



**Applying EU Anti-discrimination Law  
Online Seminar for Members of the Judiciary**

**The EU Charter of Fundamental Rights  
and EU Anti-discrimination Law**

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## Overview

A. The EU Charter and its legal value

B. The scope of application and interpretation in national legal orders

C. The issue of horizontal direct effect of Article 21 of the Charter and the evolution of the CJEU case-law

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# Overview



## A. The EU Charter and its legal value

- Historical Development:
  - General Principles of EU law
- The Charter of Fundamental Rights
- Legal value of the Charter

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- Sources of EU Law
  - Primary Law
  - Secondary Law
- EU as a new legal order of international law/ a legal order sui generis

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## Historical development



### Historical development of fundamental rights in EU law

Fundamental rights as general principles of EU law

- Constitutional traditions common to Member States
- European Convention on Human Rights

Nold, case 4/73; Stauder, case 29/69; Internationale Handelsgesellschaft, case 11/70

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## Historical development



- Charter of Fundamental Rights was drafted by the European Convention

- Solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000

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## Charter of Fundamental Rights



- With the Treaty of Lisbon (2009) the Charter was given the status of binding EU primary law and has the same legal value as the Treaties (Article 6 para. 1 TEU).

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## Current Fundamental Rights Protection



1. Article 6 para. 1 TEU: Charter of Fundamental Rights
2. Article 6 para. 2 TEU: Accession to ECHR
3. Article 6 para. 3 TEU: General Principles of EU law  
„Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.“

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# Charter of Fundamental Rights



- PREAMBLE
- DIGNITY
- FREEDOMS
- EQUALITY
- SOLIDARITY
- CITIZENS' RIGHTS
- JUSTICE
- GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

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# Charter of Fundamental Rights



- Charter contains Rights and Principles
- Article 52 para. 5:
  - “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”
- ECJ, Dominguez, C-282/10; Glatzel; C-356/12

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## Charter of Fundamental Rights



- Antidiscrimination in the Charter:  
Chapter III provisions relating to equality  
Article 21 para. 1 non-discrimination

"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

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## Charter of Fundamental Rights



### B. Scope of application and interpretation in national legal orders

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## Charter of Fundamental Rights



- Scope of Application: Article 51 para 1

"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the **Member States only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

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## Charter of Fundamental Rights



- Article 6 para. 1 TEU and Article 51 para 2 Charter:

The Charter does not extend the competences of the EU as defined in the treaties or the field of application of EU law beyond the powers of the Union or establish any new power or task for the Union.

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# Charter of Fundamental Rights



- Scope of Application: Article 51 para 1

- Institution and Bodies of the Union

- ECJ, Ledra Advertising, C-8/15 P

- ECJ, Test-Achats, C-236/09

- ECJ, Digital Rights Ireland, C-293/12

- Member States?

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# Charter of Fundamental Rights



- Application to Member States?

- Article 51 para 1: „implementation“

- Different language versions:

- English: „implementing“

- French: „mise en oeuvre“

- German: „Durchführung“ (execution)

- Italian: „nell'attuazione“

- Spanish: „cuando apliquen“

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## Charter of Fundamental Rights



- Meaning of Art. 51 para. 1?
- Explanations to the Charter (OJ C 303, 14.12.2007, p. 17–35)
- Case-law of the ECJ before the existence of the Charter

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## Charter of Fundamental Rights



First decision of the ECJ after entry into force of the Charter (26.02.2013, Åkerberg Fransson, C-617/10):

- Art. 51(1) confirms the Court's case-law
- Fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations
- if national legislation falls within the scope of European Union law, the Charter applies and the Court, when requested to give a preliminary ruling, must provide all the guidance as to the interpretation needed
- The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter

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# Charter of Fundamental Rights



- Factors proving existence of a national measure 'implementing EU law'
  - EU law places one or several specific obligations on the Member State, or the national situation is covered by a specific rule of EU law
  - Obstacle to or restriction of an EU right or denial of the genuine enjoyment thereof, e.g. restriction of a fundamental freedom (e.g. free movement of goods)

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# Charter of Fundamental Rights



