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The development of the content of the principle of equal treatment in EU law with special focus on the interpretative role of th CJEU

(szakdolgozat)

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I. Introduction

One of the main purposes of the present essay is to demonstrate the importance of the principle of equal treatment, and to draw attention to that fact how the application or non-application of this principle in „everyday life" can influence the society, the labour market and economy, and even the demography of a nation, and hereby the European Union.

The other purpose of this essay is to emphasise the „iconic" role of legal interpretation of the Court of Justice of the EU (CJEU) in the equality issues and highlight to the significance of the preliminary ruling procedure through presenting the case law of the CJEU on equality matters. It is true for the so-called „equality aquis" what J.H.H. Weiler wrote in connection with the Van Gend en Loos judgement: the court „did not only shape the legal order; it played a huge role in constituting that order. For once the word "iconic" is not a cliché."[1]

During this essay I will be illustrating the progress of the principle of equal treatment: how the idea of equality between men and women – started with the „equal pay for equal work" principle – had been broadened step by step until it became the principle of equal treatment which already contains not only the prohibition of discrimination, but a plenty of other positive actions and tools for reducing the stereotypes of the society.

The essay will cover the most important primary and secondary sources of law on equal treatment and the most emblematic case law of the CJEU on this issue.

I will examine the implementation of the „equality aquis" in Hungary and the work of the Hungarian Equal Treatment Authority and through its „case law" make some concluding remarks of the situation in Hungary.

[1] J.H.H.Weiler: Van Gend en Loos: *The individual as subject and object and the dilemma of European legitimacy (*http://icon.oxfordjournals.org/content/12/1/94.full#xref-fn-2-1)

Last but not least I will focus on the difficulties of the enforcement of the principle of equal treatment in the field of labour law and examine the possible tools for further development.

In this last section I will deal with sensitive questions of discrimination, such as why we cannot work out the solutions for people being „underprivileged" to step in the labour market. In other words with a new way of thinking and with innovation we could reach and use those people's knowledge who are – because of the stereotypes and their circumstances – in the background. These questions not only have legal, but social and economic dimensions, as well.

There are very few phisically handycapped people on the labour market, we can hardly see women in top-level positions, and most of the HIV positive persons have no work. It is very difficult getting back to the labour market for mothers having children or for people above 50, and many coloured people are unemployed. Are they really unsuitable for high quality jobs? Is it true they prefer „sitting at home"? Such preconceptions are obviously not true. Circumstances and the lack of certain conditions force them not to join to the economic life and to remain silent. Maybe the society is not flexible enough to find the solutions, or just follow the path what skandinavian countries already have built.

By the end of this essay we must understand that law in itself is not enough to reduce inequality, it is the base, the fundament on which the walls of tolerance must be built. The way of thinking must change, we must set aside stereotypes.

I would like to focus on the development of the adoption of law on equality issues, as an ongoing process, and to investigate which were the „helping factors" to improve this field, and to find answer for that question that nowdays what factors can help to innovate and to make more effective the law laid down in the EU directives.

I will use the methodology of demonstrating firstly the development of the equal treatment principle in chronological order by showing the changes of the primary and secondary sources of law. Secondly, I will focus on the case law of the CJEU - on special questions - to emphasize the very significant

interpretative role of the Court in the development. The particular Hungarian case law is not the object of this essay, so I only will make a summary and mention some examples from this field.

II. The role of the Court of Justice of the European Union

1. Legal interpretation at the CJEU and its contribution to the development of EU Law: the significances of the preliminary ruling procedure

The legal interpretation activity of the CJEU comes true through the preliminary ruling procedure. There are many iconic judgements of the CJEU which became the cornerstones of the development of EU Law.

The most important judgements established the main principles of EU aquis, such as the Van Gend en Loos Case[2] (principle of direct effect), Costa v. ENEL Case[3] (principle of supremacy).

After direct effect and supremacy had been established, the ‘‘constitutionalization of fundamental rights’’ was the completion of the constitutional arch initiated in 1963. In the famous fundamental cases (Internationale Handelsgesellschaft Case[4], Nold Case[5]) the Court demonstrated that the protection of fundamental rights is really important for the Community. There are several judgements playing important role in the process of shaping the legal order of the EU.

In the field of equality the Defrenne II. Case[6] was the first „breakthrough”. In this case, the Court recognised the direct effect of Article 119 of the Treaty of Rome on equal pay.

Since the 1990s the discussion of the Court and its practice has acquired a social dimension: human rights play an increasing role. The Court for a long time has been acknowledged as the economic court of Europe which, since the 1960s, has paved the way for the free movement of persons, goods,

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[2] Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie Netherlands. Case 26-62. English special edition 1963 00001 ECLI identifier: ECLI:EU:C:1963:1

[3] Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. Case 6-64. English special edition 1964 00585 ECLI identifier: ECLI:EU:C:1964:66

[4] Internationale Handelsgesellschaft mbH kontra Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling:: Verwaltungsgericht Frankfurt am Main - Germany. 11-70. sz. ügy ECLI identifier: ECLI:EU:C:1970:114

[5] Nold Case Judgment of the Court of 14 May 1974. J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities. Case 4-73.*European Court Reports 1974 -00491* ECLI identifier: ECLI:EU:C:1974:51

[6] Judgment of the Court of 8 April 1976. Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium. The principle that men and women should receive equal pay for equal work.Case 43-75.*European Court Reports 1976 -00455* ECLI identifier: ECLI:EU:C:1976:56

services and capital. Today the Union is different from what it was in the time of ‘‘the Six’’, not only concerning the number of members but also as to the function of the Union which includes more areas than the creation of a common market and seems to give more importance to the position of the individual as a citizen of the Union.

„Often the law and courts are reproached for lagging behind the general development of society. In 1939 the American professor Rodell used the image of the ‘‘killy-loo bird’’ to illustrate his view of law as being backward and lawyers as people who live in the past and who have difficulties in accommodating the law to present realities. The invention of the ‘‘killy-loo bird’’ was his way of illustrating legal conservatism. This bird in his imaginary world always flew backwards and was more interested in where it had been than where it should go. Such an image may have been representative for the law between the wars but it seems outdated in today’s legal world. The Court of Justice of the European Union as it has developed over the years is the definitive negation of the ‘‘killy-loo bird’’. Its critics may even say that it looks back too little. The Court seems to use its older decisions as a springboard in a continuous move forwards leaving the latest decision behind when a new jump is made. The Court is today also a historical object and a very challenging one. It is a demanding exercise for national judges to just follow its practice and find out when to ask for its interpretation or when to be sure as to what European law is. Much can be said and is said in its praise as a laudatio or as a criticism of its leaving the member states of the Union and their ‘‘peoples’’ behind in its making of the new legal order. But it should not be said that mapping the Court and its decisions is boring or not sufficiently intellectually stimulating. The existence of the Court is a challenge to the modern lawyer as it is to the historian or the legal historian who tries to keep track of the Court. In this way the Court may be somewhat like a bird. The moves can be difficult to follow. Whenever you try to grasp or catch it, it is not there anymore. Whether it has moved too high up in the air or just out of reach is a question of taste. That the catching is a good exercise and worth trying is beyond question.”[7]

[7] Ditlev Tamm: The History of the Court of Justice of the European Union Since its Origin (The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law. ed. / Allan Rosas; Egils Levits; Yves Bot. Hague : Springer, 2013. p. 9-35.)

