



Dr. Claudia Schmidt
Barcelona, 25 April 2022

The EU legal framework on equality





THE EU CHARTER OF FUNDAMENTAL RIGHTS AND THE ISSUE OF HORIZONTAL DIRECT EFFECT OF ARTICLE 21 IN THE CJEU CASE LAW

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Equality in EU Treaty law

« pay »

Article 119 EEC  

« Equal pay without discrimination based on sex »

➔ Article 141 EC ➔ Article 157 TFUE

No change in substance!

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Equality in EU Treaty law

Article 119 EEC (157 TFUE): the principle of equal pay

C-80/70 Defrenne v Belgian State (Conseil d'Etat)
25 May 1971

C-43/75 Defrenne/SABENA (Tribunal du Travail)
8 April 1976

C-149/77 Defrenne/SABENA (Cour de Cassation)
15 June 1978

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Equality in EU Treaty law

Article 119 EEC (157 TFUE): principle of equal pay

« Defrenne II »

Article 119 EEC pursues a **double aim**: economic and social.

Article 119 EEC has **direct effect**.

Since it is mandatory in nature, the **prohibition on discrimination between men and woman** applies not only to the action of public authorities, but also **extends to contracts between individuals**.

Directives can provide further details regarding certain aspects but not prejudice the direct effect of Article 119.

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Equality in EU Treaty law

Article 119 EEC (157 TFUE): principle of equal pay

« *Defrenne III* »

Article 119 of the EEC Treaty ***cannot be interpreted as prescribing***, in addition to equal pay, ***equality in respect of the other working conditions applicable to men and women.***

C-624/19 Tesco Stores 3 June 2021 (GB)

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Equality in EU Treaty law

Treaty of the European Union (TUE)

Preamble

*DRAWING INSPIRATION from the ... inheritance of Europe, from which have developed the **universal values** of ... **equality** ...*

Article 2 TUE

*The Union is founded on the **values** of ... **equality**, These values are **common to the Member States** in a society in which ..., **non-discrimination**, ... and **equality between women and men** prevail.*

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Equality in EU Treaty law

Treaty of the European Union (TUE)

Article 3, paragraph 3 TUE

*It (the Union) shall **combat ... discrimination**, and shall **promote ... equality between women and men**, ...*

Article 9

*In all its activities, the Union shall observe the **principle of the equality of its citizens**, who shall receive equal attention from its institutions, bodies, offices and agencies.*

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Equality in EU Treaty law

Treaty of the Functioning of the European Union (TFUE)

PART ONE PRINCIPLES

TITLE II PROVISIONS HAVING GENERAL APPLICATION

Article 10 TFUE

*In 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.***

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Equality in EU Treaty law

Treaty of the Functioning of the European Union (TFUE)

PART TWO **NON-DISCRIMINATION** AND CITIZENSHIP OF THE UNION

Article 19 TFUE

*1. Without prejudice to the other provisions of the Treaties ..., the **Council**, ... after obtaining the consent of the **European Parliament**, 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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EU secondary equality law Gender equality



Directive 79/7/EEC

on the progressive implementation of the principle of equal treatment for men and women in matters of social security

C-450/18 of 12 December 2019

WA v Instituto Nacional de la Seguridad Social (Pension supplement for mothers)

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EU secondary equality law Gender equality



Directive 2004/113/EC

implementing the principle of equal treatment between men and women in the access to and supply of goods and services

*C-236/09 Association Belge des Consommateurs Test-Achats ASBL and Others
Guidelines of the European Commission on the application of Directive
2004/113 to insurance in the light of the judgment in case C-236/09*

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EU secondary equality law Gender equality



Directive 2006/54/EC

on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*

**Former Council Directives 75/117/EEC, 76/207/EEC, 86/378/EEC, and
97/80/CE brought together in a single text taking into account the
developments arising out of the case-law of the ECJ*

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EU secondary equality law Gender equality



Directive 2010/41/EU

on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC

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EU secondary equality law Gender equality



