Rethinking EU Equality Law

Towards a More Coherent and Sustainable Regime: Exploring the Alternatives

Policy Brief October 2017
Recognising Gender Identity as a Non-discrimination Ground

Related legal sources
• ECJ ruling in P v S (Case C-13/94)
• Recital 3 of the Recast Directive (2006/54/EC)

EU law does not prohibit discrimination on the basis of gender identity. This is problematic for the following reasons:
• Few Member States prohibit the discrimination on the basis of gender reassignment in employment.
• Gender reassignment is only one aspect of gender identity and gender expression.
• The real scope of the CJEU interpretation in P v S and subsequent cases is unclear.

Policy Recommendations
• Amend all the equality directives to clarify that any reference to sex discrimination includes gender identity discrimination (alternative option).

Introduction
The European Union (EU) equality law framework is often criticised for its lack of internal, external and systemic coherence.* This research-based policy paper highlights three examples of incoherence and offers specific recommendations through which the EU equality law framework can be improved.

* 41% of respondents to an EU survey were not aware of laws prohibiting gender identity discrimination in employment.

Prohibiting discrimination based on gender identity in binding legislation would contribute towards: internal and external coherence.

EXTERNAL INCOHERENCE

External incoherence refers to misalignment with international approaches to equality.

SYSTEMIC INCOHERENCE

Systemic incoherence refers to misalignment with other legal and policy fields essential to achieving substantive equality.

INTERNAL INCOHERENCE

Internal incoherence refers to the existence of a 'hierarchy of rights'.
2/ Accommodating Religious Practice

Legal sources on accommodation of workers’ needs
- Disabled persons (Directive 2000/78/EC, Art. 5)
- Pregnant or breastfeeding women (Directive 92/85/EEC, Art. 5(1))
- Workers returning from parental leave (Directive 2010/18/EU, clause 6(1))
- Flexible working arrangements for caring purposes (COM/2017/0253 final, Art. 9)

The accommodation of workplace diversity can be valuable in circumstances which are not explicitly considered in EU legislation. This is the case of religious practices.

Policy Recommendations
- Promote a better understanding of the EU concept of ‘indirect discrimination’ and how it can be used at national level to accommodate relevant employee rights at the workplace.
- Encourage discussion at EU and national level on how to develop balanced approaches to accommodating religious diversity at work.
- At the next occasion, the CJEU should provide more detailed guidelines on how to balance employer/employee rights and interests in these cases.

Interpreting the concept of indirect discrimination as encompassing a balanced accommodation of religious diversity would contribute to: internal and external coherence.

3/ Synchronising Working Time, Work-Family and Gender Equality Measures

Related legal sources
- The 2015 ‘New Start’ initiative
- Draft directive on work-life balance for parents and carers (COM/2017/0253 final)

To better facilitate the objectives of gender equality, a comprehensive EU approach to work-life balance for parents and carers should more explicitly encompass regulation of standard (and long) work hours. This would also require cross-referencing the Working Time Directive.

Policy Recommendations
- Strengthen the proposed right to request flexible or reduced work hours (COM(2017) 253 final), and include the rights to be informed of schedule changes and to refuse overtime work.
- Include the objective of work-family reconciliation in the Working Time Directive preamble.
- Expand the Working Time Directive’s Art. 13 ‘adaptability’ principle to incorporate work-family reconciliation or accommodation of care obligations.

Addressing work-family reconciliation in relation to full-time/’normal’ work hours would contribute towards: systemic coherence.
Final Recommendations for EU Member States and Institutions

• Mainstream human dignity and substantive equality into all new EU legislative and policy initiatives. Consider revising existing legislation and policies to better reflect these values.

• Implement and interpret equality-related legislation in a way that preserves the underlying objectives of human dignity and substantive equality, and is aligned with international commitments.


Sources
This brief is based on research published by the authors.


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