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The theory of ordoliberalism and the principle of non-discrimination in EU law: implications for the Member States on the example of Polish Labour Code[1]

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Abstract
The principle of non-discrimination lies at the heart of the socio-economic order of the EU, the main parameters of which are sustainable economic growth, price stability, a highly competitive social market economy aiming at full employment and social progress, inclusion and social cohesion, non-discrimination, including equality between women and men and social justice (TEU: art. 3.3). Therefore, the prohibition of discrimination becomes a *sine qua non* condition for achieving EU treaty goals, strongly correlated with the theory of ordoliberalism.
The aim of the article is to analyse the normative way of securing the principle of non-discrimination in EU law in the perspective of ordoliberalism and its implications for Polish law. The authors intend to answer the research question about the extent to which ordoliberal theory had an impact on the development of the principle of non-discrimination, understood as a subjective right to equal treatment, regardless of individual characteristics, other than nationality, through the comparison of relevant provision of EU law and the Polish Labour Code.

Keywords: non-discrimination, principle of equality, ordoliberalism, internal market, Labour Code

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Teoria ordoliberalizmu a zasada niedyskryminacji w prawie UE – implikacje dla państw członkowskich na przykładzie polskiego kodeksu pracy

Abstrakt

Zasada niedyskryminacji leży u podstaw urzeczywistnianego w jego ramach ładu społeczno-gospodarczego, którego głównymi parametrami są zrównoważony wzrost gospodarczy, stabilność cen, społeczna gospodarka rynkowa o wysokiej konkurencyjności zmierzająca do pełnego zatrudnienia i postępu społecznego, włączenie i spójność społeczna, niedyskryminacja, w tym równość kobiet i mężczyzn oraz sprawiedliwość społeczna (art. 3 ust. 3 TUE). W tej perspektywie zakaz dyskryminacji staje się warunkiem *sine qua non* osiągnięcia traktatowych celów UE, silnie skorelowanym z teorią ordoliberalizmu. Celem artykułu jest analiza sposobu normatywnego zabezpieczenia zasady niedyskryminacji w prawie UE w perspektywie ordoliberalizmu i wynikających z tego implikacji dla polskiego porządku normatywnego. Autorzy zamierzają odpowiedzieć na pytanie badawcze dotyczące tego, w jakim zakresie teoria ordoliberalizmu wywarła wpływ na rozwój zasady niedyskryminacji, rozumianej jako prawo podmiotowe do równego traktowania bez względu na indywidualne cechy, inne niż przynależność państwowa, przez porównawczą analizę relewantnych przepisów prawa unijnego oraz kodeksu pracy.

Słowa kluczowe: niedyskryminacja, zasada równości, ordoliberalizm, rynek wewnętrzny, kodeks pracy

The first half of the 20th century was a period of intense development of economic, political and legal thought. One of the trends that had a significant impact on the shape of the political and legal and economic systems (initiated in West Germany and over time also in other European countries) was ordoliberalism. The first ideas of the ordoliberal thinkers occurred in the 1930s and were represented by prominent German lawyers, philosophers and economists. However, the ideas developed after the Second World War in the Federal Republic of Germany and then in the European Union.

The end of the biggest armed conflict in the history of mankind brought not only the necessity to rebuild the destroyed continent, but also forced a change in paradigms and the existing model of economic development of states (Gwoździewicz, Prokopowicz 2016: p. 64), which under conditions of integration within the EU (previously the Communities) was based, as mentioned above , on the German idea of ordoliberalism and management style called the Social Market Economy, arguing that the process of Europeanisation is not only going from top to bottom (unilateral transfer of European order to national policies), but also in the reverse direction (adopting transnational solutions of conceptual solutions shaped on national level) (Bokajło 2017: p. 261–276). Ordoliberals considered and pointed out that the legal system of the state should primarily guarantee the freedom of the individual as the most important entity on the market and create favourable conditions for free competition.

