

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 CJEU case law

Nadia Rusinova

Attorney-at-law, Lecturer The Hague University
nadia@nadiarusinova.com



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1. Prohibition of discrimination - overview

- The fundamental principle of equality requires that similar situations should not be treated differently and different situations should not be treated equally, unless this is objectively justified (C-133/93, C-300/93 and C-362/93, Crispoltoni, 1994)
 - How are similar situations determined?
 - What is the understanding of equality of treatment on which we base the decisions?
 - Under what circumstances can the discrimination allowed be considered objectively justified?

Equality:

- requires equality of outcome
- if not achievable through procedural equality, then through "positive action"

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Prohibition of discrimination: Some preliminary observations

- Not every unfair/unequal treatment amounts to discrimination.
 - Protected ground is needed, justification might be present
 - Different national solutions are possible – in BG law "personal situation" exists as a protected ground
- Discrimination can be a result of good intentions.
 - Intent is irrelevant
- Not all victims of gender-based discrimination are women.
 - Supreme Administrative Court of Bulgaria, Case 384/2024: the authority refused breast cancer treatment prescription to a man solely on the grounds that this treatment can only be applied to women, without a legitimate purpose of the said measure
 - Since the medicinal product prescribed to Andreev was medically justified, the authority had no legal basis to refuse the prescription

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Prohibition of discrimination: Some preliminary observations

- The forms of discrimination and thus the protected grounds **evolve with time**
- EQUINET report in 2022: key advantages of expanding the list of protected grounds
- Many people discriminated against are still left out of the protection of anti-discrimination law in Europe - contrast with the EU's ambitions expressed in the Charter of Fundamental Rights, to protect everyone from discrimination on any protected ground
- Socio-economic disadvantage, health status, genetic heritage, physical appearance, additional or complementary grounds related to racial or ethnic origin, non-EU nationality, etc.
- Also in the jurisprudence: e.g. CJEU Case C-354/13 *Kaltoft* (obesity), UK *Casamitjana Costa v League Against Cruel Sports, 2020* (ethical veganism)
- However... **seeking balance**
 - *De Wilde v The Netherlands*, ECtHR, Application no. 9476/19



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2. 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

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EU equality framework

General principles of law – the principle of equality

- Filling the gaps of the EU equality law when applied to EU institutions (e.g. staff cases: C-20/71 Sabbatini; C-21/74 Airola)
- When applied to MS only enhances the prohibition of discrimination expressed in EU equality directives and does not oblige Member States to go beyond the scope of the Directive:
 - ECJ - C-13/05 - Navas (illness ≠ disability)
 - ECJ - C-363/12 - Z (surrogacy ≠ maternity protection)

Primary law:

- Treaty of European Union
- Treaty on the Functioning of the European Union
- Charter of Fundamental Rights of the EU

Secondary law: EU Equality Directives

- Directive 2000/43/EC – Racial Equality Directive (prohibiting discrimination on the basis of racial and ethnic origin in employment and occupation, social protection, education, access to goods and services, including housing)
- Directive 2000/78/EC – Framework Equality Directive (prohibiting discrimination on the basis of religion, age, disability and sexual orientation in employment and occupation)
- Directive 2004/113/EC Goods and Services Directive (prohibiting gender discrimination in the access to and supply of goods and services)
- Directive 2006/54/EC – Gender (Recast) Directive (prohibiting gender discrimination in employment and occupation, including occupational pension schemes)

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EU equality framework – recent developments

Two proposals were adopted on 7 May 2024:

Directive (EU) 2024/1499 of 7 May 2024 on **standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC**

Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on **standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU**

- Lay down minimum requirements to ensure that people in all Member States enjoy a common minimum level of protection against discrimination, to achieve a better application and enforcement of EU equality law
- Cover the mandate, independence, resources, tasks and powers of equality bodies to:
 - engage in the prevention of discrimination and awareness raising activities
 - deal with cases of discrimination/assist victims.
- Member states are required to adapt their national legislation to the provisions of the directives by 19 June 2026.

