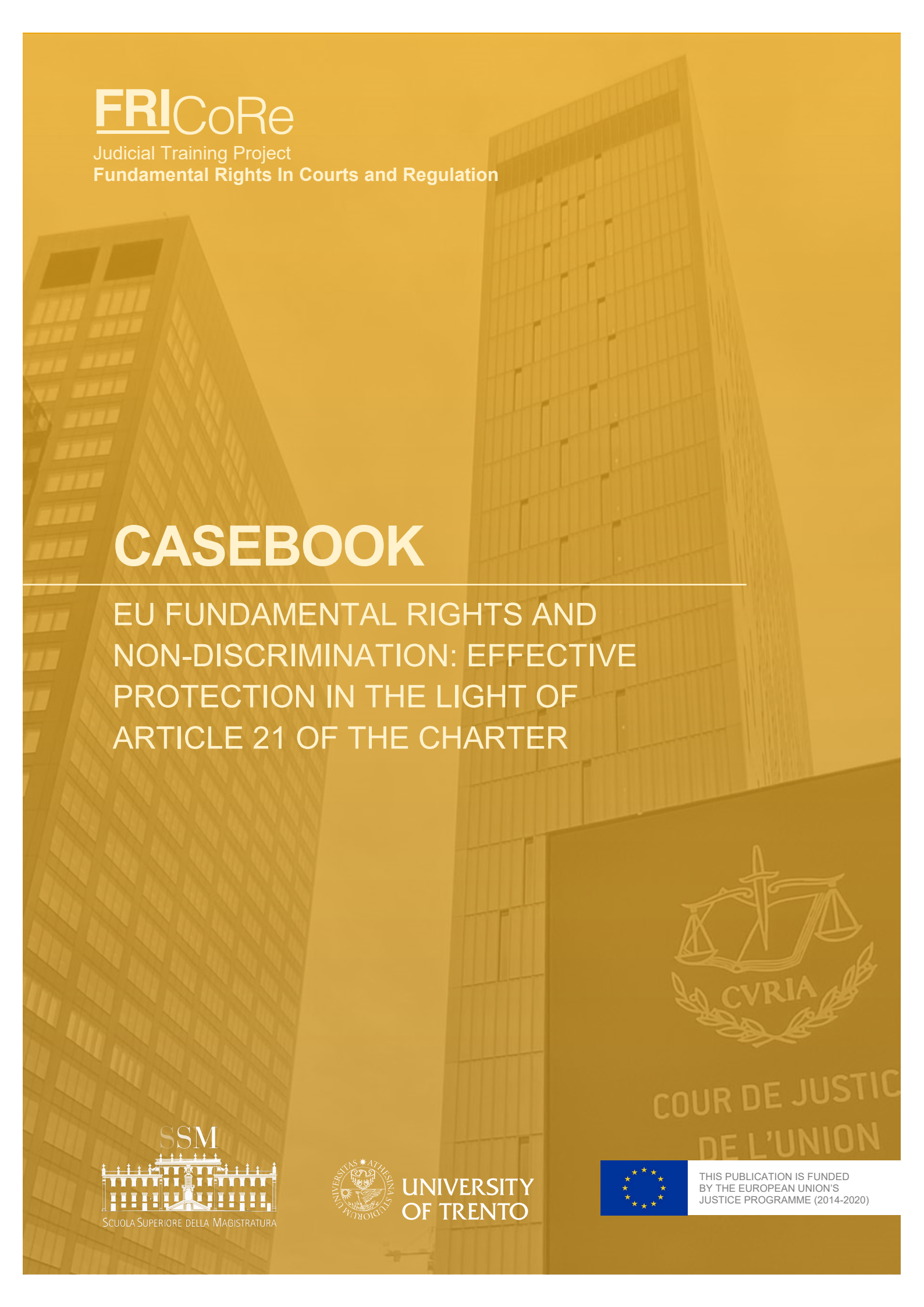
FRICoRe

Judicial Training Project

Fundamental Rights In Courts and Regulation

CASEBOOK

EU FUNDAMENTAL RIGHTS AND NON-DISCRIMINATION: EFFECTIVE PROTECTION IN THE LIGHT OF ARTICLE 21 OF THE CHARTER



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EU Fundamental Rights and Non-Discrimination: Effective Protection in the Light of Article 21 of the Charter

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Introduction: A brief guide to the Casebook

Cross-project methodology

The FRICoRe Casebook on *EU fundamental rights and non-discrimination: effective protection in the light of Article 21 of the Charter* builds upon the collaborative venture developed in previous projects of judicial training and, more recently, in the Re-Jus project. The core element of its methodology concerns the active dialogue established between **academics and judges of various European countries** on the role of the Charter and of Article 47 thereof, here particularly developed in the field of non-discrimination law. In continuity with previous projects, including Re-Jus, this collaboration combines rigorous methodologies with judicial practices and provides the trainers with the sort of rich comparative material that should always characterise transnational trainings. We firmly believe that transnational training of judges should be based on a rigorous analysis of judicial dialogue between national and European courts and, if it exists, among national courts. Training includes not only the transfer of knowledge, but also the creation of a learning community composed of different professional skills. Like in previous experiences, this Casebook is due to evolve both in content and in method over time, with additional suggestions arising from its use in training events.

Similar to previous projects, **judicial dialogue** is a key dimension of the approach followed in this Casebook. We investigate the full life cycle of a case, from its birth with the preliminary reference, to its impact in different Member States. We examine the ascendant phase and analyse how the preliminary reference is made, and whether and how it is reframed by the Advocate General and the Court. We then analyse the judgments and distinguish them according to the chosen degree of detail when they provide guidance both to the referring court and to the other courts that have to apply the judgments in the various Member States.

Judicial dialogue develops both vertically and horizontally, at both national and supranational levels. Preliminary references represent the main driver of this dialogue. Linked with preliminary references procedures, horizontal interaction among national courts takes place when the principles identified by the CJEU are applied in pertinent cases, mostly in the same and sometimes in connected fields. Also depending on the type of reference enacted, the guidance provided by the CJEU may consist in specific rules or in general principles to be applied. Very frequently the latter concerns the principle of effectiveness or the one of equivalence, due to be balanced against the principle of national procedural autonomy. In the field of non-discrimination, however, while the CJEU provides specific rules concerning the principle of effectiveness, guidance based on the principle of equivalence is extremely seldom provided. In contrast, the principle of proportionality commonly comprises the basis of rules provided by the CJEU.

Based on the methodology adopted in Re-Jus and now in FRICoRe, the analysis does not focus on single CJEU judgments but on **clusters of judgments** around common issues. Often, CJEU judgments touch on many questions depending upon how the preliminary references are framed, and it might be more effective to choose a subset of complementary issues and examine them in sequence across several cases, rather than to focus on a single judgment. This approach may add a bit of complexity, but it reflects the problem-solving

approach, rather than the conventional doctrinal perspective. The internal coordination of chapters ensures the possibility of reconstructing the judgment across different chapters.

The Casebook is complemented by a Database (https://www.fricore.eu/content/database-index) that endorses the methodological approach of judicial dialogue, giving continuity to the one established in the Re-Jus Project and integrating the whole set of materials therein developed. It is organised around EU judgments and their impact on national legal systems. Two series of national judgments are examined in the Database: those directly concerning cases brought before the CJEU within a preliminary reference procedure, and those that apply or take into consideration the CJEU case law when addressing national cases outside of a referral procedure. Hence, the database is specific, and it reflects the idea that judicial dialogue is a pillar of EU law.

We would like to encourage in training courses organised by national schools both the use of the Casebook and that of the Database, which was subject to constant updating during the course of the project, thanks to contributions coming both from the Schools of the Judiciary and from the workshops' participants.

The main issues addressed in this Casebook

Several key issues pertaining to non-discrimination as expressed in Article 21 of the Charter are addressed by this Casebook, particularly through the lens of effective protection and Article 47 of the Charter. As with the Re-Jus Casebooks and the FRICoRe Casebook on Effective Consumer Protection, the often-linked application of the principle of effective judicial protection as well as the application of other principles such as that of proportionality, remains a special focus in this Casebook.

Recent developments in non-discrimination case law at the national and EU level allow this Casebook to build on previous handbooks on non-discrimination (i.e. those drafted by the European Union Agency for Fundamental Rights and the European Court of Human Rights, and the Centre for Judicial Cooperation of the European University Institute). In particular, recent CJEU case law allows the Casebook to provide new guidance for national judges in three main areas: (1) the direct horizontal effect of Article 21 CFREU (based on *Egenberger*; *Cresco*), and the impact of this from the perspective of effective protection; (2) the relationship between Articles 21 and 47 CFREU (based on *Egenberger*; *IR*; *Leitner*); (3) compensation as a remedy in non-discrimination cases and collective action for such a remedy (based on *NH*). Where possible, more general new reflections on effective remedies are provided in the Casebook, including from the perspective of national law. The recent jurisprudence highlighted throughout the Casebook also provides new insights into judicial dialogue. In this respect, to the extent possible, the analyses in the Casebook consider whether rules developed in one area of non-discrimination (i.e., related to a particular ground, or based on the specific wording of a particular directive) are applied across the board, as general rules to be followed in all non-discrimination cases (e.g., the meaning of 'comparable' situations for the purposes of direct discrimination). The impact that CJEU judgments can have at the national level is of course also featured in the Casebook, as with the other FRICoRe Casebooks.

Another novel aspect of this FRICoRe Casebook is the special focus on non-discrimination in specific contexts, discussed in Part 2. Here, the analysis of CJEU judgments in the contexts of migration and asylum on the one hand, and health and disability on the other, sheds light on how the more general rules on non-discrimination (which are discussed

throughout previous sections of the Casebook) apply in these areas. Migration and asylum, as well as health and disability, are cross-cutting dimensions of the FRICoRe project. The inclusion of specific sections of analysis on these issues in the non-discrimination Casebook is therefore expected to lead to new lines of comparative analysis in the project's forthcoming Casebooks on Migration and Asylum, and on Health.

In relation to migration, questions arise such as what the scope of the principle of equal treatment is in this context, and what this requires from Member States in areas of social security in particular. With regard to asylum, questions arise as to the role of discrimination and the principle of proportionality. This is especially interesting given the fact that discrimination-related cases in this field are not often non-discrimination cases *per se*, but appeals against the rejection of applications for asylum which are themselves based on a well-founded fear of discrimination.

In the context of health and disability, the Casebook considers how the CJEU's restrictive interpretation of equal treatment directives is applied in relation to characteristics that are related to health and disability but not explicitly protected by EU law. The way in which justifications of what would otherwise amount to discriminatory treatment is applied in the context of disability is also addressed by the Casebook. Finally, bearing in mind the Casebook's focus on effective protection and Article 47, special attention is also paid to how this principle applies and what it requires in relation to the various specific contexts examined. Guidance is provided in this respect with reference not only to relevant CJEU law, but, where appropriate, case law from the European Court of Human Rights.

As a whole, this FRICoRe Casebook provides important guidance to aid national judges in their application of EU non-discrimination law in order to ensure the effective protection from discrimination that is sought through Articles 21 and 47 of the Charter.

The structure of the Casebook: some keys for reading

The FRICoRe Casebook provides judges and other legal experts with relevant case summaries of preliminary rulings of the CJEU as well as national case law, concrete examples of judicial dialogue, and general guidelines distilled from the judgments of the CJEU in the field of non-discrimination law.

The Casebook is divided into two Parts. Part 1, which comprises Chapters 1-3, deals with the scope of non-discrimination in the case law of the Court of Justice of the European Union. Both the **material and personal scope of non-discrimination** as expressed in Article 21 of the Charter and the relevant EU directives are identified in this Part. Part 2 (Chapters 4 and 5) then addresses non-discrimination in specific contexts, in particular migration and asylum, and health – two **cross-cutting areas** within the FRICoRe project as a whole. In each chapter of the Casebook, reflections on relevant **issues of effective protection** are provided, with particular attention to Article 47 of the Charter. **General guidance for national judges** is also extracted from the case law discussed in each chapter, providing concrete guidelines in relation to the aspect of non-discrimination discussed in that chapter.

Chapter 1 discusses the material scope of non-discrimination in EU law and constitutes the most extensive chapter within the Casebook. Focus is placed on the limited grounds of non-discrimination (Section 1.1), the meaning of and differences between direct and

indirect discrimination (Section 1.2), and when differences in treatment that would otherwise amount to discrimination can be justified (Section 1.3).

It becomes very clear from the first cases analysed in Chapter 1 that the grounds of non-discrimination under EU law are limited to those explicitly listed in the relevant Directives (*FOA,* C-354/13). While the wording of Article 21 of the Charter suggests that individuals may be protected from non-discrimination on grounds beyond those listed in the provision itself (due to the inclusion of 'such as' immediately before the grounds listed in Article 21), the CJEU has clearly and irrevocably held that the scope of discrimination cannot be extended by analogy beyond those exhaustively listed in the Directives. This strict interpretation is followed in relation to the possible justification of differences in treatment. Here, the Court has similarly found that only those grounds of justification listed in the Directives can be relied upon in cases of alleged direct discrimination (*MB*, Case C-451/16). While this may seem to contrast with the CJEU's broader approach to the personal scope of Article 21, which allows for its horizontal effect (see Chapter 2), this has so far only been upheld by the CJEU in cases where a directive exists but has not been transposed correctly. The Court has not directly addressed what would happen in a case where there is no applicable directive at all. This could also lead to the conclusion that while the horizontal effect of Article 21 may lead to broader effective protection in terms of personal scope, in the cases heard so far it has not had an impact on the limited grounds of discrimination listed in the directives (i.e., the material scope, which cannot be extended despite Article 21's inclusion of 'such as'). This would also align with the fact that the Charter only applies in Member States' application of EU law.

Regarding the meaning of direct and indirect discrimination, the cases discussed in Chapter 1 demonstrate that the definitions to be afforded to both terms is the same across the equal treatment directives, harmonising the Court's application of these instruments. The Court has spent some time providing concrete advice on how to apply these definitions in practice. In relation to indirect discrimination in particular, which sometimes requires a more complex analysis than an assessment of direct discrimination, certain terms not defined in the applicable Directive in a case (for example, 'apparently neutral provision, criterion or practice', and 'particular disadvantage') have been elaborated on by the Court (see in particular, *CHEZ Razpredelenie Bulgaria*, C-83/14). The Court's reasoning in providing such definitions allows comparison to be drawn between direct and indirect discrimination. Essentially, as the Court shows in the cases of *CHEZ Razpredelenie Bulgaria* and *Z.* (C-363/12) in particular, the main difference between the two types of discrimination is that while direct discrimination stems from a difference in treatment *on the basis of a protected characteristic*, indirect discrimination is caused by a measure that seems to be neutral, but which has the *effect* of placing persons with a protected characteristic at a disadvantage when compared to persons without that characteristic.

The justification of differences in treatment that would otherwise amount to discrimination are discussed in some detail in Section 1.3 of the Casebook. Particular attention is first paid to the scope of grounds of discrimination, which are limited to those specified in the relevant directives (*MB*, C-451/16). Second, the ground specific to indirect discrimination (objective justification on the basis of a legitimate aim, the means of achieving which are appropriate and necessary) and how the **principle of proportionality** applies in this context are addressed. Based on the principle of proportionality, for a measure to be

objectively justified, it cannot exceed the limits of what is appropriate and necessary to achieve the aims of the measure (*CHEZ Razpredelenie Bulgaria*; *F.*, C-473/16).

Third, justification on the basis of 'genuine and determining occupational requirements' under Article 4(1) of Directive 2000/78 is discussed. Here, the Court has stressed that the justification is only applicable in very limited circumstances and has again emphasised the importance of the **principle of proportionality** in determining whether the justification applies in a given case (*Vital Pérez*, C-416/13; *Bougnaoui*, C-188/15).

Finally, the Court's discussion of justifications on the ground of age are addressed. In this context, the key message from the Court appears to be that while States may have a **margin of discretion** with regard to how they achieve certain aims related to social and employment policy (*Leitner*, C-396/17; *Olympiako Athlitiko Kentro Athinon*, C-511/19), they cannot frustrate the implementation of the **principle of non-discrimination** (*Vital Pérez*, C-416/13). Indeed, it appears from the Court's discussion of Directive 2000/78 in particular that such protection comprises the underlying aim of the equal treatment directives.

Chapter 2 of the Casebook evaluates the **personal scope of non-discrimination** in EU law, with a specific focus on the horizontal effect of Article 21 of the Charter. The cases of *Egenberger* (C-414/16), *IR* (C-68/17) and *Cresco* (C-193/17) clearly demonstrate that Article 21 can be directly applied in cases between private parties, and that in the absence of national legislation compatible with the principle of non-discrimination as given expression in provisions of EU law, an obligation not to discriminate is placed directly on private parties (such as employers) not to discriminate. While certain limits are placed on the existence of this obligation in *Cresco*, the willingness of the Court to afford Article 21 horizontal effect is crucial to achieving widespread effective protection from non-discrimination, at least in the absence of relevant national legislation transposing a directive. This expansive effect appears to be aimed at overcoming a lack of implementation of the directive at the national level rather than overcoming a strict interpretation of the directive's scope.

Chapter 3 of the Casebook is focused entirely on **effective protection** from discrimination. The Chapter is divided into four parts. The first is on the relationship between Articles 21 and 47 of the Charter, with a special focus on access to justice. The case law of the CJEU first highlights the importance of **effective judicial review** of decisions by organisations who claim that the potentially discriminatory measures are justified on the basis of something being a genuine, legitimate and justified occupational requirement under Directive 2000/78 (*Egenberger*). Second, the CJEU's case law clarifies that because a preliminary ruling does not create or alter the law, but is purely declaratory, the **principle of effectiveness** does not preclude a national limitation period for claims which are founded in EU law from being brought before the date of delivery of a judgment of the Court which has clarified the legal position on the matter (*Starjakob*, C-417/13).

The second part of Chapter 3 relates to **effective remedies in non-discrimination cases**. Here, a brief comparative discussion of enforcement of non-discrimination and the different remedies available and claimed at the national level is provided before the case law analysis begins. The jurisprudence on effective remedies centres first on the CJEU's definition of **'effective, proportionate and dissuasive'** remedies in non-discrimination cases (*Asociația Accept*, C-81/12 and *Feryn*, C-54/07). Here, the Court emphasises in

particular that purely symbolic remedies are not appropriate, and suggests some examples of remedies that are effective, proportionate and dissuasive. Second, the question of whether private acts may be invalidated by national courts on the basis of a violation of Article 21 is considered with reference to *Egenberger*. This case demonstrates that, due in particular to the need for **effective judicial protection** from discrimination, private acts may indeed be invalidated. Third, the CJEU's case law (*NH*, C-507/18) is analysed to shed light on the use of **compensation** as a remedy in non-discrimination cases and the question of who may bring cases for compensation where there is no identifiable victim. With regard to the former, the Court stressed that European law should be interpreted taking into account the need to provide everyone with **effective protection against discrimination.** Second, in setting the boundaries of the **collective action for compensation**, the Court found that the requirement that sanctions against discrimination are effective, proportionate and dissuasive applies regardless of whether there is any identifiable injured party in a case.

Third, the question of which party to a non-discrimination proceeding bears the burden of proof is addressed with particular reference to *FOA* (C-354/13). Here, the Court clarified that while a minimum standard of burden of proof placing less burden on claimants exists under EU law, Member States are certainly able to introduce rules that are more favourable to claimants.

Finally, in Chapter 3, an analysis of case law from the United Kingdom (*UNISON* [2015] UKSC 51) demonstrates that while Articles 21 and 47 may interact in claims regarding discrimination in access to effective remedies, access to effective remedy standards are to be applied whether or not Article 21 is at play in a particular case. Further national case law (*Benkharbouche* [2017] UKSC 62) sheds light on the relationship between Article 47 CFREU and Article 6 ECHR, suggesting that while the scope of the provisions is not identical, in some cases it is possible to say that a violation of Article 6 necessarily entails a violation of Article 47.

Part 1 of the Casebook ends with an Appendix on Article 21 of the Charter and the scope of application of EU law under Article 51. This addresses the circumstances in which the violation of one of the prohibitions set out in Article 21 are enforceable under EU law for non-compliance with them by an institution body, office or agency of the EU, or a Member State which is implementing EU law, as set out in the first paragraph of Article 51. The Appendix also offers some tentative reflections on the meaning of the prohibition on extension of the field of application of EU law by the recourse to the Charter in the second paragraph of Article 51.

As noted above, **Part 2** of the Casebook addresses non-discrimination in the specific contexts of migration and asylum (Chapter 4) and in the contexts of health and disability (Chapter 5). As such, Chapters 4 and 5 demonstrate how the more general findings of Part 1 play out in cases within these areas, as well as providing more guidance on the two specific fields for what concerns non-discrimination.

Chapter 4 considers cases from the Court of Justice on discrimination in the context of **migration and asylum**. There is a strong connection in this respect with discrimination on the grounds of nationality and national origin (see e.g. *Kamberaj*, C-571/10, in Section 4.1).

In the specific context of applications for asylum, much of the Court's case law deals with questions pertaining to the meaning of persecution, particularly alleged persecution on the basis of sexual orientation (*X and Others*, Joined Cases C-199/12 to C-201/12; *A, B and C*, Joined Cases C-148/13 to C-150/13), rather than discrimination *per se*. The CJEU cases do demonstrate that where an individual would be subject to disproportionately discriminate prosecution or punishment on the grounds of their sexual orientation, they may be granted refugee status. The **principle of proportionality** therefore also appears to play a key role in asylum cases involving persecution on the basis of discrimination. However, unlike in cases based directly on non-discrimination law (as seen in Chapters 1-3), proportionality is not explicitly assessed by the Court in the asylum cases discussed in Chapter 4 whether in the context of possible justifications of discriminatory treatment, or more generally. The Court has therefore not adjudicated here on what would make discriminatory prosecution or punishment disproportionate for the purposes of persecution. The Court does suggest, though, that whether the punishment is applied in practice is key to determining whether an applicant would be persecuted (*X and Others*). This was interpreted in the national follow-up decisions as meaning that discrimination will only have occurred for the purposes of persecution if punishment is actually imposed on an individual. The CJEU also draws much guidance from the Convention Relating to the Status of Refugees (1951), allowing clear rules to be provided to national courts on, *inter alia*, the use of stereotyped notions of sexual orientation during asylum application interviews (*A, B and C*).

With respect to **effective protection**, in the cases discussed in Chapter 4, the Court provides similar guidance to that in cases discussed in Part 1 of the Casebook. In particular, the need to ensure effective protection of EU law and the **principle of equal treatment** regardless of Member States' margin of discretion in some areas has been emphasised in migration cases (*Kamberaj*). The analysis of national case law shows that in Poland, where effective protection from discrimination is not afforded by States in cases where persecutory acts are conducted by private rather than public actors, in some instances this protection can be provided through the application of refugee law (IV SA/Wa 3635/15). This has not been through direct horizontal effect, as seen in Chapter 3 in relation to Article 21 CFREU, but through the application of States' positive obligation to protect individuals' human rights from interference by private actors. The consequences for the personal scope of protection are therefore not quite the same as the horizontal effect here is indirect, but the approach nevertheless has the consequence of extending effective protection from discrimination to a broader range of situations.

During an application for asylum, it is for the applicant to demonstrate that they have a well-founded fear of being persecuted on the basis of a protected ground of discrimination. While the application procedures are not cases *per se*, this contrasts with the approach in non-discrimination cases, in which applicants are only required to demonstrate a prima facie case of discrimination, which is for the respondent to prove did not amount to discrimination.

In the cases concerning migration, the remedies sought are the same as those in some of the non-discrimination cases discussed in Chapters 1-3 of the Casebook (a declaration of discrimination, and a declaration of unconstitutionality of national legislation). The remedy sought in some asylum cases (e.g. *X and Others*) is also the annulment of a decision by a public authority. However, other remedies, including asylum itself, may also be sought. Under EU asylum law, **remedies must be effective**, which depends on the administrative

and judicial system of each Member State seen as a whole. Ultimately, however, the rules on effective remedies in asylum cases are different from those in true non-discrimination cases, where, as seen in Chapter 3 of this Casebook, remedies must be 'effective, dissuasive and proportionate'.

In *Chapter 5*, emphasis is first placed on non-discrimination on the grounds of disability, which is closely related to health. though not necessarily coinciding with it. The **material and personal scope of discrimination on the grounds of disability is discussed**. In terms of the material scope, cases such as *HK Danmark* (Joined Cases C-335/11 and C-337/11 v), *FOA* (C-354/13) and *Daouidi* (C-395/15) provide very clear guidance as to how 'disability' should be defined under EU law, drawing heavily on the United Nations Convention on the Discrimination of Persons with Disabilities (2006). The analysis of the relevant case law here demonstrates that, despite the restrictive approach to the limited grounds of discrimination listed in the equal treatment directives seen in Chapter 1, the definition of disability does allow, to a limited degree, some characteristics not forming a protected ground in themselves, (e.g. sickness: *HK Danmark*) to fall within the scope of EU non-discrimination law.

The personal scope of discrimination on the grounds of disability is addressed in *Coleman* (C-303/06), in which the Court considered whether protection from discrimination extends to persons who do not have a disability themselves, but are discriminated against on the basis of the disability of somebody to which they are associated (associative discrimination). This was held to be crucial to **effective protection** from discrimination, as not allowing such individuals to be protected from discrimination would reduce the effect that the prohibition of discrimination is intended to have. This also applies in other contexts, such as discrimination on the grounds of ethnic origin (*CHEZ Razpredelenie Bulgaria*). Finally, the limits of permitted differences in treatment on the basis of disability also form part of the assessment in Chapter 5. The Court's interpretation of the scope of discrimination on the grounds of disability, and in particular its wide interpretation of the personal scope, has significant impacts on **effective protection** from discrimination.

Second, an analysis of effective protection and discrimination on the grounds of disability in the context of education is provided in Chapter 5. The jurisprudence discussed here is from the European Court of Human Rights, with reference to the CJEU's case law where appropriate. Finally, Chapter 5 also includes some discussion of discrimination on the grounds of sexual orientation in relation to health, with the lead case of *Léger* (C-528/13) dealing with situations in which men are prohibited from donating blood on the basis that they are engaged in a homosexual relationship.

Within each chapter of the Casebook, a section dedicated to issues relating to effective protection, drawing on the discussions to provide more general reflections on effective protection from non-discrimination across the cases discussed. Each chapter also includes a special section dedicated to the general guidance for national judges that can be extracted from the analyses provided.

Appendix introducing non-discrimination law in the EU

Before moving to the substantive discussions within this Chapter, a brief introduction to non-discrimination law in the EU is provided below, including a box containing the most relevant sources of EU law on non-discrimination used in the Casebook (Box 1). A note regarding the relationship between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights in the context of non-discrimination (ECHR) can also be found in Box 2, below.

Brief overview of non-discrimination law in the EU

Non-discrimination law in the EU has come a long way. Its modest beginnings can be traced back to the Treaty establishing the European Coal and Steel Community, which, in 1952, prohibited discrimination in remuneration and working conditions for coal and steel workers based on nationality. Six years later, the Treaty establishing the European Economic Community introduced non-discrimination articles on gender and (again) nationality. For more than fifty years EU law only knew these two grounds on which discrimination was prohibited. The Treaty demanded that men and women were paid equally for work of equal value and it stated that discrimination on grounds of nationality shall be prohibited, whereby the latter provision only applied to citizens of Member States. Since then, primary and secondary law in conjunction with judgments of the CJEU have substantially extended the material and personal scope of non-discrimination law and gradually increased the level of protection in this field.

Starting from the mid-1970's, the EEC adopted several directives on the equal treatment of men and women concerning among other things equal pay, employment, vocational training, promotions, social security, working conditions and the burden of proof (*see Box 1 below*). Some of these have now been merged into a consolidated version of the Equal Treatment Directive for men and women in matters of employment and occupation. Gender equality became an active field of litigation with no lack of preliminary rulings of the Court of Justice, not least due to the Court of Justice itself which declared the Treaty article on equal pay directly applicable, gave a broad interpretation to the meaning of 'pay', and made equal treatment of men and women a general principle of EU law.[1] Many of the concepts – like direct or indirect discrimination – that were later applied by the Court of Justice to other grounds on which discrimination is prohibited were developed in the Court's case law on gender equality.[2] As these concepts can be convincingly applied to other grounds, the Court displays a rather consistent approach in its judgments across the different grounds of discrimination.[3] The Court also delivered a number of rulings on the equality between citizens of the EU, giving direct effect to the relevant treaty article and interpreting rights broadly to stimulate free movement of European citizens.