III. The development of the principle of equal treatment in EU Law

1. The meaning of equity and equality (non-discrimination)

The terms equity and equality are sometimes used interchangeably, which can lead to confusion because while these concepts are related, there are also important distinctions between them. Equity is giving everyone what they need to be successful. Equality is treating everyone the same. But not everyone starts at the same place, and not everyone has the same needs.

Equality aims to promote fairness, but it can only work if everyone starts from the same place and needs the same help. Equity appears unfair, but it actively moves everyone closer to success by "leveling the playing field."[8]

Equity and equality are two strategies we can use in an effort to produce fairness. Equality means the prohibition of discrimination, the „land of equity" is much wider: it also contains the positive (legislative or non legislative) actions to compensate the situation of disadvantaged people.

2. The Treaty of Rome and the most important documents and judgements until 2000.

2.1. The initial legal provisions

„In the Treaty establishing the European Economic Community (EEC) adopted in 1957, only one single provision was included to combat gender discrimination, namely the principle of equal pay between men and women for equal work. The background to this provision was purely economic; the Member States, in particular France, wanted to eliminate distortions in competition between undertakings established in different Member States. France had adopted provisions on equal pay for men and women much earlier and it feared that cheap female labour in other Member States would put French undertakings and the economy at a disadvantage."[9]

[8] http://sgba-resource.ca/en/concepts/equity/distinguish-between-equity-and-equality/ accessed on: 07.05.2016.
[9] http://ec.europa.eu/justice/genderequality/files/your_rights/eu_gender_equality_law_update2013_en.pdf p.2. accessed on: 07.05.2016.

The original text of the former Article 119 of the EEC Treaty, adopted in 1957, provided that:

„Each Member State shall (…) ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" 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.

Equal pay without discrimination based on sex means:

a) that pay for the same work at piece shall be calculated on the basis of the same unit of measurement;

b) that pay for work at time rates shall be the same for the same job."

Article 119 of the EEC should have been implemented before 1 January 1962, but the Member States were unable or unwilling to implement this Article. Until the beginning of the seventies nothing really happened.

The implementation of the principle of equal pay became one of the priorities of the Social Programme agreed upon in 1974[10] and the Member States decided to adopt a new directive on equal pay between men and women.

The so-called First Equal Pay Directive[11] – was adopted in 1975. The aim of the Directive was to reinforce the basic laws with standards aimed at facilitating the practical application of the principle of equality to enable all employees in the Community to be protected, as there were still disparities between Member States despite efforts to date.

[10] Council Resolution of 21 January 1974 concerning a social action programme
[11] 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 *Official Journal L 045 , 19/02/1975 P. 0019 - 0020*

The so-called Second Directive[12] obligated the member states to apply the principle of equal treatment not only in terms of „pay", but in the whole field of employment.

The new directives with the Social Programme provided an important impetus for legislation in the area of the equal treatment of men and women.

As it was mentioned above the judgement of the CJEU in Defrenne Case II. (1975.)[13] also brought a revolution in the field of (gender) equality.

A woman named Gabrielle Defrenne worked as a flight attendant for the Belgian national airline Sabena. Under Belgian law, female flight attendants were obliged to retire at the age of 40, unlike their male counterparts. Defrenne had been forced to retire from Sabena in 1968. Defrenne complained that the lower pension rights this entailed violated her right to equal treatment on grounds of gender under article 119 of the Treaty of the European Community.

The European Court of Justice held that Article 119 of the Treaty of the European Community was of such a character as to have horizontal direct effect, and therefore enforceable not merely between individuals and the government, but also between private parties. The essence of the Defrenne II. judgement was the following:

> *„ 8. Article 119 pursues a double aim.*
>
> *9. First, in the light of the different stages of the development of social legislation in the various member states, the aim of article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.*

[12] Council Directive 76/207/EEC 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

[13] Judgement of the Court of 8 April 1976. Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium. The principle that men and women should receive equal pay for equal work. Case 43-75.*European Court Reports 1976 -00455* ECLI identifier: ECLI:EU:C:1976:56

10. Secondly, this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.

11. This aim is accentuated by the insertion of article 119 into the body of a charter devoted to social policy whose preliminary provision, article 117, marks, 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.

12. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.

[...]

39. The prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."[14]

In the Defrenne II. case in 1976 the CJEU ruled that Article of the 119 EEC Treaty not only had an economic, but also a social aim. As such, it contributed to social progress and the improvement of living and working conditions. This case showed the importance of the procedure of preliminary ruling and how individuals who fight for their rights have also been instrumental in the development of Community law. What more, later on, the CJEU even ruled that the economic aim is secondary to the social aim[15]. It also held that the principle of equal pay is an expression of a fundamental human right.

After the Defrenne II. deciesion there was a „speed up": many directives were adopted on (gender) equality issue, such as:

- 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,

[14] Judgement of the Court of 8 April 1976. Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium. The principle that men and women should receive equal pay for equal work. Case 43-75.*European Court Reports 1976 -00455* ECLI identifier: ECLI:EU:C:1976:56

[15] see, for instance Case C-50/96. Schröder **Case** ECLI identifier: ECLI:EU:C:2000:72

- Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes[16],
- Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a selfemployed capacity, and on the protection of self-employed women during pregnancy and motherhood[17],
- 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,[18]
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC,[19]
- Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes,[20]
- 97/80/EC on Shifting Burden of Proof in sex discrimination cases.[21]

As we read the titles of the directives it can be seen that equal pay principle has been broadened step by step and the requirement of equal treatment appeared in many fields (labour / social issues).

2.2. Practical concerns of legal provisions

From this time by applying the new directives a lot of question arouse, and therefore many questions were raised to the CJEU. The following chapters introduce the most important ones of such key issues.

2.2.1. What is 'pay'?

According to the – extensive and sometimes ground-breaking – case law of the CJEU[22] on this issue, pay includes not only basic pay, but also, for example, overtime supplements, special bonuses paid

[16] Official Journal L 225 , 12/08/1986 P. 0040 - 0042
[17] Official Journal L 359 , 19/12/1986 P. 0056 - 0058
[18] OJ L 348, 28.11.1992, p. 1–7
[19] OJ L 145, 19.6.1996, p. 4–9
[20] Official Journal L 046 , 17/02/1997 P. 0020 - 0024
[21] OJ L 14, 20.1.1998, p. 6–8
[22] See for example Case C-12/81 Eileen Garland v British Rail Engineering Limited [1982] ECR 359 (Garland), 262/88 Douglas Harvey Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-1889 (Barber), Case C-33/89 Maria Kowalska v Freie und Hansestadt Hamburg [1990] ECR I-2591 (Kowalska)

by the employer, travel facilities, compensation for attending training courses and training facilities, termination payments in case of dismissal and occupational pensions.

