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# EU Equality Framework & the horizontal direct effect of art.21 of the Charter

*ERA & Malta Judicial Studies Committee*

*Valletta, 14-15 November 2024*

*Applying EU anti-discrimination law*

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NON-CONTINENTAL AND OVERSEAS TERRITORIES OF MEMBER STATES



THE MEMBER STATES OF THE EUROPEAN UNION



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The protocol order of the member states is based on the alphabetical order of their geographical names in the original language.



CHARTER  
of  
Fundamental  
Rights

EU TREATIES

EQUALITY

DIRECTIVES

# Charter of Fundamental Rights of the European Union

Title III (Equality) contains broad provisions on equality before the law (Article 20), non-discrimination (Article 21), cultural/religious/linguistic diversity (Article 22), equality between men and women (Article 23), rights of the child (Article 24), rights of the elderly (Article 25), and integration of persons with disabilities (Article 26).

## **Treaty on European Union (TEU):**

EU is based on values including non-discrimination, equality, respect for human dignity and human rights,

Article 2 proclaims equality as a fundamental EU value.

Article 3 explicitly prohibits any form of discrimination.

## **Treaty on the Functioning of the European Union (TFEU):**

- Article 8 empowers the EU to introduce measures eliminating inequalities and urges it to promote equality between men and women through all its policies.

- Article 10 requires combating discrimination in all EU activities.

- Article 19 allows for legislation against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

- Article 153 TFEU allows for EU action in the area of equal opportunities and equal treatment in matters of employment and occupation

- Article 157 TFEU recognizes the principle that men and women should get equal pay for equal work or work of equal value.

EU equality **legislation** primarily takes the form of **directives**, which set goals for member states to implement within their national laws. Here's an overview :

**Racial Equality Directive (2000/43/EC):**

Forbids discrimination on grounds of race or ethnic origin in employment, social protection, education, and access to goods and services.

- **Pregnancy and Maternity Protection Directive (92/85/EEC)**: Protects the rights of pregnant women and mothers at work, ensuring health and safety, and maternity leave provisions.
- **Employment Equality Directive (2000/78/EC)**: Establishes a general framework for combating discrimination in employment on grounds of religion or belief, disability, age, or sexual orientation.
- **Directive on Equal Treatment outside Employment (2004/113/EC)**: Extends gender equality protection to various areas, including access to goods and services, media, and transport.
- **Recast Directive (2006/54/EC)**: Seeks gender equality in employment and occupation. Covers equal pay, working conditions, promotion, and discrimination (replaced 76/207/EEC)

- Directive 1979/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
- Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity .

- **National Legislation:**

The directives create a minimum standard across the EU. Member states can adopt more robust national laws to protect against discrimination.

