

THE EU LEGAL FRAMEWORK OF EQUALITY

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Tallinn

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EQUALITY

- Equal opportunities v. equal results
- Equal opportunities – the concept which refers to the initial position (of candidates, applicants, etc.)
- Equal results – the concept which refers to the final outcome (of a competition, election, appointment process, etc.)

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- Unequal treatment v. discrimination
- unequal treatment = discrimination if there is no OBJECTIVE justification for a less favourable treatment C-149/10 Zoi Chatzi, para.64 („*comparable situations must not be treated differently and (...) different situations must not be treated in the same way unless such treatment is objectively justified*“)
- In some cases – unequal (special) treatment is required by law
- Positive actions / affirmative actions
- Special treatment (of pregnant women)
- Reasonable accommodation (of persons with disabilities)
- Religious accommodation

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Sources of EU equality law

- Hierarchy of EU equality law:
 - General principles of law – the principle of equality
 - Primary Sources: - Treaty of European Union - Treaty on the Functioning of the European Union - Charter of Fundamental Rights of the EU
 - Secondary law: EU Equality Directives

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- The Court's case-law continues to develop in new directions, often involving the intersection of EU discrimination law with other elements of European law.
 - Two elements in parallel, e.g. *Praxair* (C-486/18), regarding compensation payment upon dismissal which occurred during parental leave: both Art. 157 TFEU (equal pay) and Directive 96/34 (parental leave) apply.
 - Two are potentially at issue, only one is declared relevant, e.g. *Villar Láiz* (C-161/18), regarding the calculation of a statutory retirement pension:
 - National court asks about the prohibition of sex discrimination under Art. 4 of Directive 79/7 and under Art. 21 of the Charter of Fundamental Rights.
 - CJEU rules on the Directive and then states that it is not necessary to answer the question relating to the Charter.

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- **General principle of equality**
 - filling the gaps of the EU equality law when applied to EU institutions
 - when applied to MS the general principle of equality only enhances the prohibition of discrimination expressed in EU equality directives
 - when applied to MS the general principle of equality does not expand the material scope of EU directives C-13/05 Navas (sickness) C-167/12 CD and C-363/12 Z. (surrogacy leave)
- **General principle of equality and the prohibition of discrimination with regard to gender**
 - against EU institutions in staff cases: C-20/71 Sabbatini; C-21/74 Airola
 - with regard to MS not applicable, if outside the scope of EU directives: C-149/77 Defrenne III

PRIMARY SOURCES: EU TREATIES

- Art. 2 TEU – equality as a value common to all MS
- Art. 3(3) TEU - equality as a goal for EU
- Art. 8 TFEU („in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”).
- Art. 10 TFEU (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”)
- Art. 18(1) TFEU - prohibition of discrimination on the basis of nationality (applying to all fields of the EU law)
- Art. 19 (1) TFEU (formerly 13 TEC) – competence provision – a legal basis of EU Equality Directives – restricted to combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation
- Article 157 (1) and (2) TFEU (formerly 119 TEEC, and 141 TEC) - equal pay of men and women – C 43/75 Defrenne

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- **Charter of Fundamental Rights of the European Union**
 - Title III (Equality) contains broad provisions on equality before the law (Article 20)
 - Non-discrimination (Article 21)
 - Cultural/religious/linguistic diversity (Article 22)
 - Equality between men and women (Article 23)
 - Rights of the child (Article 24)
 - Rights of the elderly (Article 25)
 - and integration of persons with disabilities (Article 26)

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- EU equality legislation primarily takes the **form of directives**, which set goals for member states to implement within their national laws.
 - Racial Equality Directive (2000/43/EC): Forbids discrimination on grounds of race or ethnic origin in employment, social protection, education a, and access to goods and services.
 - Pregnancy and Maternity Protection Directive (92/85/EEC): Protects the rights of pregnant women and mothers at work, ensuring health and safety, and maternity leave provisions.
 - Employment Equality Directive (2000/78/EC): Establishes a general framework for combating discrimination in employment on grounds of religion or belief, disability, age, or sexual orientation.