In particular the extension of Article 157 of the TFEU to occupational pensions has been very important. In Defrenne I[23] case the Court had to consider the relationship between the concept of pay set out in Article 157 and the social security systems: the CJEU ruled[24] that although consideration in the form of social security benefits is not alien to the concept of pay, this concept does not include those social security schemes or benefits, in particular retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, and which apply, on an obligatory basis, to general categories of workers. These schemes ensure certain benefits for workers which are not so much a matter of the employment relationship, but rather a matter of – general – social policy.

It is worth to compare Defrenne I. case with the Barber case in which the Court ruled[25], that retirement pension is „pay" if it is

- the result of either an agreement between workers or employers or of a unilateral decision of the employer;
- wholly financed by the employer or by both the employer or the workers; and
- where affiliation to those schemes derives from the employment relationship with a given employer.

As we saw it above, this distinction between statutory social security schemes and occupational schemes of social security has induced the EU legislator to adopt two different directives, one in 1978 on statutory schemes[26], and another one in 1986[27] on occupational schemes. This case law had a considerable impact on equal treatment in occupational pension schemes in those Member States

[23] Defrenne I. 1971. 80/70. Defrenne v. Kingdom of Belgium ECR 445.
[24] Defrenne I. 1971. 80/70. Defrenne v. Kingdom of Belgium ECR 445. points 7-12. of the judgement, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61970CJ0080&from=EN acessed on:07.05.2016.
[25] Judgement of the Court of 17 May 1990. - Douglas Harvey Barber v Guardian Royal Exchange Assurance Group. - Reference for a preliminary ruling: Court of appeal (England) - United Kingdom- Case C-262/88. point 25. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61988CJ0262&from=ENaccessed on:07.05.2016.
[26] 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
[27] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

where it had been believed that Article 157 of the TFEU was not applicable for retirement pensions and certain forms of discrimination were still allowed.

The very broad interpretation of the concept of pay by the CJEU was very significant: for example in the Garland case the Court ruled [28] that „pay" also can be a free travel facility for family members of retired employees, and in the Worringham and Margaret Humphreys v Lloyds Bank case[29] it was declarated that employers' contributions to pension schemes are also recognised as „pay".

2.2.2. What is "equal work" in the sense of Article 157 of the TFEU?

An important question was in equal pay cases whether the work performed by a female worker is 'equal' to the work performed by a male worker.

In this respect, the CJEU in the Brunnhofer[30] case has decided that Article 157 of the TFEU also extends to 'work of equal value', and „number of factors to be taken into account, such as the nature of the activities actually entrusted to employees, (..) training requirements (..) and working conditions" when comparison is made.

According to the Macarthys judgement[31] it is not needed for the comparison of work of equal value to work at the same place or time: The original court case was filed by Ms Wendy Smith, who worked for Macarthys Ltd in their factory. The man who had previously worked in the same position for the company got higher salary. Ms Smith claimed this was unlawful according to Article 119 of the Treaty of the European Community. The company argued she had no claim because comparisons with former colleagues were not allowed. The CJEU held that Ms Smith had a claim because she could compare her pay with a former colleague.

[28] Case C-12/81 Eileen Garland v British Rail Engineering Limited [1982] ECR 359 (Garland), Summary: „The fact that an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement constitutes discrimination within the meaning of article 119 against former female employees who do not receive the same facilities ."- http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61981CJ0012&from=EN, accessed on: 07.05.2016.

[29] Case C-69/80 Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited[1981] ECR 767

[30] Case C-381/99 Brunnhofer, European Court reports 2001 Page I-04961, ECLI identifier: ECLI:EU:C:2001:358

[31] 129/79. Macarthys v. Smith (1980.) ECLI identifier: ECLI:EU:C:1980:103

In the Enderby case[32] the CJEU declared that the prohibition applies not only to discrimination arising out of individual contracts, but also collective agreements and legislation.

2.2.3. How to prove discrimination / indirect discrimination?

In the Danfoss case, the ECJ acknowledged that problem for the first time. It concluded that where a company applies a system of pay which is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers, the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex. The view emerged from the ECJ that if the normal division of proof is applied in cases where the employer does not have an easily accessible and understandable pay system, it would be excessively difficult or impossible to show that pay discrimination had taken place. In later cases the ECJ ruled more specifically on the use of statistical evidence by female employees to indicate that a pay gap existed with their male colleagues.

The ECJ found that the use of statistics, indicating that men earned more than women in work of the same value, could lead to „apparent discrimination". As a consequence, the burden to prove that the difference in pay was not based on discrimination, needed to shift to the employer.

„These developments were reinforced in the Enderby case. The ECJ ruled that: 'it is normally for the person alleging facts in support of a claim to adduce proof of such facts... However, it is clear from the case-law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty. (...) Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the

[32] 127/92. Enderby v. Frenchay Helth Authority (1993.) ECR 3199. ECLI identifier: ECLI:EU:C:1993:859

employer. These developments with regard to the use of statistical date were reinforced in a ruling of 1999 regarding indirect discrimination. If a national court finds that statistical data show there is apparent indirect discrimination, the employer should prove that the difference is justified by factors unrelated to sex. The ECJ declared that it is for the national court to judge the reliability of the statistics used, for example in terms of the number of individuals covered, or whether the records are purely fortuitous or short-term phenomena and whether in general, they appear to be significant.

Despite the existence of this case law, in many Member States it continued to be difficult for women to win cases of unequal pay before their national courts. Not all judges were informed about the ECJ jurisprudence or were willing to apply the guidelines set forth in the European Court's decisions. Therefore, after long deliberations, in 1997 the European Council adopted Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. The aim of the Directive was to ensure that measures to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process. With the implementation in 2001, Member States were compelled to adapt their laws and from then on, national courts were required to shift the burden of proof in gender equality cases."[33]

2.3. The Treaty of Amsterdam

The Treaty of Amsterdam (1999.) amended Article 119 of the EEC Treaty and renumbered it for Article 141 of the EC Treaty.

The first two paragraphs of Article 141 of the EC Treaty remained nearly the same; however, the provision in Article 141(1) EC explicitly stated 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 is applied."

[33] Dick Houtzager: Shifting the burden of proof in equality cases, accessed on: 07.05.2016. - http://www.eracomm.eu/oldoku/Adiskri/03_Burden_of_proof/2010_Houtzager_EN.pdf

As we have seen, the additional expression ‘work of equal value’, only confirms what had already become clear with the case law of the CJEU.

Furthermore, two new paragraphs have been added in 1999. According to Article 141(3) of the EC Treaty:

„The Council can adopt measures to ensure the application of the principle of equal opportunities and the 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.„

The new Article 141(4) also allowed positive actions. It stipulated 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 prevent or compensate for disadvantages in professional careers.”

With the entry into force of the Treaty of Amsterdam in 1999, the promotion of equality between men and women throughout the European Community became one of the essential tasks of the Community.

