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The European Union Antidiscrimination Law: from Prohibition of Wage Discrimination to the General Principle of Equality**

Abstract

The article provides an illustration of the EU antidiscrimination law through analysis of the concept of equality in the EU legal system. The analysis concentrates on the notion of equality and non-discrimination with respect to six protected characteristics (sex/gender, age, disability, racial and ethnic origin, religion/belief and sexual orientation) in the EU primary and secondary law as well as in the doctrine. It pays specific attention to the relevant case law of the Court of Justice of the European Union. The equality principle has longstanding roots, plays different roles in the EU legal system and has undergone the evolutionary change from market-oriented rule to the general principle of EU law. The article seeks to draw out the fact that thanks to the excessive interpretation of the concept of equality by the CJEU the Union antidiscrimination law has evolved into an independent set of legal norms. The result is the extension of the protection against discrimination beyond the concept of the EU citizenship; though, it still requires further development to be fully effective.

Key words: equality principle, prohibition of discrimination, gender discrimination, EU antidiscrimination law.

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Introduction

The European Union has started as an economic organization. The aims of the three predecessors of the EU, i.e. the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community were to contribute to economic development and the improvement of the standard of living in the participating countries[1]. Nevertheless, in the course of integration processes the EU human rights and social dimensions have been deepened, contributing to bringing Europe closer to its citizens. Notably, very important role in creating "Europe of people" has been played by the equality principle that has longstanding roots in the EU law (MacHugh 2006, 31).

The right to equality and non-discrimination for all constitutes a human right widely recognized by national, European and international law. In the EU legal system non-discrimination is both a right itself (e.g. Art. 23 of the Charter of Fundamental Rights of the European Union[2]) and a constitutive element of other human rights, as the enjoyment of rights granted by the Treaties must be guaranteed to EU citizens on a non-discriminatory basis (art. 18 TFEU[3]).

The article provides an illustration of the EU antidiscrimination law through an analysis of the concept of equality in the EU legal system. The analysis concentrates on the notion of equality and non-discrimination with respect to six protected characteristics (sex/gender, age, disability, racial and ethnic origin, religion/belief and sexual orientation) in the EU primary and secondary law as well as in the doctrine. It pays specific attention to the relevant case law of the Court of Justice of the European Union. The article also seeks to draw out the fact that thanks to the excessive interpretation of the concept of equality by the CJEU the Union antidiscrimination law has evolved into an independent branch of EU law exceeding the protection against discrimination beyond the EU citizenship. Despite its great role in the achievement of the aims of the EU, equality (and non-discrimination) remains a complex concept of unequivocal meaning that inevitably implies deficiencies in the EU antidiscrimination law.

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[1] See respectively art. 1 of the Treaty constituting the European Coal and Steel Community, art. 1 of the Treaty establishing the European Economic Community and art. 1 of the Treaty establishing the European Atomic Energy Community.

[2] C 202, 7.6.2016, 389–405.

[3] Treaty on the Functioning of the European Union (consolidated versions), OJ C 202, 7.6.2016, 47–200.

1. The Concept of Equality and Non-Discrimination in the European Union Law – Two Sides Of The One Coin?

1.1. Equality and Non-Discrimination – Conceptualization

Equality and non-discrimination remain equivocal concepts. Despite wide and deep doctrinal analysis, the discussion on equality is characterized by considerable conceptual and methodological confusion (McCrudden, Prechal 2009, 1). Thus, although widely recognized by national, European and international law, both understanding of equality and non-discrimination and their relationship to each other differ considerably across legal systems and among scholars (MacNaughton 2009, 47). These differences have significant implications since the legal framework of equality and non-discrimination depends upon their meaning. This is reflected in the antidiscrimination law of the European Union, in which different approaches to equality are visible; although it has adopted a rather traditional version of the equality paradigm (formal one), based on individual rights and identity-neutral justice (Caruso 2002, ii).

With a large degree of simplification three main concepts of equality can be identified. On the one hand there is formal equality, on the other – substantive equality and somewhere in between them lies equality of opportunity, which combines elements of both of the above-mentioned concepts.