In 1999, with the Treaty of Amsterdam, five other grounds on which discrimination is prohibited, namely race and ethnicity, religion, disability, age and sexual orientation, were

[1] See, for example, *Defrenne* I and II (cases 80/70 and case 43/75) on the principle of equal pay, pensions, and on the direct horizontal effect of article 119 EEC (now Article 157).

[2] See, for example, *CHEZ Razpredelenie Bulgaria* (C-83/14)) and *Z.* (C-363/12) for how the concept of indirect discrimination is applied to different grounds.

[3] See also Uladzislau Belavusau and Kirsten Henrard, The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law, in Uladzislau Belavusau and Kirsten Henrard (eds.), EU Anti-Discrimination Law Beyond Gender (Hart Publishing 2019) 17.

added to the *aquis communitaire*. Two directives, the Race Equality Directive on race and the Framework Equality Directive on the other four grounds, followed shortly after. Both of these Directives include the possibility for associations, organisations or other legal entities to get involved in judicial and/or administrative proceedings on behalf or in support of a claimant. The Court of Justice delivered a number of far-reaching judgments on these directives, in which it, for example, declared non-discrimination on grounds of age a general principle of EU law and developed the concept of discrimination by association.

Ten years after the Treaty of Amsterdam, the Treaty of Lisbon gave another boost to the equality law of the EU. More references to equality can be found in the Treaty and the idea of mainstreaming, an approach that calls for a serious consideration of the discriminatory consequences of a law or policy, was expanded from gender to all other grounds. At the same time the CFREU became legally binding. Article 21 CFREU expands the list of grounds on which discrimination is prohibited. The grounds now include 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 and nationality. There is no indication from the CJEU that the fact that Article 21 may be directly applicable between private parties implies that these grounds may be invoked (in vertical and horizontal relations) regardless of whether distinct directives exist to provide a thorough secondary legislation on the matter.[4]

Over the last 70 years the EU has thus developed a system of equal treatment law that goes far beyond the field of equal pay and nationality and beyond purely economic considerations of the internal market. While the intention of the early equal treatment law of the EU was to create a level economic playing field and encourage free movement, the later additions take a more fundamental approach, moving equal treatment law out of the economic sphere by giving it such a prominent place. Both the material scope, referring to the situations in which the rule applies, and the personal scope, referring to the persons who can claim a right, increased significantly over the years. However, an attempt by the Commission to further increase the material scope of equal treatment law beyond the field of employment and vocational training for more grounds, as is the case for race and gender, is being blocked in the Council of Ministers for more than a decade and an end of this impasse is not in sight.[5] Nevertheless, a legislative stand-still does not preclude legal evolution. National courts are the first line of defence against discrimination and the possibility to ask the Court of Justice for a preliminary ruling gives them the opportunity to influence the legal development of EU non-discrimination law. This Casebook aims to make it easier for national judges to play this role.

[4] The CJEU discusses the direct horizontal effect of Article 21 only in the context that an existing Directive would not be transposed sufficiently (see *Cresco*, C-193/17).

[5] Directive Proposal (COM (2008) 462) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

Box 1. Main sources of EU law on non-discrimination used

Primary law

Articles 2 and 3 TEU enshrine non-discrimination as a value of the EU

Article 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'

Article 18 TFEU: '[a]ny discrimination on grounds of nationality shall be prohibited'

Article 19 TFEU: '[t]he 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 TFEU: Contains the principle of equal pay for male and female workers for equal work or work of equal value

Article 21 CFREU:

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.

Secondary law

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

Box 2. The relationship between the CFREU and the ECHR[6]

The relationship between European law and Council of Europe law on non-discrimination is relatively close. The two main primary instruments offering protection from discrimination – the CFREU within the EU, and the ECHR within the Council of Europe – differ in terms of their scope of application and the literal text of the respective provisions prohibiting discrimination (Article 21 of the Charter and Article 14 of the ECHR). However, in practice, as will be seen in some of the substantive discussions in this Casebook, the protection afforded by the two instruments is often very similar.

This is largely due to Article 52(3) of the Charter, which provides that:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, **the meaning and 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.'

In other words, the interpretation of rights found in the Charter, including non-discrimination in Article 21 and the rights to an effective remedy and to a fair trial in Article 47, should follow the interpretation of parallel rights in the ECHR, unless an interpretation of the Charter is able to afford more extensive protection than the ECHR. This has translated in practice to the Court of Justice of the European Union relying on the more established case law of the European Court of Human Rights in some matters. The relationship between non-discrimination and effective protection in the Charter with that under the ECHR is also strengthened by the fact that all Member States of the European Union are party to the ECHR.

There are three main differences between the two systems of protection from non-discrimination, pertaining not to the content of the rights themselves, but the circumstances under which they apply, and the way in which they are enforced. The first difference is that the European Convention on Human Rights applies to Member States in relation to all of their activities within their jurisdiction, whereas the Charter of Fundamental Rights only places obligations on EU Member States to the extent that they are implementing EU law (i.e. the equality directives).

The second difference concerns the way in which the rights may be claimed under the two systems Under the Charter, Article 21 is a stand-alone right that may be claimed on its own, forming the basis of a legal proceeding. Under the ECHR, however, Article 14 is not a stand-alone right and must be claimed in connection with another right in the ECHR or one of its protocols (e.g. the right to work, or to a fair trial).

The third difference between protection from discrimination within the two systems relates to how the two instruments are enforced rather than the material content or scope of the prohibition of discrimination. Under the EU system, individuals can bring a claim of discrimination before a national court, which may then refer the case to the Court of Justice. Within the Council of Europe, the system is very different, with individuals having standing to bring a case directly to the European Court of Human Rights.

Part 1: The scope of non-discrimination in the case law of the CJEU

Chapter 1: The material scope of non-discrimination under Article 21 CFREU

This chapter provides an overview of the material scope of non-discrimination under Article 21 CFREU. In particular, it discusses the grounds of discrimination (Section 1.1), the meaning of and differences between direct and indirect discrimination (Section 1.2), and various justifications precluding a finding of discrimination (Section 1.3). General guidelines that emerge from the analysis are provided at the end of Sections1.1-1.3, with Section 1.4 containing a comment on the general issues of effective protection that arise in the cases discussed throughout the previous sections.

1.1. Grounds of discrimination

In this sub-section, the scope of grounds of discrimination under EU law is examined, with a particular focus on the expansion of grounds beyond those explicitly listed in the relevant directives.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 18 March 2014, *Z. v A Government department and The Board of Management of a Community School*, Case C-363/12 ("**Z.**") (reference case, Question 2)

➢ Judgment of the Court of 18 December 2014, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, Case C-354/13 ("**FOA**") (reference case, Question 1)

➢ Judgment of the Court (Second Chamber) of 9 March 2017, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, Case C-406/15 ("**Milkova**")

Main questions addressed

Question 1 Can discrimination be claimed on grounds other than those explicitly listed in relevant directives?

Question 2 How should the grounds of discrimination explicitly listed in directives be interpreted?

[6] For a more thorough comparison of non-discrimination within the EU and the Council of Europe, see Niels Petersen, 'The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law', in Yumiko Nakanishi (ed.), *Contemporary Issues in Human Rights Law: Europe and Asia* (Springer Open Publishing 2017) 129.

1.1.1 Question 1 - Limited grounds of discrimination

> Can Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (and giving specific expression to the principle of non-discrimination now found in Article 21 CFREU) be interpreted as meaning that discrimination on grounds not explicitly listed therein (e.g. 'obesity') are prohibited?

This question was answered in *FOA* (C-354/13).

Relevant national law (Denmark)

Paragraph 1(1) of Law No 1417 of 22 December 2004, transposing Directive 2000/78 into Danish law by amending the Law on the principle of non-discrimination in the labour market (lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.), as published by Consolidated Law No 1349 of 16 December 2008 ('the Law on anti-discrimination'):

'Discrimination for the purposes of this law shall be understood to mean direct or indirect discrimination on the basis of race, skin colour, religion or belief, political affiliation, sexual orientation, age, disability or national, social or ethnic origin.'

Paragraph 2(1) of the Law on anti-discrimination:

'An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.'

Paragraph 2a of the Law on anti-discrimination:

'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. This burden shall not be regarded as disproportionate when it is sufficiently remedied by public measures.'

Paragraph 7(1) of the Law on anti-discrimination:

'Persons whose rights have been infringed by breaches of Paragraphs 2 to 4 may be awarded compensation.'

Paragraph 7a of the Law on anti-discrimination:

'When persons who consider themselves wronged by a failure to comply with Paragraphs 2 to 4 establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

The case

The Municipality of Billund hired Mr K. as a childminder to take care of children in his own home. For the entire period during which Mr K. was employed (approximately 15 years), he was 'obese' within the meaning of the definition of the World Health Organization.

Mr K. tried to lose weight and received financial assistance from the Municipality. After succeeding, he regained the weight he had lost. In March 2010, after a leave of one year due

to family reasons, Mr K. resumed working as a childminder. Thereafter, he was visited by the head of the childminders, who observed that his weight had remained unchanged.

Owing to the decrease in the number of children in the Municipality, from the 38th week of 2010, Mr K. had only three children to take care of instead of four, as originally authorised, so when faced with a requirement to dismiss one employee, the head of the childminders chose Mr K. for dismissal.

During a meeting with the head of the childminders, Mr K. asked why he was the only childminder to be dismissed. The parties agreed that Mr K.'s obesity was mentioned but they differ over how it was mentioned and on the extent to which it influenced the decision.

The FOA, acting on behalf of Mr K., brought an action before the Retten i Kolding (District Court, Kolding) claiming that, during his dismissal, Mr K. had been discriminated against on the basis of obesity and that he ought to receive compensation for that discrimination.

Preliminary questions referred to the Court

1. Is it contrary to EU law, as expressed, for example, in Article 6 TEU concerning fundamental rights, generally or particularly for a public-sector employer to discriminate on grounds of obesity in the labour market?
2. If there is an EU prohibition of discrimination on grounds of obesity, is it directly applicable as between a Danish citizen and his employer, a public authority?
3. Should the Court find that there is a prohibition under EU law of discrimination on grounds of obesity in the labour market generally or in particular for public-sector employers, is the assessment as to whether action has been taken contrary to a potential prohibition of discrimination on grounds of obesity in that case to be conducted with a shared burden of proof, with the result that the actual implementation of the prohibition in cases where proof of such discrimination has been made out requires that the burden of proof be placed on the respondent/defendant employer …?
4. Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC … and, if so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination [on] grounds of disability as laid down in that Directive?'

Reasoning of the Court

The Court first noted that since Article 19 TFEU does not refer to discrimination on grounds of obesity, it cannot constitute a legal basis for measures of the Council of the European Union to combat such discrimination. Nor does European Union secondary legislation lay down a general principle of non-discrimination on grounds of obesity. In particular, Directive 2000/78 does not mention obesity as a ground for discrimination.

According to the case law of the Court, **the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof**. Therefore, obesity cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination. Consequently, the Court found nothing to suggest that the situation at issue, in so far as it related to a dismissal purportedly based on obesity as such, would fall within the scope of

EU law. This then meant that the provisions of the Charter of Fundamental Rights of the European Union were likewise inapplicable to the case.

The CJEU then turned to the question of whether Directive 2000/78 must be interpreted as meaning that the obesity of a worker could constitute a 'disability'. The Court first noted that following the ratification by the EU of the UN Convention on the Rights of Persons with Disabilities, 'the concept of "disability" must be understood as referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers' (see judgments in *HK Danmark* Joined Cases C-335/11 and C-337/11; *Z.*, C-363/12, EU:C:2014:159, paragraph 76; and *Glatzel*, C-356/12, EU:C:2014:350, paragraph 45).

Obesity does not in itself constitute a 'disability' within the meaning of Directive 2000/78, because, by its nature, it does not necessarily entail a limitation. However, in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may **hinder the full and effective participation of that person in professional life on an equal basis with other workers**, and the limitation is a **long-term** one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.

Ultimately, it was for the referring court to ascertain whether, in the case in the main proceedings, Mr K.'s obesity entailed a limitation which met the above-mentioned condition.

Conclusion of the Court

The Court concluded that obesity is not, as such, a ground of discrimination under Directive 2000/78. However, if in a particular case obesity entails a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, although sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination, it can be subsumed under the concept of 'disability'.

Elements of judicial dialogue

In *FOA* the judicial dialogue is predominantly horizontal. The approach taken by the Court matches that of the other cases in this cluster, which are relied on in the Court's reasoning (in particular *HK Danmark*, which is relied on repeatedly). As also seen elsewhere in this cluster, the Court also relied heavily on the pre-Charter case of *Chacón Navas* in determining what can be considered a disability for the purposes of Directive 2000/78, as well as *Coleman* (C-303/06, ECLI:EU:C:2008:415). Here, the Court reiterated that 'the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof' (*FOA*, paragraph 36). This approach in itself has been consistently applied by the Court, which has refused to extend the scope of the prohibition of discrimination beyond those specified in the relevant EU law (see also *Milkova*, C-406/15). Although it is possible to consider conditions such as obesity to be a disability if they equal disability on a functional level according to the definition specified above, new grounds cannot be added to supplement those listed in the Directives. Thus,

while Article 21 of the Charter suggests that the range of protected grounds may be broader, only those instances of discrimination falling within the scope of grounds listed in the relevant Directive are prohibited under EU law. This makes the overall scope of the prohibition of discrimination under EU law appear more restrictive than that under the Council of Europe human rights system. According to Article 14 of the European Convention on Human Rights, the prohibition of discrimination applies to 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[7] The European Court of Human Rights (ECtHR) has interpreted 'other status' to include grounds not explicitly mentioned in Article 14, such as sexual orientation and disability.[8] Interestingly, other characteristics such as 'health or any medical condition' have also been held by the ECtHR to be protected grounds, greatly widening the scope of protection as compared to that of (for example) Directive 2000/78 as interpreted by the CJEU. Nonetheless, in several cases the Court of Justice has upheld the direct horizontal effect of Article 21 CFREU and that Article 21 must still be upheld by national courts in the absence of national legislation that is compatible with the prohibition on non-discrimination found in the Directive (See Chapter 2, and the cases of *Egenberger*, C-414/16 and *Cresco*, C-193/17 in particular). This suggests that in limited circumstances, it is not necessary to only consider the scope of the Directives themselves, but also that of Article 21 – which includes 'other status'.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Although *FOA* itself was not referred to, the CJEU's case law on the scope of EU non-discrimination law were briefly discussed in a national case within the United Kingdom. In the case of *SK and LL v Secretary of State for Work and Pensions* [2020] UKUT 145 (AAC), the CJEU's judgments in *Milkova* and *Glatzel* were referred to by the Upper Tribunal of the Administrative Appeals Chamber. The case concerned two claims of discrimination in relation to a rule laid down in national legislation that a claimant for the 'Sure Start Maternity Grant' in respect of an infant will not be eligible if there is another child aged under 16 in the family for whom they are responsible (the "first child only rule"). The issue was whether those conditions discriminated unlawfully against the Appellants under EU law and/or under human rights law. The first claimant, SK, had come to the UK in 2015 and claimed asylum with her son of 3.5 years old. She was granted leave to remain in 2017 and made a claim for the maternity grant when pregnant with her daughter, who was born in the UK. SK's claim was refused on the basis that she was not eligible for the grant under national law because there was an existing member of her family under the age of 16 for whom she was responsible (i.e. her son, who had been born in Iraq), and her situation did not fall within the exceptions to the first child only rule.

In response to SK's claim of direct discrimination the respondent argued that the claim did not fall under EU non-discrimination law, which unlike the prohibition of discrimination

[7] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[8] European Union Agency for Fundamental Rights and the European Court of Human Rights, 'Handbook on European non-discrimination law: 2018 edition' 2018) 226-227. Available at <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition> accessed 29 September 2020.

under Article 14 ECHR, was restricted to specific, limited grounds of discrimination. The Court noted that while this is correct, the CJEU had noted in *Milkova*, on the basis of *Glatzel* and other previous cases, that the principle of equal treatment enshrined in Article 20 and 21 CFREU is a general principle of EU law. The Tribunal understood this to mean that the prohibition of discrimination under EU law could not be limited to the extent that the respondent sought to argue. However, the Tribunal did not discuss this in any more detail, as the judge found that the situation was more suited to claim of indirect discrimination on the grounds of nationality. The Court ultimately concluded that there was no indirect discrimination because it was not intrinsically more likely that the 'first child only' test would affect refugees more than it would affect UK nationals, even although refugees with pre-flight children were likely to be disadvantaged in terms of the greater severity of the impact of the provision on them given their likely lack of baby items.

1.1.2 Question 2 - How should the grounds of discrimination explicitly listed in directives be interpreted?

In light of the principle of non-discrimination expressed in Article 21 CFREU, how should the scope of discrimination on the grounds of disability prohibited by Directive 2000/78 be interpreted, and what is the role of international conventions in this respect?

This question was dealt with in *Z.* (C-363/12).

Relevant legal sources

EU level

Articles 2 and 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Recital 27 and Articles 1, 2, 4, 14 and 16 of Directive 2006/54 EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Articles 1, 2, 3 and 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union

National legal sources (Ireland)

Section 8 of the Maternity Protection Act 1994, in the version applicable at the material time, provides that a pregnant employee is to be entitled to maternity leave from her employment for a period of not less than 26 weeks.

Section 2 of the Employment Equality Acts 1998 to 2011 defines disability as being inter alia the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body, and defines family status as being responsibility, inter alia, as a parent or as a person *in loco parentis* in relation to a person who has not attained the age of 18 years.

Section 6(1) and (2) of the Employment Equality Acts 1998 to 2011 define discrimination as being taken to occur, inter alia, where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the specified grounds. Those grounds, as between two persons, include the fact that one is a woman and the other is a man, referred to as 'the gender ground', and that one is a person with a disability and the other either is not or is a person with a different disability, referred to as 'the disability ground'.

Section 6(2A) of the Employment Equality Acts 1998 to 2011 provides that, without prejudice to the generality of subsections (1) and (2), discrimination on the gender ground is to be taken to occur where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated.

The case

Extensive discussion of the scope and interpretation of 'disability' as a ground of discrimination can be found in Chapter 5.1.1 of the present Casebook, thus the majority of the discussion in the following paragraphs focuses on the Court's assessment of discrimination on the grounds of sex.

Ms Z, a post primary school teacher in Ireland was fertile, but she cannot carry a pregnancy because she has no uterus. Together with her husband, she resorted to an IVF and a surrogate mother. The baby was born on 28 April 2010 in California where the surrogacy agency was based. Irish legislation only grants paid leave in the cases of maternity leave (if the mother had a confinement) (Maternity Protection Act) or adoptive leave (Adoptive Leave Act 1995). Because of the physical condition of Ms Z, she neither adopted a child nor carried her pregnancy. Hence, she could not fulfil the requirements to get either leave. Therefore, the Government department (that finances the leave) refused Ms Z's application to be granted leave equivalent to adoptive leave. Nevertheless, it accepted to accommodate her by:

- granting her unpaid leave for the time she was in California (from 7 April to 18 May 2010)

- granting her statutory parental leave for a duration of a maximum of 14 weeks (from the birth until end of May and again from the beginning of the next school year). But maternal leave is of a minimum duration of 26 weeks, and the adoptive leave a minimum of 24 weeks.

From 12 April 2010 until early January 2011, Ms Z. worked only 9 days, but due to a combination of school closure and certified paid sick leave (due to stress) and not due to leave considering her disability (of not being able to carry a pregnancy). The government paid Ms Z. her normal remuneration during this whole period.

Ms Z. brought a complaint before the Equality Tribunal on the ground that the Government department failed to consider her disability and did not grant her paid leave equivalent to maternity or adoptive leave, although she had undergone an *in vitro* fertilisation treatment.

Preliminary questions referred to the Court

The national referring court referred five questions to the CJEU, two of which concerned discrimination on the grounds of sex:

1. Having regard to the following provisions of the primary law of the European Union:
   - Article 3 [TEU],
   - Articles 8 [TFEU] and 157 6[TFEU], and/or
   - Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union [('the Charter')]

   is Directive 2006/54 …, and in particular Articles 4 and 14 thereof, to be interpreted as meaning that there is discrimination on the ground of sex where a woman – whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoptive leave?
2. If the answer to the first question is in the negative, is Directive 2006/54 … compatible with the above provisions of the primary law of the European Union?

Reasoning of the Court

The Court first held that the refusal of paid leave in this case did not amount to discrimination on the basis of sex because in a comparable situation, a commissioning father who had a baby through surrogacy would not be granted a paid leave either. **There was no direct discrimination on the ground of sex because the refusal would apply to both sexes, not only women**. Moreover, according to the Directive 2006/54 EC, Member States do not have the obligation to grant adoption leave. Thus, there is no discrimination on the grounds of sex where a commissioning mother is refused paid leave from employment equivalent to maternity leave and/or adoptive leave.

The Court then recalled that whether Directive 2006/54 is compatible with the above provisions of the primary law of the European Union (including Articles 21, 23, 33, 34 of the Charter), it may decide not to give a preliminary ruling where the provision whose validity is the subject-matter of the reference manifestly has no bearing on the outcome of the main proceedings.

In determining how to interpret the other relevant ground of discrimination in the case – disability – the Court relied, among other cases, on *HK Danmark* (Joined Cases C-335/11 and C-337/11, ECLI:EU:C:2013:222, paragraphs 28-30, 32) in stating that pursuant to Article 216(2) TFEU international agreements concluded by the EU are binding on it and prevail over acts of the European Union, so instruments of secondary law must 'as far as possible be interpreted in a manner that is consistent with those agreements'. This includes the UN Convention in question, which now forms an integral part of the EU legal order, and can be relied on for the purposes of interpreting Directive 2000/78. **Ultimately, that required the same meaning of 'disability' as under the UN Convention to be adopted by the CJEU in relation to Directive 2000/78**. This definition was laid out in *HK Danmark* (paragraphs 37-39 and 44 – see Section 5.1.1.1 of this Casebook).

Conclusion of the Court

The Court concluded that the assessment of the validity of Directive 2006/54/EC and Directive 2000/78/EC in regard to EU law such as the CFREU was not required in this case, because the facts did not fall within the scope of either of the Directives.

Elements of judicial dialogue

The Court in *Z.* built on its previous case law establishing the position and role of international treaties (in this case, the UN Convention on the Rights of Persons with Disabilities, in relation to EU law, and particularly Directive 2000/78. The Court particularly relied on *HK Danmark* (Joined Cases C-335/11 and C-337/11, ECLI:EU:C:2013:222, paragraphs 28-30, 32), as explained above.

Interestingly, the majority of the horizontal judicial dialogue at play in *Z.* concerned CJEU cases that did not deal at all with Article 21 CFREU (some of which were adopted after the Charter gained binding force, e.g. *HK Danmark*). The Court's consistent approach in applying the same reasoning and findings whether or not the Charter was applied, consolidates the findings elsewhere in this Casebook that the prohibition of discrimination in Article 21 of the Charter appears to have the same substantive scope as the prohibition of discrimination as expressed in Directive 2000/78.

1.1.3 Guidelines emerging from the analysis

There are several general guidelines that can be extracted from the analysis of the cases in this cluster:

Limited grounds of discrimination

In the view of the Court of Justice as expressed in *FOA* (C-354/13):

- The scope of the relevant directives should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively therein.

Protection from non-discrimination under the EU and Council of Europe systems

- From the judgments of *FOA* (C-354/13) and *Milkova* (C-406/15), the overall scope of the prohibition of discrimination under EU law appears to be more restrictive than that under the Council of Europe human rights system. The European Court of Human Rights has interpreted 'other status' in Article 14 ECHR to include grounds not explicitly mentioned in Article 14, such as sexual orientation and disability. However, Article 21 may apply horizontally in the absence of national legislation compatible with a relevant directive (*Egenberger*, C-414/16 and *Cresco*, C-193/17), which may in some circumstances allow the scope of non-discrimination under EU law to be broader than that under the Council of Europe (which does not allow for direct horizontal effect).[9]

[9] The ECHR contains no direct obligations for private parties, and has been interpreted by the ECtHR in a manner resulting in indirect, rather than direct horizontal effect. This has been done through the application of states' positive obligation to protect individuals from the harmful conduct of private actors. See e.g. *Costello Roberts v United Kingdom*, App No. 13134/87 (25 March 1993); *Fadeyeva v Russia*, App No. 55723/00 (2005). See also Jean-Francois Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human

Role and position of the UN Convention on Persons with Disabilities

In the view of the Court of Justice as expressed in (C-363/12):

- As an international agreement concluded by the EU, the Convention has primacy over secondary instruments of EU law. This requires that relevant parts of directives be interpreted in compliance with the Convention.

1.2. Direct and indirect discrimination

A key distinction in EU non-discrimination law is that between direct and indirect discrimination, both of which are prohibited under EU law, including under Article 21 CFREU. The following sections discuss the meaning and scope first of direct, and second of indirect, discrimination and how they have been applied by the Court of Justice of the European Union. In particular, the criteria to be fulfilled in order to find that a situation amounts to direct or indirect discrimination will be analysed.

1.2.1 Direct discrimination

Direct discrimination is not defined in Article 21 CFREU. However, it is defined in the Equality Directives,[10] and has been dealt with in many of the CJEU's judgments. Essentially, **there are two components to direct discrimination: (1) a difference of treatment between individuals on the basis of a protected ground; which (2) relates to individuals in comparable situations.** This section will discuss some key cases dealing with the two issues, with a focus on the definition of the comparability of situations (Section 1.2.1.2).

1.2.1.1 Difference in treatment on the basis of a protected ground

The question of whether a situation involves a difference in treatment of two individuals on the basis of a protected ground is, for the most part, relatively straight forward. To illustrate what kinds of differences in treatment can amount to direct discrimination, examples of cases in which the Court addressed the issue will be briefly discussed.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 14 March 2017, C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* ("**G4S Secure Solutions**")

➢ Judgment of the Court (Grand Chamber) of 26 June 2018, *MB v Secretary of State for Work and Pensions*, Case C-451/16 ("**MB**")

➢ Judgment of the Court (Grand Chamber) of 22 January 2019, Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi* ("**Cresco**") (reference case)

Rights' *Human Rights Handbooks No. 7* (2007). Available at <https://rm.coe.int/168007ff4d> accessed 19 November 2020.

[10] This includes Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC, and Directive 2006/54/EC. See Justyna Maliszewska-Nienartowicz, 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?', 3(1) International Journal of Social Sciences (2014) 41, which compares direct and indirect discrimination.

Main question referred

Question 1 What constitutes a difference in treatment for the purposes of direct discrimination under EU law?

Relevant legal sources

EU level

Recital 24 and Articles 1, 2, 7 and 16 of Council Directive 2000/78/EC of 27 November 2000

Article 21 Charter of Fundamental Rights of the European Union

National legal sources (Austria)

Paragraph 1(1) of the version of the Arbeitsruhegesetz (Law on Rest Periods and Public Holidays, BGBl. 144/1983) applicable to the facts in the main proceedings ('the ARG'):

'This federal Law shall apply to all employees of every kind, unless otherwise provided for below.'

Paragraph 7 of the ARG:

'(1) Employees shall be entitled to an uninterrupted rest period of at least 24 hours on public holidays, which must begin not earlier than 00:00 and not later than 06:00 on the day of the public holiday.

…

(3) Good Friday is also a public holiday for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church.

…'

Directive 2000/78 was transposed into Austrian law by, inter alia, the Gleichbehandlungsgesetz (Law on Equal Treatment, BGBl. I, 66/2004). This establishes a principle of non-discrimination in connection with employment relationships, in particular on grounds of religion or belief, in the determination of pay and other working conditions.

1.2.1.1.1 Question 1 – Differences in treatment

For the purposes of Article 21 CFREU, and relevant provisions of secondary EU law, what constitutes a difference in treatment that could amount to direct discrimination contrary to the principle of non-discrimination?

This question was dealt with in *Cresco* (C-193/17).