Since 1999 the EU has had the competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation. This was a turning point in the development of the principle of equal treatment: from this time the principle contains not „only” gender equality, but the prohibition of discrimination based on racial or ethnic origin, religion or belief, disability, and age or sexual orientation.

3. Sources of equality law adopted in the 21st century and the most recent Case Law of the CJEU

3.1. The first non-gender related directives

The Treaty of Amsterdam has provided a legal basis for two non-gender related anti-discrimination directives. One of them was the so-called Racial Equality Directive[34], adopted in 2000, which laid down the following important principles:

„Implements the principle of equal treatment between people irrespective of racial or ethnic origin.

Gives protection against discrimination in employment and training, education, social protection (including social security and healthcare), social advantages, membership and involvement in organisations of workers and employers and access to goods and services, including housing.

Contains definitions of direct and indirect discrimination and harassment and prohibits the instruction to discriminate and victimisation.

Allows for positive action measures to be taken, in order to ensure full equality in practice.

Gives victims of discrimination a right to make a complaint through a judicial or administrative procedure, associated with appropriate penalties for those who discriminate.

Allows for limited exceptions to the principle of equal treatment, for example in cases where a difference in treatment on the ground of race or ethnic origin constitutes a genuine occupational requirement.

Shares the burden of proof between the complainant and the respondent in civil and administrative cases, so that once an alleged victim establishes facts from which it may be presumed that there has been discrimination, it is for the respondent to prove that there has been no breach of the equal treatment principle.

[34] 2000/43/EC Directive on the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 P. 0022 - 0026

Provides for the establishment in each Member State of an organisation to promote equal treatment and provide independent assistance to victims of racial discrimination."[35]

The other important directive adopted in 2000, was the so-called Employment Equality Framework Directive[36], which aims to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace.

The Directive on the principle of equal treatment between men and women in access to and the supply of goods and services was also adopted in 2000.[37]

3.2. The Treaty of Lisbon

The Lisbon Treaty emphasised even further the importance of the principles of non-discrimination and equality as fundamental principles of EU law.

Article 2 of the TEU states that *„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".*

According to Article 3(3) of the TEU, one of the aims of the EU is to *„combat social exclusion and discrimination, and (…) promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".* In addition, Article 8 of the TFEU stipulates that *„in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".* Equality between men and women forms part of the fundamental principles on which the EU is based.

[35] https://en.wikipedia.org/wiki/Racial_Equality_Directive, accessed on: 07.05.2016.
[36] 2000/78/EC Directive on equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 - 0022
[37] 2000/113/EC Directive on the principle of equal treatment between men and women in access to and the supply of goods and services, Official Journal of the European Communities, L 113, 12 May 2000

Since the entry into force of the Lisbon Treaty, Article 10 of the TFEU specifies that *„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*".

Article 19 of the TFEU replaced the former Article 13(1) and provides a legal basis to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. An additional legal basis 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…"* is provided in Article 157(3) of the TFEU.

3.3. The EU Charter of Fundamental Rights

The very important moment in the development of EU gender equality law was the adoption of the Charter of Fundamental Rights of the European Union.[38] This Charter prohibits discrimination on any ground, including sex: it recognises[39] the right to gender equality in all areas (not only in employment) and the possibility of positive action for its promotion. Furthermore, it also defines rights related to family protection and gender equality.

The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees the right to paid maternity leave and to parental leave.

Since the entry into force of the Lisbon Treaty, the Charter has become a binding catalogue of EU fundamental rights.

Both Treaties (the TEU and the TFEU) are important for the further development of EU equality law, because they serve as a basis for the adoption of future legislation.

In the 21st century many directives were adopted showing the importance of equality issues.

[38] Official Journal C 326 , 26/10/2012 P. 0001 - 0390
[39] Charter of Fundamental Rights of the European Union, Chapter III.

3.4. Recast Directive[40]

The Recast Directive in 2006, a new directive (the Recast Directive 2006/54) was adopted in which the existing provisions of different sex equality directives are brought together and some case law of the Court of Justice of the EU is incorporated. The aim of this so-called 'recasting' is to clarify and bring together in a single text the main provisions regarding access to employment, including promotion, and to vocational training, as well as working conditions, including pay and occupational social security schemes. The Recast Directive had to be implemented by 15 August 2008 and the directives which are brought together in this Directive (Directives 75/117; 76/207, as amended by Directive 2002/73; 86/378, as amended by Directive 96/97 and 97/80[41]) were repealed one year later. The Member States must of course meet their obligations arising from all these directives before the end of the various implementation periods. Nearly all the articles in the Recast Directive correspond to existing articles in one or more of the above-mentioned directives.

3.5. The most recent Case Law of the CJEU

In this chapter – showing some case law as an example - I would like to highlight the fact that in spite of the implemented directives on equal treatment, discrimination is still alive in the 21st century.

3.5.1. Discrimination on grounds of age

In the Prigge case[42] the CJEU ruled that barring airline pilots from carrying out their professional activities on reaching 60 years of age constitutes discrimination on grounds of age, which is prohibited by Union law. The case is very interesting, because we can see an example what justification can or cannot be accepted in the case of discrimination, that is why I give the short summary of this case:
Directive 2000/78/EC on equal treatment in employment and occupation prohibits persons in a comparable situation from being treated differently by reason of their age. It nevertheless provides

[40] 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)
[41] These direcives were mentioned on page 10-11.
[42] C-447/09 Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG, judgment of 13 September 2011, ECLI identifier: ECLI:EU:C:2011:573

that difference in treatment occurring under certain conditions does not constitute discrimination thus prohibited, especially in the following three cases: if a measure is necessary to maintain public security (Article 2(5) of the Directive); if the difference in treatment is based on a characteristic associated with age which constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (Article 4(1)); and/or if the difference in treatment is objectively and reasonably justified by a legitimate aim, including employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary (Article 6).

Mr Prigge, Mr Fromm and Mr Lambach, airline pilots at Lufthansa, relied upon the provisions of Directive 2000/78/EC after their employment contracts were terminated in accordance with the collective agreement in force within the airline, which provides for automatic termination of employment on reaching 60 years of age. They argued before the Federal Labour Court of Germany that this was discrimination on grounds of age. The court referred to the Court of Justice to ask it to interpret the provisions of the Directive cited above, which authorise a difference in treatment in comparable situations subject to certain conditions, in order then to be able to assess whether any of these provisions can be relied upon in this case and whether or not the Lufthansa collective agreement can continue to apply.

The Court in relation to the provisions of Article 2(5) of the Directive, found that the prohibition for pilots to pursue their profession after age 60 has the objective of guaranteeing air traffic safety, which is an objective of public security which could justify such a difference in treatment. However, referring to the international and national regulations which prohibit pilots from carrying out their professional activities only after they reach 65 years of age and merely impose certain restrictions on the pursuit of these activities between age 60 and 65, the Court considered that this total ban is not necessary to achieve the objective pursued. The Court considered also that the provisions of the Lufthansa collective agreement at issue cannot be based on Article 4(1) of the Directive either. In fact, although possessing particular physical capabilities may be considered as a genuine and determining occupational requirement for acting as an airline pilot and that the possession of such capabilities is related to age, the age limit of 60 imposed by the social partners constitutes a

disproportionate requirement. The Court refered to the fact that the international and national authorities consider that pilots have the physical capabilities to act as a pilot until age 65.

