

THE EU LEGAL FRAMEWORK
ON EQUALITY – WITH
SPECIAL ATTENTION TO THE
EU CHARTER OF
FUNDAMENTAL RIGHTS, ITS
LEGAL VALUE AND THE ISSUE
OF HORIZONTAL DIRECT
EFFECT OF ARTICLE 21 IN THE
CJEU CASE LAW’.

ERA seminar

*Applying EU Anti-
Discrimination Law*

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OUTLINE

- overview of legal equality / non-discrimination instruments & provisions
- some key concepts: direct & indirect effect, vertical & horizontal effect
- legal status of equality instruments, focus on Charter illustrated with case law
- miscellaneous:
 - EU Cie Communication on the Charter
 - EU accession to ECHR



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EQUALITY & NON-DISCRIMINATION IN EU LAW

- Charter of Fundamental Rights of the EU (CFR) (2000 / 2009)
 - Title III - Equality & non-discrimination
- Treaty on European Union (TEU)
 - art. 2 (equality = foundational), art. 3(3) (Union to combat discrimination and exclusion), art. 9 (principle of equality must be observed)
- Treaty on the Functioning of the European Union (TFEU)
 - art. 8 (Union to eliminate inequalities and promote equality men & women), art. 10 (combat discrimination)
- Equality directives →→→→



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EQUALITY DIRECTIVES

- 'race directive': 2000/43/EC
 - Material scope: employment & occupation, social protection, education, goods & services
- 'general framework directive': 2000/78/EC (belief, disability, age, sexual orientation)
 - Material scope: employment & occupation
 - *pending: Proposal to expand material scope of general framework directive, COM(2008)0426 - 2008/0140(CNS)*
- Recast Directive: 2006/54/EC (sex)
 - Material scope: employment & occupational social security
- Statutory Social Security schemes (sex): 79/7/EEC
- Self-employment (sex): 2010/41/EU
- Goods and services (sex): 2004/113/EC.
- Focusing on specific groups:
 - Pregnancy Directive (92/85/EEC),
 - Parental Leave Directive (2010/18/EU)
 - Part-time Work Directive (97/81/EC).



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LEGAL FORCE

- **treaties**: binding legal force; addressee can be anyone (including private individuals)
- **directives**: indicate result to be achieved by *state* (art. 288 TFEU)
- **Charter**: Art. 51(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.”

butbutbutbutbut...



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HORIZONTAL EFFECT OF EU LAW

- **indirect** horizontal effect can be achieved by:
 - consistently interpreting national law (e.g.. open provisions such as ‘good faith’)
 - reliance on the State’s duty to protect
 - e.g. reliance on principle of ‘loyal cooperation’ regarding freedom of movement private individuals; rationale: guarantee the effectiveness of the freedom of movement
- **direct** horizontal effect (the possibility to rely directly on EU law provisions before a national court in a dispute between 2 private parties)
 - e.g. *Defrenne II* (1976) horizontal direct effect of equal pay principle (, art. 119; now art. 157 TFEU):
 - private parties (employers) are bound by art. 157 TFEU despite the fact that the provision only addresses Member States, because of the mandatory nature of the prohibition of pay discrimination
 - however: most equality & non-discrimination provisions in directives:
 - directives do not have direct horizontal effect (*Marshall*, 1986, C-152/84)



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DEVELOPMENT OF HORIZONTAL DIRECT EFFECT

1. Van Gend & Loos: EU law can have direct effect if:
 - is relevant provision *sufficiently precise and unconditional* in order to allow direct effect?
 - against *whom* can the provision be relied upon?
 - art. 288 TFEU: directives no direct effect because only binding on MS to which it is addressed (*Marshall I*)
2. Von Colson & Kamann:
 - obligation for national courts to interpret national law so far as possible in conformity with EU law (consistent interpretation)
3. Glatzel, Milkova: entry into force of the Charter: Charter provisions may be sufficiently precise & unconditional and thus allow for direct effect
4. Egenberger (confirmed in Bauer): explicit confirmation that Charter provisions may have *horizontal* direct effect



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HORIZONTAL DIRECT EFFECT OF THE CHARTER

- **Mangold** (C-144/04, 2005)
 - unwritten general principle of EU law (right to non-discrimination based on age) applies to a dispute between private parties
 - **Küçükdeveci** (C-555/07, 2010)
 - right to non-discrimination based on age also protected by art. 21 Charter
 - **AMS** (C-176/12, 2014): horizontal enforceability only if: sufficient in itself to confer a right
- 2018/2019: 3 cases falling within scope of Dir 2000/78 (religion): art. 21 CFR applied*
- **Egenberger** (C-414/16)
 - **IR** (C-68/17)
 - **Cresco Investigation** (193/17)



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MITCOH



CRESKO INVESTIGATION V MARKUS ACHATZI (AUSTRIA) CJEU 22/1/2019, C-193/17

- facts:
 - free day or extra pay if at work on Good Friday, only for 4 specific religious denominations
 - Achatzi worked that day, but got no extra pay
- applicable law:
 - issue within scope of framework dir 2000/78, but directives no horizontal direct effect
- Court:
 - principle of equal treatment in employment originates from int. treaties & constitutional traditions
 - prohibition of religion-based discrimination: mandatory general principle of EU law (art. 21 CFR)
 - first track: EU-law consistent interpretation of relevant national law; if that is not possible:
 - *individuals can rely on art. 21 in horizontal disputes*