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Primary sources: TEU and TFEU

- Art. 2 TEU – equality as a value common to all MS
- Art. 3 (3) TEU - equality as a goal for EU
- Art. 8 TFEU - „in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”
- Art. 10 TFEU: *“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.”*
- Art. 18(1) TFEU - prohibition of discrimination based on nationality (applying to all fields of the EU law)
- Art. 19 (1) TFEU (formerly 13 TEC)
 - competence provision – a legal basis of EU Equality Directives
 - restricted to combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- Article 157 (1) and (2) TFEU - equal pay of men and women

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3. EU Charter – legal value

- The CFR was agreed by the EU in December 2000, but it did not become a legally binding instrument until the Lisbon Treaty came into force in 2009
- Provides a **human rights framework** for the development and implementation of EU law (including Equality Directives)
- **Legal character:** the same as the EU Treaties, Article 6(1) TEU: *„The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”*
- **The effect of the Charter:** where EU law is developed and implemented, the Charter must be complied with by the EU institutions, and the Member States implementing the law (Article 51(1))
- It does not however create any new powers or tasks for the EU (Article 51(2))

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EU Charter – relation with TFEU and ECHR

- The Charter is broader in scope than Article 19 of the TFEU and has different purpose
 - Art. 19 sets the basis for competence to combat discrimination and determines the grounds for which the EU can legislate against discrimination : sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation
- Relation with ECHR
 - Unlike Article 14 of the ECHR which is provision with limited autonomy, the Charter does not require another right to be engaged for its provisions to have effect
 - The Charter contains rights that are not contained in the ECHR such as the right to dignity and to legal aid

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Article 21 of the Charter (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.**



Status discrimination limb

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of **nationality** shall be prohibited.“



- Nationality discrimination limb (special category)
- All EU nationals must be treated equally within the scope of the Treaties
- Distinction between nationality discrimination between EU nationals and nationality discrimination between EU and non-EU nationals

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4. "Horizontal direct effect"

- The **direct application of a norm of EU law in a dispute between private parties**
- Not all EU norms have horizontal direct effect:
 - Directives cannot be invoked directly in a horizontal dispute
 - Directives create obligations for states to implement the directive, not directly for individual parties
- This results in gaps when directives implement a certain fundamental right
 - A gap in the effectiveness of the right
 - A gap in the access to judicial protection of the right

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"Horizontal direct effect"

Scope of protection and applicability of the Charter:

- **To institutions and bodies of EU**
 - In all types of action, Art. 51(2)
 - "Respect – observe – promote" suggests both defence and obligation
 - No extension of the Union's competences, Art. 51(2)
- **To Member States**
 - Only if they implement Union law or act within its scope, Art. 51(2) (ECJ - C-617/10 - *Åkerberg Fransson*)
- **To private individuals?**
 - No mention in Art. 51(1)- counter-conclusion?
 - ECJ - C-684/16, para. 76; C-569/16 and 570/16, para. 87 - to be determined separately for each fundamental right

Horizontal direct effect is a state of a legal norm of the EU law, in which it becomes possible for legal entities and individuals to derive rights and obligations directly from it

Horizontal direct effect of Art. 21 of the Charter - the possibility to invoke the right to equal treatment not only against the Member States, but also against private parties

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Horizontal direct effect through jurisprudence

In different lines of case law, the CJEU has allowed for the horizontal direct effect of directives and increasingly accords horizontal direct effect to Charter provisions

- Case law on article 31(1) of the Charter: annual leave
 - Case C-684/16 Max-Planck-Gesellschaft zur Förderung der Wissenschaften (Judgment of 6 November 2018, Grand Chamber)
 - C-569/16 Bauer (Judgment of 6 November 2018, Grand Chamber)
 - C-385/17 Hein (Judgment of 13 December 2018).
- **Case law based on Charter Article 21(1) and/or on Equality Directives regarding prohibition of discrimination**
 - Mangold
 - Küçükdeveci
 - Egenberger
 - IR

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Earlier case law - Mangold

C-144/04 Mangold (2005)

- Horizontal direct effect was confirmed before the Charter (directives 1999/70/EC and Directive 2000/78/EC)
- The case concerns a man who is employed on a fixed-term employment contract. Under German law, fixed-term employment contracts are illegal unless they are objectively justified, but this protection does not apply to those over 52.
- Horizontal employer-employee situation
- CJEU:
 - The deadline to implement the directive did not expire yet.
 - Nevertheless, the court found discrimination based on age: *"...the sole purpose of the directive is to establish a general framework to combat discrimination based on religion or belief, disability, age or sexual orientation, as the source of the actual principle underlying the prohibition of these forms of discrimination are enshrined ... in various international instruments and in the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age must therefore be regarded as a general principle of Community law"*

Outcome: a discriminatory provision can be challenged even in horizontal situations, even if the deadline did not expire yet.

