

**Jean Monnet Centre of Excellence  
"Reinforcing the Rule of Law and EU Values"**



**EU legal framework on equality – with  
a particular emphasis on the EU  
Charter of Fundamental Rights, its  
legal validity and the issue of direct  
horizontal effect of Art.21 thereof in  
the CJEU case law**

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**ARTICLE 2 OF THE  
TREATY ON EU**

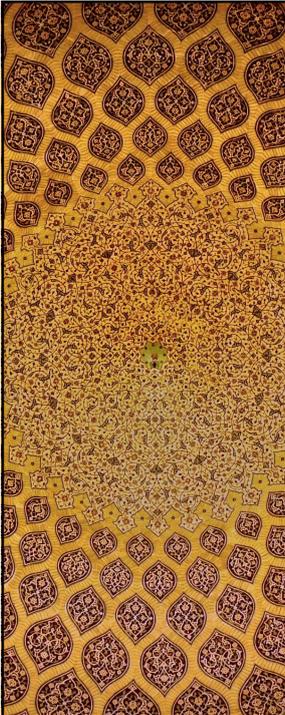
- Article 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
- These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

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

- Article 8: the obligation regarding gender aware policy of the EU
- Article 10: the obligation to introduce non-discrimination in the EU
- Article 18 and Article 45: discrimination on grounds of nationality prohibited in EU law
- Article 19: legislative power of the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation-it is necessary to have a special legislative procedure, a unanimously taken decision by the Council and the consent of the European Parliament
- Article 157 para.1: the principle of equal pay for equal work or work of equal value
- Article 157. para. 3: legislative power of the EU for ensuring gender equality in employment – the ordinary legislative procedure.

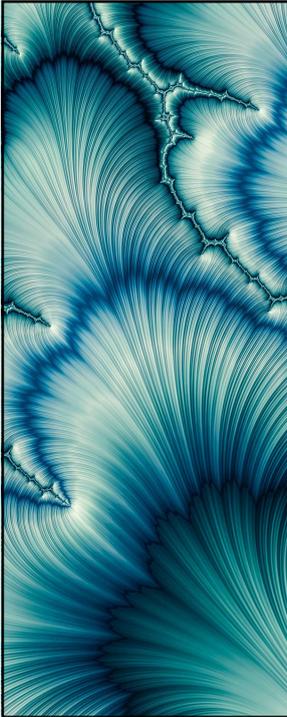
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## Principle of Equal Pay for Equal Work

- Part of the Treaty of Rome of 1957 (Article 119)
- Elaborated in the Equal Pay Directive (75/117/EEC).
- Confirmed in the CJEU Case 43/75 Defrenne II (1976)

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## **The Charter of Fundamental Rights of the European Union**

- Applicable to all institutions and bodies of the EU and Member States only when they act within the framework of EU law
- Article 20: Equality before the law
- Article 21, para. 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.”
- Article 21, para. 2: “Within the scope of application of the Treaty establishing the

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## **Direct effect of European Legal Norms in Horizontal Situations**

- Not all EU norms have direct horizontal effect:
- Directives cannot be directly invoked in horizontal disputes
- Directives create obligations upon the states to implement them, not upon individual parties
- Consequences:
- Legal voids in situations in which Directives implement certain fundamental rights
- Can Directives be effective in horizontal relations?
- The problem of effectiveness in judicial protection

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Article 19 of the TFEU: the EU, within the limits of the powers conferred to it, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

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Article 21 of the Charter: Prohibits discrimination on any grounds, applicable only in the scope of EU law (does not establish any “new” rights)

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Directive 2000/78: establishes a framework for equal treatment in employment and occupation (on the basis of religion or belief, disability, age or sexual orientation)

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## Direct Effect of EU Law

- According to the settled case law of the CJEU, in order to disapply the incompatible national legal provisions, legal and natural persons can rely on the provisions of EU law before the national courts that are clear, accurate and unconditional (*Van Gend en Loos*).
- This is known as direct effect of EU law.
- Direct effect can be vertical or horizontal depending on whether the dispute is between natural or legal person and a member state (vertical direct effect) or between private individuals (horizontal direct effect).