Formal equality assumes that similar situations should be treated in a similar way in accordance with Aristotelian maxim that "justice demands that equals be treated equally and unequals be treated unequally" (MucHugh 2006, 31). This is a procedural approach to the principle of equality, implemented through the introduction of a prohibition of discrimination, under which any differentiation of treatment is morally prohibited and cannot be justified on any grounds. In accordance with this symmetrical approach to equality the obligation of equal treatment applies only to entities considered to be equal; here two vital questions arise – first of all, who is equal and second, what does the requirement of equal treatment mean? If the answers were to be sought in the concept itself, one would have to conclude that equal entities are those who should be treated equally and equal treatment is the treatment of those who are equal. In this respect formal equality theory needs clarification (Arnardóttir 2003, 9–10). Equal entities will

be singled out for their similarity, i.e. possessed characteristic that is recognized as relevant in a given situation. The choice will be determined by prevailing cultural, political and social value climate (Makonnen 2007, 14).

On the other hand, the substantive equality formula refers to the situation of the group to which the individual belongs and focuses on achieving a fair distribution of goods and benefits (so called equality of results, Makonnen 2007, 14). This asymmetrical approach to the principle of equality implies the possibility of treating individuals differently, respective of whether the group they belong to has been discriminated against in the past, to mitigate negative effects of this discrimination. Therefore, achievement of equality of outcomes may require measures such as parity or quota system. Equal treatment is, however, a rule and differentiation is permitted only as an exception (Arnardóttir 2003, 24).

The model of equality that seems to strike a balance between two above-mentioned concepts being to some point substantive equality and later - formal, is the so-called equality of opportunity. In accordance with this approach it is possible to treat individuals differently, but only at the level of competition. Therefore equality of chance is guaranteed without affecting outcome of the competition. The purpose of this concept of equality is to provide all individuals with equal opportunities with respect to access to education, employment, health care, etc. by eliminating prejudices and other factors that can have discriminatory effects (Makonnen 2007, 14). The doctrine emphasizes the role of the CJEU in developing this concept of equality through effort to discover the material aspect of the formal equality in the EU antidiscrimination legislation (De Vos 2007, 10).

All three above-mentioned concepts are reflected in the EU antidiscrimination law. The evidence of the dominant role of the formal equality in EU law is seen in the comparative logic the concept of discrimination is based on, especially with respect to direct discrimination which requires identical treatment of identical situations. As long as the comparable situations are treated consistently (for example equally badly) the requirements of the EU equality law are satisfied. The question of whether two situations are comparable is crucial for the establishment of discrimination as in this case no distinction must be made on the basis of protected characteristic which indicates that certain other distinctions will be permitted. It gives rise to a situation in which the selection of a characteristic that is considered to be neutral or irrelevant (such as economic status or eye colour) allows to avoid accusation of direct discrimination (lack of comparability) despite the fact individuals are in a similar situation with respect to the other characteristic. This comes in for criticism from the doctrine (Pogodzińska 2009, Fredman 1992, 120 *et seq.*). On the other hand, the

concept of indirect discrimination is results-oriented in the sense that an apparently neutral practice or criterion are considered to have discriminatory nature if they have unjustifiable adverse impact upon the group to which the individual belongs. This follows the logic of substantive equality as well as the affirmative actions that aim to mitigate the unfair situation of disadvantaged groups through ensuring their fair share in the distribution of benefits (Barnard, Hepple 2000, 564–565). The concept of equality of opportunity is reflected in the obligation of reasonable accommodation. The concept of reasonable accommodation obliges the employers to adopt, where necessary in a particular case, appropriate measures enabling a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Although the EU equality law does not explicitly define the denial of reasonable accommodation as a form of discrimination nor it compels Member States to classify it in that way (Burri, Prechal 2010, 51) the CJEU interprets reasonable accommodation duty as part of a wider equality obligation (HK Danmark, C-335/11 & C-337/11, para. 54) applied in order to guarantee compliance with the principle of equal treatment of people with disability to create for them equal professional chances. This proves that the qualification of the reasonable accommodation duty in the EU legal system as the exception (to the formal equality formula), widely spread among academics (e.g. Dudek 2010, Ellis, Watson, 2015), is disputable.