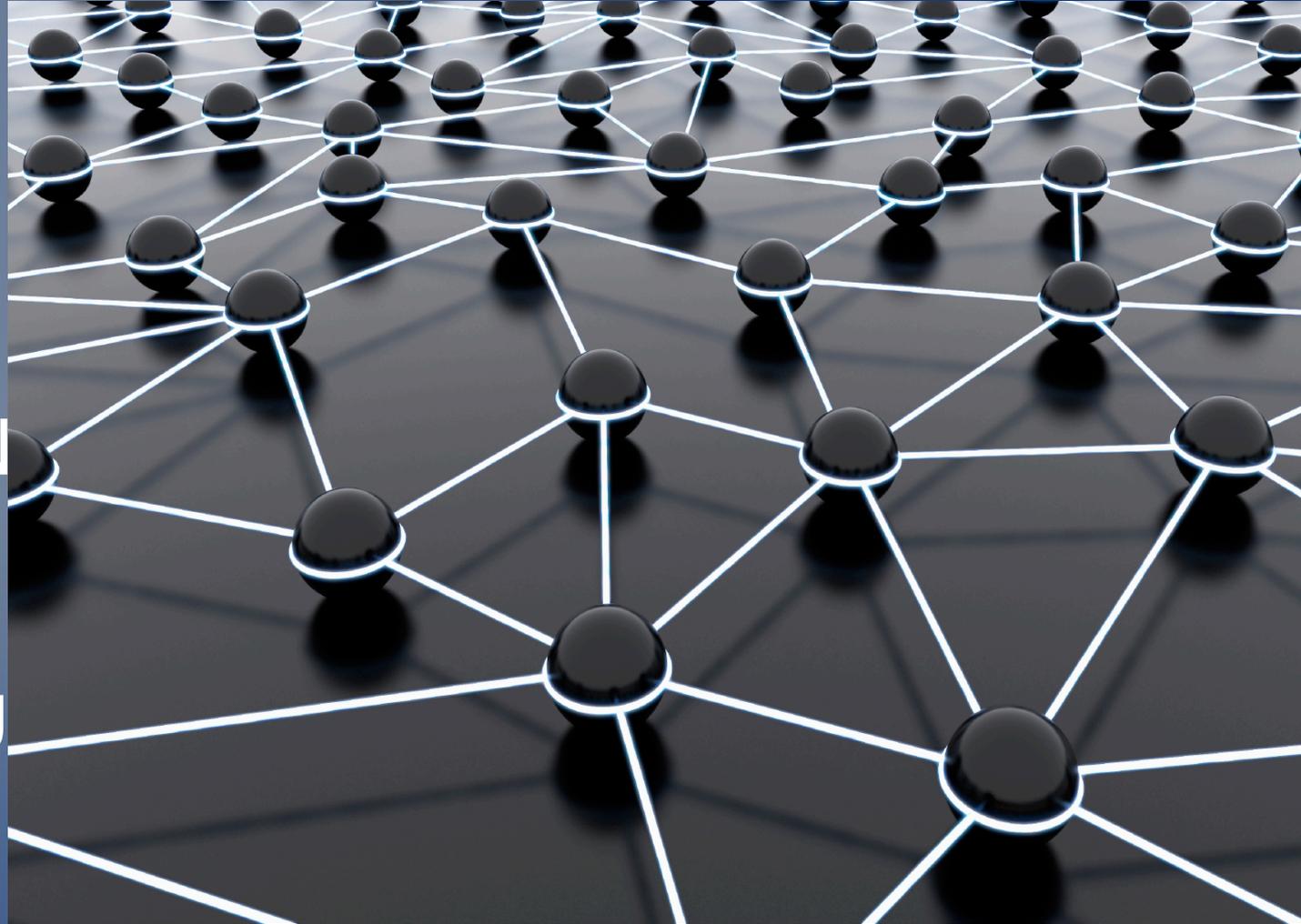
- **Case Law:**

The Court of Justice of the European Union (CJEU) plays a key role in interpreting and applying EU equality legislation.



FEDERAL  
JUDICIAL  
COOPERATION

Art. 267 TFEU



**Reference for a Preliminary Ruling**  
made by a national judge : directly  
asked to the Court

Whenever EU gender equality law may be relied upon in the national courts, they are able (and the courts of last instance are obliged) to request preliminary rulings from the CJEU: interpretation of EU Law provisions.

In the field of equal treatment, the CJEU has since 1971 delivered more than 200 binding judgments, sometimes providing far-reaching interpretations of relevant provisions.

# Empowering National Judges

*Marguerite Johnston C-222/84*

The case concerned, *inter alia*, an evidentiary rule in the Northern Ireland sex discrimination legislation that deprived the national court of the power to decide an issue arising in relation to the Equal Treatment Directive.

The CJEU found that this rule was incompatible with the requirement of effective judicial control, stipulated in Article 6 of the Equal Treatment Directive 76/207/EEC.

This article reflects, according to the CJEU, a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in the European Convention on Human Rights.