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- Directive on Equal Treatment outside Employment (2004/113/EC): Extends gender equality protection to various areas, including access to goods and services, media, and transport.
- Recast Directive (2006/54/EC): Seeks gender equality in employment and occupation. Covers equal pay , working conditions, promotion, and discrimination

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- Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
- Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
- Directive 2004/114/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;
- Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

Hierarchy of the protected grounds in EU equality law

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

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- Directive 2023/970 EU to strengthen the application of the principle of **equal pay for equal work or work of equal value** between men and women through pay transparency and enforcement mechanisms
- Directive 2024/1499/EU on **standards for equality bodies** in the field of equal treatment between persons
- Directive 2024/1500/EU on **standards for equality bodies** in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation

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- **National Legislation**

- The directives create a minimum standard across the EU. Member states can adopt more robust national laws to protect against discrimination.

- **Case Law**

- The Court of Justice of the European Union (CJEU) plays a key role in interpreting and applying EU equality legislation.

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- Whenever EU gender equality law may be relied upon in the national courts, they are able (and the courts of last instance are obliged) to request preliminary rulings from CJEU.

- In the field of equal treatment, the CJEU has since 1972 delivered a significant number judgements, sometimes providing far-reaching interpretations of relevant provisions.

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- Defrenne II

- The CJEU decided that Article 157 TFEU (*then Article 119 TEC*) has horizontal direct effect, i.e. that it can be relied upon by individuals before national courts not only against (organs of) the State, but also against individuals, such as private employers.

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- **Reasonable Accommodation in Employment:**

- The CJEU defines the scope of reasonable accommodation that employers must provide to employees with disabilities. In the **HR Rail SA (Case C-485/20)** case, the court held that employers must make reasonable adjustments like be assigned to another position for which a worker has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.

- **Freedom of Religion vs. Employer Neutrality:**

- The CJEU balances the right of freedom of religion with the principle of employer neutrality. In the **Achbita v G4S Secure Solutions (Case C-157/15)** case, the court stated that employers could restrict religious expression through limitations on employee dress codes, but such limitations must be objectively justified and proportionate to a legitimate business aim.

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- **Positive Action and Justification of Discrimination**

- **Case C-319/03 – Briheche, Principle:** Positive action must not create **new discrimination** against other groups.

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• Article 21 of the Charter - 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.

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- The question of whether Article 21 of the Charter of Fundamental Rights of the European Union (CFR) has a direct horizontal effect has been a subject of ongoing debate and development in EU law.

- **Direct Effect:**

- Direct effect refers to the situation where individuals can invoke provisions of an EU legal instrument such as treaty or regulation, directly before national courts to defend their rights. If vertical situation citizen/ company vs State authority, direct effect is possible.

- **Horizontal Effect:**

- Horizontal Effect typically refers to the application of a legal provision between private individuals (individuals, companies, etc.), as opposed to „vertical effect“, which applies between individuals and public authorities

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• **Arguments for Direct Horizontal Effect:**

- Fundamental rights' protection: proponents argue that fundamental nature of the rights enshrined in Article 21 necessitates direct horizontal effect to ensure their full effectiveness.
- Independent legal norm: clear and unconditional nature of Article 21 establishes it as an independent legal norm capable of direct horizontal application.
- Effectiveness of Charter: If limited to vertical effect, Article 21's impact in combatting discrimination in all spheres of life would be significantly reduced.

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• **Arguments against Direct Horizontal Effect**

- Lack of explicit provision: The CFR itself does not explicitly mention horizontal effect for any of its provisions, leaving room for interpretations.
- Respect for national legal systems: Opponents argue that recognizing direct horizontal effect could disrupt national legal systems and principles already addressing discrimination.
- Uncertainty and legal complexity: The potential for varying interpretations across different national courts could lead to legal uncertainty and inconsistencies.

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- **Egenberger (C-414/16)**: Direct horizontal effect was recognised for Article 21 in the context of religious discrimination in an employment dispute.

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- **Para 76**: *The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, Association de médiation sociale, C-176/12, EU:C:2014:2, paragraph 47).*

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Thank you for your attention!
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