The case

Under Article 7(3) of the ARG, only members of the Evangelical Churches of the Augsburg, Helvetic Confessions, the Old Catholic Church and the United Methodist Church were allowed 24 hours of paid leave on Good Friday, a recognised public holiday. The applicant, M. A., an employee of the private detective agency 'Cresco', is not a member of any of the churches covered by the ARG. He claimed that he suffered discrimination by being denied public holiday pay for the work he did on 3 April 2015 (Good Friday). He thus claimed compensation from his employer. Mr M.A. first lodged his case through a

court of first instance which was dismissed. A court of appeal then declared the case admissible after which Cresco appealed this decision before the Grand Chamber of the Supreme Court of Austria. The Supreme Court referred the case to the CJEU for a preliminary ruling.

Preliminary questions referred to the Court

The first question referred by the national court is relevant here:

1. Does Article 21 CFREU, in conjunction with Article 1 and Article 2(2)(a) of Directive 2000/78 preclude (in relation to private employment relationships) a national rule under which Good Friday is a holiday, with an uninterrupted rest period of at least 24 hours, only for members of certain churches, and under which, if an employee [belonging to one of those churches] works, despite that day being a holiday, he is entitled, in addition to the pay received as he is allowed not to work on account of the day being a public holiday, to payment for the work actually done, whereas other employees, who are not members of those churches, do not have any such entitlement?

Reasoning of the Court

First, the Court reiterated the principle of equal treatment enshrined in Articles 1 and 2 of Directive 2000/78, which prohibits both direct and indirect discrimination on the grounds of religion. To determine whether direct discrimination had arisen in the case, the Court looked at whether the legislation caused (1) a difference of treatment between employees on the basis of their religion; which (2) related to categories of employees in comparable situations. Since under the ARG Good Friday was a public holiday and could only constitute a means for paid leave by employees that were members of specified churches, the legislation gave rise to a difference in treatment based directly on employees' religion.

Conclusion of the Court

The Court concluded that national legislation constitutes direct discrimination on the grounds of religion if it only allows Good Friday to be a public holiday for certain employees, depending on their religious belief, and if only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day.

Elements of judicial dialogue

In the case of *MB* (C-451/16, ECLI:EU:C:2018:492) the definition of non-discrimination found in Article 2(1)(a) of Directive 2006/54 was held to be applicable to the discrimination prohibited by Directive 79/7, which does not itself define direct discrimination. The Court found that this definition included discrimination arising from gender reassignment, stating that a marriage annulment condition in UK legislation (which made the recognition of a change of gender conditional on the annulment of any marriage entered into before such a change took place) only applied to persons who had changed their gender, not to persons who had retained their birth gender. Therefore, the former group of persons were treated less favourably than the latter. This was based on sex and could therefore constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7, providing the situations of the persons were deemed to be comparable.

Further, in the case of *CHEZ Razpredelenie Bulgaria* (C-83/14, ECLI:EU:C:2015:480) the Court undoubtedly asserted that the practice at issue presented a 'less favourable treatment'

to the affected persons compared to other persons in a comparable situation. The practice was the placing by an electricity supplier, CHEZ Razpredelenie Bulgaria, of electricity meters at a height of 6-7 metres in certain districts of Bulgaria inhabited predominantly by individuals of Roma origin, whilst the meters were placed at a more accessible height of under 2 metres in other districts. The Court found that this would constitute direct discrimination in light of Article 2(2)(a) of Directive 2000/43 provided that the measure had been introduced for reasons prejudicing the Roma inhabitants of the district.

In the case of *G4S Secure Solutions* (C-157/15, ECLI:EU:C:2017:203), on the other hand, the Court found that there was no direct discrimination present in the case at hand under Article 2(2)(a) of Directive 2000/78. The case concerned an internal rule which prohibited all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace. This included the claimant, Ms A., who persisted in wearing an Islamic headscarf at work despite the rule, and was dismissed. Due to the fact that the rule was applied in a 'general and undifferentiated way', however, Ms A. was not treated any less favourably than any other employee, and the rule was not directly based on her religion or belief within the meaning of Article 2(2)(a) of the Directive.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

The scope of the CJEU's ruling was discussed by the Scottish Court of Session in Anwar, Reclaiming Motion by Anela Anwar against the Advocate General and the Commission For Equality and Human Rights [2019] ScotCS CSIH_43. The claimant had tried to argue that the judgment in *Cresco* "supported the proposition that a "third strand" has emerged in relation to the principle of effectiveness, to the effect that an individual should have a direct remedy against persons who discriminated against them, even where such discrimination is lawful in terms of national law" (paragraph 70). The Court of Session disagreed with this argument, finding that the CJEU was simply reasserting the 'basic principle of the primacy of EU law, taking into
account the obligation incumbent on member states under article 19 of the TEU to provide effective remedies'. This amounted to reiteration of previous cases rather than a "third strand" of effectiveness.

1.2.1.2 Comparability of situations

As noted above, a key requirement in order for a situation to be considered as one of direct discrimination under Article 2(1)(a) of Directive 2006/54 is that individuals in comparable situations are treated differently. The question as to what 'comparability' means and when exactly situations are comparable, has arisen in numerous preliminary rulings adopted by the CJEU. In addition, the inclusion of this requirement in the application of directives prohibiting discrimination without reference to the comparability of situations, has also been discussed by the Court of Justice. This section of the Casebook draws on the relevant case law of the Court of Justice in order to answer this question.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, Case C-236/09 ("**Association Belge des Consommateurs Test-Achats and Others**")

➢ Judgment of the Court (Fourth Chamber) of 6 July 2015, *Konstantinos Maïstrellis v Ypourgos*

Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton, Case C-222/14 ("**Maïstrellis**")

➢ Judgment of the Court (Grand Chamber) of 16 July 2015, *"CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, Case C-83/14 ("**CHEZ Razpredelenie Bulgaria**")

➢ Judgment of the Court (Tenth Chamber) of 7 February 2018, *Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera v Fondazione Teatro dell'Opera di Roma*, And *Fondazione Teatro dell'Opera di Roma v Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera, Luca Troiano, Mauro Murri* and *Catia Passeri v Fondazione Teatro dell'Opera di Roma*, Joined Cases C-142/17 and C-143/17 ("**Maturi and Others**")

➢ Judgment of the Court (Grand Chamber) of 26 June 2018, *MB v Secretary of State for Work and Pensions*, Case C-451/16 ("**MB**") (reference case)

➢ Judgment of the Court (Grand Chamber) of 22 January 2019, *Cresco Investigation GmbH v Markus Achatzi*, Case C-193/17 ("**Cresco**")

Main questions addressed

Question 1 When are situations 'comparable' for the purposes of the prohibition of discrimination under EU law?

1.2.1.2.1 Question 1 - Meaning of comparability

When can the situations of persons treated differently be regarded as 'comparable', and does this apply to the principle of equal treatment in relevant directives even when the directive does not include the term explicitly?

This question was dealt with in *MB* (C 451/16).

Relevant legal sources

EU Level

Articles 3(1)(a), 4(1) and 7(1)(a) Directive 79/7/EEC (Social Security Directive)

Article 2(1)(a) Directive 2006/54/EC (Equal Treatment Directive)

Article 21 Charter of Fundamental Rights of the European Union

National Level (United Kingdom)

Sections 44 and 122 of the Social Security Contributions and Benefits Act 1992 read in conjunction with section 122 of that Act and with Schedule 4, paragraph 1, of the Pensions Act 1995:

'A woman born before 6 April 1950 becomes eligible for the State retirement pension (referred to in the legislation as a 'Category A retirement pension') at the age of 60, and a man born before 6 December 1953 becomes eligible at the age of 65.'

Section 1 of the Gender Recognition Act 2004 (the GRA) in its version applicable to the dispute in the main proceedings:

'A person who was aged at least 18 could apply to a Gender Recognition Panel ('GRP') for a full gender recognition certificate recording a change of his or her gender on the basis of

living as a person of the other gender. According to that provision, the new gender of the person requesting such a certificate was to be referred to as "the acquired gender".'

Subsection (2) of section 4 of the GRA, entitled 'Successful applications', provided that an unmarried applicant was entitled to a full gender recognition certificate, whereas, pursuant to section 4(3), a married applicant was entitled only to an interim gender recognition certificate.

Section 9(1) of the GRA provided that, where a full gender recognition certificate was issued, the acquired gender thereafter became the person's gender for all purposes.

According to Schedule 5, paragraph 7, of the GRA, which dealt specifically with the effect of a full gender recognition certificate on eligibility for State retirement pensions, once the certificate had been issued, any question of entitlement to a State retirement pension was to be decided as if the person's gender had always been the acquired gender.

An interim gender recognition certificate allowed a married applicant to apply to have his or her marriage annulled by a court. According to Section 5(1) of the GRA, the court granting the decree of nullity was then required to issue a full gender recognition certificate.

Section 11(c) of the Matrimonial Causes Act 1973, in its version applicable during the period at issue in the main proceedings, provided that a valid marriage could legally exist only between a male and a female.

The case

This question was dealt with in *MB*.

MB was born male in 1948 and married a woman in 1974. She began to live as a woman in 1991 and underwent sex reassignment surgery in 1995. She did not hold a full certificate of recognition of her change of gender but she fulfilled the physical, social and psychological criteria provided by the national legislation for a legal recognition of a change of gender. Yet, the national legislation made the recognition of that change conditional on the annulment of any marriage entered into before such a change took place. Thus, under national law, she was still considered to be male.

On 31 May 2008 MB attained the age of 60. On 28 July 2008, she applied for a state retirement pension, backdated to 31 May 2008, on the basis that she was a woman. The application was rejected on 2 September 2008 on the ground that in the absence of a full gender recognition certificate, she could not be treated as a woman for the purpose of determining her statutory pensionable age. That decision was subsequently upheld by the First-tier Tribunal, the Upper Tribunal and the Court of Appeal. Permission to appeal was granted by the Supreme Court of the United Kingdom on 11 March 2015. The Supreme Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling.

National court's decision to refer the case to the CJEU

MB (Appellant) v Secretary of State for Work and Pensions (Respondent) [2016] UKSC 53 (United Kingdom Supreme Court)

MB argued that the CJEU has recognised that Article 4(1) of the Directive prohibits discrimination between persons of a particular birth gender and people who have acquired that gender and, although it is for Member States to determine the conditions by which

someone may acquire a gender, that only applies to physical or psychological characteristics and not to marital status. The imposition of a marital status criterion on a person who satisfies the state's physical and psychological criteria must therefore be unlawful, and cannot appropriately affect eligibility for state retirement pension. MB therefore argued that the Gender Recognition Act 2004 discriminated against her directly on the grounds of sex, and indirectly because the great majority of people who have undergone gender reassignment have been reassigned from male to female.

The Secretary of State argued that the UK procedure by which, for a person's acquired gender to be recognised, a gender recognition certificate must be obtained, was lawful. There was no reason that the conditions for the acquisition of a gender should be limited to satisfaction of physical and psychological criteria. Conditions may properly reflect social factors such as the status of marriage, which may include a definition of marriage as between a man and a woman. No question of indirect discrimination arose.

The Supreme Court was divided on the correct answer to the question and, since there was no CJEU authority directly in point, it referred the question for their guidance.

Preliminary questions referred to the Court

The first question referred by the national court dealt with this issue:

1. Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?

Reasoning of the Court

The Court noted that although marriage and the legal recognition of change of gender are matters falling within the competence of the Member States with regard to civil status, Member States must comply with EU law, and in particular, with the provisions relating to non-discrimination set out in Article 4(1) of Directive 79/7, including when they exercise their powers in the area of civil status. Article 4(1) prohibits all discrimination on grounds of sex as regards the conditions for statutory schemes ensuring protection against the risks of old age, and the State retirement pension scheme at issue was such a scheme. Article 2(1)(a) of Directive 2006/54 mentions that there is **direct discrimination based on sex if one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation**. That concept must be understood in the same way in the context of Directive 79/7. Applying this to the case, the Court found a difference in treatment within the meaning of Article 4(1) of Directive 79/7.

The Court then turned to the comparability of the situation of a person who changed gender after marrying and the situation of a person who has retained his or her birth gender and is married. The Court noted that the UK Government did not view the situations as comparable, because the martial status of the persons was different – if an individual married before changing gender, they would be married to someone of the same gender, but an individual who had retained their birth gender would be married to someone of the opposite sex. Such a difference, the Government argued, having regard to the purpose of the marriage annulment condition in question (to avoid same-sex marriages), meant that the situations were not comparable. However, the Court disagreed, first stating that **situations need not be 'identical', but rather 'similar' in order to be comparable**.

Determining comparability requires an assessment conducted in a specific and concrete manner having regard to all the elements which characterise them, 'in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates' – assessments should not be conducted in a global and abstract manner.

The Court observed that UK legislation granted a retirement pension to all persons who had reached retirement age and who had made adequate contributions to the UK's state pension scheme. That legislation protected against the risks of old age by conferring on the person concerned the right to a retirement pension acquired in relation to the contributions paid by that person during his or her working life, irrespective of marital status.

Hence, a person who changed gender after marrying and a person who had kept his or her birth gender and is married, found themselves in a comparable situation. The marital status of those persons had the effect of making that difference the decisive element in determining the comparability of the situations at issue, whereas marital status, in itself, is not relevant for the purposes of the granting of the state retirement pension. The purpose of the marriage annulment condition, namely to avoid marriage between persons of the same sex, was unrelated to the retirement pension scheme. As a result, that purpose did not affect the comparability of the situations concerned. Therefore, it must be held that the national legislation at issue accorded less favourable treatment, directly based on sex, to a person who changed gender after marrying, than that accorded to a person who has kept his or her birth gender and is married, even though those persons were in comparable situations. Moreover, the aim of avoiding same-sex marriages could not justify direct discrimination on grounds of sex as it is not among the grounds for justification expressly recognised by Directive 79/7. The national legislation at issue in the main proceedings constituted direct discrimination on grounds of sex and was prohibited by Directive 79/7.

Conclusion of the Court

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in particular the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a) thereof, must be interpreted as precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.

The national legislation at issue in the main proceedings constituted direct discrimination on grounds of sex and was, therefore, prohibited by Directive 79/7.

Impact on the follow-up case

The discriminatory provisions of the 2004 Act were amended with the legalisation of same-sex marriage in the UK in 2014, but this was not a direct outcome of the CJEU case. The case itself was referred back to the Supreme Court to apply the CJEU ruling, but no record of this is available.

Elements of judicial dialogue

In terms of horizontal judicial dialogue, in the context of the question of which situations are comparable, the Court relied on several of its previous judgments, including *CHEZ Razpredelenie Bulgaria* (C-83/14, ECLI:EU:C:2015:480), *Römer* (C-147/08, EU:C:2011:286) and *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566). The case of *CHEZ Razpredelenie Bulgaria* was particularly instructive to the Court. In this case, commercial measuring instruments for electricity meters were positioned in Roma districts of a town at a height of between six and seven metres, whereas in other districts not densely populated by Roma they were generally positioned lower than two metres above ground. The applicant claimed discrimination on the grounds of ethnicity, and the referring national court specifically asked the CJEU whether the circumstances concerned comparable situations. The Court undoubtedly asserted that the practice at issue presents a 'less favourable treatment' to the affected persons compared to other persons 'in a comparable situation', thus constituting direct discrimination in light of Article 2(2)(a) 2000/43, stating (as followed in *MB*) that 'the requirement relating to the comparability of the situations for the purpose of determining whether there is a breach of the principle of equal treatment must be assessed in the light of all the elements which characterise them' (itself building on the pre-Charter case of *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 25[11]). Together with *MB*, interpreting discrimination prohibited by various different directives as involving the different treatment of 'comparable situations', whether or not the term is used in a given directive, harmonises the application of the directives in practice**.**

In addition, although the Court did not refer to the cases directly in *MB*, the judgments of *Association Belge des Consommateurs Test-Achats and Others* (C-236/09, ECLI:EU:C:2011:100) and *Konstantinos Maïstrellis* (C-222/14) contain similar guidelines as to the definition of comparability. In *Association Belge des Consommateurs Test-Achats and Others* the Court stressed that **comparable situations must not be treated differently and different situations must not be treated the same, unless objectively justified**. In *Konstaninos Maïstrellis* the Court found direct discrimination of men on the grounds that mothers who were civil servants were always entitled to parental leave, whereas fathers who are civil servants were only entitled to it under the condition that the mother of their child works or exercises a profession. In this case the Court also emphasised that such a regulation would go against the goal of Directive 96/34 and the Framework Agreement on Parental Leave, namely to encourage men to participate equally in family responsibilities.

In the cases discussed in this cluster, the CJEU avoided interpreting the Charter directly. Even when explicitly asked for an interpretation by a national court, like in *Maturi and Others* (Joined Cases 142/17 and 143/17), the Court interpreted the Directives instead.

The Court's definition of comparability has been reinforced in case law subsequent to *MB*. This includes Cresco and *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (C-16/19). In the latter case, the Court reiterated that whether or not situations could be considered comparable 'must be assessed in the light of all the elements which characterise' the situations. It went on to say that situations need not be identical but comparable, and the assessment of this should be conducted in a global and abstract manner.

[11] Thus again reinforcing the Court's general approach that pre-Charter and post-Charter cases be decided in a similar manner.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Netherlands

In the Netherlands, the same definition of comparability as *MB* has been applied, although not relying on this case explicitly. An example is a case from the District Court of Gelderland from 21 July 2021 (ECLI:NL:RBGEL:2021:3995). In this case, the claimant and his partner were a male, same-sex couple. They participated in a surrogacy program, making use of IVF treatment to realise their desire to have a child. They submitted the expenses of the treatment to the tax authorities as tax deductible, under specific healthcare costs. For the IVF expenses to be considered 'specific healthcare costs', the law required the expenses to relate to a medical condition such as disease or disability. The claimant submitted these costs to the tax authority (defendant), who rejected this submission as they believed that the cost did not qualify for income tax deduction, because the claimant himself did not have a medical condition, as required. This requirement consequently entailed that the claimant and his partner, as a homosexual couple, could never qualify for the right to deduct the IVF treatment costs, as they could never conceive a child naturally, whilst other couples with decreased fertility are able to deduct costs for IVF from their taxable income on the basis of the same right. The claimant found this to be both a violation of the principle of equality under national law and the principle of non-discrimination.

The case was neither argued nor reasoned on the basis of the CFREU, but the Court discussed Article 14 ECHR. In doing so, it referred to cases of the ECtHR upholding the same standards as the CJEU in *MB* regarding the fact that for situations to be comparable they need not be identical but must have a relevant similarity in the sense of the concrete character of the goal of the right. Here, the court referred to *Petrov v Bulgaria*, Application no. 15197/02 and *Varnas v Lithuania*, Application no. 42615/06.

1.2.2 Indirect discrimination

In some situations, discrimination is not caused by a measure that is clearly based on a protected characteristic. Indeed, it is clear that while non-discrimination may be formally achieved by ensuring that, for example, national legislation does not explicitly treat two persons in a similar situation differently on the basis of a protected characteristic, non-discrimination in practice may still not be achieved – a measure which does not amount to direct discrimination may nonetheless have a discriminatory effect. Therefore, EU law protects individuals from *indirect* as well as direct discrimination. Due to the differences in the manner in which the two types of discrimination are manifested, they are defined differently.

The following section will utilise CJEU case law to shed light some core aspects of the meaning and scope of indirect discrimination for the purposes of EU law, and in particular Article 21 CFREU. This will predominantly be achieved by comparing indirect discrimination with direct discrimination.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 16 July 2015, *"CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, Case C-83/14 ("**CHEZ Razpredelenie Bulgaria**") (reference case)

➢ Judgment of the Court (Grand Chamber) of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, Case C-157/15 ("**G4S Secure Solutions**")

➢ Judgment of the Court (Grand Chamber) of 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Case C-188/15 ("**Bougnaoui**")

➢ Judgment of the Court (Grand Chamber) of 15 July 2021, *IX v WABE e. V. and MH Müller Handels GmbH v MJ*, Joined Cases C-804/18 and C-341/19 ("**WABE**")

Main question addressed

Question 1 What are the differences between direct and indirect discrimination under EU law?

Relevant legal sources

EU level

Article 21 Charter of Fundamental Rights of the European Union

Recitals 2, 3, 9, 12, 13, 15, 16 and 28, and Articles 1, 2, (3(1)(h), 6(1) and 8(1) of Directive 2000/43

Recital 29 and Article 13(1) of Directive 2006/32/EC

Articles 3(3) and (7) of Directive 2009/72

Paragraph 1(h) and (i) of Annex I to Directive 2009/72

National legal sources (Bulgaria)

Article 4 of the Law on protection against discrimination (Zakon za zashtita ot diskriminatsia; 'the ZZD') provides:

'(1) All direct or indirect discrimination on grounds of … race, nationality, ethnicity, … personal situation … shall be prohibited.

(2) Direct discrimination shall be taken to occur whenever, on the basis of characteristics mentioned in paragraph 1, one person is treated less favourably than another is, has been or would be treated in comparable or similar conditions.

(3) Indirect discrimination shall be taken to occur where, on the basis of characteristics mentioned in paragraph 1, one person is placed in a less favourable position compared with other persons by an apparently neutral provision, criterion or practice, unless that provision, criterion or practice is objectively justified having regard to a legitimate aim and the means of achieving that aim are appropriate and necessary.'

Points 7 to 9 of Paragraph 1 of the Supplementary Provisions of the ZZD state:

'For the purposes of this law:

Point 7. "unfavourable treatment" means: any act, action or omission which directly or indirectly prejudices rights or legitimate interests.

Point 8. "on the basis of characteristics mentioned in Article 4(1)" means: on the basis of the actual — present or past — or the presumed existence of one or more such characteristics possessed by the person discriminated against or a person connected with or assumed to be connected with that person, if such connection is the basis for the discrimination.

Point 9. "Connected persons" are: … persons who, for other reasons, may be regarded as directly or indirectly dependent on the victim, where that connection is the cause of the discrimination; ...'

Article 120(1) and (3) of the ZE:

'1. The electricity supplied to final customers shall be measured by commercial measuring instruments belonging to the operator of the electricity transmission or distribution network …

…

3. The operator of the electricity transmission or distribution network shall determine the type and number of the measuring instruments and equipment … and the place where they are installed.'

Article 27 of CHEZ RB's general conditions, as approved by the Darzhavna Komisia za energiyno i vodno regulirane:

'1. Commercial measuring instruments … shall be placed in such a way that the customer may visually check the readings.

2. If, in order to protect the life and health of the inhabitants, property, the quality of the electricity, the continuity of the electricity supply or the safety and reliability of the electricity supply system, commercial measuring instruments are installed in places to which access is difficult, the electricity distribution undertaking is required to ensure at its own cost the possibility of making a visual check within three days of a written request to that effect from the customer.'

CHEZ RB's general conditions provide that it remains possible for the customer to pay to have a second meter, a 'checking' meter, installed in his home.

1.2.2.1 Question 1 – Distinction between direct and indirect discrimination

What is the difference between direct and indirect discrimination for the purposes of the equal treatment directives and Article 21 CFREU?

This question was dealt with in *CHEZ Razpredelenie Bulgaria* (C-83/14).

The case

CHEZ RB, an electricity supplier, installed electricity meters in the *Gizdova mahala* district of Bulgaria, which is inhabited mainly by persons of Roma origin, at a height of 6-7 metres. In other districts, the metres were placed at a height of under 2 metres. Ms N., an owner of a grocer's shop in *Gizdova mahala,* filed a complaint to the Bulgarian Commission for Protection against Discrimination (KZD), in which she stated that she was unable to monitor her electricity consumption since the meter was inaccessible, making it impossible

for her to check the accuracy of the electricity bills she received. CHEZ RB claimed that the reason for placing the meters higher in the *Gizdova mahala* district was the frequent unlawful connections made to the electricity network and the cases of damage and meter tampering. The KZD's decision of April 2010 stated that Ms N. suffered indirect discrimination on the grounds of nationality. This decision was annulled by the judgment of the Supreme Administrative Court of 19 May 2011. The KZD's decision of May 2012 concluded that Ms N. suffered direct discrimination on the grounds of her 'personal situation'. CHEZ RB appealed against that decision before the Sofia City Administrative Court; that court stayed proceedings and referred several questions to the Court of Justice.

Preliminary questions referred to the Court

In total, the national court referred 10 questions to the CJEU, four of which dealt with the meaning and scope of indirect discrimination:

1. Is the expression "apparently neutral practice" within the meaning of Article 2(2)(b) of Directive 2000/43 applicable to the practice of [CHEZ RB] of positioning commercial measuring instruments at a height of between six and seven metres? How should the phrase "apparently neutral" be interpreted — as meaning that the practice is obviously neutral or that it only seems neutral at first glance, in other words, that it is ostensibly neutral?
2. For a finding that there has been indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43, is it necessary that the neutral practice places persons in a particularly less favourable position on the ground of racial or ethnic origin, or is it sufficient that that practice affects only persons of a specific ethnic origin? In that context, under Article 2(2)(b) of Directive 2000/43 is a national provision such as Article 4(3) of the ZZD — according to which there is indirect discrimination where a person is placed in a more unfavourable position because of the characteristics set out in Article 4(1) (including ethnicity) — permissible?
3. How should the expression "particular disadvantage" within the meaning of Article 2(2)(b) of Directive 2000/43 be interpreted? Does it correspond to the expression "less favourable treatment" used in Article 2(2)(a) of Directive 2000/43, or does it cover only serious, obvious and particularly significant cases of unequal treatment? Does the practice described in the present case amount to a particular disadvantage? If there has been no serious, obvious and particularly significant case of putting someone in a disadvantageous position, is that sufficient to conclude that there has been no indirect discrimination (without examining whether the practice in question is justified, appropriate and necessary in view of attaining a legitimate aim)?
4. Are national provisions such as Article 4(2) and (3) of the ZZD — which for direct discrimination require "less favourable treatment" and for indirect discrimination require "placing in a less favourable position" but which do not, unlike the directive, make a distinction according to the degree of seriousness of the unfavourable treatment concerned — permissible under Article 2(2)(a) and (b) of Directive 2000/43?

National court's decision to refer the case to the CJEU

CHEZ Razpredelenie Bulgaria AD v Komisa za zashtita ot diskiminatsia

Reasoning of the Court

The Court addressed the four questions on indirect discrimination together. The questions referred to the interpretation of certain terms found in Article 2(2)(b) of Directive 2000/43. This provision defines indirect discrimination as occurring when 'an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' The Court was essentially asked whether this precluded the provisions of national legislation in question, which required that the particular disadvantage must have been brought about for reasons of racial or ethnic origin in order to give rise to indirect discrimination.

The Court first addressed the meaning of an **'apparently neutral practice'**, relying on the Advocate General's Opinion to find that the concept must be understood as designating a **practice whose neutrality is 'ostensibly' neutral or neutral 'at first glance', rather than obviously neutral**. As well as being the most natural understanding of the term, this understanding was required by the Court's distinction between direct and indirect discrimination. Here, the Court explained that, 'unlike direct discrimination, indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put at a disadvantage' (paragraph 94, citing *Z.*, C-363/12, EU:C:2014:159, paragraph 53 and the case-law cited). As seen in Section 1.2.1.1 above, direct discrimination stems from a difference in treatment *on the basis of a protected characteristic.*

Second, the Court noted that if it is clear that a measure giving rise to a difference in treatment was introduced for reasons relating to racial or ethnic origin, it must be considered to be direct discrimination under Article 2(2)(a) of Directive 2000/43 rather than indirect discrimination. Indirect discrimination, on the other hand, does not require the measure in question to be based on such reasons – a measure will be indirectly discriminatory when, despite its use of neutral criteria not based on the protected characteristic, 'it has the *effect* of placing particularly persons possessing that characteristic at a disadvantage.'[12] Consequently, the national provision in question must be considered as being precluded by Article 2(2)(b) of Directive 2000/43.

The Court then moved to the meaning of a **'particular disadvantage'** in Article 2(2)(b) of Directive 2000/43 in comparison to the notion of 'less favourable treatment' found in the definition of direct discrimination. The Court rejected the referring Court's suggestion that the former term may only cover 'serious, obvious and particularly significant case[s] of inequality', but noted that **the disadvantage does have to particularly affect persons of a certain ethnic origin**, with previous case law having found indirect discrimination where 'far more' persons possessing the protected characteristic were disadvantage than persons not possessing it.