In EU law, one of the expressions of such an approach is the principle of non-discrimination. At the current stage of development of the European Union, it con-

stitutes the basis for the protection of individual rights in all areas covered by EU competences (Śledzińska-Simon 2011: p. 41–42), particularly in the building of the internal market. The principle of non-discrimination lies at the heart of the socio-economic order embodied in it, the main parameters of which are sustainable economic growth, price stability, a highly competitive social market economy aiming at full employment and social progress, inclusion and social cohesion, non-discrimination, including equality between women and men and social justice (TEU: art. 3.3). In this perspective, the prohibition of discrimination becomes a *sine qua non* condition for achieving EU treaty goals in the scope of building an internal market (i.a. Directive 2000/78: recital 11) with parameters and implementation tools strongly correlated with the theory of ordoliberalism.

Considering the foregoing, the authors intend to answer the research question about the extent to which ordoliberal theory had an impact on the development of the principle of non-discrimination, understood as a subjective right to equal treatment, regardless of individual characteristics, other than nationality, in EU law and Polish law. The starting point is the competition policy, as it is an area that ordoliberals pay special attention to and at the same time it is where the anti-discriminatory *acquis* develops from. The main subjects of comparative analysis are solutions guaranteeing the right to equal treatment on the labour market as a sector of the EU internal market. Verification of the research question is based on presentation of origins and main assumptions of ordoliberalism, analysis of competition policy in the light of ordoliberal theory, characteristics of the principle of non-discrimination in EU law and analysis of the impact of the EU principle of non-discrimination on Polish normative solutions on the example of the labour code in the perspective of implementing ordoliberal principles. The study finishes with the main conclusions.

Genesis and major assumptions of ordoliberalism

Ordoliberalism is an economic doctrine on the basis of which the West German economy was functioning after the Second World War. Generally it is the "ordered" liberalism that combines liberal views with elements of conservative thought and Catholic social teaching. The beginning of this doctrine is considered to be the founding of "the Freiburg school" in 1933 by Walter Eucken, Franz Böhm and Hans Großmann-Doerth. The researchers were guided by economic humanism, which restored liberalism and a common view that political economy should regain its practical role (Gardziński

2016: p. 265). In the above mentioned authors' works, they pointed out the risk of abuse of power and obtaining a dominant position by monopolies and cartels, which could result in the exploitation of weaker entities on the market, and thus in distortions of the competition mechanism. The Freiburg school consociated the assistant professors and assistants working with Eucken, Böhm and Großmann-Doerth. They were, among others: Constantin von Dietze, Friedrich A. Lutz, Bernhard Pfister, Hans Gestrich, Fritz W. Mayer, Adolf Lampe, Karl Friedrich Mayer, Leonhard Miksch, K. Paul Hansel and the wife of Eucken Edith Eucken-Erdsiek as well as Wilhelm Röpke and Alexander Rüstow (Dürr 1954: p. 11).

A characteristic feature of ordoliberalism is thinking in terms of order (*Ordnung*). Justyna Bokajło argues that ordoliberalism "is a philosophical and political current which was supposed to be a response to the crisis of capitalism, supported by the laissez-faire principle and, at the same time, centrally managed economy" (Bokajło 2014: p. 299). In practice, this meant that the ordoliberals were in favour of choosing "the third way" that would be a solution between unhampered economic freedom and the limitations of central control. In the opinion of Elżbieta Mączyńska, "the basis of ordoliberalism as a theoretical current in economics are the ideas of "ordo ", whose essence is to shape the order corresponding to the human nature and ensuring the balance of the economy" (Mączyńska 2014: p. 111). The key role in this respect is the role of a strong state, which will not only be limited to the function of a "night watchman", but will actively organise and initiate competition in the framework of an economic order based on free competition (Bokajło 2014: p. 300). In order to make this possible, it is necessary in socio-economic practice to follow the principles defined by Walter Eucken as the main, the constituting and the regulating economic order.

One of the main principles in ordoliberalism is the freedom of the individual because it allows independent choices. It enables self-fulfilment of individual people and makes it possible to maintain human dignity. According to Ludwig Erhard, man is only then fully free if he is able to limit himself in a situation where freedom would mean harm to others or mere arbitrariness (Pysz 2008: p. 101–103). The researcher believed that the best way to secure individual freedom is to limit state power, which in his opinion is only achievable in the market economic system (Schlecht 2011: p. 15).