The Court held that while the list is not exhaustive, the legitimate aims set out in Article 6 of the Directive are social policy objectives, such as those related to employment policy, the labour market or vocational training. On account of this, the objective of air traffic safety does not fall within this category.

The other very instructive decesion of the Court was the Commission versus Hungary case on the compulsory retirement of judges, prosecutors and notaries at the age of 62 [43], in which the Court stated that the radical lowering of the retirement age for Hungarian judges constitutes unjustified discrimination on grounds of age. The essence of the judgement was that the measure was not proportionate to the objectives pursued by the Hungarian legislature seeking to standardise the retirement age for the public-service professions and to establish a more balanced age structure in the area of the administration of justice. The Court pointed out that the objectives invoked by Hungary, namely the need to standardise the age-limits for retirement for public sector professions and to establish a more balanced age structure facilitating access for young lawyers to the professions concerned, do indeed come within the scope of social policy. The Court considered that, abruptly and significantly lowering the age-limit for compulsory retirement, without providing for transitional measures is not allowed, but a longer period is needed for the enforcement of standardising the retirement age for the public-service professions.

As we observed from the two judgements mentioned above, the principle of equal treatment has a strong influence on labour relations. The Kelly judgment[44] of 21 July 2011 is verify this presumption where the Court stated that EU legislation does not entitle a worker who has a plausible claim that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process. However, the refusal to grant any access to information may be one of the

[43] C-286/12 Commission/Hungary (6 November 2012) compulsory retirement of judges, prosecutors and notaries at the age of 62., ECLI identifier: ECLI:EU:C:2012:687
[44] C-104/10. case ECLI identifier: ECLI:EU:C:2012:8

factors to take into account when establishing facts from which it may be presumed that there has been discrimination. It depends on the all circumstances of the case, and this facts must be weighted by the national court.[45]

IV. Equal treatment in theory and in practice in Hungary

Hungary has ratified almost all the major international instruments combating discrimination, with the exception of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which the country has signed but not yet ratified.

I have the opinion that with the implementation of EU non-discrimination law, Hungary got a „ready-made" ruling: there was no „step by step" development in this field, so the society will need more time to catch up with the changes and to be aware of having legal and non legal tools against discrimination.

1. Legal background and institutional framework

The corner stone of the regulation is the general anti-discrimination clause, Article XV of the Fundamental Law of Hungary[46].

A comprehensive anti-discrimination code came into force on 27 January 2004. This is Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities[47] (hereinafter referred to as ETA). The provisions of Act V of 2013 on the Civil Code[48] on the protection of inherent personal rights (including the ban on discrimination) remain an important tool in the combat against discrimination in areas not covered by the ETA due to the restrictions of the law's personal. The protection provided by the ETA is amplified by sectoral laws (especially labour law) reinforcing the ban on discrimination

[45] summary can be read: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-04/cp120046en.pdf, accessed on: 07.05.2016.
[46] 25th April 2011.
[47] CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities
[48] Act V of 2013 on the Civil Code

and containing regulation on different bodies with a role in combating discrimination and specific rules related to the issue of non-discrimination.

2. Protected grounds

„Discrimination on all of the grounds listed in Article 19 TFEU is expressly prohibited but Hungarian national law covers other grounds of discrimination as well. The ETA sets forth an open ended enumeration of protected grounds. The 19-item list includes – among others – sex, racial origin, colour, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or other similar philosophical conviction, political or other opinion, sexual orientation, sexual identity and age. The last item is "any other status, attribute or characteristic", which means that the list is non-exhaustive, so grounds not explicitly identified are also covered."[49]

The ETA on the one hand, prohibits any discrimination in the public sector, so with regard to this sector the statute's scope is broader than that of the equality directives. On the other hand, the same cannot be said with regard to the private sector, where only four groups of actors fall under the ETA's scope[50]: those who make a public proposal for contracting (e.g. for renting out an apartment) or call for an open tender; those who provide services or sell goods at premises open to customers; self-employed persons, legal entities and organisations without a legal entity receiving state funding in respect of their legal relations established in relation to the usage of the funding; and employers with respect to employment (interpreted broadly). The ETA introduced the following definitions: direct

[49] European Equality Law Network - 2015. Country report on measures to combat discrimination http://www.equalitylaw.eu/country/hungary, accessed on: 07.05.2016.
[50] Act CXCIX of 2011

discrimination[51]; indirect discrimination[52]; segregation; harassment[53]; and victimization[54]. The definitions are largely based on the concepts used by the equality directives.

3. Institutional framework

3.1. The Equal Treatment Authority

The Equal Treatment Authority is the Hungarian equality body with a very wide scope of power. The Authority is an administrative authority functioning under the supervision of the Government with a competence to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, etc.) or the field concerned (employment, education, access to goods, etc.). The body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination.

Parallel to the operation of the Authority, organs that played a role in combating discrimination already before its establishment, continue to act in the field. Court procedures continue to be available for victims. Victims are provided with the possibility to decide whether they seek remedy with the Authority, or other administrative organs with a mandate. The Commissioner for Fundamental Rights (Hungary's Ombudsman) also remains authorised to investigate cases of discrimination.

The focus of anti-discrimination proceedings has mainly shifted to the Authority, however, court procedures have remained very important, as this is the only forum where victims themselves can

[51] Where one person is treated less favorably than another is, has been or would be treated in a comparable situation on any grounds covered by the directive (racial or ethnic, sex, religion or belief, disability, age or sexual orientation).
[52] Where an apparently neutral provision, criterion or practice would put persons having a particular racial or ethnic origin, religion or belief, sex, disability, age or sexual orientation at a particular disadvantage compared with other people. Except if: this provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
[53] When an unwanted conduct related to any grounds of the Directives (race or ethnic origin, religion or belief, sex, disability, age or sexual orientation) takes place. When the purpose or effect of violating a person's dignity, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
[54] Victimisation takes place where one person treats another less favourably because he or she has asserted their legal rights in line with the equality act or helped someone else to do so.

receive a monetary compensation and the scope of protection under civil law is wider than under the ETA.

Although the legislative framework is still not in complete harmony with the Directives, it can be said that the coming into force of the ETA and the Authority's operation gave an impetus to the fight against discrimination.