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## Horizontal Direct Effect of Primary Law

- *Defrenne*
- *Agonese*
- *Viking*
- In a set of judgements adopted in 2018, CJEU decided that the EU Charter, i.e., some of its provisions, may have horizontal direct effect (*Egenberg, Cresco, Bauer and Volker Willmeroth, Max Planck*)

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## Direct Effect of European Legal Norms in Horizontal Situations in CJEU Case Law

- In some of the judgements, the CJEU allowed horizontal direct effect of the directives
- (i) The case law is based on the prohibition of discrimination as a general principle of EU law
- (ii) The case law based on Article 21, para. 1 of the Charter: prohibition of discrimination
- (iii) Case law in conjunction with Article 31, para. 2 of the Charter: paid annual leave

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## C-176/12 AMS

- In Case C-176/12 *Association de médiation sociale* (AMS) the CJEU stated that in certain situations the Charter can have horizontal direct effect.
- The Court was of the opinion that the principle of non-discrimination based on age, as set out in Article 21, para.1 of the Charter, has horizontal direct effect and that it can be directly invoked in order to disapply the contrary provision of the national law as "it is sufficient in itself to confer on individuals an individual right which they may invoke as such".

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## Following Conclusions May be Drawn on the Basis of the AMS Judgement :

- The conflict between the national law and the Charter leads to disapplication of the national law if the provision of the Charter is sufficient in itself to confer on individuals an individual right which they may invoke as such (more precisely, without the need for implementing measures at the level of EU or at the national level).
- Under the circumstances, direct effect of the provision of the Charter may be invoked not only in vertical, but also in horizontal proceedings (as in the AMS case)
- Article 21, para. 1 of the Charter meets the conditions for direct effect, at least in view of non-discrimination based on age. However, it is also true of other grounds of non-discrimination stipulated by the provision.
- Article 27 of the Charter on the workers' right to information and consultation within the undertaking does not have direct effect: The Court excluded it in the AMS case,
- If the mentioned case includes a different provision of the Charter, it would be useful to ask the CJEU to establish if it complies with the *AMS test* (although national courts whose judgements are not final are not obliged to refer the question for a preliminary ruling to the Court)

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## Early CJEU Case Law

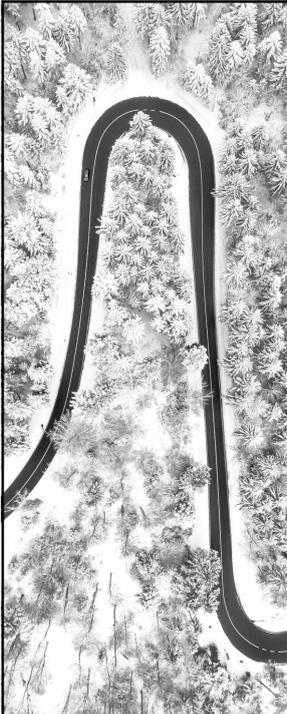
- Mangold/Kücükdeve
- EU law, particularly the principle of prohibition of discrimination on grounds of age as given expression in Directive 2000/78 shall be interpreted as precluding national legislation such as that at issue in the main proceedings which sets out that the period of employment completed before the employee reaches the age of 25 will not be taken into account in calculating the notice period.
- It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any provision of the national legislation, irrespective of whether it makes use of its entitlement, in the case referred to in the second paragraph of Article 267 of TFEU, to ask the Court for a preliminary ruling on the interpretation of that principle
- Consequences of Mangolda /Kücükdevecija:
  - The ECJ supports direct effect of a general principle in situations where it is not possible to directly invoke the Directive
  - The Directive is considered a practical tool for the implementation of a general principle

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## CJEU Case Law II

- This is further elaborated in the case law concerning equal treatment with regard to Article 21, para.1 of the Charter
- *The case of Egenberger*: the ECJ expands the horizontal direct effect of the prohibition of discrimination (as set out in Article 21(1) of the Charter concerning discrimination on grounds of religion)
- The case of *Cresco*: legal implications of horizontal direct effect of Article 21(1) go beyond the disapplication of a contrary provision of the national law – they also create a positive obligation to ensure equal rights.
- The essence of the case has been determined within the meaning of Directive 2000/78.
- However, since the provisions of the Directives do not have horizontal direct effect and it was not clear if it was possible to interpret national law in conformity with that Directive, the Court of Justice of the European Union invoked Article 21 of the Charter.
- In these cases the CJEU takes the approach developed in *Mangold/Kücükdeveci*:
- CJEU allows for the horizontal direct effect of the prohibition of discrimination over the Constitutional norms (Article 21 of the Charter) and examines the content based on Directive

