

The EU legal framework on equality and the EU Charter of Fundamental Rights



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Applying EU Anti-Discrimination Law ERA Seminar for Legal Practitioners

Dublin, King's Inns, 3-4 April 2025



Source: <https://dileaders.com/blog/category/religion/>



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Outline

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 - b. Article 20
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 - d. Article 47
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EU Primary Law

Art 2 TEU – Equality as a fundamental value of EU law

Art 10 TFEU – Mainstreaming obligation:

‘[i]n 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’

Art 19(1) TFEU – legal base for the adoption of many EU Equality Directives

EU Charter of Fundamental Rights (CFR)

- **Art 20** – Equality before the law
- **Art 21(1)** – Non-discrimination
- **More specific provisions, e.g.:**
 - Art. 23 – gender equality
 - Art. 25 – elderly
 - Art. 26 – persons with disabilities
 - Art. 10 – freedom of religion

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EU Secondary Law

Race Equality Directive (2000/43/EC, ‘RED’)

- Ground: Racial or ethnic origin
- Material scope: employment, self-employment, vocational training, membership of workers/employers’ orgs, access to & supply of goods/services, education

Empl. Equality Directive (2000/78/EC, ‘EED’)

- Grounds: religion or belief, disability, age or sexual orientation
- Material scope: employment, self-employment, vocational training, membership of workers/employers’ orgs

Directive 2024/1499/EU on standards for equality bodies → Arts. 1 & 2

- Grounds: Racial or ethnic origin, religion or belief, disability, age or sexual orientation, sex (goods and services, social security)

Framework Decision against Racism and Xenophobia (2008/913/JHA, ‘Framework Decision’)

- Grounds: Race, colour, religion, descent or national or ethnic origin
- Scope: Criminal law

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The EU Charter of Fundamental Rights (CFR)

Value:

Art 6(1) TFEU:

- Same value as the treaties
- Doesn't extend Union competencies (see also Art. 51(2) CFR)

↳ Case C-354/13, *Kalftot*:

Could the EED list of protected grounds be extended to obesity ?

'neither Article 10 TFEU nor Article 19 TFEU makes reference to obesity [...] the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof (citing *Chacon Navas* and *Coleman*) [...] the file provided to the Court contains nothing to suggest that the situation at issue [...] in so far as it relates to a dismissal purportedly based on obesity as such, would fall within the scope of EU law'

- In such context, the CFR is inapplicable (citing *Åkerberg Fransson*) (paras 33-39)



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CFR - Scope

Art 51(1) → Addressed at EU Institutions & MS when implementing EU law

↳ Case C-617/10, *Åkerberg Fransson*:

- If a national situation has a link with EU law, the CFR applies
- If there is no link with EU law, the CFR cannot be applied

Art 51(2) → Rights must be exercised within the limits of the treaties

Art 52(3) → Relationship with ECHR: corresponding rights have the same meaning & scope, but EU law can provide more extensive protection

Ex: Art 10(1) CFR (freedom of conscience/religion) 'has the **same meaning and scope**' as Art 9 ECHR, and 'forms an integral part of the relevant context in interpreting [the EED]'

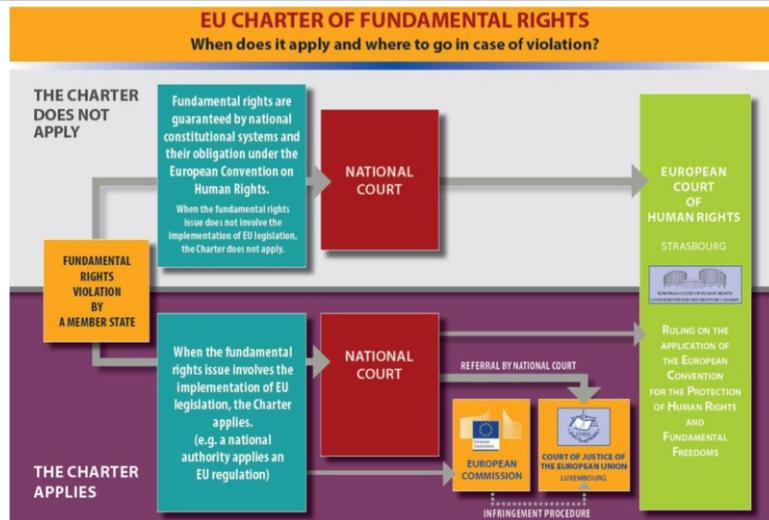
Cases C-804/18 and C-341/19, *Wabe/MJ*, para 48; Case C-157/15, *Achbita*, para 27



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Referring to the CFR or to the ECHR?



