



**The EU legal framework on equality -  
EU Charter of Fundamental Rights**

**ERA Seminar: Applying EU Anti-Discrimination law**

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## **Legal basis for equality law**

UN human rights conventions,  
including ILO conventions

Council of Europe agreements  
including ECHR and ESC

EU primary and secondary law  
including Charter of Fundamental Rights

National constitutional and statutory law

## Basic concepts:

General principle of equality:

Treat equal things equally and unequal things unequally.

Prohibitions of discrimination:

No differentiation "because of" certain characteristics

- allows exceptions

No differentiation according to criteria which "may in a particular way disadvantage" protected groups.

- Allows justification

Equality

requires equality of outcome

- If not achievable through procedural equality, then through "positive action".

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## General principle of equal treatment:

Obliges **EU institutions** across the board

→ Can be used to fill gaps in regulations.

Does not oblige Member States to go beyond the scope of the Directive:

ECJ - C-13/05 - Navas (illness ≠ disability)

ECJ - C-362/12 - Z (surrogacy ≠ maternity protection)

Consequence:

vis-à-vis member states (and private third parties)

Principle of equal treatment = specific implementation of a prohibition of discrimination (primarily: fundamental freedoms)

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## Unequal treatment < > Discrimination

Discrimination occurs when an actual difference in treatment is neither exceptionally permitted nor can be objectively justified.

Exceptionally permitted:

- Promotional measures in favour of disadvantaged groups
- Special protection provisions (maternity protection/ protection of minors)
- General arrangements (disability)

Objective justification:

- Legitimate aim achieved by proportionate means.

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## EU - primary law

Art. 157 TFEU: Equal pay for men and women (already part of Union law since 1957)

ECJ: direct third party effect in employment relationship,  
8.4.1996 - C-43/75 - Defrenne II:

"... the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to contracts between individuals".

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The third-party effect remains limited to the scope of the prohibition of discrimination (pay);

can be concretised by directives but not extended to other elements, such as equal treatment of men and women in other working conditions, ECJ 15.6.1978 - C-149/77 - Defrenne I; ECJ 3.6.2021 - C-624/19 - Tesco Stores

Consequence:

EU treaties allow third party effect for prohibitions of discrimination,  
not for the general principle of equal treatment

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## Other primary legislation

TEU: Preamble and Art. 2: Equality as a universal **value** of the Union

Art. 9 : EU commits itself to the **equality of** all Union citizens

Art. 3: Combating **discrimination**

Art. 3: Equality as an objective of the Union

TFEU: Art. 10 : Combating **discrimination**  
because of (characteristics)

Art. 19: Regulatory competence of the EU to combat **discrimination** on grounds of (characteristics)

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## Secondary law derived from this

- Gender: Equal treatment
  - Directive 79/7/EEC (Social Security)
  - Directive 2004/113/EC (goods and services)
  - Directive 2006/54/EC (Work and Employment)  
[Predecessors: RL 75/117/EEC and 76/207/EEC]
  - Directive 2010/41/EC (Self-employed activity)
  - Directive proposal (DM (2991) 93 final: Remuneration Transparency Directive

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- "Race" or ethnicity:
  - Directive 200/43/EC (employment and occupation, social protection, education, goods and services including housing)
- Religion, disability, age, sexual orientation
  - Directive 2000/78/EC (Employment and Occupation)
  - Secondary law concretises the Equal Treatment Directive as prohibitions of direct and indirect discrimination

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## Relationship between primary and secondary law

Principle of equal treatment in conjunction with prohibitions of discrimination as a standard for the validity of secondary legislation:

ECJ - C-236/09 - Test Achats

The prohibition of discrimination on grounds of ... is a general principle of Union law (-equivalent to the general principle of equal treatment), which is concretised by the **CFR** and by the Directives.

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## No direct third-party effect of directives

- Priority of Union law over national law also applies to the Directives.
- In the absence of/insufficient transposition of Directives into national law, the following applies:
  - Infringement proceedings (Com ./. State before the the ECJ)
  - Preliminary ruling proceedings (reference court) before the ECJ
  - Interpretation of the Directive by the ECJ: binding

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- National law: obliged to interpret national law in conformity with the Directive, insofar as methodologically permissible
  - If a conforming interpretation is not possible and
  - If the provision of the Directive gives clear, unambiguous and unconditional rights
- a claim arises directly from the Directive  
but only vis-à-vis the state or state institution  
NOT vis-à-vis private individuals
- ECJ 24.1.2012 - C-282/10 - Dominguez

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## EU Charter of Fundamental Rights

