

Funded by
the European Union

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 Art. 21 in the CJEU case law

Prof. Snježana Vasiljević, PhD
University of Zagreb Faculty of Law
snjezana.vasiljevic@pravo.unizg.hr

1



ART. 2 OF THE TREATY ON EUROPEAN UNION

- 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.

2

Treaty on the Functioning of the European Union

- Article 8: obligation of gender mainstreaming for the EU
- Article 10: obligation of introducing non-discrimination for the EU
- Article 18 and Article 45: discrimination on grounds of nationality is prohibited in EU law
- Article 19: EU legislative competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation – requires a special legislative procedure, the Council acting unanimously and consent of the EP
- Article 157(1): principle of equal pay for equal work or work of equal value
- Article 157(3): EU legislative competence to ensure gender equality in employment – ordinary legislative procedure

3

Principle of equal pay for equal work

- Part of the 1957 Treaty of Rome (Art. 119)
- Elaborated by the Directive on equal pay (75/117/EEC)
- Confirmed in CJEU Case 43/75 Defrenne (no. 2) (1976)

4



Charter of Fundamental Rights of the EU

- Applicable to all EU institutions and bodies and to Member States only when acting in the scope of EU law
- Art. 20: equality before the law
- Art. 21 (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."
- Art. 21 (2) "Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."
- Art. 23: equality between men and women in all areas, with the possibility of specific advantages in favour of the under-represented sex
- Art. 26: integration of persons with disabilities
- Art. 33(2): reconciliation of family and professional life, protection of maternity

5



Direct effect of European legal norms in horizontal situations

- Not all EU norms have direct horizontal effect:
- Directives cannot be relied on directly in a horizontal dispute
- Directives require states to implement the directive, and not directly individuals
- Consequences:
- Legal gaps in situations where directives implement particular fundamental rights
- Questionable effectiveness of directives in horizontal relations
- The problem of effectiveness in access to judicial protection of rights

6

Legal basis

Art. 19 TFEU: grants the EU the competence, within the limits of powers, to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

Art 21 Charter: prohibits discrimination on any ground, applicable only within the scope of application of EU law (does not establish any 'new' rights)

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

7

Direct effect of EU law

- According to settled case law of the Court of Justice of the European Union, to obtain the disapplication of conflicting national provisions, legal and natural persons may rely before their natural courts on provisions of EU law which are clear, precise and not subject to conditions (*Van Gend en Loos*).
- This is known as the direct effect of EU law. The direct effect can be vertical or horizontal, depending on whether it is relied upon in the context of proceedings between a natural or legal person and a Member State (vertical direct effect), or in disputes between private parties (horizontal direct effect).

8

Horizontal direct effect of primary law

- *Defrenne*
- *Agonese*
- *Viking*

- In a series of judgments delivered in 2018, the CJEU ruled that the EU Charter, or some of its provisions, may have horizontal direct effect (*Egenberg*, *Cresco*, *Bauer and Volker Willmeroth*, *Max Planck*)

9

Direct effect of European legal norms in horizontal situations in the CJEU case law

- In some rulings, the CJEU has allowed for the horizontal direct effect of directives
- (i) Case law based on the prohibition of discrimination as a general principle of EU law
- (ii) Case law based on Charter Article 21(1): prohibition of discrimination
- (iii) Case law relating to Charter Article 31(1): annual leave

10

C-176/12 AMS


- In case C-176/12 *Association de médiation sociale (AMS)*, the CJEU stated that in certain circumstances the Charter could have horizontal direct effect.
- It held that the principle of non-discrimination on grounds of age, laid down in Article 21(1) of the Charter, had horizontal direct effect and could be relied on directly to disapply a conflicting national provision, because it is 'sufficient in itself to confer on individuals an individual right which they may invoke as such'.

11

The following conclusions may be drawn from the judgment in the *AMS* case:

- A conflict between national law and the Charter leads to the disapplication of national law if the Charter's provision at issue is sufficient in itself to confer an individual right which can be invoked as such (more precisely, without the need for implementing measures at EU or national levels);
- In such circumstances, the direct effect of the Charter's provision can be invoked not only in vertical but also in horizontal proceedings (as was the case in *AMS*);
- Article 21(1) of the Charter fulfils the requirements for direct effect, at least as regards non-discrimination on grounds of age. However, the same is also true for other grounds of non-discrimination referred to in the provision;
- Article 27 of the Charter on the rights of workers to information and consultation within the undertaking has no direct effect: the Court excluded it in the *AMS* case;
- If the case at issue involves a different provision of the Charter, it might be useful to ask the CJEU to establish whether it satisfies the *AMS* test (although national courts which hand down judgments that are not final are under no obligation to submit references for preliminary rulings).

