UKRAINE'S PATH TO THE EU ACQUIS IN THE FIELD OF EQUALITY

Challenges and opportunities for the judiciary

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European context • Ukrainian judicial practice • effective protection



About this presentation

Focus: challenges facing the judiciary on Ukraine's path to the European Union

Two key issues

1. What does the case law of the Court of Justice of the European Union add to the text of anti-discrimination provisions itself?

2. How are these approaches already manifested or how might they be reflected in Ukrainian judicial practice?

Approximation to EU law in the field of equality is not merely a matter of legislative compliance. Equally critical is how the relevant provisions are applied by courts in practice.

CJEU Case Law: three basic approaches

Dekker · Feryn · Coleman

DEKKER · C-177/88

Refusal of employment due to pregnancy.

The Court held this to constitute direct discrimination on grounds of sex.

Practical takeaway: a comparator is an essential tool, but it must not become a formal obstacle.

FERYN · C-54/07

Public statement by an employer indicating an unwillingness to recruit persons of Moroccan origin.

The Court ruled: discrimination may occur even in the absence of an identifiable complainant.

Such statements are liable to deter potential applicants.

COLEMAN · C-303/06

Unfavourable treatment of an employee stemming from the need to care for a disabled son.

Protection extends beyond the person who directly possesses the protected characteristic.

Thus, the doctrine of discrimination by association was established.

Reasonable accommodation

The individual needs of the person — and the burden on the employer

The provision establishing the approach

Article 5 of Directive 2000/78/EC establishes the obligation to provide effective and practical measures where needed in a specific case to accommodate an individual with a disability.

The purpose of such measures is to enable a person to access, participate in, or advance in employment.

The individual needs of the person

— on the one hand —

and the burden on the employer

— on the other.

Measures must not impose a disproportionate burden on the employer.

This principle was reflected in a Ukrainian case concerning the workplace accommodation of a person with a disability.

Positive action and the limits of permissible differential treatment

Not every difference in treatment constitutes discrimination

KALANKE · C-450/93

Automatic preference given to a female candidate where qualifications were equal.

The Court found such an approach impermissible.

The core issue was the absolute and automatic nature of the preference, which precluded an appraisal of specific circumstances.

MARSCHALL · C-409/95

A preference in favour of a female candidate was permissible, provided it was not unconditional.

The rules allowed for an assessment of the specific circumstances of each individual candidate.

The Court held this approach to be permissible.

ABRAHAMSSON · C-407/98

A position could be awarded to a candidate of the under-represented sex even where they possessed lesser qualifications.

The Court ruled this incompatible with EU law.

The requirement for an individual assessment must be maintained.

Conclusion: positive action is permissible, provided it does not amount to an automatic preference.

Permissible differential treatment: the Wolf case

Differential treatment alone is insufficient to substantiate a finding of discrimination

Factual background

Mr. Wolf sought appointment to the intermediate operational service of the fire department, but had exceeded the statutory age limit of 30 years.

The differential treatment based on age was manifest.

CJEU position

The Court took into account the specific nature of the duties, in particular the exceptionally high physical fitness requirements.

Under those specific circumstances, the restriction in question was objectively justified.

Key issues for the court

It is necessary to examine:

- what legitimate aim the distinction pursues;
- whether the restriction imposed is appropriate and necessary to achieve that aim.

Regulatory framework and relevance for Ukraine

EU law, domestic law, and the limits of direct effect

European Union law

Directive 2000/43/EC — racial or ethnic origin.

Directive 2000/78/EC — religion or belief, disability, age, sexual orientation.

Directives 2006/54/EC and 2004/113/EC — gender equality, among others.

Ukrainian context

For Ukrainian courts, EU directives do not enjoy the direct effect they possess across EU Member States.

The Constitution of Ukraine, ratified international treaties, domestic legislation, and ECHR case law are directly applied.

The primary challenge lies in proper interpretation and effective judicial application.

Ukrainian judicial practice: the first two issues

Reasonable accommodation and the scope of the concept of discrimination

No. 755/7916/19 · reasonable accommodation

The plaintiff — a lead legal counsel and person with a Group I visual impairment — alleged that the workplace was not properly adapted.

Issue: can the absence of a specific remark in a medical certificate of itself dispense with the need for an individual assessment?

A medical document is relevant, but cannot automatically replace an assessment of the actual workplace circumstances.

No. 620/5444/22 · scope of the concept of discrimination

The view was taken that public authorities cannot be subject to discrimination when appearing in public-law disputes.

This underlines the need to distinguish between procedural equality of arms and anti-discrimination protection as a human rights mechanism.

A public body is entitled to due process, but is itself the bearer of human rights obligations.

Ukrainian judicial practice

Two cases on differential treatment

No. 492/446/15-a · a positive precedent

The dispute concerned the crediting of periods of employment in unaccredited pharmacies towards pharmacists' qualifying length of service.

The employees performed virtually identical duties, but were placed in disparate legal positions.

The Grand Chamber concluded that this distinction lacked objective and reasonable justification.

No. 240/19209/21 · direct effect of the Constitution

The refusal to grant an increased benefit rate was based on the expiry of a two-year limitation period.

The Supreme Court held that the rule of law entails the prohibition of discrimination and equality before the law.

Where a statute conflicts with the Constitution, the court must apply the Constitution as directly applicable law.

"Ukrkava LLC v. Ukraine"

Limits of judicial interpretation even when pursuing the elimination of inequality

What the Supreme Court did

The Grand Chamber identified the discriminatory nature of differing statutory time limits for legal entities and natural persons.

To remedy the disparity, it applied a uniform three-year time limit irrespective of the legal status of the parties.

What the ECHR found

Article 88 was formulated in unambiguous terms.

The newly adopted interpretation was closer to amending the statute than to construing it.

Practical implications for courts

It is not enough merely to identify an issue of equality.

A court must choose a legal remedy that resolves the issue without overstepping judicial authority or compromising legal certainty.

Practical algorithm for hearing discrimination cases

Seven steps from the concluding part of the presentation

1. **Identify the specific right that has been interfered with**
2. **Establish whether there are prima facie indications of discrimination**
3. **Determine the protected ground**
4. **Identify an appropriate comparator if the circumstances of the case so require**
5. **Allocate the burden of proof correctly**
6. **Examine whether the differential treatment pursued a legitimate aim and was proportionate**
7. **Select an effective judicial remedy**

Caveat: the pursuit of effective protection must not turn judicial interpretation into a de facto amendment of the law.

EQUALITY DOES NOT ALWAYS MEAN IDENTICAL TREATMENT.

However, any difference in treatment requires proper legal justification.

The task of the court is not only to identify inequality, but also to establish a lawful and effective means of remedying it.

Thank you for your time and attention