Ludwig Erhard believed that a very important element of the state's activity was to supplement the economic policy pursued by the state through social policy to provide the needy with a dignified life. This means that in ordoliberalism social policy is an

integral part of economic policy, assuming that because of the sense of responsibility, first and foremost, individuals must take care of their own safety. Only in a situation when all possibilities failed, they would receive state aid. Katarzyna Kamińska and Małgorzata Trybuchowicz point out that in ordoliberalism social justice takes a special place, understood as equality of opportunities guaranteed by the rules of competition and rules enabling participation in competition for everyone (Kamińska, Trybuchowicz 2018: p. 108). The functioning of free competition should, therefore, be considered as the main pillar of ordoliberalism.

The principles constituting the economic order formulated by Walter Eucken are essential for the smooth functioning of the competitive economic order (Grabska, Moszyński, Pysz 2014: p. 45). They were formulated in the following seven points (Eucken 2004: p. 254–291):

1) The basis of the functioning of the market economy is the private property as the direct consequence of the common property is collective responsibility, which in practice often means its lack. Private property has the advantage of contributing to its responsible treatment. This allows achieving greater efficiency and better use of resources. It should be noted, however, that Walter Eucken also perceived the risk associated with an excessive concentration of ownership, which paradoxically could be a potential threat to the market economy. In this regard, he stressed that private property cannot be used to create monopolistic structures. The task of the state should be to counteract this process.
2) Only stable and exchangeable money guarantees price comparisons with their global counterparts. As a result, market participants, producers and consumers, can easily calculate and plan, which gives them an opportunity to make adequate consumption and investment decisions. Inflation or deflation violates the proper functioning of the price mechanism as a measure of the scarcity of goods.
3) The free price formation on the markets results in the operation of a price mechanism which, apart from its informative function, also serves as an indicator of a rarity for goods and resources. Compared to a planned economy, where prices were regulated in advance, a freely operating price mechanism signals consumers' needs, which must be taken into account by producers if they want to stay on the market. It is indispensable for the smooth functioning of the market economy so that the prices and their relations correctly reflect the rarity of goods and resources.

4) Freedom of contracting and settlement guarantee that no economic initiative will be hindered. It is necessary, however, that restrictions of competition, in the form of monopoly or cartel agreements, are removed by active competition policy.
5) Full responsibility of business owners for decisions and actions taken. All forms of limiting this responsibility and transferring the effects of wrong decisions on other participants in business and society are treated as a manifestation of monopolistic aspirations.
6) Stability is a basic requirement of economic policy. When economic policy is not stable enough, the competition order cannot fully function.
7) The last constituting principle is the openness of markets. It allows the inclusion of domestic industry and the international division of labour. At the same time, open markets make it difficult for entrepreneurs to abuse power and exploit employees and also counteract monopolisation.

Compliance with the constituting principles of the economic order does not yet guarantee an economically efficient and socially acceptable management process. Therefore, Walter Eucken also defined the principles that regulate the economic order, that is, those that translate into specific activities in economic practice. By these rules, Walter Eucken understood all the areas that are usually identified with competition, social, economic and structural policy (Enste 2006: p. 5-8). The author defines four regulatory principles pertaining to current activities in the management process. These are (Eucken 2004: p. 291–304): 1) control of monopolies, 2) income policy, 3) economic account, and 4) regulations related to anomalies on the supply side. At the same time, as Piotr Pysz observes, "the policy of shaping a competitive economic order based on the constitutive principles and the policy tools used to implement its regulating principles should constitute a cohesive whole" (Pysz 2008: p. 74).

Competition policy in the theory of ordoliberalism

Ordoliberals detected high risks related to the efforts of private entities to create monopolies, which, in turn, would limit market competition. It should be noted, however, that in exceptional situations they allowed the existence of so-called technical monopolies, whose activities would be related to production and services of fundamental importance to society. The consequence of this approach was also the agreement on limited existence in the market economy - state property, e.g. in the banking or

mining sector (Pysz 2008: p. 6). The ordoliberals also detected threats to the freedom of competition flowing from the state, mainly through exerting a negative influence on entrepreneurs. The way to solve this problem was to limit the role of the state in creating a legal and institutional framework for the development of economic activity.