The European Union antidiscrimination law is characterized not only by equivocal concept of equality but also by ambiguous relation between equality and non-discrimination. With respect to this it is worth noting that the notion that equality and non-discrimination are positive and negative forms of the same principle is widely accepted. The former confirms the right to be treated in the same manner as the others, the latter – expresses the prohibition on different treatment, unless the opposite is objectively justified (in both cases) (Nowicki 2001, 215). Positive and negative concepts of the principle of equality are, however, not equivalent (MacNaughton 2009, 47). The EU legislature seems to share this view as it defines discrimination as a qualified form of unequal treatment. This is exemplified by the definition of discrimination contained in the EU's equality directives: Council Directive 2000/43/EC[4], Council Directive 2000/78/EC[5], Council Directive 2004/113/

[4] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, 22–26.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02.12.2000, 16–22.

EC[6] and Directive 2006/54/EC[7]. Under these sources of EU law discrimination, as opposed to "normal" unequal treatment, occurs only if less favourable treatment is based on one of the protected characteristics: sex, disability, religion or belief, racial or ethnic origin, sexual orientation or age. Equality is defined in the directives as the absence of any form of prohibited discrimination on any of the grounds mentioned above, as the EU law recognizes different types of discriminatory treatment.

1.2. Prohibited Forms of Unequal Treatment in the European Union Legal System

The equality directives prohibit direct and indirect discrimination, harassment and instruction to discriminate.

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the protected grounds (e.g. art. 2 (a) of the directive 2004/113/EC). The concept of direct discrimination is based on comparable logic which embraces hypothetical comparisons as well as comparisons with the treatment of actual persons (Ellis, Watson 2015, 146). According to the settled case law of the CJEU the comparability of the situations must be examined, inter alia, in light of the object of the national legislation establishing the difference in treatment (Kuso C-614/11, para. 45). In addition, any less favourable treatment of a woman related to pregnancy or maternity leave (within the meaning of Directive 92/85/EEC[8]) also constitute direct discrimination even though there is no male candidate – so that no comparator (Dekker C-77/88). Interestingly, direct discrimination can be established even in the absence of a victim. It was confirmed by the CJEU in Feryn case (C-54/07), where the Court concluded that the existence of such discrimination is not dependent on

[6] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, 37–43.

[7] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, 23–36.

[8] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, 1–7.

the identification of a potentially wronged party who claims to be the victim. The objective of equality would be hard to achieve if the scope of the protection against discrimination was to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer. In such circumstances the fact that an employer publicly declares that it will not recruit employees of a certain characteristic constitutes direct discrimination as it is likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a protected characteristic at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art. 2 (2)(b) of the directive 2000/78/EC). The concept of indirect discrimination is also based on a comparison, although this time it takes place in a group perspective instead of individual one (a victim of the alleged discrimination has to identify a group of persons in order to make a comparison). This form of unequal treatment was more problematic to define than direct discrimination. Doubts arose as to whether the adverse treatment must have actually happened or it might be only anticipated or how to assess the "group" impact of the unfavourable treatment as it may be difficult to adduce statistical evidence to such claim (Ellis, Watson 2015, 150). It is worth noting that as far as the direct discrimination can be justified only in cases explicitly prescribed by law, the indirect discrimination can be justified by legitimate aim if applied measures are appropriate and necessary (i.e. proportional) what makes it more "flexible" to defend against discrimination claims.

Moreover, discrimination includes harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of, or submission to such conduct [art. 2 (2) (a) of the directive 2006/54/EC]. Harassment is a situation where an unwanted conduct related to the protected characteristic of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment and sexual harassment – where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

For the purpose of equality directives an instruction to discriminate against persons on the protected grounds also constitutes a forbidden form of discrimination [art. 2 (4) of the directive 2000/43/EC].

