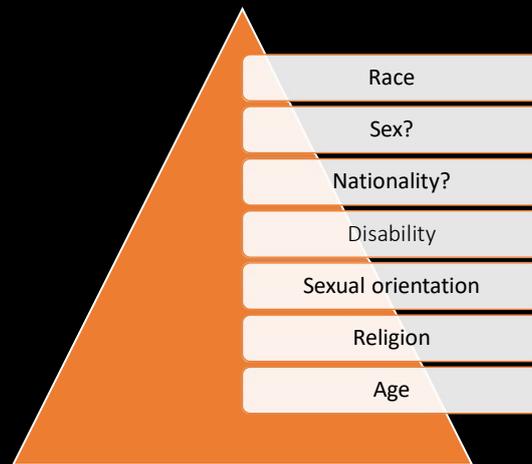
### 3. Grounds for discrimination: Differentiation



- ❑ Starting point: different regulatory instruments
  - Failed "Unification" attempt in COM(2008)426
- ❑ Aspects of divergence
  - Material scope of application
  - Different System of exceptions and justifications
  - Different promotional apparatus: positive action and reasonable accommodation
  - Distinct institutional and procedural reinforcement
  - Different intensity of control; different interpretation (Howard 2018)

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### 3. Outcome: the anti-discrimination pyramid



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### 4. Hierarchy or coincidence?



Waddington and Bell (2001): "varying approaches... based on relevant differences... or simply confused and confusing approach"?

The hierarchy created by EU law "is not the result of a particular design ... it is very much the product of political pragmatism".



Waddington and Bell (2003): - causes? Lack of familiarity by MS with certain grounds; relative strength of lobbyists supporting groups;



Howards (2006): "outcome of political pragmatism, rather than of a deliberate consideration of the different grounds".

"a more considered decision should be made"... "using the distinction of suspect grounds made by the [ECtHR]".



Benedí (2016) : hierarchy- "not deliberate, but rather the accidental product of progressive waves of legislative evolution" > need of COHERENCE

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## 4.The need (and urgency) for coherence



Coherence as a normative imperative of the Legal System



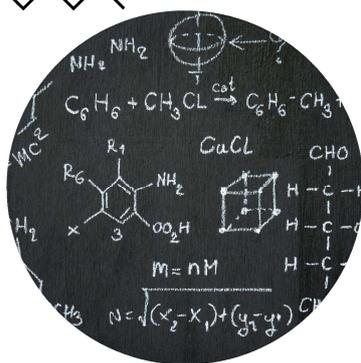
Need for argumentation to legitimise the system



Strengthening the resilience of anti-discrimination law in an era of contestation

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## 4.The Charter as a structuring element



- Art. 1- Dignity as an element of coherence
- Article 20 and the principle of equality
- Article 21 - Scope of grounds
- Article 52 - common system of justifications ; harmony in judicial review and proportionality methodology
- Functions of the Charter (canon of validity; interpretative canon)
- Proportionality and value of other Charter rights
- Horizontal direct effect



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