An important principle of the ordoliberal concept of economic policy is the principle of competition. Franz Böhm said that "it is the best tool in history to limit power because it puts the consumer in the spotlight" (Böhm 1961: p. 22). Competition is so important because it allows eliminating the problem of planning and rationing, ensuring freedom of consumption. In addition, it forces market participants to innovate, make technological progress, brings creativity and discipline and at the same time it contributes to the increase of production efficiency and enables the division of income and profits by performance. Another advantage is the prevention of the formation of monopolies and the limitation of economic and political power, which ensures freedom for citizens also outside the economy. Due to the fact that competition requires high performance from market participants, there will always be tendencies among entrepreneurs to limit it. Therefore, the most important role of the state should be ensuring conditions for intense competition (Erhard 2000: p. 9).

The purpose of competition proposed in ordoliberalism is, above all, the fair distribution of income generated by society. This current is based on the assumption that a comprehensive approach to the realities of economic life is necessary (Mączyńska, Pysz 2014: p. 11). The state should strive to protect vulnerable individuals, prevent injustices and create conditions to guarantee social peace and the harmonious life of different social strata. Only this way, it will be possible to achieve and then maintain prosperity. It is important that the state, through its activities, does not suppress the initiative of individual units. In this context, the principle of equality, adopted and binding in the European Union countries, is of fundamental importance. Compliance with it is to guarantee the same market entry conditions and fair treatment to competing entities. The state, on the other hand, should monitor the proper functioning of the market and ensure compliance with applicable law.

The concern for ensuring undistorted competition in the EU internal market, not only led to the prohibition of discrimination on grounds of nationality, mentioned in art. 18 TFEU, but also the principle of equal treatment regardless of sex, race or ethnic origin, religion or belief, disability, age or sexual orientation, currently guaranteed by art. 19 TFEU. Its most original expression, which is the prohibition of wage discrimination

against women and men, expressed in art. 119 TEEC was to eliminate the possibility of gaining a competitive advantage in the EU internal market based on minimising the production costs of goods and services available on it as a result of lower remuneration of women compared to men for the same work or work of the same quality. This is confirmed by the judgment of the CJEU in the Defrenne case, in which the Tribunal clarified that „(…) in the light of the different stages of the development of social legislation in the various member states, the aim of art. 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" (Judgment of the CJEU 1976). The treaty provision at issue was introduced on request of France, which as the only EU member state at that time guaranteed gender equality in the constitutional law. The provision was to serve the purpose of achieving the economic goals of integration (Maliszewska-Nienartowicz 2015: p. 23–40). With its development, as a result of which the EU transformed itself into a political organisation that implemented a broad spectrum of goals not only of an economic nature, and the principle of non-discrimination on grounds of gender has lost its purely economic dimension. This was indicated by the CJEU in the Defrenne judgment cited above, stating that „(…) 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 emphasised by the preamble to the Treaty" (Judgment of the CJEU 1976). This dual purpose of the principle of equality emphasises its relationship with the development of integration processes and its importance for achieving the EU objectives. It provided axiological justifications for the adoption of the EU protective solutions regulating the relations between participants of the labour market in accordance with ordoliberalism premise on the need to connect the economic order with the order realising the human values: dignity, freedom, equality (Kulińska-Sadłoch 2013: p. 239). As a result of a progressive interpretation of the provision of art. 119 of the TEEC and equality directives, this assumption contributed to the extension of the personal and subjective scope of protection against discrimination and the strengthening of the ontic status of the principle of equality in the European Union system.