Thanks to the case law of the CJEU discrimination is understood to include discrimination due to association. This type of discrimination occurs when a person is treated less favourably because of his or her association (relations) with someone who possesses one of the protected characteristics, even though she or he does not have the characteristic herself/himself (Karagiorgi 2014, 25). In Court's view presented in Coleman case C-303/06 the principle of equal treatment (in that particular case with respect to disability) applies not only to a particular category of persons but by reference to the protected ground. What is more, a person may face discrimination also because of an assumption about his or her characteristic (e.g. sexual orientation or racial origin) which may or may not be factually correct (Chopin, Germaine 2015, 37).

2. The European Union Antidiscrimination Law: Selected Protected Characteristics in Several Fields

2.1. The Genesis of the Protection Against Discrimination in the European Union Law

The most fundamental aspect of equality in EU law, apart from prohibition of discrimination based on nationality, which lays outside the scope of this paper, was the principle of equal treatment of women and men with respect to remuneration. Article 119 TEEC (now art. 157 TFEU), that obliged Member States to ensure and maintain the application of the principle of equal pay for equal work between men and women workers, was introduced because of economic reasons – to prevent Member States from gaining a competitive advantage through cheap female work that could distort the functioning of the internal market (More 1999, 518). This bare Treaty provision was transformed into a complex set of rules on equal treatment of women and men in employment and social security and subsequently – into antidiscrimination law on other grounds also as a result of judicial activity of the CJEU.

The Court issued a series of milestone judgments in which it recognized the direct effect of art. 119 TEEC allowing individuals to enforce the right to equality before national courts (Defrenne C-80/70). Moreover, the CJEU started to apply the perspective of human rights protection to equality issues, broadening a narrow economic perspective, as it repeatedly stated that there can be no doubt that the elimination of discrimination based on sex forms part of the fundamental rights, constituting general principles of EU law, the observance of which it has a duty to ensure (Defrenne C-149/77, para. 2). Furthermore, the CJEU instigated the process of development of the material scope of application of the equality principle as it confirmed that the concept of same work contained in art. 119 (1) TEEC included cases of work of equal value (Worringham C-69/80, para. 2). The EU legislator followed this logic and adopted several directives that introduced the gender equality principle beyond the specific issue of equal pay, although still in the area of employment typified by the Council directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women[9], Council directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (76/207/EEC)[10] or Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security[11].

The initial burst of legislative activity during the 1970s owed during the subsequent years and the CJEU became a key engine for development in the EU antidiscrimination law. The CJEU expanded the notion of discrimination to cover indirect discrimination, permitted a shift in the burden of proof from complainant to respondent and pushed the boundaries of the material scope of the law (Bell 2011, 615). The Court also broadened the personal scope of protection against discrimination holding that the prohibition of gender discrimination cannot be confined simply to discrimination based on the fact that a person is of one or other sex and as such must extend to discrimination arising from gender reassignment, which is based, essentially if not exclusively, on the sex of the person concerned (P v. S, C-13/94, para.20). This conclusion increased the number of protected grounds in the EU antidiscrimination law including implicitly sexual identity, however the breakthrough was made by the

[9] OJ L 45, 19.2.1975, 19–20.

[10] OJ L 39, 14.2.1976, 40–42.

[11] OJ L 6, 10.1.1979, 24–25.

introduction of Article 13 TEC (now Article 19 TFEU) on virtue of the Amsterdam Treaty. This treaty provision allowed to adopt directives prohibiting discrimination on different than gender characteristics, namely Council directive 2000/43/EC and Council directive 2000/78/EC that banned discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation. The directives changed significantly the existing approaches to combating discrimination based on these grounds across Europe, aiming to ensure all individuals living in the EU, both EU citizens and third country nationals, benefit from effective legal protection against such discrimination (Chopin, Germaine 2015, 8). They emphasise the need to establish effective protective mechanism against discrimination available to all who claim being discriminated against. The instruments are designed to guarantee the effective access to justice in discriminatory cases and include shared burden of proof (art. 8 of the Directive 2000/78/EC), prohibition of victimization (art. 11 of the directive 2000/43/EC) and duty to ensure that judicial and/or administrative procedures for the enforcement of obligations under directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them (art. 9 of the directive 2000/78/EC). Similar provisions are enshrined in the subsequent equality directives, i.e. directive 2004/113/EC[12], directive 2006/54/EC[13], following the relevant case law of the CJEU and raising the level of protection against unequal treatment throughout the European Union. The process of constitutionalising the equality principle in the EU legal system has been concluded with the Lisbon Treaty.