Proposal for a Directive 2022/.../EU*

COM (2021) 93 final

to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms

**Commission Recommendation 2014/124/EU on strengthening the principle of equal pay between men and women through transparency*

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EU secondary equality law Race or ethnic origin



Directive 2000/43/CE

implementing the principle of equal treatment
between persons irrespective of racial or ethnic origin

C-30/19 Braathens Regional Aviation 15 April 2021 (SUE)

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EU secondary equality law Religion, disability, age, sexual orientation



Directive 2000/78/CE

establishing a general framework for equal treatment
in employment and occupation

Religion or belief: Joined cases C-804/18 and C-341/19 WABE and MH Müller

Disability: C-795/19 Tartu Vangla

Age: C-914/19 Ministero della Giustizia

Sexual orientation: C-507/18 Associazione Avvocatura per i diritti LGBTI

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The EU Charter of fundamental rights

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- European Parliament
- Parliaments of the Member States
- Representatives of the governments of the MS
- Commission

➔ *Charter of fundamental rights*

Nizza, 7 December 2000

Strasbourg, 12 December 2007

Entry into force (with Lisbon Treaty):
1st December 2009

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The EU Charter of fundamental rights

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Article 6, paragraph 1, TEU
Article 51, paragraph 2 Charter

- The Charter has the *same legal value as the Treaties*
- The provisions of *the Charter shall not extend in any way the competences of the Union* as defined in the Treaties

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The EU Charter of fundamental rights

Preamble

O **P**reservation and **d**evelopment of common values
B Necessity to **s**trengthen the **p**rotection of
J fundamental rights ...
E
C « by making those rights **m**ore **v**isible in a Charter »
T
I « This Charter **r**eaffirms ... the rights as they result, in
V particular, from the constitutional traditions ... common to
E the MS ... and the case-law of the CJEU and of the ECHR. »

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The EU Charter of fundamental rights

Preamble

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<i>Chapter I</i>	<i>Dignity</i>
<i>Chapter II</i>	<i>Freedoms</i>
<i>Chapter III</i>	<i>Equality</i>
<i>Chapter IV</i>	<i>Solidarity</i>
<i>Chapter V</i>	<i>Citizens' Rights</i>
<i>Chapter VI</i>	<i>Justice</i>
<i>Chapter VII</i>	<i>General Provisions</i>

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The EU Charter of fundamental rights

Chapter III Equality

Article 21

Non-discrimination

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**.
1. Within the scope of application of the ... Treaties, any discrimination on grounds of nationality shall be prohibited.

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The EU Charter of fundamental rights

Chapter III Equality

Article 23

Equality between men and women

Equality between men and women must be **ensured in all areas**, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.

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The EU Charter of fundamental rights Article 6 TEU, Article 52 Charter

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- ... in harmony with the constitutional traditions of the MS
- subject to the principle of proportionality
- Limitations must be provided for by law and respect the essence of the (restricted) right/freedom
- ... only if necessary ... or need to protect the rights and freedoms of others
- ... with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*

*OJ C 303 p. 17, 14 December 2007

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The EU Charter of fundamental rights Article 52, par. 3, Charter

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3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and the 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.**

ECHR, Ilias & Ahmed c. Hongrie 21 November 2019

ECJ, jointed cases C-924/19 PPU « FMS, FNZ » and C-925/19 PPU « SA et SA junior » 14 May 2020

ECHR, R. R. and Others c. Hongrie 2 March 2021

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No horizontal direct effect of directives

Judgment of the ECJ interpreting (a provision of) a directive
Article 267 TFEU

- The (provision of) the directive is precluding national law
- MS failed to implement/implement it correctly -
- The provision can't be interpreted in conformity with EU law
- The provision is clear, precise and unconditional

*Legal nature of the respondent in the main proceedings
is decisive for the final ruling of the national Court*

State/public service entity :
National law disregarded

Private party:
Directive can't apply

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No horizontal direct effect of directives

"A directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual"

"In such a situation, the party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357 in order to obtain, if appropriate, compensation for the loss sustained."