Turning to the fact that Article 4(2) and (3) of the ZZD made **no distinction in the degree of seriousness of 'less favourable' treatment caused by direct discrimination on the one hand, and indirect discrimination on the other**, the Court noted that 'no particular

[12] *CHEZ Razpredelenie Bulgaria*, paragraph 96 (emphasis added).

degree of seriousness is required' with regard to the 'particular disadvantage' caused by an indirectly discriminatory measure. Thus, on this point, the legislation was not incompatible with Directive 2000/43.

Finally, although the Court noted that it was for the referring court to assess the facts and apply the above rules to a particular case, the CJEU's interpretations may aid the referring court in doing so. With that in mind, the Court noted that the practice in question displayed the characteristics of indirect discrimination unless it could be justified by Article 2(2)(b) of Directive 2000/43. First, there was no doubt that the practice was apparently neutral. Second, the practice was carried out only in certain districts which were inhabited mainly by persons of Roma origin, and was therefore 'liable to affect persons possessing such an ethnic origin in considerably greater proportions and accordingly to put them at a particular disadvantage compared with other persons'. This disadvantage was due to the 'offensive and stigmatising nature of the practice' and because it made it 'extremely difficult, if not impossible' for consumers to check their electricity meter and monitor their consumption.

Conclusion of the Court

In relation to the definition of indirect discrimination, the Court concluded that:

Article 2(2)(b) of Directive 2000/43 must be interpreted as meaning that:

– that provision precludes a national provision according to which, in order for there to be indirect discrimination on the grounds of racial or ethnic origin, the particular disadvantage must have been brought about for reasons of racial or ethnic origin;

– the concept of an 'apparently neutral' provision, criterion or practice as referred to in that provision means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic;

– the concept of 'particular disadvantage' within the meaning of that provision does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue;

– assuming that a measure, such as that described in paragraph 1 of this operative part, does not amount to direct discrimination within the meaning of Article 2(2)(a) of the directive, such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b).

Impact on the follow-up case

National follow-up judgment, 10.08.2017, Judgment no. 5196/2017.

The Administrative Court found that in taking its decision, the Commission for Protection against discrimination (komisia za zashtita ot diskriminaciata) had not given an opportunity to CHEZ RB to provide their own position on the subject matter. The Commission had begun their investigation as one of potential discrimination on the grounds of 'ethnicity'. Subsequently, a decision was taken to change the grounds for discrimination to 'personal situation'. The problem was that the decision for this ground for discrimination was taken without providing CHEZ RB with an opportunity to respond and thus violated the principles of transparency. For this reason, the case was dismissed on procedural grounds.

However, the Administrative Court took considerable note of the CJEU's preliminary ruling. In particular, the court acknowledged that while the applicant was not of Roma origin herself, she may have still been affected by direct discrimination due to the fact that the neighbourhood in which she had established her business had a high Roma population. The Court also acknowledged the CJEU's point that the mere application of the measure of restricting access to the electricity meter only in Roma neighbourhoods may constitute direct discrimination. Further, the court noted that when a presumption of discrimination arises, the burden of proof falls on the respondent (CHEZ RB) to prove that such discrimination did not occur. CHEZ RB therefore needed to prove that it had not violated the principle of equal treatment, and that the practice in question was based on objective criteria and was not implemented due to the fact that the neighbourhood had a high Roma population. Finally, the court considered that the measure imposed by CHEZ RB was neutral and objective, but that it constituted indirect discrimination. Therefore, an assessment of whether there was a 'a less intrusive way' of dealing with the issue was necessary.

Bearing all of this in mind, the Administrative Court referred the case back to the Commission to decide on the case again, having regard to:

1. The fact that the practice was applied only in Roma neighbourhoods. According to the Administrative Court, this could indeed and in the current case is likely to constitute direct discrimination;
2. The fact that the measure had a 'mandatory, long-lasting and all-encompassing' (in terms of affecting all people living in the neighbourhood) nature even when it comes to customers that paid their bills regularly;
3. The reasoning of the CJEU that the idea of discrimination on the basis of ethnicity is still applicable to persons who are not of the ethnicity in question but are affected by the act of discrimination against it, and consequently put in an unfavourable situation;
4. The burden of proof falls on CHEZ RB, which is required to show that the discrimination in question is founded 'only' upon objective criteria; and
5. The term 'personal situation' does not have an objective definition such as the term 'race' and because of that there is no one definition for it. As a result, regard must be had for each individual case and in order to prove that there has indeed been discrimination on this ground there should be an identifiable trait of the victim in question, specific to them, which differentiates them from everyone else.

Elements of judicial dialogue

There are various examples of horizontal judicial dialogue in relation to *CHEZ Razpredelenie Bulgaria*. First, the CJEU relied in this judgment on its previous case law in *Z.* (C-363/12, EU:C:2014:159), in which a woman incapable of carrying her own pregnancy had had a biological child through a surrogate, and had been refused maternity or adoptive leave as she had neither given birth to nor adopted a child. The court noted that indirect discrimination had been consistently found in cases in which a 'national measure, albeit formulated in neutral terms, works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it' (paragraph 53). This applies regardless of which protected characteristic is in play, and is a **general rule to be applied**

in relation to all grounds of discrimination protected by an applicable directive. Ultimately, in *Z.* no indirect discrimination was found, as the rule in question did not put female workers at a particular disadvantage to male workers.

Moving to cases adopted subsequently to *CHEZ Razpredelenie Bulgaria*, several cases confirm the findings in the former case. For example, in *IX v WABE eV* and *MH Müller Handels GmbH v MJ* (Joined Cases C-804/18 and C-341/19) the CJEU reiterated its finding in *CHEZ Razpredelenie Bulgaria* that 'the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it must be interpreted strictly'.[13]

Further, although the Court's judgment in *G4S Secure Solutions* (C-157/15) did not mention *CHEZ Razpredelenie Bulgaria*, the judgment does reinforce the findings of the former. *G4S Secure Solutions* concerned a private security company, G4S, which had an unwritten internal rule that workers could not wear visible signs of political, philosophical or religious beliefs in the workplace. The claimant, Ms. A, had persisted in wearing an Islamic headscarf while working, and was dismissed. She claimed discrimination on the grounds of religion or belief. The CJEU found that there was no direct discrimination in the case, and went to state that it was 'not inconceivable' that the rule amounted to indirect discrimination if 'the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage' (paragraph 34). Unlike in *CHEZ Razpredelenie Bulgaria*, the Court did not make a full assessment of this, leaving it to the referring court to apply the law to the facts (a point also emphasised in *CHEZ Razpredelenie Bulgaria*). However, the CJEU did discuss in some detail whether the measure could be justified as constituting a 'genuine and determining occupational requirement' (see Section 1.3.3.1 below).

The judgment in *G4S Secure Solutions* was relied on in the similar case of *Bougnaoui* (C-188/15) adopted on the same day.[14] The claimant, Ms B., was employed by the private company Micropole, which had a rule prohibiting the wearing of any visible sign of political, philosophical or religious beliefs at work. Ms B. had refused to remove her Islamic headscarf when on assignment with customers, who filed a complaint with Micropole. Ms B. was dismissed. Addressing the possibility of indirect discrimination arising from the rule, the Court noted that if the dismissal were based on non-compliance with the rule, and if the apparently neutral rule resulted in persons adhering to a particular religion or belief, such as Ms B., being put at a particular disadvantage, it would have to be concluded that there was a difference of treatment indirectly based on religion or belief, as referred to in Article 2(2)(b) of Directive 2000/78. These cases show that **the same definition is given to indirect discrimination regardless of which directive is being applied in a particular case**.

1.2.3 Guidelines emerging from the analysis

Several guidelines can be extracted from the analysis above with respect to the definition of direct and indirect discrimination.

Direct discrimination

CHEZ Razpredelenie Bulgaria, paragraph 96 (emphasis added).
of this Casebook.
[14] This case is discussed in detail in Section 1.3.3 below.

- Direct discrimination comprises two components: (1) a difference of treatment between individuals on the basis of a protected ground; which (2) relates to individuals in comparable situations.

  Difference in treatment

  In the view of the Court of Justice as expressed in *G4S Secure Solutions* (C-157/15):

- A difference in treatment must be based on a protected characteristic to constitute direct discrimination. A measure applied to all individuals in a general and undifferentiated manner, without regard to their possession of a particular characteristic, will not amount to a difference in treatment for the purposes of direct discrimination.

  Comparability of situations

  In the view of the Court of Justice as expressed in *MB* (C-451/16):

- That situations of persons treated differently must be 'comparable' in order for direct discrimination to occur applies whether or not the term 'comparable situations' is present in a directive prohibiting discrimination. The Court applies the same definition of direct discrimination to all directives.

- Situations need not be 'identical', but rather 'similar' in order to be considered 'comparable'.

- Rather than being assessed in a global and abstract manner, the comparability of situations should be assessed in a specific and concrete manner having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates.

Indirect discrimination under EU law

In the view of the Court of Justice as expressed in *CHEZ Razpredelenie Bulgaria* (C-83/14):

- A national provision according to which, in order for there to be indirect discrimination on a particular ground, the particular disadvantage must have been brought about for reasons related to that ground, are contrary to EU law.

- The concept of an 'apparently neutral' provision, criterion or practice means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic.

- A measure will be indirectly discriminatory when, despite its use of neutral criteria not based on the protected characteristic, 'it has the *effect* of placing particularly persons possessing that characteristic at a disadvantage'.

- The concept of 'particular disadvantage' within the meaning of Article 2(2)(b) does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue.

- Assuming that a measure does not amount to direct discrimination, such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons.
- The definition applied to indirect discrimination is the same under each of the relevant equal treatment directives.

1.3. Justifications precluding a finding of discrimination

Under European law, differences of treatment of individuals may not always amount to a situation of discrimination. Directives prohibiting discrimination provide certain grounds for justifying differences in treatment which, if applicable in a particular case, will preclude a finding of discrimination. Several of these grounds will be discussed in the following sections of the Casebook, with a focus on those grounds that have been the subject of the most substantive discussion by the CJEU.

1.3.1 The scope of justifications regarding discrimination under EU law

This section looks at the grounds that can be used to justify differences in treatment that would otherwise amount to direct discrimination. In particular, the discussion focuses on whether it is possible to justify such treatment on grounds beyond what is found in EU law. The role of the principle of proportionality, which is relied upon in multiple cases concerning justifications of otherwise discriminatory situations, is also highlighted in this section.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, Case C-236/09 ("**Association Belge des Consommateurs Test-Achats and Others**")

➢ Judgment of the Court (Grand Chamber) of 26 June 2018, *MB v Secretary of State for Work and Pensions*, Case C-451/16 ("**MB**") (reference case)

Main questions addressed

Question 1 May a difference in treatment of individuals in comparable situations be justified on the basis of grounds not listed in the applicable directive, preventing a finding of direct discrimination?

1.3.1.1 Question 1 - General scope of grounds of justification

> Are the grounds of justification allowing for a difference in treatment which would otherwise amount to direct discrimination, in violation of the principle of non-discrimination, limited to those explicitly listed in the relevant directives?

This question was discussed in *MB* (C-451/16).

Relevant legal sources

EU Level

Articles 3(1)(a), 4(1) and 7(1)(a) Directive 79/7/EEC (Social Security Directive)

Article 2(1)(a) Directive 2006/54/EC (Equal Treatment Directive)

Article 21 Charter of Fundamental Rights of the European Union

National Level (United Kingdom)[15]

Full Sections 44 and 122 of the Social Security Contributions and Benefits Act 1992 read in conjunction with section 122 of that Act and with Schedule 4, paragraph 1, of the Pensions Act 1995.

Sections 1, 2(1), 3, 4(2), 5(1) and 9(1), and Schedule 5, paragraph 7, of the Gender Recognition Act 2004 (the GRA) in its version applicable to the dispute in the main proceedings.

Section 11(c) of the Matrimonial Causes Act 1973, in its version applicable during the period at issue in the main proceedings.

The Marriage (Same Sex Couples) Act 2013, which came into force on 10 December 2014, allows persons of the same sex to marry. Schedule 5 of that Act amended section 4 of the GRA so as to provide that a GRP must issue a full gender recognition certificate to a married applicant if the applicant's spouse consents. However, The Marriage (Same Sex Couples) Act 2013 is not applicable to the dispute in the main proceedings.

The case

The facts of this case can be found in Section 1.2.1.2.1 of this Casebook

National court's decision to refer the case to the CJEU

An explanation of this case can be found in Section 1.2.1.2.1 of this Casebook.

Preliminary questions referred to the Court

The second question referred by the national court dealt with this issue:

1. Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?

Reasoning of the Court

When considering the possible justification of the difference in treatment that would otherwise amount to direct discrimination, the Court noted the UK Government's arguments in this respect. In particular, the Government had argued that the aim of 'maintaining the traditional concept of marriage as being a union between a man and a woman' could justify making a recognition of a person's change of gender conditional upon the annulment of the person's marriage (in other words, imposing only on persons who have changed gender a requirement that they annul any marriage entered into when national law did not, at the time of the facts giving rise to the main proceedings, allow marriage between persons of the same sex). The Court did not accept this argument, finding that the prohibition of discrimination in Article 4(1) of Directive 79/7 'is possible only in the situations exhaustively set out in the provisions of that directive'. In other words, **grounds of justification for differences of treatment which would otherwise amount to direct**

[15] Full versions of these texts can be found in Chapter 1.3.1 of this Casebook.

discrimination cannot be extended beyond those explicitly listed in Article 4(1) of Directive 79/7. Moving to discuss the possibility that the treatment could be justified under Article 7(1)(a) of Directive 79/7,[16] with regard to the age entitlement of pension, it would be contrary to the Directive to allow Member States to treat differently those who changed gender after marrying and those who are married but have kept their birth gender.

Conclusion of the Court

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in particular the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a) thereof, must be interpreted as precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.

The national legislation at issue in the main proceedings constituted direct discrimination on grounds of sex and was, therefore, prohibited by Directive 79/7.

Impact on the follow-up case

The discriminatory provisions of the 2004 Act were amended with the legalisation of same-sex marriage in the UK in 2014, but this was not a direct outcome of the CJEU case. The case itself was referred back to the Supreme Court to apply the CJEU ruling, but no record of this is available.

Elements of judicial dialogue

The Court in MB based its reasoning in relation to the justification of discrimination on its previous case law. For example, in finding that the grounds for justifying differences in treatment cannot be extended beyond those listed in Article 4(1) of Directive 79/7, the Court referred to its previous judgments in *Vergani* (C-207/04, EU:C:2005:495, paragraphs 34 and 35) and *X* (C-318/13, EU:C:2014:2133, paragraphs 34 and 35). With regard to Article 7(1)(a), the Court relied on its judgment in *Richards*, C-423/04, EU:C:2006:256, paragraphs 37 and 38. The approach of the Court in these cases mirrors its approach to the grounds of discrimination themselves, as discussed in Section 1.1 of this Casebook – **the grounds of discrimination, like grounds of justification of differences in treatment, cannot be extended by analogy beyond those explicitly listed in the applicable directives** (see *FOA*, C-354/13, ECLI:EU:C:2014:2463; *Z.*, C-363/12, EU:C:2014:159; and *Milkova*, C-406/15, ECLI:EU:C:2017:198).

1.3.2 Justification specifically regarding indirect discrimination

This section discusses the possibility of justifying a measure, criterion or practice which would otherwise amount to indirect discrimination. The focus of the section is on the possible justification under Article 2(2)(b) of Directive 2000/43 according to which indirect

[16] This provision allows Member States to exclude from the scope of the Directive 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

discrimination will not occur when the treatment in question can be 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. Other possible grounds of justifying what would otherwise amount to indirect discrimination are discussed in Section 1.3.3 below.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 16 July 2015, *"CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, Case C-83/14 ("**CHEZ Razpredelenie Bulgaria**")

Main question addressed

Question 1 Under which circumstances can a difference in treatment which would otherwise amount to indirect discrimination be justified according to Article 2(2)(b) of Directive 2000/43?

1.3.2.1 Question 1 - The application of the principle of proportionality in cases concerning 'objective justification'

What is the meaning of 'objectively justified' under Article 2(2)(b) of Directive 2000/43, and how does the principle of proportionality apply in this context?

This question was dealt with in *CHEZ Razpredelenie Bulgaria* (C-83/14).

Relevant legal sources

EU level

Article 21 Charter of Fundamental Rights of the European Union

Recitals 2, 3, 9, 12, 13, 15, 16 and 28, and Articles 1, 2, (3(1)(h), 6(1) and 8(1) of Directive 2000/43

Recital 29 and Article 13(1) of Directive 2006/32/EC

Articles 3(3) and (7) of Directive 2009/72

Paragraph 1(h) and (i) of Annex I to Directive 2009/72

National legal sources (Bulgaria)

Full versions of these provisions can be found in Section 1.2.2 of this Casebook.

Article 4 of the Law on protection against discrimination (Zakon za zashtita ot diskriminatsia; 'the ZZD'

Points 7 to 9 of Paragraph 1 of the Supplementary Provisions of the ZZD

Article 40(1) and (2) of the ZZD

Article 104a(4) of the ZE

Article 120(1) and (3) of the ZE

Article 27 of CHEZ RB's general conditions, as approved by the Darzhavna Komisia za energiyno i vodno regulirane

The case

The facts of this case can be found in Section 1.2.2 of this Casebook.

Preliminary questions referred to the Court

The national court referred 10 questions to the CJEU, one of which dealt with the possible justification of the treatment in the case:

1. Is Article 2(2)(b) of Directive 2000/43 to be interpreted as meaning that the practice of [CHEZ RB] in question is objectively justified from the point of view of ensuring the security of the electricity transmission network and the due recording of electricity consumption? Is this practice also appropriate in the light of the defendant's obligation to ensure that consumers have free access to the electricity meter readings? Is that practice necessary when, according to media publications, there are other technically and financially feasible means of securing the commercial measuring instruments?'

National court's decision to refer the case to the CJEU

CHEZ Razpredelenie Bulgaria AD v Komisa za zashtita ot diskiminatsia

Reasoning of the Court

The question referred to the Court essentially dealt with the meaning of objective justification under Article 2(2)(b) of Directive 2000/43. In answering the question, the Court first reiterated that pursuant to Article 2(2)(b), 'a provision, criterion or practice which is apparently neutral but would put persons of a given racial or ethnic origin at a particular disadvantage amounts to indirect discrimination, and is therefore prohibited, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' **This is to be interpreted strictly.**

According to CHEZ RB, the reason for difference in treatment concerned was in order to avoid further damage to and tampering with electricity meters, and unlawful connections to the meters in the district concerned, which it stated has already occurred. This was with the view to preventing fraud and abuse, to protecting individuals' life and health, and to ensuring the quality and security of electricity distribution for all users.

Agreeing with the Opinion of the Advocate General and citing its own previous case law (*Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraphs 46 and 55, on combating fraud and criminality), the Court accepted that the aims stated were legitimate aims recognised by EU law. However, **the measures must be 'objectively' justified by these aims.**

Again referring to the Advocate General's Opinion, the Court found that the company first had to establish objectively that the damage and unlawful connections had occurred to the stated, and that since 25 years had elapsed since this conduct, the reason for which there is a current risk that the conduct would continue – it was not enough to simply state that this was 'common knowledge', as CHEZ RB seemed to have done before the referring court. If this could be established, pursuant to Article 2(2)(b), **it had to be established that the practice was an appropriate and necessary means for achieving the aim**. In this regard, the Court found that the practice was indeed capable of enabling the targeted unlawful conduct to be effectively combatted, making it a seemingly appropriate measure. In terms of necessity, it was stated to be for the referring court to determine the necessity of the measure by deciding whether less restrictive measures could achieve the aim, but

noted the KZD's argument that other electricity distribution companies had ended the practice in question, using other techniques to avoid damage and tampering with the meters.

Next, if the measure was deemed to be necessary, the referring court would have to determine whether it was **proportionate** to the aims pursued and whether the practice unduly prejudiced the legitimate interests of the inhabitants of the district concerned. Here, the court would have to consider 'legitimate interest of the final consumers of electricity in having access to the supply of electricity in conditions which do not have an offensive or stigmatising effect' (paragraph 124), as well as the 'binding, widespread and long-standing nature' of the measure, which was itself imposed without distinction on all inhabitants despite no unlawful conduct having been attributed to the majority of them (and the fact that they cannot be held accountable for the unlawful acts of third parties). Finally, the court would have to take into account the final consumers' legitimate interest in being able to check and monitor their electricity consumption effectively and regularly.

As stated, the Court repeatedly reiterated that **it is for the national referring court to make these determinations**. However, the CJEU strongly suggested that the measure could not be objectively justified, stating that 'it seems that it necessarily follows […] that the practice at issue cannot be justified within the meaning of Article 2(2)(b) of Directive 2000/43 since the **disadvantages caused by the practice appear disproportionate to the objectives pursued**' (paragraph 127). How the principle of proportionality is applied in relation to specific grounds of justification (which also apply to direct discrimination) is discussed in Section 1.3.3 of this Casebook.

Conclusion of the Court

With regard to the justification of what would otherwise constitute indirect discrimination the Court concluded that a measure liable to constituting an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b) (i.e. seemingly amounting to indirect discrimination) could be:

> 'objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that measure prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.'

Impact on the follow-up case

National follow-up judgment, 10.08.2017, Judgment no. 5196/2017.

This judgment is summarised in Section 1.2.2.1 of this Casebook.

Elements of judicial dialogue

The Court in *CHEZ Razpredelenie Bulgaria* built on its previous, pre-Charter case law on justifications precluding a finding of indirect discrimination. In particular, in finding that the aims pursued by the measure in the case (namely to combat further damage to and tampering with electricity meters, in order to prevent fraud and abuse, to protect individuals' life and health, and to ensure the quality and security of electricity distribution for all users) were indeed legitimate, the Court referred to the case of *Lacanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraphs 46 and 55). However, more substantial judicial dialogue can be seen in relation to the proportionality of the measure in the case. In this respect, finding that the national referring court would 'have to determine whether the disadvantages caused by the practice at issue are disproportionate to the aims pursued and whether that practice unduly prejudices the legitimate interests of the persons inhabiting the district concerned' (paragraph 123) the Court referred back to its judgment in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraphs 32 and 47, and *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 76 et seq. The meaning of proportionality provided here, which is in *CHEZ Razpredelenie Bulgaria* not actually labelled as the principle of proportionality, is later relied on in the case of *F* (C-473/16, ECLI:EU:C:2018:36), with explicit reference to the principle of proportionality. In this latter case, the Court uses slightly clearer language to hold that 'the **principle of proportionality** requires, according to the settled case-law of the Court, that the measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued' (paragraph 56).

1.3.3 Justification on specific grounds

As well as the general grounds of justification discussed in Section 1.3.1 and 1.3.2 above, EU law allows for differences in treatment that would otherwise amount to discrimination to be justified on specific grounds. This includes (although is not limited to) justification on the grounds of 'genuine and determining occupational requirements', and justification on the grounds of age. Both have been the subject of significant discussion by the Court of Justice and are discussed below.

1.3.3.1 Justification on the grounds of 'genuine and determining occupational requirements'

Under Article 4(1) of Directive 2000/78, a difference in treatment may be justified if, 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a '*genuine and determining occupational requirement*'[17] as long as the objective is legitimate and the requirement is proportionate. The definition of such a requirement has been addressed by the CJEU in several cases dealing with different grounds of discrimination prohibited by Article 2 of Directive 2000/78. The following sections consider the Court's rulings in the relevant cases in order to provide an overview of the meaning of 'genuine and determining' occupational requirements.

[17] Emphasis added.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 12 January 2010, *Colin Wolf v Stadt Frankfurt am Main*, Case C-229/08 ("**Wolf**")

➢ Judgment of the Court (Second Chamber) of 13 November 2014, *Mario Vital Pérez v Ayuntamiento de Oviedo*, Case C-416/13 ("**Vital Pérez**") (reference case, Question 1a)

➢ Judgment of the Court (Grand Chamber) of 15 November 2016, *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, Case C-258/15 ("**Salaberria Sorondo**") (reference case, Question 1a)

➢ Judgment of the Court (Grand Chamber) of 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Case C-188/15 ("**Bougnaoui**") (reference case, Question 1b)

➢ Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV Bundesarbeitsgericht (BAG)*, Case C-414/16 ("**Egenberger**")

➢ Judgment of the Court (Grand Chamber) of 11 September 2018, Case C-68/17, *Ir v JQ* ("**IR**")

➢ Judgment of the Court (Grand Chamber) of 15 July 2021, *IX v WABE e. V. and MH Müller Handels GmbH v MJ*, Joined Cases C-804/18 and C-341/19 ("**WABE**")

➢ Judgment of the Court (Second Chamber) of 15 July 2021, *XX v Tartu Vangla*, Case C-795/19 ("**Tartu Vangla**")

Main question addressed

Question 1 Can the following constitute 'genuine and determining occupational requirements' in order to justify, a difference in treatment that would otherwise amount to discrimination?

a. A measure imposing an upper age limit in recruitment; and

b. The wish of a customer of a company no longer to have the services of that company provided by an employee wearing a religious accessory.

Relevant legal sources

EU level

Recitals 18, 23 and 25 and Articles 1, 2, 3, 4(1) and 6 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

1.3.3.1.1 Question 1a - Upper age limits in recruitment

In line with the principle of equal treatment and Articles 20 and 21 of the CFREU, can an upper age limit for candidates in recruitment leading to a difference in treatment on the grounds of age be justified on the basis that it constitutes a 'genuine and determining occupational requirement' for the purposes of Directive 2000/78?

This question was dealt with in *Vital Pérez* (C-416/13) and *Salaberria Sorondo* (C-258/15).

National legal sources (Spain)

In Spain, each of Spain's 17 Autonomous Communities has passed laws or regulations containing provisions relating to the rules governing the local police, which are varied so far as concerns the maximum age for access to the profession, with some fixing that age at 30 whilst others do not provide for any limit.

Article 18(6) of the Law of the Principality of Asturias on the coordination of local police forces (Ley de Coordinación de las Policías Locales de la Comunidad Autonóma del Principado de Asturias) (BOE No 169 of 16 July 2007), defines the duties of local police officers as follows:

'[p]roviding assistance to citizens, protecting persons and property, the arrest and custody of offenders, conducting crime prevention patrols, traffic control and such other duties as may be assigned to them by superior officers.'

Article 32(b) of Law of the Principality of Asturias on the coordination of local police forces lays down inter alia the following as a general condition of entry into the local police force:

'…

(b) be at least 18 years of age and no more than 30 years of age.'

The cases

Both cases dealing with this question concern an upper age limit as a condition for the recruitment of new police officers in different Autonomous Communities in Spain. The lead case of *Vital Pérez* (C-416/13) forms the basis of the following paragraphs, with reference to *Salaberria Sorondo* (C-258/15) where relevant.

On 8 April 2013, Mr V.P. brought an action before the referring court against the Ayuntamiento's decision of 7 March 2013 approving the specific requirements laid down in the notice of competition intended to fill 15 local police officer posts. Point 3.2 of the notice of competition required applicants to be no more than 30 years of age, which Mr V.P. sought to have annulled on the basis that it violated the fundamental right of access on equal terms to public office affirmed in the Spanish Constitution and in Directive 2000/78. Specifically, he argued that the age limit had no basis and was not justified by the need for officers to have a certain level of physical fitness, which was ensured by means of the physical tests the notice of competition required applicants to take.

Mr V.P. observed that the various decrees or laws enacted by the Autonomous Communities either did not fix a maximum age or fixed it at 35 or 36 years of age. The Ayuntamiento argued that in setting that age condition it had merely applied Law 2/2007 and relied on Article 6 of Directive 2000/78 and previous CJEU case law (*Wolf*, C-229/08, EU:C:2010:3) to justify the measure. The referring court took the view that the age requirement at issue in the main proceedings may not satisfy the proportionality test, noting that less restrictive methods than the imposition of an age-limit exist to attain the objective of ensuring that local police officers possess the particular level of physical fitness required for the performance of their professional duties. The court also disagreed with the Ayuntamiento's reliance on the *Wolf* case, which it argued could be distinguished on its facts from the present case.

Bearing that in mind, the Juzgado de lo Contencioso-Administrativo No 4 de Oviedo (Court for Contentious Administrative Proceedings, No. 4, Oviedo (Spain)) decided to stay the proceedings and to refer a question to the Court for a preliminary ruling.