2.2. Equality and Non-Discrimination in the Primary Sources of European Union Law

After the Lisbon reform the status of equality principle was strengthened. The EU's and Member States' obligations under equality and non-discrimination have been clarified in the primary sources of EU law.

[12] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, 37–43.

[13] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, 23–36.

Equality is one of the EU values. In accordance with art. 2 TEU[14] "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". Moreover, promotion of the equality, also in its relations with the wider world, and combating discrimination are EU objectives is listed in art. 3 TEU. In order to pursue these goals effectively, 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. 10 TFEU). The idea of mainstreaming implemented in the EU law refers particularly to the gender equality what is highlighted by art. 8 TFEU ("In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women"). Article 157 TFEU confirms the principle of equal pay for equal work for man and women – the first explicitly mentioned protected characteristic in the EU law. It stipulates that each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value (what codifies the case law of the CJEU) is applied. For the purpose of this article, the term "pay" is construed broadly and means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. In accordance with the settle case-law of CJEU pay within the meaning of art. 157 TFEU covers all consideration which employees receive directly or indirectly from their employers in respect of their employment i.a. special travel facilities for former employees (Garland, C-12/81), benefit paid by an employer to a woman on maternity leave (Gillespie, C-342/93), overtime pay (Herzog, C-399, 409 & 425/92, C-34, 50 & 78/93), special bonus payments made by employers (Krüger, C-281/97), termination payments (Gruber C-249/97) and occupational pension scheme (Bilka, C-170/84). Art. 157 (2) TFEU explains that equal pay without discrimination based on sex means either that for the same work at piece rates shall be calculated on the basis of the same unit of measurement or that pay for work at time rates shall be the same for the same job.

The two subsequent paragraphs express legal authorization respectively to the EU institutions and Member States. Art. 157 (3) TFEU authorizes the European Parliament and the Council, acting in accordance with the ordinary legislative

[14] Treaty on the European Union (consolidated versions). OJ C 202, 7.6.2016, 13–46.

procedure, and after consulting the Economic and Social Committee to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value, complementing and extending the competent norm enshrined in art. 19 TFUE. According to art. 19 (former art. 13 TEC) "without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". The doctrine emphasises limited ambit of this article that does not allow to use it as a legal basis of measures to promote equality beyond prohibition of discrimination (Ellis, Watson 2015, 16). Under art. 157 (4) TFEU so called positive actions are permissible. The provision states that "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". This kind of legitimization was expressly introduced into EU antidiscrimination directives and gave rise to numerous judgment of the CJEU (i.a. Hofmann, C-184/83, Kalanke, C-450/93, Marschall, C-409/95, Abrahamsson, C-407/98) revealing the Court's ambiguity towards these kinds of measures which although intended to promote substantive equality are treated as the exceptions to the principle of (formal) equality (Szczerba-Zawada 2016).

Important support for the principle of equality in the EU has been provided by giving legal force to the Charter of the Fundamental Rights by virtue of the Lisbon Treaty. Nowadays the Charter has the same legal value as the Treaties (art. 6 TEU). Chapter III of the Charter titled "Equality" guarantees that everyone is equal before the law (art. 20) and introduces general antidiscrimination clause according to which "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" (art. 21). This autonomous non-discrimination provision must be interpreted in the light of art. 52 (2) of the Charter that envisages that "rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties". This implies the limited scope of application

of art. 21 (1) to the fields and grounds mentioned in art. 19 TFEU and the 4 equality directives. The Charter pays special attention to gender equality stating that "Equality between men and women must be ensured in all areas, including employment, work and pay" (art. 23). It also legitimates the affirmative action in favour of the under-represented sex.