- EU law places one or several specific obligations on the Member States, or the national situation is covered by a specific rule of EU law
  - ECJ, 21.12.2011, N.S., C-411/10
  - ECJ, 10.07.2014, Julian Hernández a.o., C-198/13
  - ECJ, 06.03.2014, Siragusa, C-206/13
  - ECJ, 01.12.2016, Daoudi, C-395/15
  - ECJ, 16.05.2017, Berlioz Investment Fund, C-682/15

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## Charter of Fundamental Rights



- ECJ, Siragusa, C-206/13
  - Is the national legislation intended to implement a provision of EU law?
  - What is the nature of that legislation?
  - Does the legislation pursue objectives other than those covered by EU law, even if it capable of indirectly affecting EU law?
  - Are there specific rules of EU law on the matter or capable of affecting it?

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## Charter of Fundamental Rights



- Obstacle to or restriction of an EU right or denial of the genuine enjoyment thereof
  - ECJ, 30.04.2014, Pflieger, C-390/12
  - ECJ, 13.09.2016, Rendón Marín, C-165/14
  - ECJ, 21.12.2016, AGET Iraklis, C-201/15

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## Charter of Fundamental Rights



### C. The issue of horizontal direct effect of Article 21 of the Charter and the evolution of the CJEU case-law

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## Charter of Fundamental Rights



- Antidiscrimination in the Charter:  
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## Direct effect I



- Judgment *van Gend en Loos* (case 26/62, 1963)  
EU law may enable individuals to directly invoke a European Law provision before a national Court
- General condition: provision has to be self-executing

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## Direct effect II



### Direct effect of primary law

Fundamental freedoms

„Equal pay for equal work“ (art. 157 TFEU)

### Direct effect of secondary law

Regulations

Directives: direct effect only in exceptional cases

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## Direct effect III



- Direct effect of Directives

Conditions:

- Expiration of the deadline for transposition
- Unconditional and sufficiently precise
- No obligations for individuals

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## Direct effect IV



- In principle only vertical direct effect (state-citizen)

- Exception: horizontal direct effect (between individuals)

- Primary law

- Art. 157 TFEU („equal pay for equal work“)
    - Art. 101 TFEU (cartels prohibition)
    - Fundamental freedoms? Partially: trade unions, sports federations

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## Direct effect V



- Horizontal direct effect of Directives/Fundamental Rights?

*Mangold* (C-144/04)

*Kücükdevici* (C-555/07)

*Dominguez* (C-282/10)

*AMS* (C-176/12)

*IR* (C-68/17)

*Egenberger* (C-414/16)

*Max-Planck-Gesellschaft* (C-684/16)

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## Horizontal Direct Effect



- *Kücükdevici* (C-555/07), para 43:

“...European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78 ...”

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# Horizontal Direct Effect



- Egenberger (C-414/16)

Prohibition of all discrimination, which is laid down in Article 21(1) of the Charter, is sufficient in itself [and does not need to be made more specific by provisions of EU or national law] to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law

Consequence: guarantee the full effectiveness of those articles by disapplying any contrary provision of national law

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# Horizontal Direct Effect



- ASM (C-176/12)

Article 27 Charter ('Workers' right to information and consultation within the undertaking')

Wording of Article 27: in order to be fully effective, it must be given more specific expression in European Union or national law.

Difference with Küçükdeveci in so far as "the principle of non-discrimination on grounds of age is sufficient in itself to confer on individuals an individual right which they may invoke as such"

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## Indirect effect



- Means in particular:
  - Duty to interpret national law in compliance with EU law
    - „This obligation permits national courts to ensure the full effectiveness of European Union law when they determine the disputes before them.“ (Dominguez, C-282/10, para. 24)
    - Includes obligation to change established case-law (DI, C-441/14, para. 34)
    - No interpretation *contra legem*
  - State liability

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## Charter of Fundamental Rights



- Art. 52 para. 3 Charta – Homogeneity Clause  
Fundamental rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those.

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## Charter of Fundamental Rights



- Art. 53 Charter – Level of Protection

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

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Thank you very much for your attention!

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