A similar notice of competition was at stake in the *Salaberria Sorondo* case, where Mr S.S.G. claimed that a recruitment condition imposed by the Director-General of the Basque Police and Emergency Services Academy in Spain that candidates be under 35 years of age was contrary to Directive 2000/78 and to Articles 20 and 21 CFREU.

Preliminary question referred to the Court

1. Do Articles 2(2), 4(1) and 6(1)(c) of [Directive 2000/78] and Article 21(1) of the [Charter], inasmuch as they prohibit all discrimination on grounds of age, preclude the fixing, in a notice of competition issued by a municipality expressly applying a regional law of a Member State, of a maximum age of 30 for access to the post of local police officer?

An extremely similar question was referred to the CJEU in the *Salaberria Sorondo* case, but in relation to an upper age limit of 35 for recruitment to the police force of the Autonomous Community of the Basque Country, and with no reference to Article 21 CFREU.

Reasoning of the Court

Before answering the question referred to it, the CJEU observed that the **principle of non-discrimination** is a general principle of EU law which was given specific expression in Directive 2000/78 in the field of employment and occupation. Therefore, in a preliminary ruling concerning an individual and a public administrative body, the interpretation of the general principle of non-discrimination on grounds of age as enshrined in Article 21 of the Charter, and the provisions of Directive 2000/78, the Court should only examine the question in light of the Directive (see *Tyrolean Airways Tiroler Luftfahrt*, C-132/11, EU:C:2012:329, paragraphs 21 to 23). Accordingly, the Court did not refer to Article 21 CFREU in its reasoning in either *Vital Pérez* or *Salaberria Sorondo*. The Court also noted that Directive 2000/78 seeks to lay down a general framework to guarantee equal treatment in employment and occupation to all persons is by offering them effective protection against discrimination on one of the grounds covered. The underlying aim of the Directive therefore seems to be **effective protection** from discrimination.

In determining whether national rules fixing the maximum age of recruitment for a police officer at 30 was contrary to the Directive, the Court looked at whether it was a discriminatory measure that could not be justified under the Directive. First, the Court found that the situation in the case fell within the scope of the Directive, which applies to both public and private bodies in relation to issues of access to employment such as recruitment conditions, which formed the focus of Mr V.P.'s claim.

Next, the Court found it 'obvious' that the recruitment condition in question introduced a difference of treatment based directly on age as referred to in Articles 1 and 2(2)(a) of Directive 2000/78. The same finding and reasoning were followed in *Salaberria Sorondo*.

Turning to Articles 4(1) of the Directive, the CJEU assessed whether the difference in treatment could be justified on the basis of there being a 'genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. The Court reiterated its previous case law holding that **it is not the ground**

on which the difference of treatment is based but a *characteristic related to that ground* which must constitute a genuine and determining occupational requirement, and that possession of particular physical capacities is one characteristic relating to age (*Wolf*, C-229/08, EU:C:2010:3, paragraph 35, and *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66). Given the nature of police work, it was found that the possession of particular physical capacities may be regarded as a 'genuine and determining occupational requirement'. Furthermore, the concern of ensuring operational capacity and proper functioning of the police force was held to be a legitimate objective within the meaning of Article 4(1) of the Directive.

However, the requirement of **proportionality** was more problematic – differences of treatment on the grounds of age can only be justified in 'very limited' circumstances (recital 23 of Directive 2000/78) and Article 4(1) must be interpreted strictly. In finding that the age limit of 30 in the case was precluded by Article 4(1), the Court noted the differences in age limits across different autonomous communities in Spain, the abolishment of a similar age limit for recruitment to the national police force, and the fact that the physical tests also required during the recruitment process could achieve the aim of objective of ensuring that local police officers possess the particular level of physical fitness required for the performance of their professional duties. Significantly, the CJEU distinguished the present case from that of *Wolf*, in which it found that the 'exceptionally high' physical capacities required of firefighters (not required of local police officers to the same degree) justified an upper age limit in recruitment. The Court was also unable to find evidence that a particular age structure was necessary for achieving the objective of safeguarding the operational capacity and proper functioning of the local police service.

The Court then moved on to assess the possible justification of the measure under Article 6(1) of Directive 2000/78. This will be discussed in Section 1.3.3.2.1 of this Casebook.

In the later case of *Salaberria Sorondo*, the CJEU largely followed the reasoning of the *Vital Pérez* case, but distinguished the facts of the case. The Court concluded in *Salaberria Sorondo* that since the duties performed by the police forces of Autonomous Communities differ from those carried out by the local police and the difference in the retirement age of those police officers and the average age of police officers at the time, unlike in *Vital Pérez*, the objective of safeguarding the operational capacity and proper functioning of the local police service made it necessary to maintain within it a particular age structure. The Court concluded that the measure was both appropriate to ensure the operational capacity and proper function of the police service concerned, and did not go beyond what was necessary for the attainment of that objective.

Conclusion of the Court

In *Vital Pérez*, the Court concluded that:

'Articles 2(2), 4(1) and 6(1)(c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which sets the maximum age for recruitment of local police officers at 30 years.'

In *Salaberria Sorondo*, although the maximum age limit did constitute a difference in treatment on the grounds of age, the treatment was held in the case of recruitment for

police officers who are to perform all the operational duties incumbent on police officers to be objectively and reasonably justified by a legitimate aim, under Article 4(1) of the Directive. Therefore, the treatment did not constitute discrimination and the legislation in question did not violate the Directive, which the Court noted puts into effect the principle of equal treatment.

Elements of judicial dialogue

This cluster of cases involves interesting horizontal judicial dialogue, particularly regarding the CJEU's previous case law. Significantly, in each case the Court distinguished an influential case from that at hand. As explained above, the CJEU distinguished *Vital Pérez* from the *Wolf* case, which had held that an upper age limit in the recruitment of firefighters was justified under Article 4(1) of Directive 2000/78. This arguably changed the direction of the case law regarding upper age limits in recruitment, and imposed a stricter proportionality test than was found in the *Wolf* case.[18] In *Salaberria Sorondo*, a seemingly comparable case to that of *Vital Pérez*, the Court again found that the difference in treatment, as in *Wolf*, was justified, but relied on the facts of the case to distinguish it from *Vital Pérez*, rather than applying a different legal reasoning. Overall, this short string of case law builds a relatively comprehensive overview of what to take into consideration when assessing whether or not differences in treatment falling under the scope of Directive 2000/78 can be justified under Articles 4(1) of that Directive. The general guidance emerging from these cases will be revisited in Section 1.3.5 below.

Additionally, in both cases, the referring courts made reference to relevant CJEU cases. Although the CJEU did not go into detail on the referring courts' considerations in this respect, it addressed the referring courts' points directly in its preliminary rulings and came to the same conclusion as the national courts in distinguishing certain cases (see above).

The Court has discussed the matter of Article 4(1) of Directive 2000/78 in several other cases, most notably in *Egenberger* (C-414/16) and *IR* (C-68/17). Due to its significance to the matter of effective protection for what concerns non-discrimination, the Court's dialogue on Article 4(1) in these two cases, which both dealt with discrimination on the grounds of religion or belief, is discussed in detail in Chapter 2 of this Casebook.

The CJEU has referred back to its judgments in *Salaberria Sorondo* and *Vital Pérez* in subsequent cases. In the case of *Tartu Vangla* the Court referred to its finding in Vital Pérez that 'the concern to ensure the operational capacity and proper functioning of the police, prison or rescue services' is a legitimate objective that can justify a difference of treatment, but that the difference in treatment must be proportionate to the objective pursued. However, neither Directive 2000/78 nor the Court's own previous case law allowed clear conclusions to be drawn as to this matter. Later in its judgment, the Court then referred to *Salaberria Sorondo*, reiterating that 'it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement'.

[18] Millán Requena Casanova, Principio de no Discriminación y Límites de Edad en el Acceso al Empleo Público: Del Asunto Wolf a la Sentencia Tjue Vital Pérez C. Ayuntamieto de Oviedo, *Revista General de Derecho Europeo* (38) 2016.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

The Netherlands

A similar issue arose in a case before the Dutch Supreme Court in 2021 (ECLI:NL:HR:2018:2396). The claimants had worked for KLM as a commercial pilot. The applicable law stipulated that pilots who reached the age of 56 must retire from service. The claimants argued that they were discriminated against because of their age. These pilots started proceedings against KLM, in which they demanded *inter alia* a declaratory judgment stating that the relevant collective labour agreement provision was null and void. After this claim was rejected by lower courts, the Supreme Court rejected their grounds of appeal and confirmed the decision of the lower court whereby it was decided that the age discrimination could be objectively justified. The Courts used Directive 2000/78 and cases of the CJEU to decide that there was no violation of the prohibition of discrimination and applied the CJEU's judgments concerning the justification of discrimination on the grounds of age.

1.3.3.1.2 Question 1b - Customers' wishes concerning outward signs of religion or belief

Can a customer's request not to be served by an employee wearing outward signs of religious or beliefs constitute a 'genuine and determining occupational requirement' under Directive 2000/78, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, and therefore not amount to an infringement of the principle of non-discrimination, given expression to in Article 21 CFREU?

This issue was discussed in *Bougnaoui* (C-188/15).

National legal sources (France)

The provisions of Directive 2000/78 were transposed into French law, notably Articles L. 1132-1 and L. 1133-1 of the code du travail (Labour Code), by Law No 2008-496 of 27 May 2008 laying down various provisions to bring anti-discrimination legislation into line with Community law (Journal officiel de la République française (JORF), 28 May 2008, p. 8801).

Article L. 1121-1 of the Labour Code:

'No one may limit personal rights or individual or collective liberties by any restriction which is not justified by the nature of the task to be performed and proportionate to the aim sought.'

Article L. 1132-1 of the Labour Code, in the version in force at the material time:

'No person may be excluded from a recruitment procedure or from access to work experience or a period of training at an undertaking, no employee may be disciplined, dismissed or be subject to discriminatory treatment, whether direct or indirect, as defined in Article 1 of Law No 2008-496 of 27 May 2008 laying down various provisions to bring anti-discrimination legislation into line with Community law, in particular as regards remuneration, within the meaning of Article L. 3221-3, incentive or employee share

schemes, training, reclassification, allocation, certification, classification, career promotion, transfer, or contract renewal by reason of his origin, his sex, his conduct, his sexual orientation, his age, … his political opinions, his trade union or works council activities, his religious beliefs, his physical appearance, his surname or by reason of his state of health or disability.'

Article L. 1133-1 of the Labour Code:

'Article L. 1132-1 shall not preclude differences of treatment arising from a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

Article L. 1321-3 of the Labour Code, in the version in force at the material time:

'Workplace regulations shall not contain:

> 1° Provisions contrary to primary or secondary law or to the requirements laid down by the collective agreements and understandings as to working practices applicable in the undertaking or establishment;
>
> 2° Provisions imposing restrictions on personal rights and on individual and collective freedoms which are not justified by the nature of the task to be undertaken or proportionate to the aim that is sought to be achieved;
>
> 3° Provisions discriminating against employees in their employment or at their work, having the same professional ability, by reason of their origin, their sex, their conduct, their sexual orientation, their age … their political opinions, their trade union or works council activities, their religious beliefs, their physical appearance, their surname or by reason of their state of health or disability.'

The case

Micropole is a private undertaking in France which provides digital services for customers in both the public and private sector. Ms B., a Muslim, was employed by Micropole as a design engineer under an employment contract of indefinite duration. Notably, prior to being recruited by Micropole, the Operation Manager and the Recruitment Manager had clearly stated that the Islamic headscarf could pose a problem when in contact with customers of the company. After a complaint from one of its customers, Ms B. was dismissed by letter on 22 June 2009 for refusing to remove her headscarf when she was sent on an assignment to customers of Micropole. Ms B. argued that this was discriminatory and brought an action to the Labour Courts in France.

Following the decision to dismiss the case, Ms B. (with the support of the Association de défense des droits de l'homme (ADDH)), lodged a further appeal to the Higher Labour Courts. The appeal was denied, and the decision of 18 April 2013 was upheld: the discrimination was not connected to the religious beliefs of the employee because she was permitted to express them within the undertaking, and was proportionate to Micropole's aim of protecting its image and of avoiding conflict with its customers' beliefs. Ms B. disagreed with this, and appealed to the Court of Cassation, which referred a question to the Court of Justice for a preliminary ruling on the interpretation of Article 4(1) of Directive 2000/78. Said article concerns occupational requirements under which a Member State may justify a difference in treatment. Under Article 4(1), the objective of the difference in

treatment needs to be legitimate, the requirement must be proportionate, and must be by reason of the nature of the occupational activity or of the context in which it is carried out.

Preliminary question referred to the Court

1. Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?

Reasoning of the Court

The Court held that if Ms B.'s dismissal was based on non-compliance with a rule in force within that undertaking, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs, and if it were to transpire that the apparently neutral rule resulted in people adhering to a particular religion or belief being put at a disadvantage, then this would constitute indirect discrimination. This difference in treatment can be objectively justified by a legitimate aim, such as the implementation of a policy of neutrality vis-à-vis its customers, if the means of achieving this aim are appropriate and necessary.

Moreover, if Ms B.'s dismissal was not based on such an internal rule, it must be considered whether the willingness of an employer to take account of a customer's wish no longer to have services provided by a worker who has been assigned to that customer by the employer and who wears an Islamic headscarf constituted a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78. Member States may provide that such a difference in treatment does not constitute discrimination 'where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is **proportionate'**.

The Court also emphasised its previous findings that it is clear from Article 4(1) of Directive 2000/78 that **it is not the ground on which the difference of treatment is based but a *characteristic related to that ground* which must constitute a genuine and determining occupational requirement** (citing , *Wolf*, C-229/08, EU:C:2010:3, paragraph 35; *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66; *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 36; and *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 3).

Conclusion of the Court

The Court found that it is for the Member States to stipulate, should they choose to do so, that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 of the Directive does not constitute discrimination. However, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.

It follows from the above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context

in which they are carried out. It cannot cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

Impact on the follow-up case

The Court of Cassation (Court of cassation, social chamber, 22 November 2017, No. 13-19.855).

In its judgment the Court stated that restrictions on religious freedom must be justified by the nature of the task to be performed, and meet an essential and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate within the meaning of articles L. 1121-1, L. 1321-3 and L. 1132-1 of the Labour Code, Articles 9 and 14 of the European Convention on Human Rights and Article 18 of the International Pact on Civil and Political Rights. The Court added that the wearing of the Islamic headscarf by the employee of a private company, in contact with customers, does not infringe the rights or beliefs of others with regard to the said provisions. The discomfort or sensitivity of the customers of a commercial company allegedly felt solely at the sight of a sign of religious affiliation does not constitute an operative or legitimate criterion justifying the precedence of economic or commercial interests over the fundamental freedom of the employee.

The Court concluded that the prohibition on wearing the Islamic headscarf in a private commercial enterprise, even if limited to customer contact, taken on this ground alone, constituted an **unjustified and disproportionate infringement** of religious freedom. In its judgment the Court specified that the employer, invested with the task of ensuring that all the fundamental rights and freedoms of each employee are respected within the working community, may provide in internal regulations or in a memorandum subject to the same provisions as the internal regulations, for a neutrality clause prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, provided that this general and undifferentiated clause is applied only to employees who are in contact with customers. When an employee refuses to comply with such a clause in the exercise of her professional activities with the company's clients, it is up to the employer to investigate whether, while taking into account the constraints inherent in the company and without the latter having to bear an additional burden, it is possible for the employer to offer the employee a position that does not involve visual contact with these clients rather than dismissing her.

The Court of Cassation finally ruled on the dismissal of the employee. It noted that no neutrality clause was provided for in the company's internal regulations or in a memorandum and that the prohibition on the employee from wearing the Islamic headscarf in her contact with clients resulted only from an oral order given to the employee concerned and aimed at a specific religious sign, which resulted in the existence of discrimination directly based on religious belief.

Elements of judicial dialogue

As the judgment in the *Bougnaoui* decision was delivered on the same date as the *G4S Secure Solutions* (C-157/15) case, the Court refers to the latter decision when finding that (a) there was a difference of treatment in the case (paragraph 32); and (b) a company's policy of neutrality vis-à-vis its customers can constitute a legitimate aim for the purposes of assessing whether indirect discrimination is present pursuant to Article 2(2)(b)(i) of

Directive 2000/78, as long as the means of achieving it are appropriate and necessary (paragraphs 35-43).

In the joined cases of *IX v WABE eV and MH Müller Handels GmbH v MJ* (C-804/18 and C-341/19), similar issues arose concerning the wearing of Islamic headscarves and a necklace with a cross on it. A key question referred by the national court in *WABE* concerned whether indirect unequal treatment under Article 2(2)(b) of Directive 2000/78 can be justified if the prohibition relates to *any* visible signs of religious, political or other philosophical beliefs rather than merely large visible signs. This question was raised particularly in light of the *Bougnaoui* judgment, as it left unanswered whether the corporate neutrality policy could only be achieved legitimately if *all* forms of religious expression were prohibited.

The Court of Justice relied on both *Bougnaoui* and *G4S Solutions*, stating that a difference in treatment indirectly based on religion is prohibited 'unless the provision, criterion or practice from which it derives is objectively justified by a legitimate aim and the means of achieving that aim ae appropriate and necessary'. The Court went on to note that while an employer's desire to pursue a policy of neutrality is a legitimate aim in itself, this is not sufficient on its own to avoid indirect discrimination. Rather, a justification can only be *objectively* justified 'where there is a genuine need on the art of that employer', the burden of proof for which lies with the employer. In determining whether this is the case, the *legitimate* wishes of customers or users can be considered. However, this has to be distinguished from a customers' complaint in the absence of an internal rule prohibiting visible sign of political, philosophical or religious beliefs (as in *Bougnaoui*), and from direct discrimination that arises from customers' discriminatory requirements (as in *Feryn*, C-54/07). Particular consideration should also be paid to whether the employer has evidence that without such a policy its freedom to conduct a business under Article 16 CFREU would be undermined because it would suffer adverse consequences. The CJEU moved on to refer to *G4S Solutions* and its finding herein that such an internal rule must be properly applied, in a consistent and systematic manner, and must be limited to what is strictly necessary. Answering the question posed by the referring court, the CJEU concluded that such an internal policy may be justified, as long as it meets the requirements outlined above.

1.3.3.2 Justification on the grounds of age

The CJEU has heard many cases relating to the justification of different treatment on the grounds of age, under Article 6 of Directive 2000/78. Article 6(1) allows for such differences in treatment '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'. The Court's case law on the meaning and application of this will be discussed in the following sections. Article 6(2) also allows for some differences in treatment on the grounds of age through the 'fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits […] and the use, in the context of such schemes, of age criteria in actuarial calculations' under certain conditions. The Court's case law on this provision will also be examined in this sub-section of the Casebook.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Second Chamber) of 8 September 2011, *Sabine Hennigs v Eisenbahn-Bundesamt, and Land Berlin v Alexander Mai*, Joined cases C-297/10 and C-298/10 ("**Hennigs and Mai**")

➢ Judgment of the Court (Second Chamber) of 26 September 2013, *HK Danmark acting on behalf of Glennie Kristensen v Experian A/S*, Case C-476/11 ("**HK Danmark**") (reference case, Question 2)

➢ Judgment of the Court (Grand Chamber) of 11 November 2014, *Leopold Schmitzer v Bundesministerin für Inneres*, Case C-530/13 ("**Schmitzer**")

➢ Judgment of the Court (Second Chamber) of 13 November 2014, *Mario Vital Pérez v Ayuntamiento de Oviedo*, Case C-416/13 ("**Vital Pérez**")

➢ Judgment of the Court (Second Chamber) of 21 January 2015, *Georg Felber v Bundesministerin für Unterricht, Kunst und Kultur*, Case C-529/13 ("**Felber**") (reference case, Question 1)

➢ Judgment of the Court (Second Chamber) of 28 January 2015, *ÖBB Personenverkehr AG v Gotthard Starjakob,* Case C-417/13 ("**Starjakob**")

➢ Judgment of the Court (Second Chamber) of 8 May 2019, *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich*, Case C-24/17 ("**Österreichischer Gewerkschaftsbund**")

➢ Judgment of the Court (Third Chamber) of 15 April 2021, AB v Olympiako Athlitiko Kentro Athinon, Case C-511/19 ("**Olympiako Athlitiko Kentro Athinon**")

Main questions addressed

Question 1 When can a difference in treatment on the grounds of age be justified objectively and reasonably justified by a legitimate aim?

Question 2 When can a difference in treatment on the grounds of age be justified under EU law in the context of occupational social security schemes?

Relevant legal sources

Articles 2(1) and (2)(a) and Article 6(1) and (2) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Articles 21 and 52(1) Charter of Fundamental Rights of the European Union

1.3.3.2.1 Question 1 – Justification of age discrimination under Article 6(1) of Directive 2000/78

When can unequal treatment on grounds of age for the purposes of Article 21(1) of the Charter and of Directive 2000/78, be justified? What kind of aims are legitimate in this respect?

This question was addressed in *Felber* (C-529/13).

Relevant national law (Austria)

Paragraphs 53, 54 and 56 of the Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965) (Federal Law on the Pension Rights of Federal Civil Servants, their Survivors and the Members of their Families (Law on Pensions 1965)) of 18 November 1965 (BGBl. 340/1965; 'the PG 1965') were, in the version in force at the time of the facts of the dispute in the main proceedings, worded as follows:

'Pre-service pensionable periods which may be credited

Paragraph 53(1) Pre-service pensionable periods are the periods listed in subparagraphs 2 to 4, in so far as they precede the date from which the period of federal civil service which gives entitlement to a pension runs. Those periods become periods which give entitlement to a pension by being credited.

(2) The following pre-service pensionable periods shall be credited:

…

(h) the period of a completed … course of study at an … intermediate school, secondary school, academy or related educational establishment, provided that the statutory minimum duration of compulsory education has not been exceeded,

…

Exclusion from being credited or waiver

Paragraph 54 …

(2) The following pre-service pensionable periods are excluded from being credited:

(a) the periods completed by the civil servant before having reached the age of 18 …

…

Special pension contribution

Paragraph 56

(1) The civil servant shall make a special pension contribution in so far as the Federal State does not receive, for the pre-service pensionable periods credited, an agreed transfer in accordance with the provisions of social security law …'

The case

The applicant, Mr F., was born in 1956, was a professor and had been a federal civil servant since 1991. For the purposes of calculating the claimant's pension rights, the pensionable periods prior to his entry into the service of the administration were determined by a decision taken in 1992. Only the periods of training and professional practice completed after the age of 18 were taken into consideration for calculating his pension rights. Consequently, the period of education completed by Mr F. before the age of 18 – three school years – was not credited. The Landesschulrat für Salzburg (School Authority of the Province of Salzburg) rejected his application that the period be credited or purchased by payment of a special contribution. Mr F. subsequently appealed against that decision. The Court nevertheless found that the departure of the rules applicable to the crediting of periods of education completed prior to entry into service in the calculation of the amount

of retirement pensions from those applicable to the crediting of such periods in the calculation of civil servants' remuneration was compatible with the constitutional principle of equal treatment. Since the Court was unsure whether it was necessary to carry out that new non-discriminatory calculation only for remuneration rights or also for pension rights, it decided to stay the proceedings and refer to the CJEU for a preliminary ruling.

Preliminary questions referred to the Court

The national court referred three questions to the CJEU, two of which were answered:

1. Does it constitute – for the moment notwithstanding Article 52(1) CFREU and Article 6 of Directive 2000/78/EC – (direct) unequal treatment on grounds of age for the purposes of Article 21(1) of the Charter and Article 2(1) and (2)(a) of the Directive if periods of study at an intermediate or secondary school are credited as pre-service pensionable periods only if they were completed after the civil servant reached the age of 18, where those pre-service pensionable periods are important not only for the pension entitlement but also for the amount of that pension and that pension (total pension) is regarded in national law as the continued payment of remuneration in the context of a public-law employment relationship which still exists even after the civil servant has retired?
2. If so, is this unequal treatment for the purposes of Article 52(1) of the Charter and Article 6(1) and (2) of the Directive

   (a) justified in order to accord to persons whose date of birth lies after the date on which school began in the year they started school or to persons who attend a type of school with an extended upper stage and, for that reason, have to attend school after the age of 18 in order to complete their studies the same conditions as to persons who complete intermediate or secondary school before the age of 18, even if the eligibility of periods of school attendance after the age of 18 is not restricted to the abovementioned cases;

   (b) justified in order to exclude from the entitlement periods in which, in general, no gainful activity takes place and accordingly no contributions are paid? Does such a justification exist irrespective of the fact that at first no contributions are payable also in respect of periods of attendance at intermediate or secondary schools after the age of 18 and in the event of the subsequent crediting of such periods of school attendance a special pension contribution is payable in any case?

   (c) justified because the exclusion of the crediting of pre-service pensionable periods completed before the age of 18 is to be regarded as equivalent to setting an 'age for admission to an occupational social security scheme' within the meaning of Article 6(2) of the Directive?'

Reasoning of the Court

In summarising the issue at hand – interpreting the principle of non-discrimination – the Court mentioned that this is enshrined in Article 21 CFREU and given expression in Directive 2000/78, the latter of which formed the focus of the Court's discussions. With regard to Article 2(1) and 2(2)(a) of the Directive, the Court was tasked with ascertaining whether the national legislation at issue in the main proceedings led to a difference of treatment on grounds of age in relation to employment and occupation. Insofar as the national legislation favoured persons who undertake or finish studies after their 18th

birthday (as only those persons will benefit from the crediting of those periods of study they completed in an intermediate or secondary school before their entry into the federal civil service), the Court established a difference in treatment between persons based directly on the age at which they completed their school education.

The Court then considered whether that difference of treatment on the grounds of age could be justified under Article 6(1) of the Directive. Turning first to the legitimacy of the aim, the Court reiterated its previous findings that Member States enjoy a broad margin of discretion when choosing to pursue a particular aim with regard to their social and employment policy, as well as in the definition of measures capable of achieving that aim. Applying this to the case at hand, the Court held that the aim of excluding the crediting of periods of education completed before the age of 18 constituted a legitimate employment policy objective, in so far as the pursuit of the aim ensured observance of the principle of equal treatment and related to an essential element of their employment relationship.

Second, the Court addressed whether the means of achieving the aim were **appropriate and necessary.** While the Court did not refer directly to proportionality or the **principle of proportionality** (the requirements of appropriateness and necessity are found in Article 6(1) itself), these two standards have been referred to in subsequent case law as comprising a proportionality test (see e.g. *F* (C-473/16, ECLI:EU:C:2018:36)). The means were appropriate – the minimum age for employment in the public service being set at 18 years essentially meant that all members of the civil servants' pension scheme could begin to contribute at the same age and acquire the right to receive a full retirement pension. The means were also necessary – the claimant sought to take into account periods of education completed at an intermediate or secondary school, rather than periods of employment (as was the case in *Hütter*). In that regard, the Court found the national legislation to be coherent in light of the justification of excluding from the retirement pension calculation periods during which the person involved did not contribute to the pension scheme.

Conclusion of the Court

Article 2(1) and 2(a) and Article 6(1) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding national legislation which excludes the crediting of periods of school education completed by a civil servant before the age of 18 for the purpose of the grant of pension entitlement and the calculation of the amount of his retirement pension, in so far as that legislation is objectively and reasonably justified by a legitimate aim relating to employment policy and labour market policy and constitutes an appropriate and necessary means of achieving that aim.

Elements of judicial dialogue

In this case the CJEU provided national courts with a clear rule concerning the crediting of periods of school education before the age of 18 for the purposes of pension entitlement and calculation of civil servants. Vertical dialogue is also seen here in the national case law leading to the request for a preliminary ruling. Mr F. relied on the case of *Hütter* (C-88/08, EU:C:2009:381) to request that the period of education in question be credited or purchased by payment of a special contribution, although the case was distinguished from the present case by the CJEU as the period in *Hütter* concerned employment, rather than schooling.

The Court has dealt with the application of Article 6(1) of Directive 2000/78 in several other cases, each providing Member States with instruction as to its meaning and scope. The case of *Schmitzer* (C-530/13), for example, concerned legislation that had been adopted to put an end to a previously discriminatory system of advancement in employment, but in effect maintained the difference in treatment on the basis of age. The Court held that budgetary (as well as administrative) considerations did not constitute in themselves a legitimate aim for Article 6(1) of Directive 2000/78. This finding was reiterated in *Leitner* (C-396/17), in which the Court stated that 'while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.' (paragraph 43). The same applied to administrative considerations that had been referred to by the Austrian Government and the national court in *Leitner* in its referral to the CJEU.