# Large understanding of EU equality law invocability

Defrenne II/Sabena

the CJEU decided that Article 157 TFEU (then Article 119 TEC) has horizontal direct effect, i.e. that it can be relied upon by individuals before national courts not only against (organs of) the State, but also against individuals, such as private employers.

## Determining the scope Of EU protection

### **Reasonable Accommodation in Employment:**

The CJEU defines the scope of reasonable accommodation that employers must provide to employees with disabilities. In the **Mangold v Helm (Case C-115/03)** case, the court held that employers must make reasonable adjustments like flexible working hours for employees with disabilities, unless doing so would impose an **undue burden** on the employer.

### **Freedom of Religion vs. Employer Neutrality:**

The CJEU balances the right of freedom of religion with the principle of employer neutrality. In the **Achbita v G4S Secure Solutions (Case C-219/14)** case, the court stated that employers could restrict religious expression through limitations on employee dress codes, but such limitations must be objectively justified and proportionate to a legitimate business aim.

## **Intersectionality - Addressing Overlapping Discrimination:**

While not explicitly mentioned in EU directives, the CJEU increasingly recognizes the **intersection of different grounds of discrimination** can exacerbate the situation for individuals belonging to multiple groups. For example, in the **Chacón Navas v Eurest Colectividades SA (C-173/18)** case, the court acknowledged the potential for women with disabilities to face compounded discrimination and emphasized the need for comprehensive protection.

**Positive Action and Justification of Discrimination:**  
The CJEU establishes the boundaries of **positive action** measures aimed at improving the situation of disadvantaged groups. In **Kaba v Land Baden-Württemberg (Case C-214/10)**, the court affirmed that while positive action is permitted under specific circumstances, it cannot lead to the automatic selection of individuals from a disadvantaged group over more qualified candidates from other groups.

The CJEU has already held that both membership of a socio-professional category (Agafiței and Others, C-310/10) and obesity [FOA (Kaltoft), C-122/15] are **not grounds of discrimination** protected under EU law.

## Article 21 Charter - Non-discrimination

1. 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.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

The question of whether Article 21 of the Charter of Fundamental Rights of the European Union (CFR) has a direct horizontal effect has been a subject of ongoing debate and development in EU law.

Direct Effect:

Direct effect refers to the situation where individuals can invoke provisions of an EU legal instrument, such as a treaty or regulation, directly before national courts to defend their rights. In vertical situations (citizen/company vs State authority), direct effect is possible.

Horizontal Effect:

Horizontal effect typically refers to the application of a legal provision between private individuals (individuals, companies, etc.), as opposed to "vertical effect", which applies between individuals and public authorities.

## Arguments for Direct Horizontal Effect:

- **Fundamental right protection:** Proponents argue that the fundamental nature of the rights enshrined in Article 21 necessitates direct horizontal effect to ensure their full effectiveness.
- **Independent legal norm:** Some scholars argue that the clear and unconditional nature of Article 21 establishes it as an independent legal norm capable of direct horizontal application.
- **Effectiveness of the Charter:** If limited to vertical effect, Article 21's impact in combatting discrimination in all spheres of life would be significantly reduced.

## Arguments against Direct Horizontal Effect:

- Lack of explicit provision: The CFR itself does not explicitly mention horizontal effect for any of its provisions, leaving room for interpretations.
- Respect for national legal systems: Opponents argue that recognizing direct horizontal effect could disrupt national legal systems and principles already addressing discrimination.
- Uncertainty and legal complexity: The potential for varying interpretations across different national courts could lead to legal uncertainty and inconsistencies.

According to Art. 51 (1) CFR, the Charter is addressed to the EU institutions, bodies, offices and agencies and to the Member States when they are implementing EU law.

That, however, according to the Court, does not systematically preclude the possibility that individuals may be directly required to comply with certain provisions of the Charter even in relations between individuals.