The principle of non-discrimination in EU law

Equality is an idea of fundamental importance for cooperation between states in the organisational framework of the European Union. This is confirmed by art. 2 TEU, according to which: "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". The analysed provision identifies equality as an axiological "common denominator" of Member States' societies based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Equality is also an operational goal of the EU and the Member States embodied both within the EU internal policies (TEU: art. 3.1 and 3.3), as well as external actions and policies (TEU: art. 3.5, Woodward, van der Vleuten 2014: p. 67–92). Adherence to equality is not only a moral obligation of the Member States and the EU (as a result of the status of equality as a value) but also a legal one (equality is a standard of EU law) as the prohibition of discrimination has been raised to the principle of EU law (Judgment of the CJEU 2006, Tobler 2013: p. 443–469). With regard to the EU, it is specified in art. 8 TFEU indicating that the European Union is aiming to eliminate inequalities and promote equality between men and women in all its activities.The equality is defined in TFEU as a horizontal principle: "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" (TFEU: art. 9). To fulfill this obligation, the EU has the competence to adopt secondary legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (TFEU: art. 19). These acts take the form of equality directives such as Council Directive 2000/43/EC, Directive 2000/78/EC or 2006/54/EC, which require the Member States to achieve a goal of implementing the principle of non-discrimination in the areas covered by their material scope of application. The obligations of the Member States as regards the principle of non-discrimination also arise from the provisions of the Treaties. Art. 157.1 TFEU obliges each Member State to ensure the application of the principle of equal pay for male and female workers for the same work or work of equal value, constituting the intervention of public authority permissible in ordoliberalism, when the market acts against demands of social justice, understood as impartial – objective and equal treatment of all, in this particular case, in the field of labour valuation (Szulczewski 2016: p. 70 and

77). The obligation of taking measures to protect individuals against discrimination also results from the need for the Member States to comply with the general anti-discrimination clause contained in art. 21 EU CFR to the extent that they apply EU law (EU CFR: art. 51.1). The possible interference of Member States in market relations based on authorisation derived from EU law is not limited to combating direct discrimination (i.e. a situation where a person is treated less favourably than another person is treated, was treated or would be treated in a comparable situation due to its legally protected characteristics, Directive 2000/78: art. 2.2a), indirect discrimination (cases in which an apparently neutral provision, criterion or practice may lead groups of people to a particularly disadvantageous situation due to one of the legally protected characteristics, unless that such a provision, criterion or practice is objectively justified by a legitimate aim and that means of achieving that aim are proportionate, Directive 2000/78: art. 2.2b), harassment (undesirable conduct related to a legally protected characteristics, the purpose or effect of which is to violate the dignity of a person and to create for him/her intimidating, hostile, degrading, humiliating or offensive atmosphere, Directive 2000/78: art. 2.3) or any unfavourable treatment of a woman in relation to pregnancy and motherhood (Directive 2006/54: art. 2.2c), but also includes taking specific measures to prevent or compensate for the disadvantage of groups distinguished by legally protected characteristics in the EU (Directive 2000/78: art. 7), so-called positive actions (Ramos Martín 2014: p. 20–33). Providing a fair and equal treatment to the individual in the labour market is achieved not only by a requirement to treat equally, but also by including a prohibition of victimisation in a mechanism for preventing prohibited discrimination that requires Member States to protect employees from any adverse treatment by the employer in response to an employee measures to ensure that the principle of equal treatment is respected (e.g. Directive 2000/78: art. 11).

The purpose of the principle of non-discrimination is to create a normative space in which an individual can fully exercise his or her rights and freedoms, being protected from arbitrary, discriminatory, restriction of his or her rights by others – particularly, entities with a stronger position, which is in line with the main assumptions of ordo-liberalism. This translates into specific legislative obligations of the Member States, which will be illustrated on the example of changes introduced to the Polish Labour Code as a key normative regulation in the area covered by the prohibition of discrimination due to all legally protected characteristics in the EU law, i.e. employment.

