

THE EU CHARTER IN LEGAL PRACTICE

Introduction to the principle of non-discrimination
under EU law

ERA Cross-professional training

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Plan

- 1 Terminology in non-discrimination law**
- 2 Elements of multilevel legal protection against discrimination in the EU**
- 3 Scope of protection against discrimination, including Article 21 of the Charter**
- 4 Effects of Article 21 of the Charter in national proceedings**
- 5 Selected prohibited criteria of discrimination**

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To start...terminology

- formal equality vs substantive equality
- principle of non-discrimination vs principle of equality
- non-discrimination: prohibition of unequal treatment in comparable situations (narrow)
- equality (wide)
 - obligation of equal treatment,
 - protection against discrimination
 - promotion of equality
 - combatting discrimination

! Important to wear „equality eyeglasses“

Definitions

Direct discrimination

occurs where a person is treated less favourably than another is, has been, or would be treated in a comparable situation on any of the grounds specified in the law

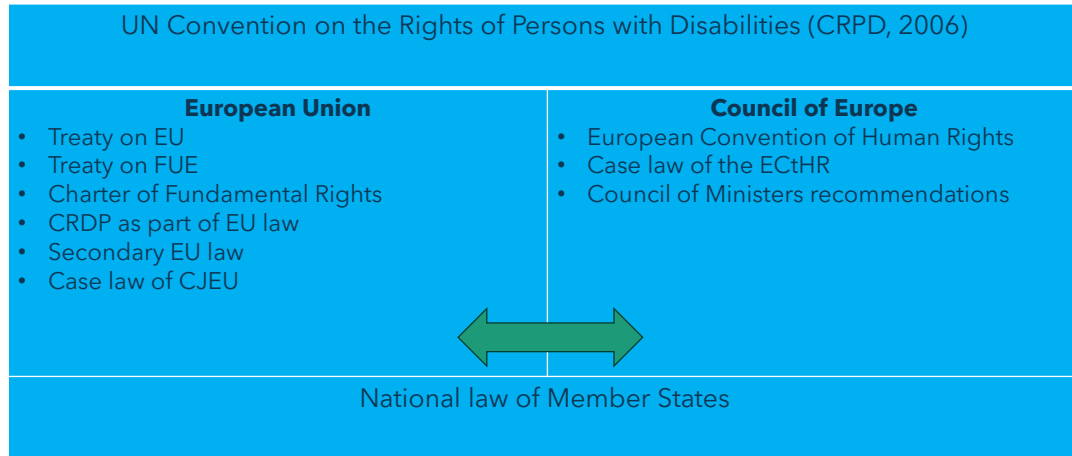
- Less favourable treatment
- Comparable situation
- Ground of discrimination

Indirect discrimination

occurs where an apparently neutral provision, criterion or practice would put, or would be liable to put, all or a significant number of persons belonging to a group distinguished by one or more particular characteristics at a disadvantage or in a particularly disadvantageous situation

- Apparently neutral provision, criterion or practice
- May lead to a disadvantage
- Particularly affects a specific group
- Comparison (including statistical data)

Multilevel legal protection against discrimination in EU



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EU Law on discrimination - TUE

Article 2: equality as a fundamental EU value

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.

Article 3(3): combating discrimination and promoting equality

The Union shall (...) combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

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EU Law on discrimination - TFUE

Article 8

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 10

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.

Article 18 (1)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 19 (1)

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and 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.

Article 157: equal pay

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

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EU Law on discrimination – Charter of Fundamental Rights of the EU

Article 20 Equality before the law

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.
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.

Article 23 Equality between women and men

Equality between women and men 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 favour of the under-represented sex.