The Court of Justice of the European Union has gradually developed the case law around the horizontal effect of the Charter and has recognized the potential for direct horizontal effect in certain circumstances:

- *Achbita v G4S Secure Solutions NV* (C-219/14): While not directly addressing horizontal effect, the court underlined the possibility of private entities infringing upon fundamental rights, implying the potential for Charter application in such situations.
- *Egenberger v Österreichische Unilever GmbH* (C-593/15): Direct horizontal effect was recognized for Article 21 in the context of religious discrimination in an employment dispute.

C-414/16: Ms **Egenberger** applied for a job with a private protestant organisation which pursues charitable, benevolent and religious purposes. The job entailed the preparation of a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. Ms Egenberger was shortlisted but eventually not invited for an interview, apparently because she did not belong to a Protestant church.

case **IR v JQ**, C-68/17, concerned JQ, a doctor in a hospital run by IR, a limited liability company which carried out the work of Caritas (the international confederation of Catholic charitable organisations). JQ was a Roman Catholic but he divorced and remarried in a civil ceremony without his previous marriage being annulled. For this reason, he was dismissed. However, the hospital did not dismiss another employee in a comparable situation but who was of Protestant faith.

case **Cresco Investigation GmbH v Markus Achatzi**, C-193/17: in Austria, Good Friday is a paid public holiday only for members of 4 specific churches. If a member of one of those churches works on Good Friday, he or she is entitled to additional pay. Mr. Achatzi, not a member of any of the churches in question, worked on Good Friday and claimed extra pay from Cresco Investigations, a private detective agency. He argued that he suffered discrimination by being denied public holiday pay.

The substance of the cases was dealt with under Directive 2000/78. However, since provisions of a directive have no horizontal direct effect and it was not certain whether consistent interpretation of national law was possible, the Court turned to Art. 21 CFR.

The prohibition of discrimination on grounds of religion is mandatory as a general principle of EU law and is laid down in Art. 21 CFR. That provision is sufficient in itself to confer on individuals a right, which they may rely on as such in disputes between them. The Court observed that as regards its mandatory effect, Art. 21 CFR is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on other grounds and these provisions apply also where discrimination has origin in contractual relationships.

For these reasons, if consistent interpretation of national law is not possible, the referring court must ensure judicial protection of the right conferred by Art.21 CFR and guarantee its full effectiveness even in disputes between individuals.

With a less detailed reasoning, the Court further decided on the horizontal direct effect of Art. 47 CFR, in combination with Art. 21 CFR.

The Court held that Art. 47 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 and that the national court must ensure the judicial protection for individuals flowing from Arts. 21 and 47 CFR.

horizontal direct effect has been **accepted** in cases concerning Art. 21, 31(2), 47 CFR. Some refer to INdirect horizontal effect of a directive in combination with CFR aka « Derivative horizontal direct effect »

Horizontal direct effect has been **denied** concerning Art. 27 CFR: In Association de médiation sociale (AMS), C-176/12, because of the reference to “cases and conditions provided for by Union law and national laws and practices” it was decided that Art. 27 CFR needed further elaboration in EU or National law first before being fully effective.

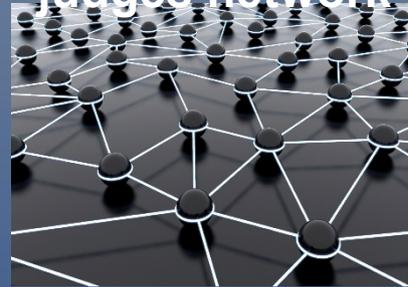
- → Art. 27 no direct effect.

## EU agencies:

- European Institute for Gender Equality (EIGE, Vilnius, Lithuania)
- Fundamental Rights Agency (FRA, Vienna, Austria)

contribute to research, awareness-raising, and monitoring implementation of the equality legal framework.

267 TFEU  
References for  
Preliminary Ruling  
Via National  
judges network



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# Thank you for your Attention

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