

European law and equality: An introduction

European law has had, and continues to have, a powerful effect in broadening and strengthening the UK's laws on equality. This leaflet briefly explains the relationship between European and UK law in this area.

What is the European Union?

The European Union (EU) is an economic and political partnership of countries normally referred to as the 'Member States'. Its only powers are those given to it by its Member States and it makes laws within these powers. It now has 27 Member States.

The Treaties setting out the EU's powers

The EU is not a single political unit based on a single international treaty. The EU is a complex legal structure based on a number of different interconnected treaties that have evolved over time. The pace and destination of this evolution has affected the way in which European equality law has developed, so it is worth providing a summary of how this complex legal structure has evolved.

The starting point is the Treaty of Rome in 1957. This created the 'European Economic Community' (EEC) to 'ensure the economic and social progress' of Member States as well as the 'constant improvement of their living and working conditions'.

Initially, the main focus was on making economic progress by securing the freedom of movement of capital, workers, goods and services across Europe. In 1973 the heads of government of the Member States decided that people in Europe could not be expected to accept the disruption associated with such economic progress without a parallel effort to secure social progress. A social action programme was drawn up, leading to new laws on matters such as social security and equal treatment for men and women in employment and promoting the idea of social 'solidarity' that still underpins much of the EU's work on equality.

In 1992, the Treaty of Maastricht created a new legal and political entity called for the first time 'the European Union'. This did not replace the Treaty of Rome but operated alongside it. Maastricht committed Member States to work to bring about an 'ever closer union', resulting in co-operation in immigration, justice and home affairs, and so bringing a sharper focus on issues with human rights implications.

In 1997, Member States agreed the Treaty of Amsterdam which included strengthened powers to take social measures, such as fresh powers to legislate on discrimination. It also created the concept of European citizenship. It substantively amended both the Rome and Maastricht Treaties but it did not consolidate them into one single treaty. This lack of consolidation has made the law unnecessarily complex and difficult to understand.

To avoid confusion, since the amendment of earlier treaties at Amsterdam, the Treaty of Rome is always called the European Community or EC Treaty, and the Maastricht Treaty is always called the European Union or EU Treaty. Official references to Articles of these Treaties always contain, as appropriate, the suffix EC or EU.

Alongside these reforms, a Charter of Fundamental Rights was drawn up by representatives of the Member States, the European Commission, the European Parliament and members of national parliaments, stating the fundamental rights that underpinned, and inspired these changes. The Charter was adopted in Nice in December 2000, with a whole chapter, or section, on equality. Although it is frequently referred to by the European Court of Justice, Member States accord it less significance than the EC or EU Treaties.

Member States considered that consolidation was necessary. In December 2007 in Lisbon Member States agreed the text of a constitution for the EU to bring together the EC and EU Treaties, and the Charter, into a single constitution for Europe. However, this constitution will not have legal effect unless it is ratified internally by all Member States. The UK and some other Members have done so, but Ireland rejected the constitution in a referendum in 2008. If, and when, all Member States ratify the constitution, the content of the Charter will have greater legal significance.

The key political institutions of the EU

The most important political institutions of the European Union (EU) are the Council, the Parliament, and the Commission. Each has a different role.

Essentially the Commission's role is to propose how the EU's mandate should be taken forward through legislation and other forms of political action. It has a President, and one Commissioner from each Member State. The department of the Commission that deals with anti-discrimination provisions is the Directorate General for Employment, Social Affairs and Equal Opportunities, also known as DG V.¹

The Parliament, which is directly elected, exercises democratic oversight by reviewing the work of the Commission. It can also be involved in the proposal of some legislation.

The Council is a more amorphous body, it is made up of Ministers from each Member State. Each Member State takes it in turn to run the Council for six months when it is said to have 'the Presidency'. There is no fixed membership of the Council: each Member State sends the most appropriate Minister for the subject under debate at any particular meeting.

What is European law?

When we talk of European law we are referring to a number of forms that the law takes.

Firstly, the EC and EU Treaties provide the primary legislation from which the institutions and law-making bodies of the EU derive authority and power. Confusingly, both Treaties include powers to make secondary legislation, but also contain some rights that can be enforced by individuals against other individuals. The right to equal pay for work of equal value in Article 141 EC is one such right.

There are two principal forms of secondary legislation – Regulations and Directives. Regulations always have immediate full effect in the legal order of Member States and the rights that they convey can always be relied on by individuals. By contrast, Directives are an instruction to Member States to introduce legislation that conforms to the requirements of the Directive. Directives require particular results to be achieved (for example, the elimination of particular forms of discrimination), but national authorities are left to choose the way in which to achieve the Directive's objectives. This allows some discretion to take account of specific national circumstances.

The institutions of the EU only have power to make Regulations and Directives to the extent that the EC and EU Treaties permit. Sometimes secondary European legislation is challenged as being outside the scope of any of the Treaties. If so, it can be declared of no effect.