Article 26 Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

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EU Law on discrimination – EU directives

- Directive 79/7/EEC – social security
- Directive 92/85/EEC – protection of pregnant workers
- Race Equality Directive (2000/43/EC)
- Framework employment Directive (2000/78/EC) against discrimination at work on grounds of religion or belief, disability, age or sexual orientation
- Gender Goods and Services Directive (2004/113/EC) implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- Gender Recast 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 (refer to Dir. 76/207/EEC)

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EU Law on discrimination – EU directives

- Work-Life Balance Directive (2019/1158) on work-life balance for parents and carers (Council Directive 2010/18/EC repealed)
- Pay Transparency Directive (2023/970) 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
- 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
- Directive 2024/1385 on combating violence against women and domestic violence
- Women on boards

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EU Law on discrimination - patchwork

CFR	any discrimination..... 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
Dir 2000/78	implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
Dir. 2000/43	combating discrimination on the ground of racial or ethnic origin
Dir. 2004/113	combating discrimination based on sex in access to and supply of goods and services
Dir. 2006/54	implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

scope of application of the CFR to the actions of the Member States -
"implementation of EU law" - Article 51(1)

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Direct discrimination

definition	where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 (article 2(2)(a) dir. 2000/78)
How to compare?	- comparability of persons/situations is a prerequisite for assessing whether discrimination has occurred; - comparison must be carried out in relation to persons/situations on the assumption that there is both an obligation and a possibility to treat all equally (subject to exceptions provided for by law; - the assessment resulting from such comparison must be precise and specific (rather than general and abstract) and may relate to present, past or hypothetical situations; - comparability is determined by reference to the criteria indicated by the subject matter and purpose of the legal act governing the particular field (e.g. fisheries)
exceptions	reference group is not required in cases: discrimination based on pregnancy, harassment, sexual harassment

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Indirect discrimination

Definition	apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons
objective justification	- provision, criterion or practice is objectively justified by a legitimate aim and - means of achieving this aim are appropriate and necessary
specific cases of discrimination	Disability: the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice (article 2(2) dir. 2000/78) Age: differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary (article 6 dir. 2000/78) Religion: this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos

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Other forms of prohibited discrimination

- **harassment:** shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States (Article 2(3) dir. 2000/78)
- **sexual harassment:** where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 2(1)(d) dir. 2006/54)
- **instruction to discriminate** against persons on any of the grounds referred to in Article 1 (Article 2(4) dir. 2000/78)

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Effect of Article 21 in national proceedings

exclusion of direct effect of directives is disputes between individuals

- a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (152/84 *Marshall*; C-91/92 *Faccini Dori*; C-122/17 *Smith*)
- even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 109; of 24 January 2012, *Dominguez*, C-282/10, C-122/17 *Smith*)

Direct effect of Article 21 of the CFR

C-414/16 *Egenberger*:

- 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 (...)
- 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 (...)
- (...) 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 need be any contrary provision of national law.

!!! Primacy and direct effect always together - C-573/17 *Popławski*

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Selected prohibited criteria - age

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Article 6 dir. 2000/78

different treatment on the ground of age is not discrimination, when objectively justified by a legitimate aim, appropriate and proportionate

Examples:

- the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- the fixing of maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement

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Case law of the CJEU - examples

- termination of employment at pension age (C-411/05 *Palacios de la Villa*)
- maximum age of recruitment to fire service (C-229/08) or for police officers (C-416/13)
- exclusion of professional experience acquired before the age of 18 for the purposes of calculating remuneration (C-396/17 *Leitner*)
- maximum 60 years to be a notary (C-408/23 *Rechtsanwältin und Notarin*);
- 50 years of age as the age limit for access to the profession of notary (C-914/19 *GN*)

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Selected prohibited criteria - disability

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Article 2(2)(b) dir. 2000/78

as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order **to eliminate disadvantages** entailed by such provision, criterion or practictet treatment art. 5 dir. 2000/78

Art. 5 dir. 2000/78 Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, **reasonable accommodation** shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

on the ground of age is not discrimination, when objectively justified by a legitimate aim, appropriate and proportionate
! UN CRPD 2006 is part of EU Law

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Case law of the CJEU - examples

- termination of employment at pension age (C-411/05 Palacios de la Villa)
- direct discrimination by association - parent of the child with disability (C-303/06 Coleman, C-38/24 Bervidi)
- a blind person be totally deprived of any possibility of performing the duties of a juror in criminal proceedings (C-824/19 TC)
- discrimination on the ground of disability also in a situation when different treatment inside the group of workers with disabilities (C-16/19 Babiński)

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Useful sources

<https://fra.europa.eu/en/case-law-database>

<https://equineteurope.org/>

<https://eige.europa.eu/>

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