

Nature of the Prohibition of Discrimination on Grounds of Sexual Orientation in EU Law

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Abstract : The EU law encompasses many supranational legal systems (EU law, ECHR, international public law and constitutional traditions common to the Member States) which guarantee the protection of fundamental rights, with partly overlapping scopes of applicability, various principles of interpretation of legal norms and a different hierarchy. In EU law, the prohibition of discrimination on grounds of sexual orientation originates from both the primary and secondary EU legislation. At present, the prohibition is considered to be a fundamental right in pursuance of Article 21 of the Charter, but the Court has not yet determined whether it is a right or a principle within the meaning of the Charter. Similarly, the Court has not deemed this criterion to be a general principle of EU law. The personal and materials scope of the prohibition of discrimination on grounds of sexual orientation based on Article 21 of the Charter requires each time to be specified in another legal act of the EU in accordance with Article 51 of the Charter. The effect of the prohibition of discrimination on grounds of sexual orientation understood as above will be two-fold, for the States and for the Union. On the one hand, one may refer to the legal instruments of review of EU law enforcement by a Member State laid down in the Treaties. On the other hand, EU law does not provide for the right to individual petition. Therefore, it is the duty of the domestic courts to protect the right of a person not to be discriminated on grounds of sexual orientation in line with the national procedural rules, within the limits and in accordance with the principles set out in EU law, in particular in Directive 2000/78. The development of the principle of non-discrimination in the Court's case-law gives rise to certain doubts as to its applicability, namely whether the principle as the general principle of EU law may be granted an autonomous character, with respect to the applicability to matters not included in the personal or material scope of the Directives, although within the EU's competence. Moreover, both the doctrine and the opinions of the Advocates-General have called for the general competence of CJEU with regard to fundamental rights which, however, might lead to a violation of the principle of separation of competence. The aim of this paper is to answer the question what is the nature of the prohibition of discrimination on grounds of sexual orientation in EU law (a general principle in EU law, or a principle or right under the Charter's terminology). Therefore, the paper focuses on the nature of Article 21 of the Charter (a right or a principle) and the scope (personal and material) of the prohibition of discrimination based on sexual orientation in EU law as well as its effect (vertical or horizontal). The study has included the provisions of EU law together with the relevant CJEU case-law.

Keywords : EU law, EU principles, non-discrimination in EU law, Charter of the Fundamental Rights

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