A third source of law is the European Court of Justice (ECJ). The ECJ gives rulings on the meaning and effect of the Treaties and of secondary legislation. In doing so, it has built up a body of case law which is based on the adoption and development of general principles of law common to the Member States, including provisions of international law such as those in the European Convention on Human Rights (ECHR). The ECHR is the treaty which protects the civil and political rights of citizens of the Member States of the Council of Europe (see below for further details of the Council of Europe).

European discrimination law

From the beginning, the Treaty of Rome addressed discrimination in relation to nationality and gender. Initially this stemmed from concerns that market integration would be undermined if free movement of labour was limited by discrimination based on nationality between citizens of member states.

Article 6 of the Treaty of Rome (now Article 12 EC) prohibited any discrimination on the grounds of nationality of a Member State. To supplement this, a Regulation was made in 1968 (Regulation 1612/68). This made detailed provision in relation to all aspects of discrimination against Member States' nationals (and their families) when exercising their rights to move freely around the EU in order to work. Article 119 of the Treaty of Rome (the precursor to Article 141 EC) gave women and men the right to equal pay for work of equal value.

For the first twenty years after the foundation of the EEC there were no specific laws at European level clarifying the extent to which these two Articles could be relied on by individuals. However, that changed in 1976 when, in one of the most important of all its rulings, the ECJ held that the original Article 119 could be relied on by individuals against companies and other individuals, even in the absence of national legislation.² At the same time, a series of Directives prohibiting sex discrimination more widely were issued complementing the principle of equal pay in Article 119; the most significant were the Equal Treatment Directive 1976 (76/207/EEC)³ and the Equal Pay Directive 1975 (75/117/EEC).

Subsequent ECJ rulings have ensured that sex discrimination is widely defined. Thus the ECJ has ruled that the prohibition on sex discrimination in the Equal Treatment Directive includes discrimination against transsexual people (on grounds of gender reassignment) and discrimination for reasons of pregnancy and maternity.

There was no mention of a prohibition on discrimination in relation to age, disability, race or ethnic origin, religion or belief, and sexual orientation until the Treaty of Amsterdam, but that Treaty added a new Article 13 EC that empowered the Council, on a proposal by the Commission, to take steps to combat discrimination on these grounds.

Article 13 EC has been used by the Council to make important anti-discrimination Directives. The first was the Race Equality Directive (2000/43/EC)⁴ which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin in relation to not only employment and training, but also education, social protection and social advantages (including social security and healthcare), involvement in organisations of workers and employers and access to goods and services, including housing.

Soon after this, an Employment Equality Directive covering age, disability, religion or belief and sexual orientation and establishing 'a general framework for equal treatment in employment and occupation' (2000/78/EC)⁵ was made. As its name indicates, this Directive is restricted to the employment sphere.

A further Directive has recently been made banning sex discrimination in access to goods and services (2004/113/EC).⁶ In the summer of 2008 the Commission proposed a Directive in relation to goods and services discrimination on the grounds of age, disability, religion or belief and sexual orientation. This proposal will be debated in the course of 2009 and may be approved by the Council under the Swedish Presidency in the second half of 2009, though it is unlikely to come into effect fully for some time.

How does EU law affect national law and its interpretation?

All laws passed at the European level are treated as being legally superior to national laws. This means that, should European law and UK law conflict, European law must be made to prevail if possible. This is achieved in the first place by disregarding national legislation which is inconsistent with European laws that have direct effect in a specific dispute. Secondly, national courts are required to interpret the national law in a way that gives it a meaning, so far as possible, that is consistent with European law, regardless of whether national legislation predated the European law.

The ECJ helps this process because it can give preliminary rulings on the proper interpretation of European law in any particular context. Any court or tribunal can refer a case to the ECJ for a ruling on the effect of European law. A court can do this either on its own accord or on being asked by one of the parties to the case.

When this happens, the case is halted until the ECJ has ruled, after which the court or tribunal must seek to give effect to the ECJ judgement. This may even require an interpretation inconsistent with ordinary meaning of the law or the reading-in of additional words if this is considered necessary to give effect to European law.

If it is impossible for the court to interpret the national law in a way that complies with the ECJ interpretation of European law, then the national government must pass legislation to bring national law into line with the relevant EC Directives.

What happens if a Directive is not introduced into national law?

The general rule in the UK is that individual citizens are only given rights once a national law has been passed giving effect to a Directive. However, the ECJ has ruled that where an individual has suffered loss as the result of a state's failure to give effect to a Directive by passing a national law, then that State, or its organs,

cannot benefit from their failure to correctly implement the directive. Consequently, individuals may rely on the provisions of the Directive against all State agencies and public bodies.

By contrast, an individual who feels that they have been discriminated against, by reference to a Directive that has not been fully and properly implemented in the national law of a Member State, cannot invoke its provisions in court if the employer (or other person against whom a claim is made) is in the private sector. However, they may be able to claim damages against the government – see below.