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DEVELOPMENT HORIZONTAL DIRECT EFFECT: *EGENBERGER* & *BAUER*

Egenberger (C-414/16, 2018):

- legal issue:
 - horizontal application of directive not possible
 - consistent interpretation not possible
 - national court asks if in that case it is obliged to disapply the national legal provision
- CJEU:
 - art. 21 & art. 47 CFR can be relied upon, *also in horizontal relations*

Bauer (C-569/16, 2018):

- CJEU confirms Egenberger
- explicitly discusses counter-argument based on art. 51 CFR:
 - absence of specific reference to individuals cannot be interpreted as precluding them
 - fact that certain EU primary law provisions directly address MS does not preclude horizontal application
 - Article 31(2) CFR 'by its very nature entails a corresponding obligation on the employer'



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OTHER EXAMPLES

- **horizontal direct effect:**
 - **Braathens**, C-30/19, 2021
 - race discrimination complaint: additional security check, based on appearance
 - Air company accepts liability and pays compensation, without acknowledging discrimination
 - according to Swedish law: if liability accepted: no examination of the merits
 - CJEU: Swedish law does not ensure the right to have the existence of the alleged discrimination examined: thus it infringes the requirements of art. 7 and 15 of Dir. 2000/43, in light of Art. 47 CFR
- **vertical direct effect:**
 - **TC & UB**, C-824/19, 2021
 - VA has reduced capacity to work due to sight loss; admitted as a juror, however not invited to participate in a single trial
 - TC & UB fined for discrimination
 - CJEU: Dir. 2000/78 is specific expression of the general principle of non-discrimination of art. 21 CFR + relevance art. 26 CFR
 - aim (protection of criminal trial guarantees) legitimate
 - measure appropriate
 - but: not necessary: total exclusion; no examination of possibility to provide for a reasonable accommodation (Dir. 2000/78), which should be understood in light of art. 26 CFR as referring to the elimination of barriers that hinder full and effective participation
 - (test prescribed by art. 52(1) CFR)



CHARTER SCOPE (ART. 52(1))

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”



EU CHARTER: ART. 20 & 21

- Art. 20: Everyone is equal before the law
- Art. 21: non-discrimination
 1. Any discrimination based on grounds such as race shall be prohibited
 2. Within the scope of application of the Treaty ... and without prejudice ... any discrimination on grounds of nationality shall be prohibited



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FOCUS OF ART. 20 CHARTER

- In judicial practice:
 - Art. 20 seems to be used as protection against arbitrary distinctions:
 - 2 approaches:
 - **Equality as rationality**: very marginal assessment of justification of unequal treatment:
 - Objective reasons for difference?
 - Scientific data to support chosen course of action?
 - Example: Case C-127/07 on EU Greenhouse gas emissions trading scheme (2008): scheme applied to steel industry but not plastics & aluminium sectors
 - **Equality & employment relations**: stricter test:
 - Example: departures from equality principle (e.g. because of part-time employment or atypical contracts) to be carefully scrutinised



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USUALLY: FOCUS OF ARTICLE 21 CHARTER

- 21(1): general non-discrimination clause
- 21(2): nationality
- **Examples:**
 - 21(1) Test Achats (C-236/09), Zoi Chatzi (C-149/10)
 - 21(2) Kamberaj (C-571/10)



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EU STRATEGY TO STRENGTHEN CHARTER APPLICATION

COM(2020)711 final, 2 Dec. 2020

- EU Commission proposal: 4 strands
 - ensuring effective application by MS
 - empowering civil society, rights defenders and justice practitioners
 - fostering the use of the Charter as a compass for EU institutions
 - strengthening people's awareness of their rights under the Charter
- “Upholding EU fundamental rights and values is a shared responsibility and requires a collective effort from all concerned: EU institutions, bodies and agencies, national and local authorities, including law enforcement authorities, rights defenders, legislators, *judges and other legal practitioners*, and civil society organisations...”
- Strategy includes supporting judges and other justice practitioners by:
 - providing Charter training opportunities and support the development of a dedicated e-learning tool for judges
 - promote Charter-related training activities and material
 - inviting networks of judges and other practitioners to cooperate on training and share practices on the application of the Charter
 - FRA will update ‘Charterpedia’



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CHARTER & EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

art. 52(3) CFR: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”



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EU ACCESSION TO ECHR

- Art. 6(2) TEU
The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
- Art. 59(2) ECHR
The European Union may accede to this Convention.
- But: OPINION 2/13 OF THE COURT (Full Court), 18 December 2014



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WHY EU ACCESSION TO ECHR?

- Accountability EU institutions; possibility of conflicting obligations for MS

Questions:

- Final say?
- Differing standards for ECHR States Parties that are and those that are not EU members?
 - presumption of equivalent protection (*Bosphorus v Ireland*, appl.no. 45036, 2005)



DIFFERENCE IN FOCUS

- EU: focus on internal market; harmonisation
- ECHR: protection of minimum human rights standards

Intrinsic tension?

- CJEU C-399/11, 26 February 2013, *Stefano Melloni v Ministero Fiscal*: CJEU (Para 60):
“[MS]... free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised” (60)



CURRENT SITUATION

- accession discussed since 1970s
- CJEU rejected draft accession agreement in 2014
- EP resolution of 12 February 2019 on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework (2017/2089(INI)): reiterates importance of EU accession
- Oct. 2019: letter to CoE that EU was ready to resume negotiations
- since then: discussions ongoing



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THANK YOU, ANY QUESTIONS?



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