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Earlier case law - Küçükdeveci

C-555/07 Küçükdeveci (2010)

- The case concerns dismissal and notice period. The notice period was calculated on the basis of a law which provides that periods of employment before the age of 25 are not taken into account when calculating the notice period - according to the complainant this is a discriminatory measure based on age which is contrary to Union law and should not be applied. Again, it's a horizontal situation
- CJEU:
 - The Court has recognized the existence of the principle of non-discrimination based on age, which must be considered as a general principle of EU law (Mangold)
 - This principle takes precedence over national legislation that contains a difference in treatment based on age
 - 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
- Difference with Mangold:
 - The deadline to transpose the directive has already expired, and
 - CJEU applied Art. 21 of the Charter, not only directive 2000/78/EC (para 22)

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C-414/16, Egenberger, 2018

- The case concerns a job advertisement under a fixed-term contract regarding a project for the preparation of a parallel report on racial discrimination. Applicants are required to belong to a Protestant or other church that is a member of the Community of Christian Churches in Germany. Ms. Egenberger applied for the job offer without professing any religion, but was not invited to an interview. She appealed to the court that the consideration of religion in the appointment procedure in question was not compatible with the statutory prohibition of discrimination as interpreted in EU law. Dispute between individuals – horizontal situation
- Federal Labour Court in Germany (referring court) - Directive 2000/78 has been transposed into German law in such a way that the legal provisions and practices in force at the date of adoption of this directive are preserved and extensive judicial review does not apply as religion constitutes a professional requirement, which is justified in view of the nature of the employer's church organization
- It also found the contradiction with the national law concerning the rights of religious organizations to self-determination.
- The question for CJEU to decide was whether this is compatible with the EU law.

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C-414/16, Egenberger, 2018

CJEU :

- Principle of non-discrimination (Article 21 of the Charter) and the principle of judicial review (Article 47 of the Charter) are directly applicable
- Prohibition of all discrimination on grounds of religion or belief is a general principle of EU law
- Para 76: The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law
- Key statement: *„...the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if needed any contrary provision of national law.“*

"As regards its mandatory effect, Article 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 (...)"

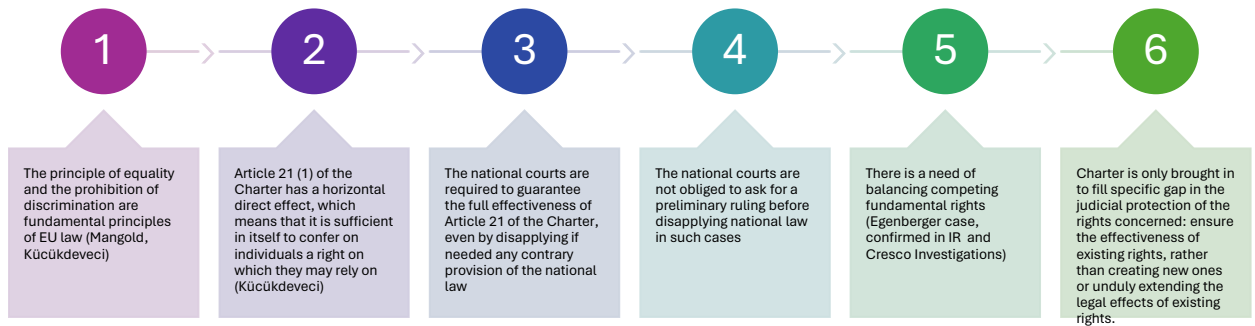
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C-68/17 IR, 2018

- Conclusions confirmed in *IR* and *Cresco*
- *IR*: Catholic hospital's dismissal of a Catholic chief medical practitioner on a managerial post because of his remarriage after his divorce (but without annulment of the marriage under the canon law) may amount to religious discrimination
 - The requirement for a Catholic medical practitioner to observe the sacred and indissoluble nature of marriage according to the understanding of the Catholic Church does not appear to constitute a fundamental, legitimate and justifiable professional requirement
 - CJEU: the prohibition of any discrimination based on religion is imperative as a **general principle of law** enshrined in the Charter of Fundamental Rights, so that **any private party can invoke this prohibition in a dispute falling within the scope of EU law**

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Conclusions



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Thank you for your attention!

Nadia Rusinova

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