Action by the European Commission

After the enactment of a Directive, the European Member States will generally be given a period of time within which to bring their domestic law in line with the objectives of the Directive. This is known as ‘transposing’ the Directive.

Once the deadline has elapsed, if a Member State has failed to communicate to the Commission its national measures implementing the Directive it will be notified that the required deadline has passed and asked to give its reasons. Where a Member State claims to have transposed a Directive, it may nevertheless be notified by the Commission that its national law does not conform with that Directive. The Member State will be given a reasonable time by the European Commission to make its laws conform.

If the issue is not settled during the preliminary stages of the infringement process, and the European Commission believes that a Member State is still in breach of Community law, the ECJ will be called on to pronounce on the matter. If the ECJ upholds the Commission’s view, it may impose a financial penalty on the Member State in question.

Giving direct effect to a Directive

Where a Member State has set out to implement a Directive but does not appear to have succeeded in doing so, the ECJ has ruled that the courts of that State must do everything possible to interpret the text of the implementing legislation in a way which is consistent with the Directive.

Likewise, the ECJ has ruled that where a Member State has failed to implement a Directive, that State cannot deny citizens those rights in the Directive that are expressed in a way that is sufficiently precise and unconditional in the text. So Directives can have direct effect in disputes between individuals and a body that is a part of the State. These bodies are called ‘emanations of the state’. There is a wide range of such bodies carrying out State functions including nationalised industries.

Challenging a Member State's failure to implement a Directive

Individuals or organizations that wish to challenge the UK government for failing to introduce a law that fully gives effect to a Directive can take a case to the UK High Court in a procedure known as 'judicial review'.

Such a case needs to be brought within three months of the passage of the law which is the subject of the complaint, or three months from the date of an action about which an individual seeks to complain. If successful, the High Court ruling will require the government to introduce an amended law, complying with the requirements of the Directive.

Interested parties can also request the Commission to take proceedings against a government. If the Commission considers the complaint valid it will ask the Member State to submit observations. If the issue cannot be resolved, the Commission will send an opinion to the State asking that the infringement cease. If the State fails to comply the Commission may take enforcement action against the Member State in the ECJ.

Individuals who are adversely affected in a way which they think is prohibited by the Directive, but not adequately addressed in the UK law, may nevertheless be entitled to claim compensation from the UK government, where the failure to transpose the Directive has led to a loss being sustained by an individual, provided that the failure is sufficiently clear and obvious.⁷

What other European bodies are there?

The most significant other European body is the Council of Europe. It was set up in 1949 to defend human rights, pluralist democracy and the rule of law. The UK is a member. Following the collapse of communism, membership expanded rapidly to take in the new countries of Eastern Europe and the former Soviet Union. It therefore has a broader membership than the EU, as well as a narrower set of powers and responsibilities.

The Council of Europe seeks to develop and protect common and democratic principles throughout Europe based on the European Convention on Human Rights which sets out a range of human rights and fundamental freedoms. These must be respected by all the member countries of the Council of Europe. Members are expected to ratify the Convention at the earliest opportunity. The Convention set up the European Court of Human Rights in 1959. People in countries whose government has ratified the Convention can take a case to the European Court of Human Rights and seek to establish that their rights have been breached. The UK enshrined the rights and obligations under the Convention into national law through the Human Rights Act 1998.

In addition the European Social Charter guaranteeing social and economic human rights was adopted by the Council of Europe in 1961 (and revised in 1996). The European Committee of Social Rights (ECSR) is responsible for monitoring compliance with the Charter by member countries.

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- 1 <http://ec.europa.eu/social/home.jsp?langId=en>
 - 2 Case 43/75 Defrenne v SABENA (No 2) [1976] ECR 455.
 - 3 A subsequent Consolidating Directive 2006/54 ('on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – recast') came into effect from 15 August 2006. Other sex discrimination directives include: Directive 97/80/EC on the Burden of Proof in Sex Discrimination; The EC Parental Leave Directive (96/34/EC), extended to the UK by Council Directive 97/75/EC; the Equal Treatment (Social Security) Directive (79/7/EEC); and the Pregnant Workers Directive (92/85/EC).
 - 4 http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_43_en.pdf for further details see http://ec.europa.eu/employment_social/fundamental_rights/legis/lgdirect_en.htm
 - 5 http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_78_en.pdf for further details see http://ec.europa.eu/employment_social/fundamental_rights/legis/lgdirect_en.htm
 - 6 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML>
 - 7 Francovich v Republic of Italy C6/90 [1991] ECR I-5357, [1995] ICR 722.



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Equality and Diversity Forum

207-221 Pentonville Road, London N1 9UZ

Tel: 020-7843 1597, Fax 020-7843 1599, email info@edf.org.uk, website www.edf.org.uk