The category of primary sources of EU law consists of also so called general principles of law. Their status is similar to the Treaties and has been formulated by the CJEU pursuant to its obligation under Article 19 of the TEU to ensure that in the interpretation and application of the Treaties the law is observed.The general principles of law play a crucial – constitutional – role in the EU legal system as "they put flesh on the bones of a legal system which, being set out in framework Treaties, would in their absence have remained a skeleton of rules falling short of a proper legal order" (Ellis, Watson 2015, 99). The catalogue of general principles of EU law includes the principle of equality. It is clear against settled case of law of CJEU in accordance to which the prohibition of discrimination is merely a specific enunciation of the general principle of equality, which is one of the fundamental principles of EU law (Ruckdeschel, C-117/76 & C-1677, para. 7). This general principle of equality, which is one of the fundamental rights, precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified (Portugal v Council, C-149/96, para. 91). Interestingly, the CJEU qualified both principles: equality and non-discrimination as general principle of EU law using both terms synonymously which makes the relations between equality and non-discrimination difficult to outline precisely. It is also unclear if the status of a general principle refers to non-discrimination irrespective of grounds or only to gender and age as stated expressly by the CJEU. Regardless of these uncertainties, the general principle of equality and non-discrimination plays a very important role in the EU law as it is used as a standard of review of the legality of actions taken by the EU and the Member States. The CJEU has made it clear that the Member States are constrained by the general principles (including equality) when they implement Union measures even if the time for implementation of the (equality) directives has not passed. As Court noted in landmark Mangold case (C-144/04), para. 76, "observance of the general principle of equal treatment, in particular in respect of age, cannot, as such, be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation,

social dialogue, affirmative action and other specific measures to implement such a directive are concerned".

2.3. European Union Secondary Law on Equality and Non-Discrimination

The EU secondary equality legislation is typified mainly by directives. This specific source of EU law is binding upon Member States as to the result to be achieved, giving national authorities some discretion with respect to forms and methods. National legislators must adopt implementing measures to transpose directives, but the implementation shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by the directives (i.a. art. 7 of the directive 2004/113/EC). The implementation of the directives means achievement of their objectives. In case of equality directives this is to lay down a general framework for combating discrimination in order to put into effect the principle of equal treatment on the grounds of religion or belief, disability, age or sexual orientation (Council Directive 2000/78/EC), racial or ethnic origin (Council Directive 2000/43/EC) and sex/gender (Directive 2006/54/EC and Council directive 2004/113/EC). As the CJEU reiterates, the Member States' obligation to achieve the results envisaged by the equality directives is binding to all the authorities of the member states: legislative, executives and judicial bodies. "It follows that, in applying national law, and in particular the provisions of national legislation specifically introduced in order to implement a directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to" (Johnston C-222/84, para. 6).

The anti-discriminatory directives prohibit direct and indirect discrimination, as well harassment and instruction to discriminate. It is worth highlighting that the protection against different forms of discrimination is limited to concrete areas as the material scope of application of the directives covers: employment and occupation (Council Directive 2000/78/EC, Council Directive 2000/43/EC, directive 2006/54/EC), social protection and social advantages (Council Directive 2000/43/EC, directive 2006/54/EC and directive 79/7/EEC), education (Council Directive 2000/43/

EC) and access to and supply of goods and services (Council Directive 2000/43/EC and Council directive 2004/113/EC). Therefore the EU equality law provides protection against discrimination diversified upon both the protected characteristics and fields of protection. As a result there is a hierarchy of protected characteristics – the characteristic that is protected against discrimination to the widest extent (in four areas) is racial or ethnic origin, gender is protected in three areas, while the characteristics protected only in one area are as follows: religion or belief, age, disability and sexual orientation.

Table 1: Personal and material scope of application of EU prohibition against discrimination

Area of protection	Protected characteristics					
	Racial or ethnic origin	Gender	Religion/ belief	Age	Disability	Sexual orientation
Employment	X	X	X	X	X	X
Social protection	X	X				
Access to goods and services	X	X				
Education	X					

Source: Own elaboration based on equality directives

It is important to notice that all the directives set the minimum requirements of protection against discrimination. It means that the Member States may introduce or maintain provisions which are more favourable than those laid down in the directives, and, at the same time are not allowed to lower the standard of protection already established in their national legal systems.