The Court in *Schmitzer* (as well as the case of *Starjakob*, C-417/13) also found that **respect for the acquired rights and protection of the legitimate expectations** of civil servants treated more favourably by the previous system with regard to their remuneration constitute legitimate employment-policy and labour-market objectives which can justify, *for a transitional period*, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age. However, the fact that a measure pursues these legitimate objectives cannot in and of itself justify the fact that a measure *definitively* maintains the age-based difference in treatment which the reform of a discriminatory system (of which the measures form part) was designed to eliminate. Again, this was affirmed in *Leitner*, as well as the more recent case of *Österreichischer Gewerkschaftsbund* (C-24/17), in which the Court ruled that objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations could not justify a measure that maintained definitively, if only for certain persons, the age-based difference in treatment that the reform is designed to eliminate. The legislation in question was therefore not appropriate for the purpose of establishing a non-discriminatory system for contractual public servants treated unfavourably by the old system.

Other aims found to be legitimate for the purposes of Article 6(1) include the enabling of older workers who enter the service of an employer at a later stage in their working life to build up reasonable retirement savings over a relatively short contribution period, and the inclusion of young workers in the same occupational pension scheme at an early stage, while making it possible for them to have at their disposal a larger proportion of their wages. This was found in *HK Danmark* (C-476/11), where despite the presence of legitimate aims, the Court stated that it is settled case law that a measure is appropriate for ensuring attainment of the aims pursued only if it genuinely reflects a concern to attain them in a consistent and systematic manner, which was ultimately for the national court to decide. It was therefore for the national court to determine whether the measure did not go beyond that which was necessary for achieving the aims pursued.

Article 6(1) was also discussed in the case of *Hennigs and Mai* (Joined cases C-297/10 and C-298/10). This case concerned the transferral of contractual employees to a new collective pay system based on objective criteria, which actually maintained, in order to carry out the transfer to that new collective pay system, unequal treatment of employees of different ages. The CJEU found that an aim to establish a pay scale for public sector contractual employees so as to take account of employees' professional experience (thereby rewarding experience

that enables a worker to perform his duties better) was indeed legitimate. Having recourse to the length of service was, as a general rule, an appropriate way to achieve that aim.

Interestingly, in *Vital Pérez* (C-416/13), the Court noted that the failure of national legislation to state the objectives it pursued does not necessarily prevent it from being justified under Article 6(1), if the aim can be identified and reviewed for the requirements of legitimacy, appropriateness and necessity. The Court found that the age requirement provided for in the law in question (placing age limits in the recruitment of police officers) was based on the training requirements of the post in question and the need for a reasonable period of employment before retirement or transfer to another activity, falling under the scope of Article 6(1)(c). Second, ascertaining that the age limit was neither appropriate or necessary in order to ensure that local police officers have a reasonable period of employment before retirement, the CJEU emphasised that while Member States have discretion in how to achieve objectives of employment policy (a point reiterated in many cases, including most recently, *Olympiako Athlitiko Kentro Athinon*, C-511/19), they cannot frustrate the implementation of the principle of non-discrimination.

1.3.3.2.2 Question 2 – Justification of age discrimination under Article 6(2) of Directive 2000/78

Must the principle of non-discrimination be interpreted as precluding an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age, provided that the difference in treatment on grounds of age that arises therefrom is appropriate and necessary to achieve a legitimate aim?

This question was addressed in the case of *HK Danmark* (C-476/11).

Relevant national law (Denmark)

Article 6a Law No 1417, amending the Law on the principle of non-discrimination on the labour market (lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.), of 22 December 2004 ('the Anti-Discrimination Law')

'Notwithstanding Articles 2 to 5, the present law does not preclude the fixing of ages for admission to occupational social security schemes or the use, in the context of such schemes, of age criteria in actuarial calculations. The use of age criteria must not result in discrimination on the grounds of sex.'

The case

Ms K. was recruited into Experian's after-sales services at the age of 29. Experian's pension scheme used different rates for different age brackets. Applicable rates:

> Under 35 years of age: employee contribution 3% and [Experian] contribution 6%;
>
> From 35 to 44 years of age: employee contribution 4% and [Experian] contribution 8%;
>
> Over 45 years of age: employee contribution 5% and [Experian] contribution 10%.'

This pension scheme was not prescribed by law or by a collective agreement, but arose solely from the contract of employment. The issue at hand was that Ms K. earned *de facto* less money than her colleagues who fell into a different age bracket due to the higher contribution by Experian. Ms K. resigned from her position. HK, acting on her behalf, claimed from Experian, pursuant to the Anti-Discrimination Law, compensation equivalent

to nine months' salary, as well as a back payment of pension contributions at the rate applicable to employees of over 45 years of age (10%), on the ground that the pension scheme set up by Experian constituted unlawful discrimination on grounds of age. Experian rejected the claims on the ground that pension schemes are not generally covered by the prohibition of discrimination on the grounds of age laid down by the Anti-Discrimination Law. The Western Regional Court decided to stay the proceedings and make a reference to the CJEU for a preliminary ruling.

Preliminary question referred to the Court

The national court referred the following question to the CJEU:

1. Must the exception in Article 6(2) of [Directive 2000/78] concerning the determination of age limits for admission or entitlement to retirement or invalidity benefits be interpreted as not precluding a Member State from maintaining a legal situation in which an employer can pay, as part of pay, pension contributions which increase with age, with the result, for example, that the employer pays a pension contribution of 6% for employees under 35, 8% for employees from 35 to 44 and 10% for employees over 45, in so far as that does not bring about discrimination on grounds of sex?'

Reasoning of the Court

The Court started by addressing the question of whether an occupational pension scheme under which an employer pays, as an element of pay, pension contributions which increase with age falls within the scope of Article 6(2) of Directive 2000/78. The Court quickly found that the pension scheme established a difference in treatment based on the criterion of age. It then considered whether that difference constituted discrimination prohibited by the principle of non-discrimination on grounds of age in Article 21 of the Charter, given specific expression by the Directive. First, the Court looked at whether the pension scheme could be justified under Article 6(2) of the Directive.

After considering the wording of the official translation of Article 6(2) into several languages, the Court stated that 'that provision applies only to the cases that are exhaustively listed therein. Thus, if the European Union legislature had intended to extend the scope of that provision beyond the cases expressly referred to therein, it would have said so expressly, by using, for example, the adverbial phrase "inter alia".' (paragraph 44). The CJEU thereafter ascertained that Article 6(2) of the Directive must be interpreted restrictively. It stated that the increases in the pension contributions at issue in the main proceedings did not involve, as such, a 'fixing … of ages for admission or entitlement to retirement … benefits', as referred to in Article 6(2) of Directive 2000/78. The Court did not accept the argument that this provision must be interpreted as applying not only to the fixing of ages for admission and entitlement to retirement benefits but also to less severe forms of discrimination based on age, as in the main proceedings. Additionally, due to the restrictive interpretation, the Court maintained that not all aspects of an occupational social security scheme covering the risks of old age and invalidity fell within the scope of that provision. Thus, age-related increases in pension contributions did not fall within Article 6(2).

The Court then moved on to the question of whether it could be justified under Article 6(1) of the Directive. First, it ruled that the objectives pursued by the measure, (first, to enable older workers who joined the company at a later stage in their working life to build

up reasonable retirement savings over a relatively short contribution period; and second, to include young workers in the same occupational pension scheme at an early stage, while making it possible for them to have at their disposal a larger proportion of their wages) were legitimate aims. Subsequently, the Court analysed whether the pension scheme was appropriate and necessary to achieve the aims. It found that it was not unreasonable to regard the age-related increases in contributions as enabling the aims of the pension scheme.

However, the Court stated that it is settled case law that a measure is appropriate for ensuring attainment of the aims pursued only if it genuinely reflects a concern to attain them in a consistent and systematic manner, which was ultimately for the national court, not the CJEU, to decide.

Conclusion of the Court

The principle of non-discrimination on grounds of age, enshrined in Article 21 CFREU and given specific expression by Council Directive 2000/78 and, in particular, Articles 2 and 6(1) of that Directive, must be interpreted as not precluding an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age, provided that the difference in treatment on grounds of age that arises therefrom is appropriate and necessary to achieve a legitimate aim, which it is for the national court to establish.

Impact on the follow-up case

On 12 November 2015 the Western High Court declared the pension scheme did not constitute age discrimination as it was appropriate and necessary to fulfil legitimate aims (case no. 1/2015).

Elements of judicial dialogue

In its ruling, the Court referred to *Dansk Jurist- og Økonomforbund* (C-546/11, ECLI:EU:C:2013:603) re-emphasising that the exception to the principle of non-discrimination in Article 6(2) of the Directive must be interpreted restrictively, and that Article 6(2) applies only to occupational social security schemes that cover the risks of old age and invalidity. Additionally, the Court later used its past jurisprudence in *Fuchs and Köhler* (Joined Cases C-159/10 and C-160/10, ECLI:EU:C:2011:508) to reiterate that a measure is appropriate for ensuring attainment of the aims pursued only if it genuinely reflects a concern to attain them in a consistent and systematic manner.

The ruling of the Court in *HK Danmark* was used in the subsequent case of *Felber* (C-529/13)[19] to ascertain whether the legislation in that case, which led to the failure to take periods of study completed by Mr F. before the age of 18 and before his entry into the federal civil service into account for the calculation of his pension points, fell within the scope of Directive 2000/78. More specifically, in *Felber* the Court used its past jurisprudence in *HK Danmark* to clarify the concept of 'pay' in the context of the Directive.

[19] For a full discussion of this case, see Section 1.3.3.2, above.

1.3.4 Guidelines emerging from the analysis

Many general guidelines concerning the justification of differences in treatment which would otherwise amount to discrimination prohibited by Article 21 CFREU are provided by the CJEU in the cases discussed above. These are presented below according to the different types of justification.

Justifications regarding direct discrimination

In the view of the Court of Justice as expressed in *MB* (C-451/16):

- Only the grounds listed in the Directive(s) can justify direct discrimination – other grounds, for example national policy goals, cannot justify direct discrimination.

Justifications regarding indirect discrimination

In the view of the Court of Justice as expressed in *CHEZ Razpredelenie Bulgaria* (C-83/14):

- A measure constituting an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, is capable of being objectively justified by legitimate aims only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued.
- It is for the referring court to determine whether other appropriate or less restrictive means of achieving the aims exist, and if not, whether the measure excessively prejudices the legitimate interest involved.
- Where the existence of a legitimate aim is dependent on the existence of certain facts, the burden of proof lies with the respondent to demonstrate these facts and, where relevant, that these facts remain relevant to the legitimate aim in question despite a time lapse since their occurrence.

Justification on specific grounds

Justification on the grounds of 'genuine and determining occupational requirement'

In the view of the Court of Justice as expressed in *Vital Pérez* (C-416/13):

- Differences in treatment can only be justified in 'very limited' circumstances.
- A genuine, legitimate and justified occupational requirement must comply with the principle of proportionality.

In the view of the Court of Justice as expressed in *Egenberger* (C-414/16):

- The concept of a 'genuine and determining occupational requirement' refers to a requirement that is *objectively dictated* by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of a customer.

In the view of the Court of Justice as expressed in *Wolf* (C-229/08):

- The possession of particular physical capacities may in some cases be regarded as a 'genuine and determining occupational requirement'.

Justification on the grounds of age:

In the view of the Court of Justice as expressed in *Felber* (C-529/13):

- Member States enjoy a broad margin of discretion when choosing to pursue a particular aim with regard to their social and employment policy, as well as in the definition of measures capable of achieving that aim.

In the view of the Court of Justice as expressed in *Vital Pérez* (C-416/13):

- The failure of national legislation to state the objectives it pursues does not necessarily prevent it from being justified on the grounds of age if the aim can be identified and reviewed for the requirements of legitimacy, appropriateness and necessity.
- While Member States have discretion in how to achieve objectives of employment policy, they cannot frustrate the implementation of the principle of non-discrimination.

In the view of the Court of Justice as expressed in *HK Danmark* (C-476/11):

- A measure is appropriate for ensuring attainment of the aims pursued only if it genuinely reflects a concern to attain them in a consistent and systematic manner, which was ultimately for the national court to decide.

1.4. Issues relating to effective protection

Considering the case law discussed above, effective protection as such has not been the subject of much discussion in the cases providing guidance as to the material scope of non-discrimination under EU law. However, some general comments regarding effective protection can be made, with particular reference to the case of *Vital Pérez* (C-416/13), in which the CJEU did discuss effective protection explicitly.

The CJEU stated that the manner in which Directive 2000/78 seeks to lay down a general framework to guarantee equal treatment in employment and occupation to all persons is by offering them effective protection against discrimination on one of the grounds covered. The **underlying aim of the Directive (and perhaps by analogy of the other equal treatment directives) therefore seems to be effective protection from discrimination.** With this in mind, it is interesting to see that the Court has consistently held that justifications for treatment that would otherwise amount to discrimination must be interpreted strictly. This has been upheld in relation to various different justifications relating to both direct and indirect discrimination. The Court's approach to this matter demonstrates its reluctance to compromise the effective protection afforded by the equal treatment directives and Article 21 CFREU despite the wide margin of discretion that Member States enjoy in choosing to pursue a particular aim with regard to their social and employment policy (for example), as well as in the definition of measures capable of achieving that aim.

Chapter 2: The personal scope of non-discrimination under Article 21 CFREU

As well as the material scope of non-discrimination protected in Article 21 CFREU, aspects of its personal scope (i.e. to whom the prohibition of non-discrimination applies) has also been addressed by the Court of Justice of the European Union. In this respect, the Court has found Article 21 to have direct horizontal effect, placing an obligation on private parties to ensure individuals' protection from non-discrimination even in the absence of national legislation ensuring this protection. In effect, this extends the personal scope of Article 21 and contributes to the effective protection of individuals from discrimination; it allows legal claims of discrimination to be brought regardless of the private nature of the entity accused of discriminatory treatment, allowing (albeit in defined circumstances) individuals previously barred from bringing an action against private parties, access to justice.

2.1. The direct horizontal effect of Article 21 CFREU

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV Bundesarbeitsgericht (BAG)*, Case C-414/16 ("**Egenberger**") (reference case)

➢ Judgment of the Court (Grand Chamber) of 11 September 2018, Case C-68/17, *Ir v JQ* ("**IR**") (reference case)

➢ Judgment of the Court (Grand Chamber) of 22 January 2019, *Cresco Investigation GmbH v Markus Achatzi*, Case C-193/17 ("**Cresco**")

Main questions addressed

Question 1 Does Article 21 CFREU have direct horizontal effect, placing obligations on private parties to ensure non-discrimination?

Relevant legal sources

EU level

Recital 24 and Articles 1, 2, 7 and 16 of Council Directive 2000/78/EC of 27 November 2000

Article 21 Charter of Fundamental Rights of the European Union

National legal sources (Germany)

Sources from both CJEU cases:

Article 4(1) and (2) Grundgesetz für die Bundesrepublik Deutschland (GG) (Basic Law for the Federal Republic of Germany)

'(1) Freedom of belief and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.

(2) Every person shall have the right to practise his religion without interference.'

Paragraphs 1 of the Allgemeine Gleichbehandlungsgesetz (AGG) (General law on Equal Treatment)

'The objective of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual identity.'

Paragraph 7(1) of the AGG:

'Workers shall not be discriminated against on any of the grounds mentioned in Paragraph 1; this also applies where the person responsible for the discrimination merely assumes in the course of the discriminatory conduct that one of the grounds mentioned in Paragraph 1 exists.'

Paragraph 9 of the AGG:

'(1) Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious communities, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination, or the nature of the activities engaged in.

(2) The prohibition of a difference of treatment on grounds of religion or belief shall not affect the right of the religious communities mentioned in subparagraph 1, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a religion or belief, to require their employees to act in good faith and with loyalty in accordance with their self-perception.'

Sources from *Egenberger* only:

Paragraph 2(1) of the Richtlinie des Rates der Evangelischen Kirche in Deutschland über die Anforderungen der privatrechtlichen beruflichen Mitarbeit in der Evangelischen Kirche in Deutschland und des Diakonischen Werkes (Guidelines of the Council of the Protestant Church in Germany on the requirements for occupational work under private law in the EKD and for the Diaconal Work, 'the EKD Employment Guidelines') of 1 July 2005, as amended:

'The service of the Church is defined by the mission to bear witness to the Gospel in word and deed. All women and men who work in employment relationships in the Church and Diaconate contribute in different ways to making it possible to fulfil that mission. That mission is the basis of the rights and duties of employers and workers.'

Paragraph 3 of the EKD Employment Guidelines:

'1. Occupational work in the Protestant Church and its Diaconate presupposes in principle membership of a member church of the [EKD] or of a church with which the [EKD] is in communion.

2. For tasks which are not to be regarded as proclamation [of the Gospel], pastoral care, instruction or direction, an exception may be made to subparagraph 1 where other suitable workers cannot be found. In that case persons who belong to another member church of the Working Group of Christian Churches in Germany or the Association of Protestant Free Churches may also be recruited. Recruitment of persons who do not meet the

requirements of subparagraph 1 must be examined in each individual case having regard to the size of the workplace or institution and its other workers and the duties to be performed in the particular environment. This is without prejudice to the second sentence of Paragraph 2(1).'

Sources from *IR* only:

Paragraph 1 of the Kündigungsschutzgesetz (Law on Protection against Dismissal) of 25 August 1969 (BGBl. 1969 I, p. 1317), in the version applicable to the dispute in the main proceedings:

'Socially unjustified dismissals

(2) A dismissal is socially unjustified when it is not based on reasons relating to the person or conduct of the employee, or is due to urgent operational requirements that preclude the employee's continued employment with the business. ...'

Article 4 of the Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse (Basic regulations on employment relationships in the service of the Church) of 22 September 1993 (*Amtsblatt des Erzbistums Köln 1993*, p. 222; 'the GrO 1993'), headed 'Duty of loyalty': Catholic employees are expected to recognize and observe, non-Catholic employees to respect the truths and values of the Gospel.

Article 5 of the GrO 1993, headed 'Breaches of the duty of loyalty':

(1) If an employee no longer complies with the requirements for employment, the employer shall attempt to counsel the employee to remedy this shortcoming on a lasting basis. … Dismissal shall be considered as a last resort.

(2) For dismissal on grounds relating specifically to the Church, the following breaches of the duty of loyalty in particular shall be regarded by the Church as serious:

– …

– entering into a marriage that is invalid according to the Church's teachings and its legal system,

– …

(3) In the case of [employees] occupying managerial posts, conduct generally considered to be a possible ground for dismissal in accordance with paragraph 2 shall rule out any possibility of continued employment. In exceptional cases, dismissal may be avoided if there are serious reasons in the individual case indicating that such dismissal would be excessive.'

2.1.1 Question 1 – Application of Article 21 CFREU between private parties[20]

When a national legislature has not correctly implemented European directives on non-discrimination, can Article 21 CFREU require that private actors (such as employers) ensure non-discrimination themselves, leading to the horizontal effect of that provision?

[20] The discussion in this section is taken from the case note of Aurelia Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights: ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ', *Eureopean Constitutional Law Review* (2019) 1-12.

This question was dealt with in the lead cases of *Egenberger* (C-414/16) and *IR* (C-68/17).

The case

In *Egenberger*, a job applicant – Ms V.E. – had allegedly been discriminated against because she did not belong to any religious denomination. The employer, Evangelisches Werk (a 'relief organisation' of the Evangelical Church in Germany), had explicitly stated in the job advertisement that membership in a Protestant church or a church affiliated with the Working Group of Christian Churches in Germany was required, even though the job in question arguably had very little to do with churches. Ironically, the position mainly consisted of writing reports on German efforts to combat discrimination in the framework of the United Nations Convention on the Elimination of All Forms of Racial Discrimination.

Egenberger complained that the employer's actions were not compatible with the prohibition of discrimination in the German General Law on Equal Treatment (Allgemeines Gleichbehandlungsgesetz) as interpreted in accordance with EU law. Before the reference for a preliminary ruling, the labour court of first instance had already decided in favour of Ms. E. and ordered that compensation of no more than €1957.73 be paid. Ms E.'s further appeals were mainly motivated by her wish to be awarded a considerably greater amount. The German Federal Labour Court (Bundesarbeitsgericht) referred the case to the European Court of Justice, since it considered that the outcome of the dispute in the main proceedings depended on whether the fact that the employer had made a differentiation based on church membership was lawful under the German General Law on Equal Treatment, which had to be interpreted in conformity with EU law.

The second case (*IR*) concerned a conflict between JQ, a physician, and his employer, IR, a private organisation dependent on the Catholic Church. JQ was divorced; he subsequently remarried in a civil ceremony without having his first (Catholic) marriage annulled by a church tribunal. IR, therefore, terminated the employment contract.

Preliminary questions referred to the Court

The national court referred three questions to the CJEU, the first of which led to the Court's discussion of the application of Article 21 to private parties:

1. Is Article 4(2) of Directive [2000/78] to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos?

A very similar question was referred to the CJEU in *IR*.

Reasoning of the Court

In *Egenberger*, the Court began by referring to the principle enshrined in its previous case law according to which the requirement to interpret national law in conformity with EU law includes an obligation for national courts to change their established case law if need be. A national court cannot rightly maintain that it is unable to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner incompatible with EU law. Then, in considering the hypothetical

scenario in which it is not possible for a national court to interpret the applicable national law in conformity with Article 4(2) of the Directive, the Court of Justice intervened in the debate on the horizontal effect of EU fundamental rights.

Interestingly, as far as the direct horizontal effect of the prohibition of discrimination on grounds of religion was concerned, the Court's position diverged from the Opinion delivered by Advocate General Tanchev in *Egenberger*. The Advocate General had concluded that the prohibition of discrimination on grounds of religion should not create a subjective right capable of being applied horizontally in situations involving private parties. Instead, according to the Advocate General, the remedy available to the applicant under EU law was a state liability action seeking damages from Germany.

The Court in *Egenberger* did not follow the Advocate General on this point. Instead, the Court acknowledged the **direct effect of Article 47 of the Charter and the direct horizontal effect of Article 21(1) of the Charter**. The latter principle was then confirmed by *IR*.

The Court considered Article 21(1) of the Charter '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' (paragraph 76). In this regard, it clarified that '(a)s 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' (paragraph 77).

Conclusion of the Court

The Court concluded that:

'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 of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.'

Judicial dialogue

The Court built on its previous judgments in cases such as *Defrenne* (C-43/1975, ECLI:EU:C:1976:56) and *Angonese* (C-281/98, ECLI:EU:C:2000:296). In *Defrenne*, the Court explicitly stated that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, 'as well as to contracts between individuals'. Furthermore, in *Angonese*, the private party that the Court considered bound by the Treaty's prohibition of discrimination was not a private regulator (such as a labour union) but a normal, private employer (a bank). Therefore, after *Defrenne* and *Angonese*, it should have been clear that the direct horizontal effect of EU fundamental rights and freedoms could apply to contracts between individuals.

Hence, from a purely EU law viewpoint, acknowledgement of the direct horizontal effect of Article 21 of the Charter in Egenberger was neither revolutionary nor surprising. Arguably, there is a logical and continuous line that extends from *van Gend and Loos* to *Egenberger*, passing through *Walrave* (C-36/74, ECLI:EU:C:1974:140), *Defrenne*, *Angonese*, *Mangold* (C-144/04, ECLI:EU:C:2005:709), *Kücükdeveci* (C-555/07, ECLI:EU:C:2010:21),

and *DI* (C-441/14, ECLI:EU:C:2016:278) along the way. As a result, the prohibition of discrimination as a general principle of EU law, now codified in Article 21 of the Charter, has direct horizontal effect in all fields covered by EU law.

Subsequent to *Egenberger* and *IR*, the Court's judgment in *Cresco* (C-193/17) has further solidified the CJEU's position regarding the direct horizontal effect of Article 21. This case concerned national legislation to the effect that only members of the certain churches were allowed 24 hours of paid leave on Good Friday, a recognised public holiday. The applicant, an employee of the private detective agency 'Cresco', was not a member of any of these churches, and claimed that he suffered discrimination by being denied public holiday pay for working on Good Friday of 2015. He claimed compensation from his employer through a court of first instance, but his case was dismissed. A court of appeal then declared the case admissible, after which Cresco appealed this decision before the Grand Chamber of the Supreme Court of Austria. The Supreme Court referred the case to the CJEU for a preliminary ruling.

The CJEU highlighted that **Directives do not themselves have horizontal effect, and cannot be relied upon against an individual**. To do so in the absence of legislation correctly transposing a Directive into national law, would in effect allow the EU to enact obligations for individuals with immediate effect, despite only having competence to do so where it is empowered to adopt regulations. Therefore, Directives cannot have horizontal effect for the purpose of setting aside national legislation contrary to a Directive.

The Court then emphasised that Directive 2000/78 does not actually establish the principle of equal treatment in employment and occupation, but rather lays down a general framework for combatting discrimination in this context. (*Egenberger* paragraph 75, *IR* paragraph 67). Furthermore, the prohibition of all discrimination on the grounds of religion or belief is mandatory as ***a general principle of EU law***, as laid down in Article 21 CFREU. The prohibition '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' (paragraph 76; *Egenberger* paragraph 76). In addition, Article 21 has the same mandatory effect as the founding Treaties prohibiting discrimination '*even where the discrimination derives from contracts between individuals*'[21] (paragraph 77; *Egenberger* paragraph 77). Therefore, the Court found that even where national legislation does not conform with Directive 2000/78, individuals are still entitled to the legal protection afforded to employees under Article 21, which the referring court is obliged to guarantee to full effect. Further, relying on its previous judgments, in particular *Milkova* (C-406/15, EU:C:2017:198, paragraphs 66-68) discrimination must be rectified, and 'a national court must set aside any discriminatory provision of national law' (paragraph 80) and place disadvantaged persons in the same position as those enjoying the advantage concerned in the situation, whether or not they have the competence under national law to do so. The Court then found an *obligation for employers* 'to ensure that employees who are not members of one of those churches enjoy the same treatment as that enjoyed only by employees who are members of one of those churches under the provisions at issue in the main proceedings' (paragraph 83).

For all of this to apply, the Court stated that there must be a valid point of reference, which was present in this case, and the obligations placed on the employer to place those

[21] Italics added.

disadvantaged by the difference in treatment in the same position as those benefitting from it only apply until the national legislature has taken measures reinstating equal treatment.

Ultimately, the Court concluded that until the Member State concerned has amended such legislation, in order to restore equal treatment, a private employer subject to the legislation must also grant his other employees a public holiday on Good Friday. These employees must seek prior permission from the employer to be absent from work on that day. If the employer refuses such permission, they must recognise that the employees working on Good Friday are entitled to a payment in addition to their regular salary for work done on that day. It therefore seems that the *Cresco* judgment places certain conditions on the direct application of Article 21CFREU to private parties (namely, that (1) the relevant national law is not in conformity with the applicable directive; (2) no (legislative) measures have been taken to rectify the discriminatory situation; and (3) there is a valid point of reference).

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

The cases discussed in this cluster fully harmonise with the previous Court of Justice jurisprudence and Italian- French case law while clashing with the current approach in Germany and the UK. Although the judges who decided *Angonese*, *Egenberger*, and *IR* may have been unaware of the conflict of views between the judiciaries of different Member States regarding the direct application of fundamental rights and freedoms to labour relationships, the abovementioned decisions objectively represent, independent of the judges' subjective awareness, a strong voice in the supranational and cross-national judicial dialogue on the horizontal effect of fundamental rights, freedoms, and constitutional principles.

For purposes of German law, *Egenberger, IR* and the subsequent judgment in *Cresco* could be seen as the comeback of the direct horizontal effect doctrine. It remains to be seen whether national courts from jurisdictions taking a different approach (i.e. Germany and the UK) will accept the Court of Justice's approach.

In Poland, the case of *Egenberger* has been referred to only by administrative courts in several taxation cases (the need for national courts to amend settled case-law if it is based on an interpretation of national law which is incompatible with the objectives of the directive). It therefore does not yet seem to have had an impact on the horizontal effect of Article 21 within Polish case law.