Impact of the EU principle of non-discrimination on Polish employment law

Poland's accession to the European Union required the implementation of the Polish normative space to the EU law, also with respect to ensuring protection against unequal treatment, resulting from the provisions of the EU equality acquis (Szczerba-Zawada 2015: p. 165–176; Szczerba-Zawada 2017: p. 81–101). These changes to the Polish Labour Code, constituting the subject matter of the following analysis, were introduced by the Act of August 24, 2001, which, in order to adapt Polish law to EU law, added Section IIa to the Labour Code, now entitled "Equal treatment in employment", then amended by the Act of 14 November 2003 amending the Act – Labour Code and amending some other acts and the Act of 21 November 2008 amending the Labour Code. Included in Chapter IIa of the Labour Code provisions of art. 18^{3a} to 18^{3e} introduce protection against a qualified form of unequal treatment that is based on the personal characteristics of the protected entity, i.e. discrimination. Thus, they affect the behaviour of labour market participants, limiting the freedom of action of a party recognised as stronger in employee relations, i.e. employers, in regard to a reduction in the possibility of participation of an individual in the market due to his or her personal characteristics irrelevant for professional activity. The Polish legislator considered them to be "gender, age, disability, race, religion, nationality, political convictions, trade union membership, ethnic origin, religion, sexual orientation, and regardless of fixed or unlimited employment, either full or part-time time dimension" (Labour Code: art. 18^{3a} § 1), making them legally protected. In Polish labour law, therefore, equal treatment of employees is required, firstly, regardless of their personal characteristics or properties, natural or acquired, for example, as a result of union activity or religious belief, which exemplary enumeration is included in art. 18^{3a} § 1 of the Labour Code, which enables them to be supplemented with other features of major social significance, and moreover for whatever reasons other than the personal properties of the employee, i.e. fixed-term or unspecified employment or full-time or part-time employment (Tomaszewska 2018: p. 143). The catalog of characteristics protected against unequal treatment in the Labour Code is, therefore, wider, compared to what is required by art. 19 TFEU and the equality directives adopted on its basis, protecting against discrimination on the basis of sex (Directive 2006/54: art. 1), religion, belief, disability, age, sexual orientation (Directive 2000/78: art. 1), racial and ethnic origin (Directive 2000/43: art. 1). Consequently, in this respect, the protection against discrimination in the Polish law exceeds the mandatory EU level of protection.

The prohibition of discrimination on the basis of the indicated criteria applies to the establishment and termination of employment, employment conditions, promotion and access to training in order to raise professional qualifications (Labour Code: art. 18^{3a} § 1) and, therefore, only in certain areas of the sphere governed by the relevant provisions of the the EU equality *acquis*. On the other hand, the Polish Labour Code does not ensure protection against unequal treatment in relation to membership and employees' activity in organisations (trade unions and local governments) and benefits deriving from this (as stipulated by Directive 2000/78: art. 3.1.d), what is regulated by the Equality Act, and does not explicitly explain if, as in the case of EU law (Directive 2000/78: art 3.1.a), the stage of establishing an employment relationship also includes selection criteria and recruitment conditions (as suggested by Spurek 2009: p. 29; Tomaszewska 2018: p. 144). Institutional solutions, constituting an essential element of the EU anti-discrimination mechanism, were excluded from the Labour Code regulations as well. The authorities competent at counteracting infringements of the principle of equal treatment were set out in Chapter 3 of the Equality Act. The abovementioned shortcomings of the former, implying the fragmentary nature of the principle of non-discrimination, result in lowering the standard of protection against unequal treatment in comparison with the European standard. With regard to the scope of material application of the prohibition of discrimination, a higher level of protection in the Polish legal order than the one provided for under EU law concerns the obligation of equal remuneration for equal work or work of equal value. The stipulation in art. 18^{3c} § 1 of the Labour Code does not combine this obligation with any of the legally protected characteristics, specifically the sex criterion (TFEU: art.157) or with regard to the remaining legally protected characteristics under relevant directives. However, the systemic interpretation of this article requires wage discrimination to be treated as a qualified form of unequal treatment (Korus 2014: p. 70–71). Therefore, the latter will mean a situation in which an employee is worse paid in terms of wages, due to unrelated qualities or properties concerning him personally and socially important, for example listed in art. 18^{3a} § 1 of the Labour Code or for reasons of fixed or indefinite employment or full-time or part-time employment (judgment of the Supreme Court 2012) for all components, "regardless of their name and nature, as well as other work-related benefits granted to employees in cash or in a form other than money" (Labour Code: 18^{3c} § 2) for equal work or work of equal value. This means that in accordance with EU law the concept of remuneration is not limited to basic payment, but also includes benefits received in regard with the job.