As the aim of the directives is to put into effect the principle of equality they envisage solutions to encourage victims of discrimination to refer to the protection mechanism. This includes the shared burden of proof according to which when persons who consider themselves wronged because the principle of equal treatment had not been applied to them they can, before a court or other competent authority establish facts from which it may be presumed that there has been direct or indirect discrimination, then it shall be for the respondent to prove that there had been no breach of the principle of equal treatment (art. 19 of the directive 2006/54/EC). The shared burden of proof plays a significant role in ensuring that the principle of equal

treatment can be effectively enforced which has been confirmed in the established case law of the CJEU. The same refers to the so called prohibition of victimization, i.e. protection of individuals who claim discrimination from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment (art. 9 of the directive 2000/43/EC).

Despite its fundamental role in the EU law and constantly broadened scope of application through the judicial activity of the CJEU the equality principle does not have absolute character as all the antidiscrimination directives allow some exceptions to equality principles, including genuine occupational requirements, protection of women regarding pregnancy and maternity, reasonable accommodation for disabled persons, positive actions, justification of differences of treatment on grounds of age. The table below indicates the exceptions to equality principle envisaged in four directives constituting the core of EU antidiscrimination secondary legislation.

Table 2: Exceptions to equality principle in the EU law

Exception to the equality principle	Directive			
	2000/43	2000/78	2004/113	2006/54
Occupational requirements	Art. 4	Art. 4	-	Art .14 (2)
Protection of women regarding pregnancy and maternity	-		-	Art. 28
Justification of differences of treatment on grounds of age	-	Art. 6	-	-
Positive actions	Art. 5	Art. 7	Art. 6	Art. 3
Reasonable accommodation for disabled persons	-	Art. 5	-	-

Source: Dudek 2015, 271.

Under the exceptions concerning occupational requirements Member States are allowed to accept that a differentiation of treatment based on a one of the protected characteristics does not constitute discrimination but only if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Similar exceptions have been extended to churches and other public or private organizations the ethos of which is based on religion or belief, but exclusively with respect to the religion or belief if by reason of the nature of these activities or

of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. This difference of treatment in such a case cannot, however, justify discrimination on any other ground (e.g. sexual orientation). Although allowed, the CJEU consequently interprets this provision as the derogation of the individual right which must be interpreted strictly and applied in accordance with the principle of proportionality. Moreover, the Member States should assess periodically the introduced limitations with respect to genuine occupational requirements in order to decide whether it is justified to maintain this kind of derogation in the light of social developments (Johnston C-222/84, paras. 4, 37).

The aim of the exception allowing to guarantee specific rights to women on account of pregnancy and maternity (such as maternity leave) is, as explained by the CJEU, firstly, to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth and secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (Hofmann C-184/83, para. 25). Lack of one of the above-mentioned reasons will result in the similarity of situation of men and women that requires their similar treatment in the light of which the exception at stake cannot be accepted. The aims of protecting female workers are valid only if, there is a justified need for a difference of treatment as between men and women. This is not the case of prohibition of women's nightwork, as whatever the disadvantages of nightwork may be, it does not seem that, except in the case of pregnancy or maternity, the risks to which women are exposed when working at night are, in general, inherently different from those to which men are exposed (Stoeckel C-345/89, para. 15).

It must be noted that the above-mentioned derogations constitute the so called 'closed system of exceptions' as regards direct discrimination (Burri, Prechal 2010, 10). It means that in the situation that amounts to direct discrimination the different treatment is accepted as far as one of these exceptions applies. In the case of indirect discrimination, however, the justifications may be based on other grounds under the condition that the differentiation pursues legitimate aim and the measures to attain that aim are appropriate and necessary (as envisaged by a definition of indirect discrimination).

The obligation to make a reasonable accommodation constitutes of two elements: it envisages that the employer must take appropriate measures unless this would result in a disproportionate burden on his or her account. As opposed to the above-mentioned justifications to different treatment, the CJEU does not require a narrow interpretation of the concept of the reasonable accommodation. It rather postulates a broad definition of the reasonable accommodation duty covering elimination of the various barriers, not only material but also organisational, that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers (HK Danmark C-335/11 & C-337/11), what confirms the thesis that this concept should not be classified as an exception to the formal equality but rather as an example of equality of opportunity.