2.2. Issues relating to effective protection

The breadth of the personal scope of non-discrimination under Article 21 CFREU necessarily has an impact on the effective protection afforded by the provision – the broader the personal scope of the prohibition of non-discrimination, the broader the scope of protection afforded by Article 21 CFREU.

The cases discussed above demonstrate that as well as State entities, private parties are required to respect the prohibition of discrimination. By placing obligations on private parties such as employers to take action to ensure the effectiveness of the prohibition in practice, the direct horizontal effect of Article 21 is able to significantly increase the scope of effective protection with regard to Article 21 CFREU. While there may be limits imposed on the application of such an obligation by the *Cresco* case, the impact of the rulings in

Egenberger (C-414/16) and *IR* (C-68/17, taken together with the Court's earlier judgments allowing for direct horizontal effect) is not necessarily diminished. Indeed, a key notion in *Cresco* (C-193/17) was that private parties only retain an obligation to ensure non-discrimination until the relevant Member State has provided national legislation which itself prohibits discrimination that would be contrary to Article 21 CFREU and other relevant provisions of EU law. When such legislation is in place, there is no need for the horizontal application of Article 21 CFREU, as the same effect is achieved through the application and enforcement of the national legislation. Nonetheless, in the absence of such legislative measures by a Member State, in order to ensure effective protection from non-discrimination, the Court's approach to horizontal effect is crucial.

While this may seem to contrast with the CJEU's more restrictive approach to the material scope of non-discrimination (see Chapter 1), the horizontal effect of Article 21 has so far only been upheld by the CJEU in cases where a directive exists but has not been transposed correctly. The Court has not directly addressed what would happen in a case where there is no applicable directive at all. This could also lead to the conclusion that while the horizontal effect of Article 21 may lead to broader effective protection in terms of personal scope, in the cases heard so far it has not had an impact on the limited grounds of discrimination listed in the directives (i.e. the material scope, which cannot be extended despite Article 21's inclusion of 'other status'). This would also align with the fact that the Charter only applies in Member States' application of EU law.

2.3. Guidelines emerging from the analysis

Several points of guidance are provided by the CJEU in relation to the direct horizontal effect of Article 21 CFREU:

In the view of the Court of Justice as expressed, *inter alia*, in *Egenberger* (C-451/16):

- Article 21 CFREU can have direct horizontal effect, meaning that it can be directly applied in relation to private parties.

In the view of the Court of Justice as expressed in *Cresco* (C-193/17):

- Certain conditions have been laid down for the direct horizontal effect of Article 21 CFREU to apply:
    1. The relevant national law is not in conformity with the applicable directive;
    2. No (legislative) measures have been taken to rectify the discriminatory situation; and
    3. There is a valid point of reference (i.e. information allowing the situations of affected persons to be appropriately compared).
- In these situations, private parties such as employers have to place the persons disadvantaged by the difference in treatment in the same position as those benefitting from it, *until measures reinstating equal treatment have been adopted by the national legislature*.

Chapter 3: Effective protection from discrimination through Article 47 CFREU

Effective judicial protection is crucial to achieving non-discrimination, and as discussed in Section 1.4 above, may even be said to be the underlying aim of the equal treatment directives (see *Vital Pérez*, C-416/13). Without effective protection, (potential) victims of non-discrimination – who are often placed in a position of relative vulnerability vis-à-vis the party alleged to have treated them in a discriminatory manner (for example, employer-employee relationships) – cannot be afforded sufficient safeguards and redress for what concerns discrimination. Within the Charter of Fundamental Rights of the European Union, the principle of effective protection is given expression in Article 47, with a particular focus on the rights to an effective remedy and to a fair trial, and effective access to justice. Emphasis is placed in Article 47 on effective judicial protection, both in relation to remedies and a fair trial. Also within the Charter, Article 20 on equality before the law has a close relationship both with Article 21 and Article 47. While the connection between Articles 20 and 21 is perhaps more obvious (and is discussed in Chapter 5 of this Casebook), the connection between Articles 20 and 47 is of interest to us here. Essentially, taken together, the provisions 'determin[e] that remedies for breach of EU law rules should be the same as those for breach of comparable rules of national law (i.e. principle of equivalence)'.

Despite the clear relationship between non-discrimination and effective protection, there are only a limited number of cases decided by the CJEU that deal with both Articles 21 and 47 of the Charter of Fundamental Rights of the European Union explicitly. Significant examples of these cases are discussed in detail in Section 3.1 below. In relation to judicial review of a private entity's decision on occupational requirements, this includes *Egenberger* (C-414/16), *IR* (C-68/17) and *Leitner* C-396/17. In relation to national limitation periods for non-discrimination claims, focus is placed on *Starjakob* (C-417/13). However, as seen in some of the previous discussions in this Casebook, the lack of explicit reference to provisions concerning effective protection in its case law has not compromised the Court of Justice's ability to deliver judgments significantly impacting effective protection from non-discrimination (as was seen, for example, in Chapter 2 concerning the horizontal effect of Article 21 CFREU).

In addition to the relevant provisions related to effective protection within the Charter, the principle is reflected in various provisions of secondary EU law. These are predominantly found in the Equality Directives. For example, Directives 2000/78 and 200/43 both include a provision stating that Member States are obliged to ensure 'judicial and/or administrative procedures […] are available to all persons who consider themselves' to have been discriminated against (see Articles 9(1) and 7(1), respectively. Examples of how Member States have done this are provided below.[22] Directives 2000/78 and 2000/43, which are discussed in many of the cases in this Casebook, each contain a provision on sanctions (Articles 17 and 15, respectively) to the effect that sanctions adopted by Member States,

[22] For a more in-depth comparison of all Member States' practices in this respect, see European Network of Legal Experts in Gender Equality and Non-Discrimination, 'A Comparative analysis of Non-Discrimination Law in Europe' (2019) 81. Available at <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1/language-en> accessed 7 October 2020.

who have the discretion to choose appropriate sanctions to be available in non-discrimination cases, must be 'effective, proportionate, and dissuasive'. This terminology is not defined in the Directives themselves, but although there is not a huge amount of CJEU jurisprudence directly on the matter, the Court has given some indications as to what the terms mean. Of particular note here is the case of *Asociația Accept*, which is discussed in Section 3.2.1 below.

The third substantive issue discussed by the Court regarding effective protection in non-discrimination cases is that of the allocation of the burden of proof in such cases - should the burden lie, as would usually be the case, with the applicant, or does the nature of non-discrimination cases, together with the principle of effective judicial protection, require a reversal?

This chapter addresses each of these issues as they have been raised by the Court of Justice, with additional explanation being provided through the discussion of national case law, where relevant. First, the relationship between Articles 21 and 47 CFREU within the jurisprudence of the Court of Justice is considered in Section 3.1, followed by effective remedies in non-discrimination cases in Section 3.2. Section 3.3 comprises a discussion of the burden of proof in non-discrimination cases, and Section 3.4 includes insights from the relevant national case law on discrimination in the context of access to justice. Section 3.5 provides some more general remarks on effective protection in non-discrimination cases, and Section 3.6 offers general guidance for national judges, on the basis of the cases discussed in the substantive sections of the chapter.

3.1. Relationship between Articles 47 and 21 CFREU

The cases discussed in this section demonstrate how Article 47 CFREU is applied in cases concerning Article 21. Taken together, the cases give an impression of the relationship between the two provisions and how they are applied, and whether Article 21 has an impact on the CJEU's consideration of a potential violation of Article 47. This section also sheds light on the Court of Justice's interpretation of the principle of effectiveness in the context of national limitation periods for claims founded in EU law, including relevant provisions of EU law on non-discrimination.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV Bundesarbeitsgericht (BAG)*, Case C-414/16 ("**Egenberger**") (reference case, Question 1)

➢ Judgment of the Court (Grand Chamber) of 11 September 2018, *Ir v JQ*, Case C-68/17 ("**IR**") (reference case, Question 1)

➢ Judgment of the Court (Second Chamber) of 28 January 2015, *ÖBB Personenehr AG v Gotthard Starjakob,* Case C-417/13 ("**Starjakob**") (reference case, Question 2)

➢ Judgment of the Court First Chamber of 8 May 2019, *Martin Leitner v Landespolizeidirektion Tirol,* Case C-396/17 ("**Leitner**")

Main questions addressed

Question 1 Does the right to an effective remedy under Article 47 CFREU impact on whether and to what extent a private entity's decision on occupational requirements is subject to judicial review under Directive 2000/78?

Question 2 If a difference of treatment on the grounds of age is found to be justified according to Article 21 CFREU and Articles 2 and 6 Directive 2000/78, does the EU-law principle of effectiveness under the first paragraph of Article 47 of the Charter and Article 19(1) TEU require that the period of limitation for claims founded in EU law cannot start to run until the legal position has been conclusively clarified by the pronouncement of a relevant decision by the Court of Justice of the European Union?

Relevant legal sources

EU level

Articles 21 and 47 Charter of Fundamental Rights of the European Union

Article 19(1) Treaty on European Union

Articles 4(2) and 9 Directive 2000/78

National legal sources (Germany)

Full versions of these texts can be found in Chapter 2.1.1 of this Casebook.

Sources from *Egenberger*

Paragraphs 2(1) and 3, Richtlinie des Rates der Evangelischen Kirche in Deutschland über die Anforderungen der privatrechtlichen beruflichen Mitarbeit in der Evangelischen Kirche in Deutschland und des Diakonischen Werkes (Guidelines of the Council of the Protestant Church in Germany on the requirements for occupational work under private law in the EKD and for the Diaconal Work, 'the EKD Employment Guidelines') of 1 July 2005, as amended.

Paragraphs 2 and 4, Dienstvertragsordnung der Evangelischen Kirche in Deutschland (EKD Regulation on contracts of employment) of 25 August 2008.

Sources from *IR*

Paragraph 1 of the Kündigungsschutzgesetz (Law on Protection against Dismissal) of 25 August 1969 (BGBl. 1969 I, p. 1317), in the version applicable to the dispute in the main proceedings.

Articles 4 and 5 of the Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse (Basic regulations on employment relationships in the service of the Church) of 22 September 1993 (*Amtsblatt des Erzbistums Köln 1993*, p. 222; 'the GrO 1993'):

The Grundordnung für katholische Krankenhäuser in Nordrhein-Westfalen (Basic regulations for Catholic hospitals in North Rhine-Westphalia, Germany) of 5 November 1996 (*Amtsblatt des Erzbistums Köln*, p. 321)

Sources from *Egenberger* and *IR*

Article 4(1) and (2) Grundgesetz für die Bundesrepublik Deutschland (GG) (Basic Law for the Federal Republic of Germany)

Article 137 Weimar Constitution of 11 August 1919

Paragraphs 1, 7(1), 8, 9(1) and 15 Allgemeine Gleichbehandlungsgesetz (AGG) (General law on Equal Treatment)

3.1.1 Question 1 – Judicial review of private decisions

> Does the right to an effective remedy under Article 47 CFREU have an impact on whether and to what extent a private entity's decision on occupational requirements is subject to judicial review under Directive 2000/78?

This question was dealt with in the cases of *Egenberger* (C-414/16) and *IR* (C-68/17).[23] The following paragraphs are based on the lead case of *Egenberger*, with reference to *IR* where relevant.

The cases

The facts of these cases can be found in Section 2.1.1 of this Casebook.

Preliminary question referred to the Court

In relation to effective protection and access to justice, the national court in *Egenberger* (C-414/16) referred the following question to the CJEU:

1. Is Article 4(2) of Directive [2000/78] to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos?

A very similar question was referred in *IR*.

Reasoning of the Court

In *Egenberger* (C-414/16), the Court first explained that Article 4(2) sets out the criteria that must be taken into account in the balancing exercise performed when two competing fundamental rights are in play: in this case, the fundamental right of workers not to be discriminated against and the right of autonomy of organisations whose ethos is based on religion or belief. In the event of a dispute, 'it must be possible for the balancing exercise to be subject if need be of review by an independent authority, and ultimately by a national court'.

The Court of Justice reached this result, *inter alia*, by interpreting Article 4(2) of Directive 2000/78 in the light of Article 47 of the Charter, which, as the Court reiterated, 'lays down the right of individuals to effective judicial protection of their rights under EU law' (paragraph 49). This required the right of autonomy of churches and other organisations whose ethos is based on religion or belief to be balanced against, the right of workers not to be discriminated against on grounds of religion or belief, in situations where those rights

[23] The discussion in the following sections is based on a case note written by Aurelia Colombi Ciacchi. See Aurelia Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights: ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ', *Eureopean Constitutional Law Review* (2019) 1-12.

may clash. While Article 4(2) sets of the criteria to be considered in such a balancing exercise, the Court found it necessary 'for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court' (paragraph 53). The Court clarified that it must be possible for an assertion of an organisation whose ethos is based on religion or belief to be the subject of 'effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of [Directive 2000/78] are satisfied in the particular case' – to allow the criteria to be reviewed by the organisation itself rather than an independent authority such as a national court would deprive the review of its effect.

In *Egenberger*, the Court also explicitly required that Article 4(2) of the Directive 'must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and *objectively dictated* (...)' (paragraph 69).

Likewise, in *IR,* the Court rejected the subjective perspective defended by IR and the German government and required an objective perspective as well as effective judicial review of the decisions of religious organisations. In the case, the Court clearly stated that an organisation whose ethos is based on religion or belief 'cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review to ensure that it fulfils the criteria laid down in Article 4(2)' of the Directive.

The abovementioned principles stated by the Court in *Egenberger* and *IR* entail that Paragraphs 9(1) and (2) of the General Law on equal treatment are not, as such, incompatible with EU law. However, national courts have to interpret and apply them in conformity with the Directive and strike a fair balance between competing fundamental rights. The requirements laid down in Article 4(2) of the Directive, thus, set an objective limit to the freedom of religious organisations, i.e. **effective judicial review of their decisions must be allowed.**

The latter point might seem obvious, but from the viewpoint of German law, it was nothing short of a revolution: the Court of Justice broke the barriers that German law had erected to protect the autonomy of religious organisations from interference by state powers, including civil courts. Since the *Egenberger* and *IR v JQ* judgments, German civil courts may review not only the plausibility but also the substance of decisions of religious organisations when those decisions are alleged to discriminate against workers on the grounds of religion or beliefs.

Conclusion of the Court

In both cases, the Court found that where a church or other organisation whose ethos is based on religion or belief asserts that, in a particular situation, something constitutes a genuine, legitimate occupational requirement, then this assertion *must be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that Directive are satisfied*. In addition, if a national court cannot interpret whether its laws are in conformity with Article 4(2), the judicial protection provided must still be complaint with Articles 21 and 47 of the Charter of Fundamental Rights of the European Union, and these rights need to be made fully effective by, if need be, disapplying contrary provisions of national law.

Impact on the follow-up case

Judgment of the Bundesarbeitsgericht (Federal Labour Court) of Germany, 25.10.2018, 8 AZR 501/14.

In March 2019, the employer filed a complaint before the German Federal Constitutional Court (BVerfG). The case is currently pending before the BVerfG.

With these judgments, the Court of Justice broke the barriers that German law had erected to protect the autonomy of religious organisations from interference by state powers, including civil courts.

Elements of judicial dialogue

Egenberger (C-414/16) was subsequently relied on in *Leitner* (C-396/17), which concerned a civil servant who had been reclassified under a new remuneration and advancement system. He requested his grading reference date to be recalculated in order for his experience acquired before the age of 18 to be taken into account, as well as the payment of remuneration he claimed he was owed. The CJEU reformulated a question referred by the national court dealing with Article 17 Directive 2000/78 to instead answer whether Article 47 CFREU should be interpreted as precluding national legislation that 'reduces the scope of the review which national courts are entitled to conduct, by excluding questions concerning the basis of the "transition amount" calculated according to the rules of the previous remuneration and advancement system', thereby addressing possible **limitations of the scope of judicial review** in such situations.

Although the two cases dealt with different aspects of the right to effective remedy, in *Leitner* the Court reiterated its statement in *Egenberger* that Article 47 CFREU provides a right for individuals to effective judicial protection of their rights under EU law (in both cases the right to non-discrimination enshrined in Article 21 CFREU). In *Leitner*, it was used to find that since the legislation in question implemented Directive 2000/78, 'the Austrian legislature was required to respect the fundamental rights guaranteed in Article 47 thereof, [of the CFREU], and more specifically the right of individuals to enjoy **effective judicial protection** of the prerogatives which EU law confers on them'. After then making reference to Article 19(10) TEU and Article 9 Directive 2000/78 reaffirming the right to an effective remedy (also in relation to discrimination (see *Schmitzer*, C-530/13)), the Court concluded in *Leitner* that '[i]t follows that compliance with the principle of equality requires, so far as concerns persons who have been the subject of discrimination on grounds of age, that **effective judicial protection of their right to equal treatment be guaranteed.**' (*Leitner*, C-396/17, paragraph 62). Interestingly, although discrimination was dealt with here, neither Article 21 nor the principle of non-discrimination were mentioned by the Court.

Ultimately, the Court held that a civil servant disadvantaged by the previous remuneration and advancement system who could not challenge the discriminatory effects of the 'transition amount', would not be in a position to enforce all the rights deriving from the principle of equal treatment, in breach of Article 47. How the interplay between Articles 21 and 47 will be further adjudicated upon by the CJEU remains to be seen,[24] but it is clear

[24] An interesting addition to the judicial dialogue on this issue would have been provided in the case of *Österreichischer Gewerkschaftsbund* (C-24/17, ECLI:EU:C:2019:373), which in the context of age discrimination

from the case law so far that the standards expected of Member States under both provisions of the CFREU remain unaltered by one another, and that Article 47 applies in full in cases concerning discrimination.

3.1.2 Question 2 – National limitation period for claims in light of the principle of effectiveness

Should the principle of effectiveness be interpreted as requiring that a national limitation period for claims which are founded in EU law must not start to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter?

This question was dealt with in *Starjakob* (C-417/13).

National law sources (Austria)

2004 Law on Equal Treatment (Gleichbehandlungsgesetz, BGBl. I 66/2004, 'the GIBG').

Paragraph 29(1) of the GIBG

Paragraph 1480 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch)

Paragraph 1486 of the ABGB

The case

Mr S.'s reference date for the purposes of advancement was determined by taking into account the period of apprenticeship completed after reaching the age of 18, while the period completed prior to that was disregarded. On the basis of the CJEU's judgment in the case of *Hütter* (C-88/08, EU:C:2009:381), which had led to a reform in the Austrian law putting in place the applicable remuneration and advancement system. Mr S. commenced proceedings against the ÖBB claiming payment of the difference that would have been payable to him if the calculation of his reference date for the purposes of advancement had taken into account the disregarded period.

The Regional Court of Innsbruck dismissed the action, holding that Paragraph 53a of the ÖBB-G abolished discrimination based on age. It found that Mr S. could claim that the reference date for the purposes of advancement should be calculated in accordance with Paragraph 53a (1) if he accepted the consequences linked to that new reference date in Paragraph 53a(2) and if he provided evidence of periods of service to be taken into account under Paragraph 53a(4) ('the obligation of cooperation'). As Mr S. had not yet supplied that evidence, his reference date for the purposes of advancement under Paragraph 3 of the 1963 Regulation on Remuneration in the Federal Rail Transport Sector (1963 BO) applicability was maintained.

On appeal, the Higher Regional Court of Innsbruck upheld Mr S.'s claim. The legal position applicable to him by the 1963 BO was discriminatory. It considered that it was necessary

in relation to remuneration and advancement in employment asked the question: 'Is European Union law, in particular Article 47 of the Charter […], to be interpreted as meaning that the fundamental right to effective legal protection enshrined therein precludes national legislation under which the age-discriminatory remuneration system is no longer to apply in current and future procedures and the transition of the remuneration of existing public servants to the new remuneration system is to be based solely on the salary calculated or paid for the transition month?' The Court found it unnecessary to answer this question in light of its answers to the previous questions referred to it in that case.

to determine a new reference date for the purposes of advancement for Mr S. which took into account the period of apprenticeship completed before the age of 18, whilst not applying the extension of the periods required for advancement.

Preliminary questions referred to the Court

The national court referred seven questions to the Court, one of which dealt with the issue of access to justice:

1. If Question 1(a) or Questions 1(b) and 2(b) [whether there is a difference of treatment on the basis of the applicant's age and whether such a difference would be justified under EU law on non-discrimination][25] are answered in the affirmative:

   Does the EU-law principle of effectiveness under the first paragraph of Article 47 of the Charter and Article 19(1) TEU require that the period of limitation for claims founded in EU law cannot start to run until the legal position has been conclusively clarified by the pronouncement of a relevant decision by the Court of Justice of the European Union?

Reasoning of the Court

In addressing this question, the Court stated that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty to the extent that such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law. Consequently, regarding whether such a limitation period should not start before the date of delivery of judgment clarifying the legal position of the matter, the Court noted that the interpretation which the Court gives to a rule of EU law clarifies and defines, where required, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. In other words, a preliminary ruling does not create or alter the law but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force. As a result, the date of delivery in the *Hütter* (C-88/08) judgment did not affect the starting point of limitation at issue in this case.

Conclusion of the Court

The CJEU concluded the following:

'The **principle of effectiveness** must be interpreted as meaning that, in a case such as that at issue in the main proceedings, it **does not preclude a national limitation period for claims which are founded in EU law from starting to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter**.'

Elements of judicial dialogue

It could be said that this case is an example of failed judicial dialogue between the CJEU and the referring national court. The referring court made multiple references to the Charter of Fundamental Rights (Articles 21 and 47) in the questions it referred to the Court of Justice, but the latter failed to mention the Charter at all when addressing and answering the questions. Instead, the Court of Justice based its reasoning and decision on previous case law, most notably *Schmitzer* (C-530/13, EU:C:2014:2359) and *Pohl* (C-429/12, EU:C:2014:12). In relation to *Pohl*, the CJEU first reiterated its findings that 'a preliminary

[25] These questions are dealt with in Chapter 1.3.3 of this Casebook.

ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force', and that '[i]n other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force'. This has been further reiterated in *Grossmania*, C-177/20, ECLI:EU:C:2022:175). The Court in *Pohl* then went on to note that the starting point for the limitation 'is a matter for national law and that the fact that the Court may have ruled that the breach of EU law has occurred generally does not affect the point at which that period starts to run', and that consequent to these considerations, the *Hütter* (C-88/08) judgment did not affect the starting point of the limitation period in *Starjakob* and was not relevant to ascertaining whether or not the principle of effectiveness had been violated in relation to Mr S..

3.2. Effective remedies and sanctions in non-discrimination cases

This section addresses effective remedies and sanctions as crucial components of effective protection from discrimination. The Court of Justice has adopted several judgments dealing with effective remedies and sanctions, ranging from whether national courts may find a private decision to be invalid due to it being contrary to Article 21, to the scope of compensation as a national remedy, and the meaning of the requirement in equal treatment directives that sanctions in discrimination cases be 'effective, proportionate and dissuasive'.[26] These three issues will be discussed in the following paragraphs in light of Article 47 CFREU.

Enforcement and effective remedies and sanctions for non-discrimination across Member States

Before turning to the case law analysis, it is interesting to see how different Member States have given effect to the obligations found in the equality directives to ensure access to justice for victims of discrimination and to ensure that sanctions for non-discrimination are effective, proportionate and dissuasive. The following paragraphs provide a brief explanation of some examples of different Member States' enforcement systems in the context of non-discrimination and the main types of remedies sought at the national level in cases referred to the CJEU that are discussed in this Casebook (Table 3.1).

Member States' enforcement systems for non-discrimination[27]

Member States use a variety of methods in which to ensure effective protection from discrimination in practice. This includes, but is not limited to, judicial proceedings. Some States focus more on administrative proceedings, while others utilise civil, criminal or labour courts to ensure effective judicial protection. Sometimes, compulsory conciliation or mediation proceedings are included either as part of judicial proceedings (for example in Italy, Portugal, Spain and Sweden, and Austria in relation to disability cases), or alongside

[26] See e.g. Article 17 of Directive 2000/78.

[27] The information in this section is taken from the European Network of Legal Experts in Gender Equality and Non-Discrimination, 'A Comparative analysis of Non-Discrimination Law in Europe' (2019) 81-82. Available at <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1/language-en> accessed 1 September 2021.

them (as in many Member States, including Croatia, Estonia, Finland, Germany, Hungary and Poland).

Non-judicial proceedings available in non-discrimination cases may be either general (i.e. available in other types of cases) or specific to non-discrimination. More general proceedings include human rights institutions, inspectorates (e.g. labour inspectorates found in Member States such as France, Italy, Poland, Portugal and the Czech Republic) or ombudsman (e.g. Latvia, Hungary). Some countries have special non-discrimination tribunals (Finland), Commissions (Malta, Bulgaria), some of which are able to award remedies such as compensation in cases where discrimination is found to have occurred. In Member States such as the Netherlands, where discrimination complaints can be heard by (human rights) institutions able to give non-binding opinions, claimants are still able to take their case to court for a binding judgment on the matter. In both the Netherlands and Austria, the court is then required to take the institution's opinion into account in deciding the case.

Finally, in urgent situations, some countries allow the use of special court procedures. In Spain, for example, a more general emergency court procedure is available in instances of alleged violations of fundamental rights and civil liberties, and Belgian individuals may ask for an injunction for the immediate cessation of discrimination.

Example: Poland

EU non-discrimination directives have been implemented into the Polish legal order by the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment. Under Article 13 of the Act, anyone against whom the principle of equal treatment has been violated has the right to compensation (section 1). It further provides that in cases of violation of the principle of equal treatment, the provisions of the Act of 23 April 1964 - Civil Code, shall apply (section 2). The concept of compensation is related to material loss. Thus, it was no clear if a victim may claim redress for immaterial suffering resulting from a discriminatory action or omission. The Appeal Court (judgment of 18 November 2015, **V Ca 3611/14) held (changing the position adopted by the** Regional Court (judgment of 9 July 2014, VI C 402/13)) **that any victim of discrimination is entitled**, under the Act of 3 December 2010, **both to compensation for** material loss and redress for immaterial suffering.

Example: Italy

In Italy, sanctions for discrimination are found in labour law, and include **compensation for non-pecuniary damages** (which are often imposed, sometimes in light of the dissuasiveness of remedies under Directive 2000/78, explained above). This is together with the sanctions of **invalidity of discriminatory acts**, and **measures against unlawful dismissal**.[28]

To demonstrate, in the field of occupation and employment, an employee may file a complaint against their employer at the Labour Court, using an emergency procedure if necessary. Here, they can claim both monetary and non-monetary damages. Significantly, if an employer has lodged a complaint or legal proceeding in relation to alleged

[28] European Network of Legal Experts in Gender Equality and Non-discrimination, 'Country Report, Non-discrimination: Italy 2019' (2019), 10. Available at <https://www.equalitylaw.eu/downloads/5014-italy-country-report-non-discrimination-2019-pdf-1-36-mb> accessed 7 October 2020

discrimination in the workplace, retaliation in the form of, for example, 'creating a hostile, degrading, humiliating or offensive environment', it is null and void.[29] Further, if discrimination in the workplace was done by a colleague rather than an employer, that colleague may be liable for damages. [30]

Finally, several commissions exist in Italy to help enforce non-discrimination. For example, employers can be requested by the Commission for Equal Treatment to provide relevant information to allow the Commission to evaluate gender equality in the organisation.[31] The Commission for Racial Equality plays a supportive role to claimants who have filed a claim of discrimination in the workplace, and has the authority to investigate such a claim, request information from employers, and issue recommendations.[32]

Example: The Netherlands[33]

In the Netherlands, non-discrimination is prohibited in Article 1 of the Constitution, and there are several laws on equal treatment (especially regarding disability, sex and in the context of employment). The following procedures exist for enforcing the principle of equal treatment: judicial procedures (criminal, administrative and civil) and alternative dispute resolution, namely the procedure before the equality body, the Netherlands Institute for Human Rights (NIHR).

Criminal law provisions may be applied in as far as the offences / discrimination fall under the definition of discrimination in Article 90quater of the Criminal Code.

Civil and administrative law: The Dutch equal treatment laws do not entail compulsory judicial procedures. If discrimination occurs in the sphere of private employment, civil (labour) law procedures apply. If it occurs in public employment, the procedures of administrative employment law apply. The civil courts also have competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the Government) are concerned. Outside the area of contract law, an instance of discrimination (e.g. harassment) can be considered as tort and be dealt with in a civil law court procedure. The administrative courts have competence with respect to public employment contracts (civil servants) and when government actions in the sphere of public services amount to discrimination. This does not include unilateral Government decisions (e.g. to grant a subsidy). Government actions can also be considered as tort (*onrechtmatige overheidsdaad*) in which case a civil court is competent to hear the case.