Discrimination that is prohibited under the Labour Code may take direct form (Labour Code: art. 18^{3a} § 3), whose definitional approach in the Labour Code allows to qualify as discriminatory treatment, not only unequal treatment currently occurring or happened in the past, but also potential treatment (Wratny 2013: p. 38) not provided by EU directives as they attribute hypothetical nature to behaviour with which discriminatory treatment is compared, not discrimination as such (Boruta 2004: p. 36) and indirect form (Labour Code: art. 18^{3a} § 4) – for which similar inaccuracies were eliminated as a result of the amendment of the Act of November 21, 2008. Forcing or encouraging someone to discriminate regardless of whether it actually occurred is also considered to be an act of discrimination (Labour Code: art. 18^{3a} § 5.1). Thus, the standard of protection against discrimination guaranteed in the domestic legal order in labour relations is higher than that resulting from the EU directives, which treat only the order of discrimination as violation of the principle of equal treatment (Directive 2006/54: art. 2.2.b). In accordance with the requirements of EU law, the national legislator also classified harassment as an act of discrimination. Its definition, unlike in the directives (Directive 2000/43: art. 2.3), is incomplete as there is no clear link between undesirable behaviour and one of the reasons of prohibited discrimination (Boruta 2004: p. 5), what excessively expanded the scope of protection against this type of behaviour, as well as sexual harassment (Labour Code: art. 18^{3a} § 6), whose semantic scope has been also erroneously expanded, including not only, as EU law says (Directive 2006/54: art. 21.d), any undesirable behaviour of a sexual nature, but also behaviour referring to gender, while the latter should be considered as gender harassment (Boruta 2004: p. 39).

Discrepancies between the anti-discrimination provisions of the Polish Labour Code and the provisions of EU law also result in the lack of regulation of recognition any less favourable treatment of women in relation to pregnancy or motherhood as a form of discrimination. Extending explicitly the prohibition of discrimination also on such cases would not only implement the aims of EU secondary law (Directive 2006/54: art. 2.2.c), but would perfectly complement the high level of protection that the legislator already provides in labour relations for women in connection with a specific condition that is characteristic only for them, namely pregnancy and motherhood (Labour Code: art. 18^{3b} § 3.3 and art. 177–180), which, as a source of stereotypes and prejudices against women, is a reason of being treated worse in the labour market.

The purpose of the prohibition of discrimination is to implement in practice the standard of equal treatment resulting from art. 18^{3a} § 1 of the Labour Code, since equal treatment means non-discrimination in any way (Labour Code: art. 18^{3a} § 2). The contents of the provisions cited above indicate that the national legislator does not attempt to substantially define the principle of equal treatment, which is also not done by EU acts of primary and secondary law, and what has been done by judicature in both legal orders. According to its position, equality before the law (equality in the law) should be understood as a requirement for equal treatment of all legal entities (addressees of legal norms) equally characterised by a given significant (relevant) characteristic (judgment of the Constitutional Tribunal 1988, Judgment of the CJEU 2014). *A contrario* the principle of equality requires different treatment of entities that do not remain in a comparable position (judgment of the Supreme Court 2010; judgment of the CJEU 2013). Equality does not mean, either in EU law or in Polish law, the absolute obligation to treat all employees according to one criterion. Therefore, in specific cases, the differentiation of their situation will not be an act of discrimination. Firstly, when the situation of employees is not comparable (in this perspective equality is a relative concept that takes into account the individual characteristics of an individual). Secondly, when there is one of the permissible exceptions of the requirement of equal treatment. It does not infringe the principle of equal treatment by the employer: not hiring an employee for one or several reasons specified in art. 18^{3a} § 1 of the Labour Code, if the type of work or the conditions of its execution cause that the reasons mentioned in this provision are the actual and decisive professional requirement for an employee; termination of employment conditions in the scope of working time, if justified by reasons not related to employees without appointment for another reason or other reasons listed in art. 18^{3a} § 1 of the Labour Code; application of measures that differentiate the legal situation of an employee because of the protection of parenthood or disability; applying the criterion of seniority in determining the terms of employment and dismissal of employees, rules for remuneration and promotion, and access to training in order to improve professional qualifications, which justifies different treatment of employees due to their age; undertaking, for a limited time, actions aimed at equalising the chances of all or a significant number of employees distinguished for one or several reasons specified in art. 18^{3a} § 1 of the Labour Code, by reducing actual inequalities in favour of such employees and limiting by churches and other religious associations, as well as organisations whose ethics are based on religion, beliefs or worldview, access to employment, on the basis of