The other accepted exception to the equality principle allows for differentiation of treatment on ground of age if, within the context of national law, it 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 (art. 6 (1) of the Directive 2000/78/EC). This rather broad formula of justification of different treatment based on age is criticized in the doctrine as weakening the protection of discrimination with respect to this characteristic (Zawidzka-Łojek 2013, 220).

The attempt to reach out beyond the strict consistency of treatment, which can lead to unequal treatment in practice, is made with the acceptance of the so called positive actions in the EU law. These measures, referred to in chapter 3.2, are intended to promote substantive equality through quotas and other actions taken in favour of underrepresented groups. As such, although discriminatory *prima facie*, they are in fact intended to eliminate or reduce actual inequalities which may exist in the reality of social life. Nevertheless constituting derogation from an individual right to equal treatment, such measures must remain within the limits of what is appropriate and necessary in order to achieve the aim in view (Briheche C-319/03).

Conclusions

Antidiscrimination law, including EU law, is controversial. It is the result, to some extent at least, of the fact that what is qualified as discrimination in law is both wider and narrower than its social understanding (Khaitan 2015, 2). The problem with

the EU non-discriminatory law is its limited and equivocal material and personal scope of application which implies that it refuses to prohibit conduct that many would consider discriminatory (e.g. earlier retirement age for women) while in other instances it qualifies as discrimination treatment that is hardly considered to be as such by laymen such as company's dress code banning all head coverings. Therefore, despite the qualification of concepts such as direct and indirect discrimination, harassment, affirmative actions or reasonable accommodation as part of equality mechanism, also as a result of the creative judicial interpretation of the Court of Justice of the EU, there is a need for further development. New forms of prohibited unequal treatment (e.g. multiple discrimination), new grounds of protection (e.g. gender identity) and new fields of protection (e.g. corporate boards) are waiting for introduction. Their explicit legal recognition would, undoubtedly, contribute to put equality into practice and to further satisfy the aim of the EU antidiscrimination law. This requires shift from formal equality, predominant in the EU antidiscrimination law, to substantive equality that would change the character and scope of duties under the principle of equality. It would enable to transcend the norm of equality set usually by the majority group, which in fact deepens the existing inequalities. At this stage of development, the EU antidiscrimination law, although it has some redistributive effect (e.g. under the concept of indirect discrimination), it does not demand a resolution of the underlying structural problems which disadvantage different minority groups (Fredman 1992, 125).

Although the status of equality as a general principle of EU law mitigates identified weaknesses, at least partially, allowing to broaden the scope of obligations of the Member States under equality principle (as proved by the Mangold judgment), and adoption of equality legislation would enhance effectiveness of the protection against discrimination. The latter faces, unfortunately, legal obstacles – the principle of subsidiarity that governs the shared competences, under which the matter of equality and non-discrimination falls, makes, in fact, EU legislative activity in this area dependent on the acceptance of the Member States which have so far opposed the proposals of new equality directives [e.g. Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation 2008/0140 (CNS)].

To sum up, despite its market-related origins, the principle of equal treatment has evolved into a constitutional right of equality that is one of the general principles of EU law. It is also the judicial activity of the Court of Justice of the European Union that shaped the principle of non-discrimination in a way that was not explicitly

envisaged in the founding Treaties that allowed to expand its personal and material scopes of application. However, much still needs to be done to improve the level of protection and to strike a balance between equality and diversity, as the equality of treatment must not be based on the assumption of identical treatment that results in eradication of all differences. The equality principle should guarantee the same scope of freedom to develop one's identity and not force somebody to resign from their individualism in the name of similarity. In this perspective the principle of equality is used to protect differences to assure that they do not adversely affect the minority groups through perpetuation of stereotypes, as the problem to be addressed is not unequal treatment *per se*, but the disadvantage which often is attached to such treatment (Fredman 1992, 128).

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