„The domestic legal framework is not fully in line with the directives in some areas. The most important problems may be summarised as follows:

- Due to the comprehensive material scope of the ETA, the requirement of equal treatment as set forth by the ETA applies only to a restricted circle of private actors. Therefore, with regard to the sectors falling under the material scope of the directives, the Hungarian law may be in breach of the acquis, as it does not impose on all persons of the private sector the obligation of non-discrimination. (e.g. fellow employees may not be called to account for harassment under the ETA).
- The ETA allows for objective justification in certain cases of direct discrimination.
- Depending on judicial interpretation, some provisions of the new law on churches and religion[55] and the National Public Education Act[56] may cause a contradiction between domestic and EU law in relation to organisations with a religious ethos, as they provide such organisations with the absolute, unqualified and unconditional rights to make differentiations in relation to recruitment.
- The exclusion of workers of the pensionable age from a severance payment may be in violation of the relevant CJEU jurisprudence.
- The obligation of reasonable accommodation has not been unambiguously transposed into the Hungarian law. The problem is especially acute with regard to employing people with disabilities, in spite of an amendment to the RPD Act, which – if interpreted from a strict grammatical point of view – only guarantees the requirement of reasonable accommodation in relation to the recruitment procedure (i.e. primarily the job interview), but does not prescribe that reasonable

[55] Act CCVI of 2011 on the right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities.
[56] Act CXC of 2011. on National Public Education

efforts shall be made to adapt the workplace to the special needs of persons with disabilities to promote their actual employment."[57]

3.2. The work of the Equal Treatment Authority with special focus on labour law issues

The Hungarian Equal Treatment Authority came into being on 1 February 2005. It was established by the Act on equal treatment and the promotion of equal opportunities (Act Nr. CXXV of 2003). The Authority is independent from the Government, it cannot be instructed with respect to the decisions it makes on complaints and its decision is final and there is no higher body that the case can be taken to. The Hungarian Metropolitan Court holds exclusive jurisdiction to hear appeals against decisions of the Authority.

„Since it was established, the Authority has been active in disseminating information about the legal protection against discrimination. The Authority's website (www.egyenlobanasmod.hu) contains a lot of information, including the relevant legislation, a brief and clearly formulated description of the Authority's scope of competence and the Authority's case law.

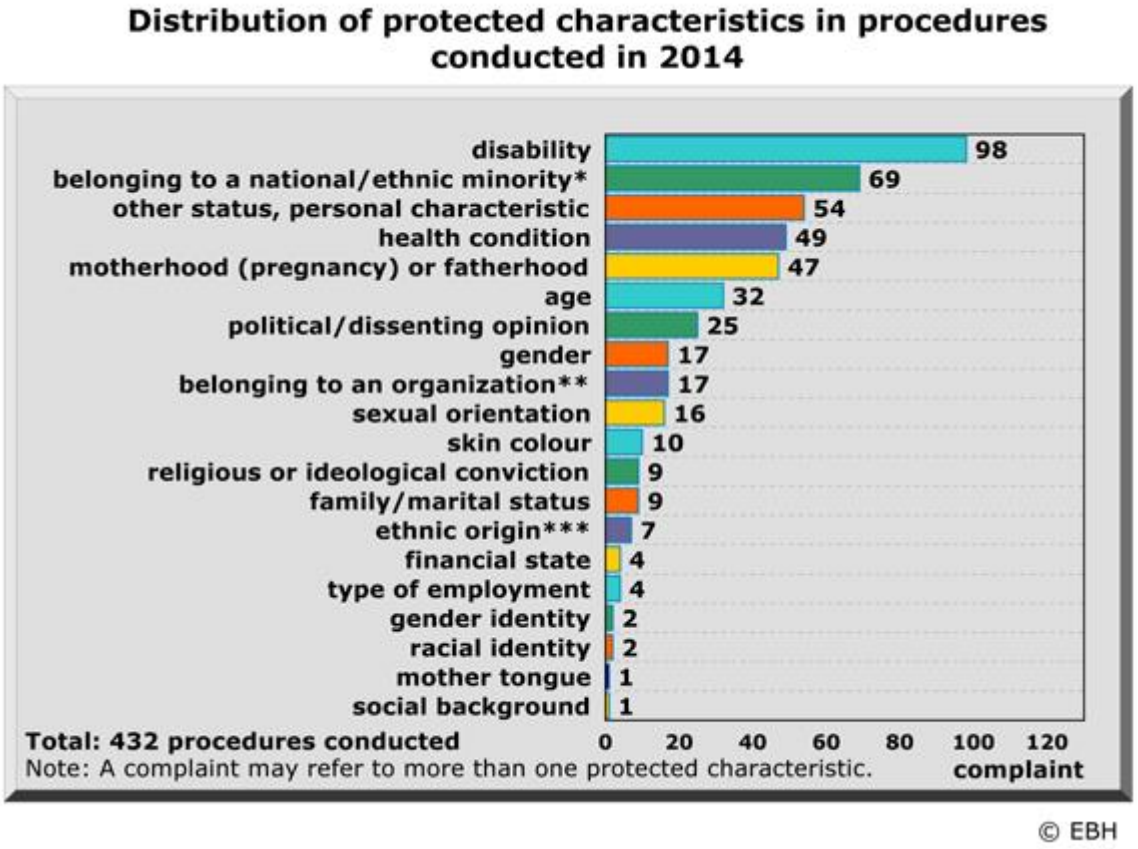
Mention has to be made of a grant provided to the Authority with the aim of enhancing its effectiveness and accessibility in the framework of the so-called Social Renewal Operative Programme 5.5.5 (hereafter: TÁMOP project).

The TÁMOP project is financed by the European Social Fund and the Hungarian State, it was started in 2009 and ended in 2014. The total TÁMOP project budget was EUR 3 million 36 thousand (HUF 911 million). As the first element of the project, an equal treatment referee system was established in September 2009. The 20 referees (lawyers, attorneys at law) were at the beginning seated in the so-called Houses of Opportunities (a regional equal opportunities network) in every county seat and in the capital. From 2011 on, a more diverse system was set up, and the referees started to hold consultation hours in offices of NGOs, government offices and community centres. They are

[57] European Equality Law Network - 2015. Country report on measures to combat discrimination http://www.equalitylaw.eu/country/hungary, accessed on: 07.05.2016.

forwarding discrimination complaints, provide assistance to the complainants in formulating their petitions and operate as a kind of filtering system. In 2013, the referee system served 2730 clients and forwarded 173 complaints to the Authority. In 2014 these numbers were 1835 and 110 respectively."[58]

In this chapter I would like to show the distribution of protected characteristics in prosedures with a table containing the latest data.[59] We will see that the most equality cases are in connection with disability or with belonging to a national/ethnic minority. Gender issues are only the 8th of the list, which is - on my point of view - the result of on the one hand the ongoing development of gender law since 1970 and the (social, economic) changes of the society.



[58] Source: Website of the Equal Treatment Authority, accessed on: 07.05.2016.

[59]Report on the activity of the Equal Treatment Authority in 2014 and on the experiences gathered in the context of applying Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, http://www.egyenlobanasmod.hu/article/view/report-on-the-activity-of-the-equal-treatment-authority-in-2014.

I would like to illustrate with a case law of ETA[60], that similar changes (as in gender issues) needed in the way of thinking of the society:

A petitioner with visual impairment submitted in her complaint that at a restaurant she visited together with her family and a seeing eye dog, the staff had called on her – before they had consumer their meals – to take the dog out into the restaurant's courtyard. Since the dog was not allowed to stay in the restaurant, the petitioner and her family left.