Source: Commission (EU), Staff Working Document accompanying accompanying the Communication on the 2016 Report on the Application of the EU Charter of Fundamental Rights ([SWD\(2017\) 162 final](#))

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CFR – Art 20

Art 20: “Everyone is equal before the law”

- More rarely applied in equality case law
- Referred to in Case C-149/10, *Zoi Chatzi*, to establish what are ‘comparable situations’
- Concerned entitlement to parental leave for twins’ parents

“Observance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 [CFR] requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.” (paras 63-64)

“the task of bringing[twins] up is not necessarily comparable to the task that bringing up two children of different ages involves. Accordingly, it must be found that the parents of twins are in a special situation” (paras. 67-68)



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CFR – Art 21: Non-discrimination

Relationship with the general principle of equal treatment

Case C-476/11, HK Danmark

‘the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which **must be regarded as a general principle of European Union law and to which specific expression is given by Directive 2000/78** in the field of employment and occupation [citing *Kücükdeveci*, para 21]. The prohibition of any discrimination on grounds, inter alia, of age is set out in Article 21 of the Charter of Fundamental Rights of the European Union (‘the Charter’), which, from 1 December 2009, has the same legal status as the Treaties.’ (para. 19)

‘it is on the basis of **the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter and given specific expression by Directive 2000/78**, that the question whether European Union law precludes an occupational pension scheme such as that at issue in the main proceedings must be examined.’ (para. 31)

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CFR – Art 21: Non-discrimination



Relationship with other CFR rights / Treaty provisions (I):

→ Case C-157/15, Achbita:

Legitimate aim based on freedom to conduct a business (Art 16 CFR) accepted as justification for indirect discrimination

“An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in **Article 16 of the Charter** and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.” (paras. 38-39)

↳ repeated with the same wording in **Joined Cases C-804/18 and C-341/19 WABE/MJ** (para. 63)

“The wearing of signs or clothing to manifest religion or belief is covered by the ‘freedom of thought, conscience and religion’ protected by **Article 10 of the Charter**.” (para 46)

+ Link between the **EED + Art 19 TFEU + Art 21 CFR** to interpret ‘religion or belief’

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CFR – Art 21: Non-discrimination

Relationship with other CFR rights / Treaty provisions (II):

→ Case C-518/22, *J.M.P. v AP Assistenzprofis GmbH*

-Issue: age requirement in a recruitment procedure for an assistant for a person with disabilities

-Direct age discrimination but legitimate objective: protecting the disabled person's fundamental right to self-determination → accepted under Art. 2(5) EED, interpreted in line with:

- **Art 26 CFR** (integration of persons with disabilities)
- **Art 19 of the UNCRPD** (right to independent living and community inclusion) (paras 61, 68)

↳ **Broad / purposive interpretation relying on CFR**



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CFR – Art 21: Non-discrimination

Relationship with other CFR rights / Treaty provisions (III):

→ Case C-930/19, *X v État belge*

-Issue: non-EU citizen divorced from abusive EU spouse had to prove sufficient resources to retain EU residence under Dir 2004/38, whereas same requirement doesn't apply for non-EU citizens' family reunification under Dir 2003/86

-Arguably, underlying **gender, nationality and ethnic origin** issues

-Relationship between **Arts. 13(2) Dir 2004/38 + 20 CFR + 21 CFR?**

- Art. 21(2) CFR doesn't cover differences in treatment between non-EU citizens
- Art. 20 CFR: Dir 2004/38 and Dir 2003/86 are not comparable

↳ Requiring divorced non-EU citizens victims of domestic violence to demonstrate sufficient resources is justified and valid (Art. 13(2) Dir. 2004/38)



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CFR – Art 21: Non-discrimination

When to refer to Art 21 CFR?

If relying on a Directive is sufficient, the CJEU is likely to refuse considering Art. 21 CFR

Case C-132/11, *Tyrolean Airlines*

'In accordance with the case-law, where [collective agreements] adopt measures which **fall within the scope of Directive 2000/78**, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect that directive [citing *Prigge and Others*, para. 48]. In those circumstances, **the first question falls to be examined solely in the light of Directive 2000/78.**' (para. 22-23)

Case C-416/12, *Vital Perez*

After reminding that Dir 2000/78 gives expression to the prohibition of age discrimination:

'**when it is ruling** on a request for a preliminary ruling concerning the interpretation of the general **principle of non-discrimination on grounds of age**, as enshrined in Article 21 of the Charter, and the provisions of Directive 2000/78, in proceedings involving an individual and a public administrative body, **the Court examines the question solely in the light of that directive**' (para. 25)

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CFR – Indirect Effect

Indirect effect or 'consistent interpretation' → need to interpret national law in line with EU law, and if needed, to disapply national law

Case C-441/14, *Dansk Industri*

-Age discrimination dispute between private parties regarding national provision contrary to the EED

-While EU Directives cannot have direct horizontal effect...