religion, religion or belief if the type or nature of the exercise of activities by churches and other religious associations, as well as organisations, means that religion, a belief or a worldview are the actual and decisive professional requirement for the employee, proportional to the legitimate goal of differentiating the person's situation, this also applies to the requirement that employees work in good faith and loyalty to the ethics of the church, other religious association and organisations whose ethics are based on religion, belief or worldview (Labour Code: art. 18^{3b} § 2 – § 4). The analysis of the exhaustive list of exemptions to prohibited discrimination indicates the justification in the form of an attempt to find a balance between the interest that each employer has in the employment of a worker with specified properties, justified, for example, by the employer's possibilities and financial needs (Tomaszewska 2018: p. 150) and protected by the freedom to contract and the need to guarantee real equality in practice in the labour market by prohibiting arbitrary limitation of the professional chances of an individual due to irrelevant features for the job or measures in the field of redistributive justice (so-called positive actions), aimed at equalising the chances, allowing the basic postulate of ordoliberalism, i.e. creating conditions for growth opportunities to take care of your own destiny, equality of opportunity and fair assessment by the market of the individual's achievements (Szulczewski 2016: p. 77).

Shifting of the burden of proof in the cases of discrimination on the defendant's side (Labour Code: art. 18^{3b} § 1) serves to equalise the unequal positions of the labour market participants, i.e. the victim of discrimination, having in most cases no full access to the information necessary to prove it, is the weaker entity in relation to the individual who committed the unlawful differentiation of treatment (Kędziora, Śmiszek 2010: p. 55). The shifted burden of proof, both in Polish and EU law, requires that the person who raises the violation of the principle of equal treatment firstly presents the facts on the basis of which any form of discrimination can be presumed. Only if this condition is met, it is up to the defendant to prove that the alleged discrimination did not occur (judgment of the CJEU 2012). Adducing prima facie evidence of unequal treatment by the party alleging discrimination raises the factual presumption that this differentiation is the result of discrimination. "If an employee is not able to substantiate unequal treatment (e.g. by comparing his situation to the situation of other employees) or give (does not claim) any unacceptable criterion as the cause of unequal treatment, it is not possible to infer (in civil proceedings) that discrimination really took place" (Gonera 2011: p. 10). The non-existence of the first of the indicated sequence of condi-

tions will result in the lack of evidentiary obligation on the part of the defendant; failure to comply with the latter will mean that there has been an unlawful discriminatory treatment of the plaintiff.

Conclusions

The principle of non-discrimination is inextricably linked to the economic goals of integration, although its evolutionary character has led to a change in its nature from a sectoral principle (limiting the discretion of the European Union institutions and Member States authorities) into a horizontal principle that every EU policy requires, including policies implemented on the EU internal market. As a consequence, the principle of equality can be seen, firstly, as the foundation of the internal market constituting the essence of its freedoms, secondly, as a regulatory instrument limiting the arbitrariness of interference by the European Union and the Member States in this market, and, thirdly, as a constitutional principle both of the internal market as well as other areas of the EU activity (More 1999: p. 518), which went beyond the purely economic framework to develop the EU system of human rights protection and paradigm shift in the perception of equality not only as an instrument for building and protecting the internal market, but as a correlate of individual rights and freedoms. In all these approaches, the main postulates of ordoliberalism and the based on it EU model of a sustainable social economy are closed, which apart from purely economic values also take into account social values and human rights standards. In this perspective, the principle of non-discrimination becomes a tool for interference in market processes with a legitimate need, both at the national and international level of ensuring freedom and justice which is essential in ordoliberalism.

As the analysis carried out in this article shows, fulfilling the content of the prohibition of discrimination on the labour market, the EU legislator, and following its example – also domestic one – tries to balance the interests of all participants of this market. Nevertheless, the implementation of the prohibition of discrimination resulting from EU law has a greater impact on the freedom of employers than employees, in order to eliminate unwanted, from the point of axiology and pragmatics of integration processes, behaviour of the employer as a stronger entity. This objective has significant consequences in terms of the means to achieve it as it allows the national legislator to trespass into contractual relations so far that the anti-discrimination provisions of labour law adopted are applied instead of the provisions of employment contracts and

other acts on the basis of which the employment relationship is formed if they violate the principle of equal treatment in employment (Labour Code: art. 18 § 3). This reveals the normative value of the prohibition of discrimination as a general principle of EU law that was derived from the constitutional orders of the Members States, adopted to the specific requirements of the EU legal order and imposed on the Member States (and individuals) as a part of legal binding obligation.

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