Entry into force: 1.12.2009 (Treaty of Lisbon)

Legal character: the same as the EU Treaties,  
Art. 6 I TEU (= primary law)

Art. 20: Equality before the law

Art. 21: Non-discrimination (17 characteristics)

Art. 23: Equality of the sexes

Art. 24: Children's rights

Art. 25: Rights of the elderly

Art. 26: Integration of disabled persons

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## Interpretation of the Charter of Fundamental Rights

- Having regard to the Explanations on the CFR, Art. 52 VII
- Corresponding ECHR rights as minimum guarantee content of the CFR, Art. 52 III
- in the case of constitutional traditions common to the Member States: Interpretation in accordance with these traditions, Art. 52 IV
- Interpretation of infringement of rights recognised by Union law, international law and international agreements to which the Union or all Member States are parties is inadmissible, Art. 53.

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## Requirements for the application of the CFR

Application to EU institutions in all types of action, Art. 51 I CFR [respect and protect = defence and obligation].

(no extension of the Union's competences, Art. 51 II)

Applicable to Member States only if they implement Union law or act within its scope, Art. 51 I CFR (ECJ - C-617/10 - Åckerberg Fransson)

Applicable to private individuals: no mention in Art. 51 I GRC - counter-conclusion?

Dissent: ECJ - C-684/16, para. 76; C-569/16 and 570/16, para. 87 (to be determined separately for each fundamental right).

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Recognised for prohibitions of discrimination, Art. 21  
(RS Mangold/ Küçükdeveci because of age; Egenberger because of religion)

Recognised for paid annual leave, Art. 31 para. 2

Not recognised for information and recognition, Art. 27

Not recognised for general principle of equality

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### Effect of the CFR's third-party effect

ECJ 22.11.2005 - C-144/04 - Mangold

"It is the responsibility of the national Court to guarantee the full effectiveness of the general principle of non-discrimination ..., setting aside any provision of national law which may conflict with Community law...".

If a Directive is not open to interpretation, the national court must **not apply** it; the claim follows directly from primary EU law.

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### **Effect of the CFR's third-party effect**

ECJ 19.4.2016 - C-441/14 - DJ

"... the principle prohibition discrimination [Art. 21 CFR] confers on private persons an individual right which they may invoke as such and which, even in dispute between private persons, requires national courts to disapply national provisions that do not comply..."

The requirement of non-discrimination from Art. 21 CFR confers individual rights.

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### **Effect of the CFR's third-party effect**

ECJ 22.1.2019 - C-193/17 - Cresco Investigation

"Art. 21 of the Charter ... must be interpreted as meaning that, until the Member State has amended its legislation ... in or to restore equal treatment, a private employer ... is obliged also to grant his other employees a public holiday ..."

The principle of non-discrimination provides an independent basis for claims for the granting of benefits, also against private individuals.

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### Effect of the CFR's third-party effect

Directives themselves do not act directly between private parties (only in relation to the state/state institutions)

Fundamental rights in conjunction with the provisions of the Directive that concretise them can (depending on the fundamental right) have a direct effect between private individuals in the sense of

Inapplicability of  
conflicting  
national laws

Self-employed basis  
of entitlement

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### CFR and violation of rights by member states

The violation  
of fundamental rights  
of national law  
or of ECHR rights

which are not within the  
determined by Union law area

is judged according to  
national law  
(national courts/  
constitutional court)  
If necessary: Individual  
complaint to the ECtHR

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The violation  
of fundamental rights,  
by measures taken within the  
scope of application of  
Union law

is assessed by the national court,  
which interprets and applies Union law  
if necessary: preliminary ruling procedure  
to the ECJ  
if applicable: Non-application of national law  
If applicable: Individual complaint to ECtHR

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### **Relationship between Union law and national law**

- Primacy of application of Union law, also vis-à-vis national constitutional law (ECJ 26.2.2013 - C-399/11 - Melloni, para. 59).
- Supplementation by national law: only in areas not fully determined by Union law, and only insofar as this does not impair the unity and effectiveness of Union law.

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## Relationship between Union law and the ECHR

- No precedence (as the EU has not ratified the ECHR)
- Member States have ratified, must respect ECHR despite EU accession (ECtHR 18.2.1999 - No. 24833/94 - Matthews ./ UK)
- Art. 52 III CFR: for rights which are taken from the ECHR it is regarded as the minimum level for the CFR
- Presumption of equivalence of the ECtHR (30.6.2005 - no. 45036/98 - Bosphorus ./ Ireland, para. 156) could be rebutted  
Legal policy dissent possible

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**Thank you for your attention!**

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