C-282/10 Dominguez 24 January 2012 (second question)

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The principle of equal treatment in the field of employment and occupation C-144/04 Mangold 22 November 2005

“The source of the actual principle underlying the prohibition ... of discrimination being found ... in various international instruments and in the constitutional traditions common to the Member States.

*The **principle of non-discrimination** on grounds of age must thus be regarded as **a general principle of Community law**.*

*It is the responsibility of the **national court** to **guarantee the full effectiveness of the general principle of non-discrimination** in respect of age, **setting aside any provision of national law which may conflict with Community law**, even where the period prescribed for transposition of that directive has not yet expired.”*

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The principle of equal treatment in the field of employment and occupation C-555/07 Küçükdeveci 19 January 2010

*“..., it is **for the national court**, hearing a dispute involving the **principle of non-discrimination** on grounds of age as given expression in Directive 2000/78, to **provide ... the legal protection which individuals derive from European Union law** and to **ensure the full effectiveness of that law**, disapplying if need be, any provision of national legislation contrary to that principle (see, to that effect, Mangold, paragraph 77).”*

See also: **C-447/09 Prigge and Others** 13 September 2011

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**The principle of equal treatment
in the field of employment and occupation
C-176/12 AMS 15 January 2014**

*“ ... the **principle of non-discrimination** on grounds of age at issue in ... case [Kücükdeveci], laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.”*

[Obiter dictum]

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**The principle of equal treatment
in the field of employment and occupation
C-441/14 DI (Dansk Industri) 19 April 2016**

*“... It is also **apparent from the Court’s case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law (Mangold, ... and Küçükdeveci).”***

*Moreover, it is apparent from ... the judgment in AMS (C-176/12) that **the principle prohibiting discrimination on grounds of age 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.***

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**The principle of equal treatment
in the field of employment and occupation
Article 21 Charter - direct horizontal effect**

C-414/16 - Egenberger 17 April 2018

*“A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the **judicial protection deriving for individuals from Articles 21 and 47 of the Charter** ... and to guarantee the full effectiveness of those articles by disapplying if need be, any contrary provision of national law.”*

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**The principle of equal treatment
in the field of employment and occupation
Article 21 Charter - direct horizontal effect**

C-68/17 - IR 11 April 2018

*“A **national court** hearing a dispute between two individuals **is obliged**, in a manner that is consistent with Article 4(2) of Directive 2000/78, to provide ... the **legal protection** which individuals derive from the general principles of EU law, such as the principle prohibiting **discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter** ..., and to **guarantee the full effectiveness** of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.”*

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The principle of equal treatment in the field of employment and occupation Article 21 Charter - direct horizontal effect

C-193/17 - Cresco Investigation 22 January 2019

“ Article 21 of the Charter ... must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday ...”

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No horizontal direct effect of directives but

Horizontal direct effect of Article 21 Charter

- The (provision of) the directive precludes national law
- MS failed to implement/implement it correctly -
- The provision is clear, precise and unconditional
- It can not be interpreted in conformity with EU law

*Legal nature of the respondent in the main proceedings
is decisive for the final ruling of the national Court*

National law must be disregarded

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**No horizontal direct effect of directives
but
Horizontal direct effect of Article 21 Charter**

*According to the legal nature of the respondent
the obligation to disapply the national law is dictated by*

Article ... of Directive ... and Article 21 of the Charter	Article 21 of the Charter
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State/public authority **Private party**

Cf. mutatis mutandis, joined Cases **C-569/16** and **C-570/16**
Bauer and **Willmeroth** 6 November 2018

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**The principle of equal treatment
in the field of employment and occupation
Article 21 Charter - direct horizontal effect**

Joined Cases **C-804/18** and **C-341/19** **WABE** and **MH Müller**
15 July 2021

Question 2.

Does a unilateral **instruction from the employer** prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute **indirect discrimination** on the grounds of religion **and/or gender**, within the meaning of [...] Directive [2000/78], against a female employee who, due to her Muslim faith, wears a **headscarf**?

In particular:

(a) Can [indirect] discrimination on the grounds of religion **and/or gender** be justified under Directive [2000/78] by [...]?

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