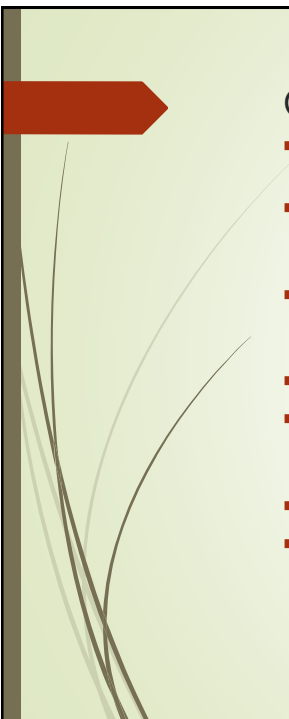
12



Earlier case law of the CJEU

- Mangold/Kücükdeveci:
- European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.
- 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 contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.
- Consequences of Mangold/Kücükdeveci:
 - • CJEU upholds the direct effect of a general principle in situations where explicit reference to the Directive is not possible
 - The Directive is seen as the practical implementation of the general principle.

13



CJEU case law II

- This was further developed in equal treatment case law in reference to Article 21(1) of the Charter.
- *Egenberger* case: CJEU extends the horizontal direct effect of the prohibition of discrimination (as laid down in Article 21(1) of the Charter) to discrimination on grounds of religion.
- *Cresco* case: legal implications of the horizontal direct effect of Article 21(1) go beyond disapplication of the conflicting national provision – they also create a positive obligation to ensure equal rights.
- The substance of the case was addressed under Directive 2000/78.
- However, since the Directive provisions do not have horizontal direct effect and it was not clear whether a consistent interpretation of national law is possible, the CJEU referred to Article 21 of the Charter.
- In such cases, the CJEU develops the approach set out in *Mangold/Kücükdeveci*:
- CJEU grants horizontal effect to the prohibition of discrimination in reference to constitutional norms (here Article 21 of the Charter) and examines the substance based on the Directive.

14



CJEU case law II

- The Court highlighted that the principle of equal treatment in the field of employment and occupation derives from various international instruments and from the constitutional traditions common to the Member States and has not been established, as such, by the Directive. Moreover, the prohibition of discrimination on grounds of religion is protected as a general principle of EU law and guaranteed by Art. 21 of the Charter.
- That provision is sufficient in itself to confer on individuals a right which they may invoke as such in disputes between themselves (in horizontal situations).
- Finally, the Court observed that as regards its mandatory effect, Art. 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (*Defrenne*, *Agonese*, *Viking*).
- If a consistent interpretation of national law is not possible, the referring court must ensure judicial protection flowing from Art. 21 of the Charter and guarantee the full effectiveness of that article even in disputes between individuals. (*Egenberger*)

15

Art. 47 in conjunction with Art. 21 of the Charter

- With less detailed reasoning, the Court further ruled on the horizontal direct effect of Art. 47 of the Charter, in combination with Art. 21 of the Charter.
- 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 rights which they may rely on as such and which the national court must protect.
- The judicial protection of individuals derives from Art. 21 and 47 of the Charter.

16

CJEU case law III – extension to social rights as well?

- Initial hesitation of the CJEU:
- *AMS* case: Art. 27 of the Charter does not have horizontal direct effect as it requires more specific expression in law
- Asserting the horizontal effects of Article 31(2) (ANNUAL PAID LEAVE) of the Charter:
- *Bauer and Willmeroth* case: Article 31(2) has horizontal direct effect since it is mandatory and unconditional in nature and 'in itself' confers rights on workers in disputes between private parties.

17

Conditions for the Charter's horizontal effect

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

- For Charter provisions to have horizontal direct effect, the Charter must be applicable. According to Art. 51(1), the Charter is applicable in the Member States only when 'they are implementing Union law'.
- Two conditions can be distinguished from the case law that are necessary for the Charter provisions to have horizontal effect
- i) The right at issue is 'mandatory': is the national judge in a position to establish whether the provision of EU law has been breached?
- ii) and unconditional: Charter provisions do not require specific expression or clarification in EU or national law
- → It is still unclear what exactly the Court means by 'mandatory and unconditional'

18

What is ultimately the purpose of the Charter?

- The Charter was adopted to fill a very specific gap in the judicial protection of fundamental rights.
- It seeks to ensure the effectiveness of existing rights, rather than creating new ones or unduly extending the legal effects of existing rights.
- Article 47 of the Charter was briefly mentioned in the *Egenberger* case.
- The Court also notes the need to ensure 'effective protection' in accordance with Art. 47 (*Egenberger, Bauer and Willmeroth*).
- Case law on horizontal effect can be read as addressing a lacuna in the system for judicial protection created by the lack of direct effect of directives.



19



- Thank you for your attention!

20