'it is apparent from [...] *Association de médiation sociale (AMS)* (C-176/12, EU:C:2014 :2) that **the principle prohibiting discrimination on grounds of age** [expressed in Art. 21 CFR] confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, **requires the national courts to disapply national provisions that do not comply with that principle.** 37 Accordingly, in the present case, **if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law**, the national court must disapply that provision. (paras 36-27; see also para. 42)

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CFR – Indirect Effect (cont'd)

Case C-193/17, *Cresco Investigation*

- Religious discrimination case
- Austrian law gave a paid public holiday on Good Friday only to members of certain religions
- A private employee of a different faith claimed this was discriminatory

CJEU:

- ✓ Found national law incompatible with Art 21 CFR and the EED
- ✓ The national court had to disapply the discriminatory provision (like in *Dansk Industri*)
- ✓ BUT went a step further re remedies:
 - ✓ Simply nullifying the benefit for the favoured group (equalise downwards) → not an effective remedy
 - ✓ As long as national law not amended, the benefit should be extended to all employees to ensure equal treatment

↳ Art. 21 CFR = not only a tool to **strike down discrimination** but also to **require positive measures**

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CFR – Vertical Direct Effect



Art. 21 CFR can be invoked in disputes between a private individual and the state/public body

Case C-236/09, *Test Achats*

- Belgian association challenged national transposition measures of Dir 2004/113/EC
- Belgian constitutional court: *Was exception in Art 5(2) Dir 2004/113/EC contrary to Art 21 CFR?*
- Art 5(2) Dir 2004/113/EC: permitted sex to be taken into account as an actuarial factor to be considered in insurance premium and related benefits/services

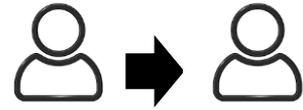
CJEU:

- ✓ Men and women are in comparable situations regarding insurance premiums / related benefits
- ✓ Exception incompatible with Arts. 21 and 23 (equality between men and women) CFR
- ✓ Exception could not be justified (paras 30-32)

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CFR – Horizontal Direct Effect



Art. 21 CFR can even be invoked in disputes between private individuals

Case C-414/16, Egenberger (religious discrimination)

- Egenberger had applied for a job at a German evangelical charity
- Not hired because she was not of the employer's faith
- German law allowed religious organisations substantial autonomy in hiring decisions (arguably beyond what the EED permits) → **Could Art. 21 CFU be invoked against a non-state employer to bypass the restrictive national law?**

CJEU:

- The mandatory effect of **Article 21(1) CFR** is similar to other provisions prohibiting discrimination on various grounds in the founding treaties and 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them' (paras 76–77)
- The right to effective judicial protection in **Art. 47 CFR** '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.' (para. 78)

→ **Ruling confirmed and reinforced in Case C-68/17, IR v JQ (Grand Chamber, 2018)**

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CFR also relevant for enforcement



Particularly relevant: Art 47 CFR → noteworthy cases:

- **Egenberger:** As discussed re direct horizontal effect
- **Case C-30/19, Braathens:**
 - ✓ Airline passenger discriminated against when boarding flight due to apparent ethnicity
 - ✓ Art 7(2) RED (an expression of Art 47 CFR) + Art 15 RED (citing Cases C-54/07, Feryn, C-81/12, Accept)
 - ✓ Need to ensure real and effective judicial protection + genuinely dissuasive sanctions
 - ✓ Purely symbolic sanctions not compatible with the RED

'under the national law at issue in the main proceedings, in the event of the defendant's acquiescing to pay the compensation claimed by the claimant, without however recognising the discrimination alleged, the claimant is unable to obtain a ruling by a civil court on the existence of that discrimination. It must be held that such a national law infringes the requirements imposed by Articles 7 and 15 [RED], read in the light of Article [CFR]'. (para. 44)

Another interesting judgment:

- **Case C-396/17, Leitner** (age discrimination of civil servants) → Art 47 CFR + Art 9 EED

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Final remarks regarding the CFR

Not all Charter provisions will automatically have direct effect

They must meet the **direct effect** criteria (→ Case C -176/12, *AMS* re Art. 27 CFR – **NO direct effect**)

BUT several provisions have now been recognised such effect:

- Non-discrimination – Art. 21 – Test Achats, *Egenberger*
- The right to effective remedy – Art. 47 - *Egenberger*
- Right to annual leave – Art. 31(2) - Joined Cases C-569/16 and C-570/16, *Bauer & Willmeroth* / “*Max Planck*”

Apart from direct effect, the CFR can also be useful in other ways:

- Indirect effect (*Dansk Industri*) and positive obligations (*Cresco*)
- Invoked with a Directive provision to support a broad/purposive interpretation - *J.M.P. v AP Assistenzprofis*

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Useful resources

- EU Agency of Fundamental Rights
 - [Charterpedia](#)
 - [CFR case law data base](#) (EU and national case law)
 - [FRA e-learning: Charter Courses](#)
 - [Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level](#) (2020)
- Paola Iamiceli et al, [EU Fundamental Rights and Non-discrimination: Effective Protection in the Light of Article 21 of the Charter](#) (FRICoRE 2022)
- M Kellernauer et al (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (Vol I) (OUP 2024)
- Commission (EU), Staff Working Document accompanying the Communication on the 2016 Report on the Application of the EU Charter of Fundamental Rights ([SWD\(2017\) 162 final](#))
- Angela Ward, ‘The impact of the EU Charter of fundamental rights on anti-discrimination law: more a whimper than a bang?’ (2018) *Cambridge Yearbook of European Legal Studies* 20, 32-60.

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