Immediately upon receiving notice about the initiation of proceedings, chief executive of the company − the citizen a foreign country − who was the subject of the procedure in this case, expressed his regret in writing and submitted that he had not been aware of the domestic regulations mandating that assistance dogs must be allowed into facilities used to provide services. The parties concluded a settlement in the framework of the Authority's proceedings. The settlement included a written apology and, moreover, also stipulated that in the future the company's director would proceed in accordance with the relevant laws and would also educate his staff accordingly. The rules laid down in the Social and Labour Minister's Decree No. 27/2009. (XII. 3.) SZMM on the training, examination and use of assistance dogs was attached to the settlement as an appendix. The company director also undertook to have the petitioner and her dog as a lunch guest at the restaurant on one occasion.

I think the education for feeling empathy and solidarity (emotional intelligence) towards people with disability (or being disadvantaged of any reason) should start in the kindregarten and in primary school to avoid the similar situations mentioned above.

V. The role of the principle of equal treatment in the future

One of the aims of this chapter is to draw attention to that fact how the application or non-application of this principle in „everyday life" can influence the society, the labour market and economy, and even the demography of a nation, and hereby the European Union. The other purpose is to show good examples, good practices which are worth to follow.

[60] EBH/196/2014

1. Equal treatment and demographic changes

The best example to show how equality policy can influence the demographic changes of a state is the „Swedish model".

„Sweden is known as the forerunner of the Second Demographic Transition. The ideal family size is among the highest in the European Union, and childlessness has remained at a relatively low level. Ethnic diversification has increased over time, with about onefifth of the population having a 'foreign background' in the early 2000s. The level of female labor-force participation is the highest in Europe (although mothers of preschoolers often work part-time), and young women are just as highly educated as men. Family policies, based on the principle of equality across social groups and gender, play an important role in keeping fertility relatively high. In combination with other factors, family policies also play a role in the fluctuations of fertility rates, as eligibility to parental-leave and benefits as well as the availability of public childcare are linked to parents' labor-force attachment."[61]

What is the „secret of the Swedish model"? „The increasing prevalence of new family ideals, norms, and attitudes has been accompanied by changes in different aspects of social conditions, among other things, by changes in the ethnic composition of the population. While previously a relatively homogeneous society, immigration has become an important component of population growth in Sweden in the second half of the 20th century. In the 1960s, labor-force immigration dominated, mostly from other Nordic countries, but also from Southern Europe. From the mid-1970s, the main reason for immigration has been family reunification, as well as asylum. In the 1990s, a large number of refugees came from the Balkans. Yet, the proportion of immigrants of non-European origin has been constantly increasing. Currently more than every fifth person in the Swedish population has a 'foreign background'. These substantial changes in ethnic composition raise issues such as the

[61]Prof. Dr. Ann Numhauser-Henning: Study on The policy on gender equality in Sweden http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510011/IPOL_STU(2015)510011_EN.pdf, accessed on: 07.05.2016.

immigrants' (and their children's) adaptation to Swedish values, especially regarding gender equality and family patterns."[62] So the keyword was: education.

The other important target of Swedish gender equality policy to enable both women and men to combine jobs with parenthood. Family policies and gender equality policies in Sweden are not two separate entities, but are closely interwoven and constructed to mutually support each other. Public policies in Sweden are based on the principle of equality, both across social groups and between women and men.

The result is a society where egalitarian family ideals are more prominent than in most other European countries, and also nearly equally supported by women and by men. Consequently it can be seen that combining childbearing and gender equality may be a way to keep fertility from dropping to the very low levels seen in many European countries.

The main message of this strategy - that seems to work at least for Sweden – is that the relation between working and childbearing should not be „or" but „and".

This new way of thinking can be applied not only in the field of gender issues, but also in other fields we could reach and use those people's knowledge and talent who are – because of the stereotypes and their circumstances – in the background.

2. Equal treatment and the labour market – impact on economy

„Despite significant progress in recent decades, labor markets across the world remain divided along gender lines. Female labor force participation has remained lower than male participation, gender wage gaps are high, and women are overrepresented in the informal sector and among the poor. In many countries, legal restrictions persist which constrain women from developing their full economic potential.

[62] Prof. Dr. Ann Numhauser-Henning: Study on The policy on gender equality in Sweden http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510011/IPOL_STU(2015)510011_EN.pdf, accessed on: 07.05.2016.

While equality between men and women is in itself an important development goal, women's economic participation is also a part of the growth and stability equation. In rapidly aging economies, higher female labor force participation can boost growth by mitigating the impact of a shrinking workforce. Better opportunities for women can also contribute to broader economic development in developing economies, for instance through higher levels of school enrollment for girls.[63]

The Swedish example demonstrate that firstly the circumstances must be ensured for those underprivileged groups having the potential for adding value to the economy, it is a kind of „investment" into the future.

3. Equal treatment as a form of human rights provisions

The principle of equal treatment was born in the field of labour law, and inspite of the widened content and meaning of it, it is still related to labour law in the common sense. But for instance when a blind person is not allowed to go with his/her eye dog into a restaurant, or when a person with a wheelchair can not got into the metro/tram or to the pharmacy because there is no ramp, it is not a labour law issue. These situations are touching the fundamental rights of people. What is the relation between the principle of equal treatment and human rights? Is the right to equal treatment a form of human rights?

In this chapter I will review those human rights documents which contain the prohibition of discrimination, and try to find some answer for the relation between the principle of equal treatment and human rights.

3.1. A wider look at the EU Charter of Fundamental Rights

As we saw it above one of the sources of the equality principle is the EU Charter of Fundamental Rights. This document sets out systematically the fundamental rights already considered by the ECJ

[63] http://www.imf.org/external/themes/gender/index.htm , accessed on:07.05.2016.

as arising from the general principles of EC law. The Charter goes further, however, in setting out a wider catalogue of rights that are considered to be fundamental in the European Union.

The Charter contains a Chapter titled 'equality'. The extent to which these provisions will be seen as giving rise to a legally enforceable principle of equality remains to be seen – the Charter contains a number of complex provisions as to the scope of its application.

Although the Charter became binding only with the entry into force of the Lisbon Treaty, several Advocates-General, the Court of First Instance, and the ECJ itself have already referred to the Charter in their opinions and decisions.

3.2. Equality in international hard and soft law

European Convention on Human Rights Article 14 ECHR provides that '*the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*. The Council of Europe has adopted a new equality provision (Protocol 12) that will go some way to remedying some of the limits of Article 14 ECHR. The Protocol, in effect, would add an additional provision to Article 14 that would prohibit discrimination on any grounds such as those set out in Article 14 by a public authority in circumstances where other Convention rights are not engaged, whilst '*[r]eaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures'*. The Protocol entered into force on 1 April 2005.

Equality also appears in the major human rights documents: United Nations (the International Covenant on Economic, Social and Cultural Rights 1966, the International Covenant on Civil and Political Rights 1966). In addition, some international treaties have a specific focus on discrimination and equality (Convention on the Political Rights of Women 1953, Convention on the Elimination of All Forms of Racial Discrimination 1966, Convention on the Elimination of All Forms of Discrimination Against Women 1979, and Convention on the Rights of the Child 1989).