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## CJEU Case Law

- The Court has pointed out that the principle of equal treatment in the field of employment and occupation is based on different international instruments and the constitutional tradition common to the member states and is not, as such, established by the Directive. Moreover, prohibition of discrimination on grounds of religion is protected as a general principle of EU law and guaranteed by Article 21 of the Charter.
- That provision is sufficient in itself to confer on individuals an individual right which they may invoke as such in disputes between themselves (in horizontal situations).
- Finally, the Court observed that, with regard to mandatory effect, Article 21 of the Charter, in principle, is not different from various provisions of founding treaties concerning prohibition of discrimination on other grounds and these provisions are applied where discrimination arises from the existing contractual relations (*Defrenne, Agonese, Viking*)
- If consistent interpretation of national law is not possible, the referring court must ensure the judicial protection of the right enshrined in Article 21 of the Charter and guarantee full effectiveness of that Article even in disputes between individuals (*Egenberger*)

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## Article 47 in Conjunction with Article 21 of the Charter

- The Court went on to decide, in a less detailed reasoning, on horizontal direct effect of Article 47 of the Charter, in combination with Article 21 of the Charter
- The Court held that Article 47 is sufficient in itself and does not require additional clarification in the provisions of EU law or a national law in order to confer the rights to individuals which they may invoke as such and which must be protected by a national court
- The judgement has additionally confirmed the right to effective judicial remedy (Article 47 of the Charter), ensuring that the prohibition of discrimination set out in Article 21 may be achieved through judicial proceedings between private individuals

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## CJEU Case Law III – Extended to Social Rights?

- Initial hesitation of the CJEU:
- The case of *AMS*: Article 27 of the Charter has no direct horizontal effect as it must be given more specific expression in the law
- Reaffirming horizontal effects of Article 31, para.2 – PAID ANNUAL LEAVE of the Charter:
- The case of *Bauer and Willmeroth*: Article 31(2) has horizontal direct effect as it is mandatory and unconditional in nature + “in itself” gives workers the rights in disputes between private individuals.

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## Conditions for Horizontal Effect of the Charter

Is there a clear set of conditions for the provisions of the Charter to have a horizontal effect?

- In order for the provisions of the Charter to have horizontal direct effect, the Charter must be applicable. According to Article 51 (1), the Charter is applicable in the Member States when they “implement” EU law
- According to the case law, two conditions must be met for the provisions of the Charter to have direct effect:
- 1) that the right at issue is mandatory: is a national judge capable of finding the violation of a provision of EU law ?
- 2) & unconditional: provisions of the Charter do not require any specific expression nor clarification in either EU or national law
- → It is still unclear as to what the Court considers “mandatory and unconditional”.

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## Finally, What is the Purpose of the Charter?

- The Charter has been adopted in order to fill a very specific void in judicial protection of fundamental rights
- it is striving to ensure the effectiveness of the existing rights in lieu of creating new ones or unjustifiably expanding legal effects of the existing rights
- Article 47 of the Charter briefly mentioned in the *Egenberger* case, in which the Court also noted the necessity to ensure “effective protection” in line with Article 47 (*Egenberger, Bauer and Willmeroth*)
- The *Egenberger* judgement in which the fundamental rights go beyond the framework of mere institutional protection and provide protection to individuals in private law relations is a step further in the development of the EU constitutional law
- Case law on horizontal effect can be interpreted so as to fill the void in the system of judicial protection caused by the absence of direct effect of directives.



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The EU Charter of Fundamental Rights has been legally binding since 2009

- The Charter has the legal force of EU primary legislation, i.e., the same legal force as the founding treaties, and it is binding upon all EU institutions and Member States in their implementation of EU law.

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