Several International Labour Organization (ILO) instruments deal with discrimination: the Equal Remuneration Convention 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention 1958 (No. 111).

In 2010. the ILO adopted the Nr.200. Recommendation on HIV/AIDS, and the „Code of Practice on HIV/AIDS in the World of Work", that means that there are existing and serious problems on equality issues and people (both employers, employees and also other people not related to an imployment situation) need the guidelines how to handle these situations in the best way. The recommendation is not binding, although it is often cited in the decesions of European Court of Human Rights on AIDS/HIV issues. The ILO Code is used by the biggest multinational firms too.[64]

In addition, several Council of Europe conventions are relevant (on economic and social rights (European Social Charter 1961, revised European Social Charter, 1996), national minorities (Framework Convention for the Protection of National Minorities 1995), and minority languages (European Charter for Regional or Minority Languages, 1992).

The Equality and Human Rights Commission is Great Britain's national equality body and has been awarded an 'A' status as a National Human Rights Institution (NHRI) by the United Nations. On the website of this organ we can read the definition of human rights:

„Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life. They can never be taken away, although they can sometimes be restricted – for example if a person breaks the law, or in the interests of national security. These basic rights are based on values like dignity, fairness, equality, respect and independence. But human rights are not just abstract concepts – they are defined and protected by law. In Britain our human rights are protected by the Human Rights Act 1998."[65]

[64]http://munkajogportal.hu/egyenlo-banasmod-aids-a-munkahelyen, accessed on:07.05.2016.
[65]https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights,accessed on: 07.05.2016.

The cited definition and human rights documents suggest that the principle of equal treatment is a form of human rights, what is – in my point of view - partly true, but there is a big difference from the aspect of vindicating /enforcing one's rights: the rights on the grounds of equality can be inforced only that case if the person has certain protected feature to which negative sterotypes are connected by the society. This is the difference between human rights and equality: basic rights and freedoms belong to any person and enforceable without any conditions, but the field of equality is narrower because of definiating the socalled protected grounds /features as a precondition.

4. Positive action /discrimination - as a tool for further development

4.1.What is a positive action?

Positive action refers to a broad spectrum of policies and programmes which are aimed at targeted groups in order to redress inequalities which result from discriminatory practices, or the position of certain groups in a given society. Positive action policies may be used to change the composition of institutions and bodies, for example, to achieve a higher representation of female members of Parliament, or more women as company directors, or more judges drawn from ethnic minorities. As a legal tool it has enormous value in being able to tackle what is sometimes described as multiple discrimination. This is where one particular characteristic, for example, sex, or race, or age cannot be pinpointed as leading to a particular act of discrimination, but where belonging to a particular group, or social class in society perpetuates the perceived role of that group in society. The policy may also be used to change the composition of educational establishments and the labour force of a particular sector or workplace.

As we saw in the prior chapters since the Treaty of Amsterdam where the equal pay provision, Article 141 of the EC, was amended to permit positive action measures for the under-represented sex, to pursue vocational activities or prevent or compensate for disadvantage in professional careers. Article 13 of the EC provided a legal base for a wider raft of anti-discrimination measures and in 2000 two new Directives were adopted, Directive 2000/43 and 2000/78, addressing equal treatment issues in racial and ethnic origin and in employment and occupation matters generally. Significantly, both Directives permit positive action to be used. A criticism of the EU legislation is that it does not compel

Member States to use positive action, although it is arguable that in order to meet the overriding obligation to secure equality Member States should, in certain circumstances, where women and ethnic groups are under-represented in particular positions or segments of the labour market, have a duty to use positive action to secure results.

VI. Concluding remarks

My point of view is that there has been an ongoing significant development in the field of equality in the Eurpoean Union. In this development there were „turning points" so-called „big steps" such as setting aside the idea that equality means only equal pay, widening the meaning from gender law to other protected grounds, shifting the burden of proof, in which the CJEU payed the main role. Now we are reaching another milestone, where we will need a lot of creativity, innovationt - and courage (to try new ways) – to be able to make the „next step" of development. It is clear that law in itself is not enough to reduce inequality.

If we look around on the field of employment, there are already plenty of new phenomenon which can be used for the aims of equality policy.

„The existence and development of different forms of work have been repeatedly acknowledged by the European institutions. In its Green Paper on modernising labour law of November 2006, the European Commission noted that: 'Rapid technological progress as well as globalisation have fundamentally changed European labour markets. Fixed-term contracts, part-time work, on-call and zero hours contracts, hiring through temporary employment agencies and freelance contracts have become an established feature of the European labour market, accounting for 25% of the workforce' (European Commission, 2006). As the Lisbon strategy illustrates, Europe's achievement of the labour market targets fixed in 2000 and revised in 2005 relied on developing forms of 'atypical or non-standard' work arrangements that allow 'for more flexibility, either internal or external quantitative flexibility. Non-standard forms of employment allow for adapting hours of work, organisation

of working time and the responsiveness of work to fluctuations in the demand for production or services'".[66]

I think one of the keyword is education, the other important factor is the media, which nowdays seems to be the stongest tool to influence people's way of thinking, and the third „ingredient" is the internet that provides people with information and enable people to get in contact with each other. For example if there would be a program with the aim that one group/type of disadvantaged people (for instance wheelchaired) could get a laptop with internet as a kind of social benefit, if he/she undertake to take and ECDL exam within a certain time, in a short time we could see the advantageous results: shopping online, arranging official matters from home, getting into contact with people having similar circumstances/problems or with helping organisations, opportunity for distant work, getting the latest information, taking part in distant learning/ training, even language learning, earn money while sitting with a laptop in the living room. A measure like this would „open a window to the world" for that person and I am sure also for his/her family even they live in the smallest undeveloped village. There are so many possibility and potential in equality issues, we must find and use them.

Lastly, I agree with the words of IMF Chief Christine Lagarde and I think it can be true for not only women but for the other groups belonging under the scope of equality law:

"Women's empowerment is not just a fundamentally moral cause, it is also an absolute economic no-brainer," Ms. Lagarde said in a keynote speech at the W-20, an ancillary conference launched by the Group of 20 largest economies aimed at boosting gender parity in the global workforce. It holds the potential to boost growth, raise overall per capita income, tackle poverty, and reduce income inequality for people all over the world," the IMF chief said.[67]

[66]European Observatory of Working life: http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements
[67] Wall Street Journal -http://blogs.wsj.com/economics/2015/09/06/gender-equality-an-economic-no-brainer-says-imf-chief/

It is very interesting that equality issue was born form an economic aim in 1957., and it is very likely that the further develpoment of equality policy will also come from the economic interest of the society.

First and last we can say that depending on the attitude of the society (and the government), equality may have two faces: if we use equality measures in a wise way, it can be a key to economic growth and social peace, or if we ignore existing inequalities, it can cause serious pressure on the society.

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