In addition to this, the equal treatment legislation provides for a special (non-compulsory) procedure before the NIHR, which has a section that deals with complaints about discrimination. The NIHR is a quasi-judicial body which issues non-binding Opinions.

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[29] L and E Global, 'Anti-Discrimination Laws in Italy' (2019). Available at <https://knowledge.leglobal.org/anti-discrimination-laws-in-italy/> accessed 1 September 2021.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] This text is taken from the European Network of Legal Experts in Gender Equality and Non-Discrimination', Country Report on Non-Discrimination: The Netherlands (2016) 77-78. Available at <https://ec.europa.eu/info/sites/info/files/2016-nl-country_report_nd_final_en.pdf> accessed 15 October 2020 77-78; and Government of the Netherlands, 'Prohibition of discrimination'. Available at <https://www.government.nl/topics/discrimination/prohibition-of-discrimination> accessed 15 November.

After it has issued an Opinion, a complaint may still be lodged before a conventional civil/ administrative court if the applicant wishes to obtain a binding judgment. The NIHR is a low-threshold body: no legal representation is required.

Table 3.1 – National remedies claimed in non-discrimination cases referred to CJEU

Remedy sought	Cases in which remedy was sought	Member State of referring court/s
Annulment of decision of public body	*Milkova*, C-406/15; Glatzel C-356/12; *Léger,* C-528/13; *Schmitzer*, C-530/13; *CHEZ Razpredelenie Bulgaria*, C-83/14; *MB*, C-451/16; *Leitner,* C-396/17*;* *Maïstrellis,* C-222/14	Bulgaria, United Kingdom, Austria, Greece, France, Germany
Annulment of a decision by a private body	*IR*, C-68/17; *Egenberger*, C-414/16; *Asociația Accept*, C-81/12; *Daouidi,* C-395/15; *Maturi and Others*, Joined Cases C-142/17 and C-143/17;	Germany, Italy, France, Romania
Invalidity of national law	*Salaberria Sorondo,* C-258/15	Spain
Annulment of national or local law	*Association Belge des Consommateurs Test-Achats and Others,* C-236/09; *Vital Pérez*, C-416/13;	Belgium, Spain
Compensation for damages	*FOA,* C-354/13; *NH*, C-507/18; *Felber*, C-529/13; *Cresco,* C-193/17; *Bougnaoui*, C-188/15; *Egenberger*, C-414/16; *HK Danmark*, C-476/11; *Starjakob,* C-417/13; *Bowman,* C-539/15; *Maturi and Others,* Joined Cases C-142/17 and C-143/17; *Coman and Others,* C- 673/16	Austria, Denmark, Germany, France, Italy, Romania
Declaration of discrimination	*Kamberaj*, C-571/10; *Asociația Accept*, C-81/12; *Österreichischer Gewerkschaftsbund*, C-24/17	Austria, Italy, Romania

Order to end discrimination	*Coman and Others*, C- 673/16	Romania
Imposition of a fine	*Asociația Accept*, C-81/12	Romania
Reinstatement of position (employment)	*Maturi and Others*, Joined Cases C-142/17 and C-143/17	Italy

This box demonstrates that while a relatively broad range of remedies are available to claimants in discrimination cases, the most commonly sought remedies appear, from the cases included in the analysis, to be the annulment of decisions by private bodies, and compensation for damages.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Second Chamber) of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07 ("**Feryn**")

➢ Judgment of the Court (Third Chamber) of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, Case C-81/12 ("**Asociația Accept**") (reference case, Question 1)

➢ Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV Bundesarbeitsgericht (BAG)*, Case C-414/16 ("**Egenberger**") (reference case, Question 2)

➢ Judgment of the Court (Grand Chamber) of 11 September 2018, Case C-68/17, *Ir v JQ* ("**IR**")

➢ Judgment of the Court First Chamber of 8 May 2019, *Martin Leitner v Landespolizeidirektion Tirol,* Case C-396/17 ("**Leitner**")

➢ Judgment of the Court (Second Chamber) of 8 May 2019, *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich*, Case C-24/17 ("**Österreichischer Gewerkschaftsbund**")

➢ Judgment of the Court (Grand Chamber) of 23 April 2020, *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, Case C-507/18 ("**NH**") (reference case, Question 3)

➢ Judgment of the Court (Grand Chamber) of 26 January 2021, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19 ("**Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie**")

Main questions addressed

Question 1 In the light of the right to an effective remedy, and of Article 47 CFREU, should a national rule by virtue of which it is possible only to impose a warning in cases where there is a finding of discrimination be considered as an effective, proportionate and dissuasive sanction?

Question 2 In the light of Article 47 CFREU, could a national judge find a private decision invalid, because of a violation of Article 21 CFREU?

Question 3 In the light of Articles 21 and 47 CFREU:

a. Could national legislation provide compensation against discrimination in case of public statements where a person declares that he or she would never recruit persons of a certain sexual orientation to his or her undertaking, even where no recruitment procedure is open or planned, provided that the link between those statements and the conditions for access to employment within that undertaking is not hypothetical?

b. Could such an action be brought by an association of lawyers whose objective is the judicial protection of persons having a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons?

Relevant legal sources

EU level

Articles 21 and 47 Charter of Fundamental Rights of the European Union

Recitals 15, 28, 31 and 35, and Articles 2(2)(a), 9, 10(1) and 17 Directive 2000/78

3.2.1 Question 1 – The meaning of 'effective, proportionate and dissuasive' remedies

In the light of Article 47 CFREU, the right to an effective remedy and the principle of effective protection, what can be considered an 'effective, proportionate and dissuasive' sanction in national non-discrimination cases?

This question was dealt with in the case of *Asociația Accept* (C-81/12).

National legal sources (Romania)

Government Decree No 137 of 31 August 2000 on the prevention and suppression of all forms of discrimination, as amended and subsequently supplemented, in particular by Law No 324 of 14 July 2006, and republished on 8 February 2007 (Monitorul Oficial al României, Part I, No 99, of 8 February 2007 ('GD No 137/2000'), is intended to transpose, inter alia, Directive 2000/78.

According to Article 2(11) of GD No 137/2000, discrimination gives rise to civil liability, administrative offences or criminal offences, as the case may be, under the conditions laid down by law.

Under Article 20 of GD No 137/2000:

'(1) A person who considers that he has suffered discrimination may make a complaint to the [CNCD] within one year from the date on which the facts occurred or the date from which he could have been aware that they had occurred.

(2) The [CNCD] shall decide the application by decision of the Director of the Board …

…

(6) The person concerned is required to prove the existence of the facts from which the existence of direct or indirect discrimination may be presumed, while the person against whom a complaint has been lodged has the burden of proving that the facts do not constitute such discrimination. …

(7) The Director of the Board shall give a decision on the claim within 90 days of the date on which it is lodged and [that decision] shall include … the methods of payment of the fine …

…'

Article 26(1) and (2) of GD No 137/2000 states:

'(1) The administrative offence provided for in Articles … 5 to 8 … and 15 shall be sanctioned by a fine of RON 400 to 4 000 if the discrimination targets a natural person, or a fine of RON 600 to 8 000 if the discrimination is directed against a group of persons or a community.

(2) Sanctions may also be applied to legal persons. …'

Article 27(1) of GD No 137/2000 provides:

'Persons who considers themselves the victim of discrimination may seek before the court compensation and the restoration of the status quo ante or the elimination of the situation to which the discrimination gave rise, in accordance with the provisions of general law. To make such a claim it is not necessary to lodge a complaint before the [CNCD] …'

Article 5(2) of Governmental Decree No 2 of 12 July 2001 on the legal regime for sanctions, amended and subsequently supplemented (Monitorul Oficial al României, Part I, No 410 of 25 July 2001) ('GD No 2/2001'), provides

'Administrative offences shall be punishable principally by: (a) a warning; (b) a fine; (c) community service.'

Under Article 13(1) of GD No 2/2001, the limitation period for imposing a fine for administrative offences is six months from the date on which the events took place.

Article 13(4) of GD No 2/2001 provides for the possibility, by means of special laws, to lay down other limitation periods for imposing penalties for administrative offences.

The case

On 3 March 2010, Accept, a non-governmental organisation for the promotion and protect lesbian, gay, bi-sexual and transsexual rights, lodged a complaint against Mr B. and SC Fotbal Club Steaua Bucureşti SA ('FC Steaua') before the National Council for Combatting Discrimination (CNCD), claiming that the principle of equal treatment had been breached in recruitment matters.

Accept argued that, in an interview concerning the possible transfer of a professional footballer, X, and the supposed sexual orientation of that player, Mr B. had made certain discriminatory statements on 13 February 2010. In particular, the statements suggested that rather than hiring a homosexual footballer, Mr B. would have preferred to hire a player from the junior team. According to Accept, the journalists' suppositions – which Mr B. made his own – that X was homosexual prevented the conclusion of a contract of employment with that player. Accept claimed that Mr B. directly discriminated on grounds

of sexual orientation, breaching the principle of equal treatment in employment and violating the dignity of homosexuals.

Accept also argued that the football club, FC Steaua, had not distanced itself from Mr B.'s statements, and in fact confirmed that having a homosexual footballer on the team would cause tension in the team and with fans. Finally, Accept claimed that Mr B. was still a shareholder in the football club at the time he made the statements.

The CNCD did not find that the situation fell within the scope of a possible employment relationship. However, it did find that the statements constituted discrimination in the form of harassment. It therefore imposed a warning on Mr B., which was the only sanction available under the relevant national law, given the time lapse between the facts and the decision (more than 6 months). In response, Accept brought an action before the referring court seeking, in essence, its annulment, as well as a declaration that the relevant facts fall within the scope of employment matters and that it may be assumed from proven facts that there has been discrimination and, finally, the imposition of a fine instead of a warning.

In relation to the remedies sought, the court observes that under Article 13(1) of GD No 2/2001, whatever the gravity of any discrimination found by the CNCD, where it adopts a decision after the expiry of the limitation period of six months from the date on which the relevant facts occurred, it is unable to impose a fine, but may only give a warning, within the meaning of Article 7(1) of GD No 2/2001, for which there is no limitation period.

Uncertain as whether this conflicted with Article 17 of Directive 2000/78, the court referred the following question to the CJEU.

Preliminary questions referred to the Court

One question referred to the Court dealt with this issue:

1. Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of [GD No 2/200]1 on the legal regime for sanctions, conflict with Article 17 of [Directive 2000/78] given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?

Reasoning of the Court

When addressing the issue, the Court reiterated that pursuant to Article 17 of Directive 2000/78, Member States are responsible for determining the rules and sanctions applicable to infringements of national provisions implementing the Directive, and for ensuring that they are applied by taking all measures necessary. While no specific sanctions are mandated by Article 17, they do have to be 'effective, proportionate and dissuasive'. This also applies in cases where an association empowered to bring a non-discrimination proceeding does so, even if there is no identifiable victim (relying on *Feryn*, C-54/07).

Therefore, the rules on sanctions put in place to transpose Article 17 of Directive 2000/78 into national law 'must in particular ensure, in parallel with measures taken to implement Article 9 of that directive, **real and effective legal protection** of the rights deriving from it'.

The Court then held that 'the severity of the sanctions must be **commensurate to the seriousness of the breaches** for which they are imposed, in particular by ensuring a

genuinely dissuasive effect […], while **respecting the general principle of proportionality**' (paragraph 63) – a '**purely symbolic sanction' is not compatible** with the requirements of Directive 2000/78.

In the case, the national law in effect allowed non-discrimination actions to be brought before the CNCD between 6 and 12 months after the relevant facts occurred. However, even if a claim was lodged within this time period, the CNCD's decision may not be delivered until after the expiry of the time limit. In such situations, the CNCD's practice was to apply a non-pecuniary sanction essentially amounting to a verbal or written warning and a 'recommendation to comply with the law'. Whether or not, in light of a possible reluctance of those with standing to assert their rights, the applicable rules on sanctions are genuinely dissuasive, is a matter for the referring court to ascertain. Where appropriate, the court may consider any repeat offences of the defendant concerned.

Further, while the fact that a particular sanction is not pecuniary does not necessarily render it symbolic (particularly where there is a sufficient degree of publicity and if it aids a finding of discrimination in a possible action for damages), the appropriateness of a 'simple warning' should be assessed by the referring court. Here, the fact that the claimant could also bring separate claim for damages within three years of the relevant facts occurring, does not itself 'make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified' in the present case. The Court agreed with an argument raised by Accept that where an association with standing does not act on behalf of specific victims of discrimination, it could be difficult to prove the existence of harm suffered by such an association for the purpose of the relevant rules of national law. Moreover, if the sanction of a warning tends only to be imposed in Romanian law for very minor offences, as Accept had also argued, that would 'suggest that such a sanction is not commensurate to the seriousness of a breach of the **principle of equal treatment** within the meaning of' Directive 2000/78.

Conclusion of the Court

The Court concluded that:

'Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.'

Impact on the follow-up case[34]

The Court of Appeal hearing the follow-up case did not find discrimination. In relation to effective sanctions, the court 'stretched the CJEU's instruction to find that the warning was sufficient and proportionate'. Subsequently, Accept appealed to the Court of Cassation and Justice, where it was rejected. The CJEU's case was referred to very little in the judgment, essentially using it only to emphasise that it is for the national court to make the relevant assessments. The Court specifically rejected Accept's arguments that the warning was incompatible with Article 17 of Directive 2000/78 and that it was symbolic.

As noted in the European University Institute's ACTIONES Handbook on Non-Discrimination, due to the fact that the proportionality test is to be undertaken by the national court, even in apparently 'straightforward' cases such as that at hand, the guidance offered by the CJEU can be 'stretched so as to confirm the legality of the national practice preceding the preliminary question.'[35]

Elements of judicial dialogue

Since the CJEU's judgment in 2013, the Court has referred to *Asociația Accept* in subsequent judgments, although has not been the subject of substantive discussion. In two cases heard by the CJEU in 2019, *Leitner* (C-396/17) and *Österreichischer Gewerkschaftsbund* (C-24/17), the Court was asked questions directly concerning the interpretation of Article 17 of Directive 2000/78 and Article 47 of the Charter. Both cases were heard on the same day and concerned discrimination on the grounds of age. In both of the judgments, the Court held that Article 17 of the Directive was not engaged, finding an interpretation of the provision unnecessary for the outcome of the dispute. This was because, in both cases, the case did not concern the infringement of national provisions adopted for the purposes of transposing Directive 2000/78, which goes to the heart of Article 17 (the purpose of which, as stated in *Asociația Accept* and reiterated in *Leitner* and *Österreichischer Gewerkschaftsbund*, is to lay down the rules on sanctions applicable to infringements of such legislation).

Asociația Accept itself contained much discussion of the pre-Charter judgment of *Feryn* (C-54/07), which dealt with Article 15 of Directive 2000/43, the parallel provision to Article 17 of Directive 2000/78. The Court highlighted that Article 15 places responsibility for determining the rules on sanctions for infringements of national legislation transposing Directive 2000/43 into national law. It further explained, as the Court in *Asociația Accept*, that the measures must be sufficiently effective to achieve the aim of the Directive and to ensure that they can be effectively relied upon in national courts so that judicial protection will be real and effective. However, it also noted that Article 15 does not impose specific sanctions, 'leav[ing] Member States free to choose between the different solutions suitable for achieving its objective' as long as sanctions are effective, proportionate and dissuasive (paragraph 37). Next, the Court held that this also applies in cases with no direct victim but brought by a body empowered to bring claims. Finally, and crucially, the Court suggested several sanctions that could be appropriate: a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the

[34] The information in this paragraph is based on the European University Institute, 'ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter: Module 6 – Non-discrimination' (2017) 95-96. Available at <https://cjc.eui.eu/projects/actiones/actiones-platform/> accessed 7 October 2020.
[35] Ibid 96.

cost of which is to be borne by the defendant; a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice; a fine; or the award of damages to the body bringing the proceeding. The majority of these findings were relied on in *Asociația Accept*.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Italy

The decision of the Tribunal of Milan of 22 February 2017 is of particular interest. In that case, the applicants claimed that the conduct of a political party (Lega Nord) against immigrants (putting up of posters in public streets, where immigrants are described with an offensive name, as not welcome in the city of Saronno and as beneficiaries of public aid instead of citizens), constituted racial and ethnic discrimination. With regard to remedies, the court, relying on the CJEU case law, affirmed that it is essential to refer to the principle of effectiveness. The court stated that the principle of effective judicial protection is a general principle of Union law deriving from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 ECHR, and in Article 47 CFREU. The court then affirmed that it is therefore the task of national courts, in accordance with the principle of cooperation set out in Article 4 TEU, to ensure the judicial protection of the rights of individuals under the rules of Union law. Moreover, the principle of effectiveness requires that national courts must identify the appropriate remedy with the aim of ensuring effective protection of rights, on the basis of Article 19 TEU (which, in the court's view, establishes a link between effective protection and effective remedy).

In the light of the criteria mentioned above, the court, relying explicitly on the CJEU case law (including *Asociația Accept* and *Feryn*) stated that the remedies necessary to eliminate the negative consequences of discrimination must be effective, proportionate and dissuasive (i.e. capable of inducing the individual who has committed the discrimination to refrain from violating the purposes and rules protecting the infringed right).

The court ordered the political party to compensate for damages (5000 Euro). In the quantification of the damage, the court considered, *inter alia*, the high discriminatory content of the expressions contained in the posters, their suitability to create a strongly hostile climate towards immigrants, the high number of posters, the posting in places of high attendance, the role and notoriety of the political party to which the expressions refer, the echo that the above statements have had in the political life of the city, **and the need to provide a suitable remedy to dissuade the perpetrators of the discriminatory conduct to refrain, in the future, from further violating the rules protecting the equal dignity of persons with conduct similar to that at issue**.

Moreover, *Asociația Accept* is important within the reasoning of a previous case concerning discrimination against Roma people perpetrated by the same political party (Tribunal of Milan of 19 April 2016). In that case, the Court affirmed that the European principles – even in cases where there are no specifically identifiable victims of collective discrimination – impose effective, proportionate, and dissuasive sanctions (Article 15 of Directive 2000/43). The Tribunal, relying on *Asociația Accept,* stated that a merely symbolic sanction cannot be considered compatible with a correct and effective implementation of the non-discrimination directive and that the mere publication of the judicial decision is not dissuasive enough.

Moreover, the Italian Court of Cassation in its decision of 20 July 2018, No. 19443, requesting a preliminary ruling from the CJEU, relied on *Asociația Accept* in formulating the preliminary questions of the case *NH* (C-507/18) (see Section 3.2.3 of this Casebook).

3.2.2 Question 2 – Invalidity of private decisions as a remedy

> In the light of Article 47 CFREU, could a national judge find a private decision invalid because it violates Article 21 CFREU?

This question was dealt with in the case of *Egenberger* (C-414/16).[36]

National legal sources (Germany)

Full versions of these texts can be found in Chapter 2.1.1 of this Casebook.

Paragraphs 2(1) and 3, Richtlinie des Rates der Evangelischen Kirche in Deutschland über die Anforderungen der privatrechtlichen beruflichen Mitarbeit in der Evangelischen Kirche in Deutschland und des Diakonischen Werkes (Guidelines of the Council of the Protestant Church in Germany on the requirements for occupational work under private law in the EKD and for the Diaconal Work, 'the EKD Employment Guidelines') of 1 July 2005, as amended.

Paragraphs 2 and 4, Dienstvertragsordnung der Evangelischen Kirche in Deutschland (EKD Regulation on contracts of employment) of 25 August 2008.

Article 4(1) and (2) Grundgesetz für die Bundesrepublik Deutschland (GG) (Basic Law for the Federal Republic of Germany)

Article 137 Weimar Constitution of 11 August 1919

Paragraphs 1, 7(1), 8, 9(1) and 15 Allgemeine Gleichbehandlungsgesetz (AGG) (General law on Equal Treatment)

The case

The facts of this case can be found in Section 2.1.1 of this Casebook.

Preliminary questions referred to the Court

This question was dealt with in the Court's consideration of the first and second questions referred by the national court:

1. Is Article 4(2) of Directive [2000/78] to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos?

2. If the answer to Question 1 is in the negative:

[36] The discussion in the following sections is based on a case note written by Aurelia Colombi Ciacchi. See Aurelia Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights: ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ', *Eureopean Constitutional Law Review* (2019) 1-12.

> In a case such as the present, is it necessary to disapply a provision of national law — such as, in this case, the first alternative of Paragraph 9(1) of the AGG — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations affiliated to them is also lawful where a particular religion, in accordance with the self-perception of the religious community, having regard to its right of self-determination, constitutes a justified occupational requirement?

Reasoning of the Court

In *Egenberger*, the Court reiterated the relationship between **effective judicial protection**, Article 47 CFREU and the Directive in question (Directive 2000/78) on the one hand, and non-discrimination and Article 21 on the other. The Court, stated, for example, that the objective of the Directive, 'is to lay down a general framework for combating discrimination […] as regards employment and occupation, with a view to **putting into effect** in the Member States the **principle of equal treatment**'. Accordingly, the Directive is a 'specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter' (paragraph 47).

In order to ensure that the Directive can actually put non-discrimination into effect in practice, thus ensuring **effective protection**, the Court found that it is possible to apply Article 21 CFREU directly, even in disputes between individuals themselves. This is due to the mandatory character of Article 21 CFREU, which 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' (paragraph 76).

Further, in light of the **principle of effective judicial protection** and Article 47 CFREU, the decisions of private parties in relation to non-discrimination must be capable of being subject to judicial review. The Court stated that 'Article 4(2) of Directive 2000/78, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of **effective judicial review** by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case' (paragraph 59).

Similarly, in the case of *IR* (C-68/17), the Court noted that 'an organisation whose ethos is based on religion or belief and which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to **effective judicial review** to ensure that it fulfils the criteria laid down in Article 4(2)' of the Directive (paragraph 61).

Taken together, the effect of both the horizontal effect of Article 21 CFREU and the need to be able to subject the decisions, at least of organisations whose ethos is based on religion or belief, to effective judicial review, could lead to a national court holding a private decision amounting to discrimination to be invalid.

Conclusion of the Court

The Court concluded that:

'Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.

…

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 of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.'

Impact on the follow-up case

The impact on the follow-up case is explained in Section 2.1.1 of this Casebook.

Elements of judicial dialogue

The elements of judicial dialogue in *Egenberger* are explained in Sections 2.1.1 and 3.1.1 of this Casebook.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

The impact of *Egenberger* is discussed in Section 2.1.1 of this Casebook.

3.2.3 Question 3a – Compensation as a remedy

In the light of Articles 21 and 47 CFREU, could national legislation provide compensation against discrimination in case of public statements where a person declares that he or she would never recruit persons of a certain sexual orientation to his or her undertaking, even where no recruitment procedure is open or planned, provided that the link between those statements and the conditions for access to employment within that undertaking is not hypothetical?

The following analysis is based on *NH* (C-507/18).

The case

NH is a lawyer and the *Associazione Avvocatura per i diritti LGBTI - Rete Lenford* is an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons (LGBTI) in court proceedings. NH stated, in an interview given during a

radio programme, that he would not wish to recruit homosexual persons to his law firm nor to use the services of such persons in his law firm. The *Associazione* sought an action against NH before the Tribunal of Bergamo, arguing that that NH's statements constituted conduct that was discriminatory on the ground of workers' sexual orientation, contrary to national law. In 2014 the Tribunal found NH's conduct to be unlawful in so far as it was directly discriminatory and ordered NH to pay EUR 10,000 to the *Associazione* in damages. It also ruled that extracts from that decision had to be published in a national daily newspaper. In 2015, the Court of Appeal of Brescia dismissed the appeal brought by NH against the order of the Tribunal of Bergamo.

Subsequently, NH appealed in Cassation against that judgment, alleging infringement or misapplication of national law on the grounds that he expressed an opinion with respect to the profession of lawyer in a situation where he was not presenting himself as an employer but as a private citizen, and that the statements at issue were not made in any concrete professional context. In this respect, the Court of Cassation noted that with regard to the facts, the Court of Appeal ascertained that in a conversation during a radio programme, NH made a series of statements in support of his general aversion to a particular category of individuals that he would not wish to have around him in his firm, nor in the hypothetical choice of his co-workers' and, second, that there was no current or planned recruitment procedure.

Preliminary question referred to the Court

The referring court questioned the limits imposed on the exercise of the **freedom of expression** by the legislation combating discrimination in matters of employment and occupation. The Court observed that the protection against discrimination afforded by Directive 2000/78 and national law covers the creation, carrying on and termination of an employment relationship and thus affects economic activity, and that those instruments appear to it however to be unrelated to the freedom of expression and do not seem to seek to limit that freedom. Furthermore, the Court reminded that the application of those instruments would be subject to there being a real risk of discrimination.

Accordingly, the Court referred to the CJEU the question as to whether, according to Articles 2 and 3 of Directive 2000/78, a statement expressing a negative opinion with regard to homosexuals, whereby, in an interview given during a radio entertainment programme, the interviewee stated that he would never appoint an LGBTI person to his law firm nor wish to use the services of such persons, fall within the scope of the anti-discrimination rules laid down in that directive, even where no recruitment procedure has been opened, nor is planned, by the interviewee.

Reasoning of the Court

The CJEU reframed the question referred by the Italian Court of Cassation, stating that what was at stake in the main proceedings is not whether the statements made by NH fall within the concept of 'discrimination', but whether, having regard to the circumstances in which those statements were made, they fall within the material scope of the Directive in so far as it refers to 'conditions for access to employment … or to occupation, including selection criteria and recruitment conditions' (Article 3(1)(a) of Directive 2000/78). Accordingly, the CJEU observed that the referring court was asking, in essence, whether the concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a)

of Directive 2000/78 must be interpreted as covering statements such as the ones at stake in national proceedings.

The CJEU affirmed that 'conditions for access to employment (…) or to occupation' do not by themselves enable a determination to be made as to whether statements made outside of any current or planned procedure to recruit a person to particular employment or to a particular occupation fall within the material scope of Directive 2000/78. Therefore, the CJEU interpreted Article 3(1)(a) in the light of the objectives of the Directive, which is intended to establish a general framework for combating discrimination on the grounds, *inter alia*, of sexual orientation as regards employment and occupation, 'with a view to putting into effect in the Member States the principle of equal treatment, by providing everyone **with effective protection against discrimination based**, in particular, on that ground'.

Furthermore, the Court stated that Directive 2000/78 is a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in **Article 21 of the Charter**.

In the light of that objective and considering the nature of the rights which Directive 2000/78 seeks to safeguard and the fundamental values that underpin it, the CJEU stated that the concept of 'conditions for access to employment … or to occupation' within the meaning of Article 3(1)(a) of the directive, which defines the scope of that directive, cannot be interpreted restrictively.

With regard to **freedom of expression**, the CJEU recalled that that freedom is an essential foundation of a pluralist, democratic society reflecting the values on which the Union is based and that it constitutes a fundamental right guaranteed by Article 11 CFREU. Nevertheless, the Court, relying on Article 52(1) CFREU, recalled that freedom of expression is not an absolute right and its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Furthermore, the CJEU stated that the limitations to the exercise of the freedom of expression that may flow from Directive 2000/78 were indeed provided for by law, since they resulted directly from that directive. It also found that those limitations were justified and respected the essence of the freedom of expression, since they were applied only for the purpose of attaining the objectives of Directive 2000/78 (i.e. to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection). The CJEU also stated that those **limitations respected the principle of proportionality in so far as the prohibited grounds of discrimination are listed in Article 1 of Directive 2000/78, the material and personal scope of which is defined in Article 3 thereof, and the interference with the exercise of freedom of expression did not go beyond what was necessary to attain the objectives of the directive, in that only statements that constituted discrimination in employment and occupation were prohibited**. The Court added that those limitations are necessary to guarantee the rights in matters of employment and occupation of persons who belong to groups of persons characterised by one of the grounds listed in Article 1 of Directive 2000/78. The Court held that **if statements fell outside the material scope of the Directive solely because they were made outside of a recruitment procedure**, in particular in the context of an audiovisual entertainment programme, **or because they**

allegedly constituted the expression of a personal opinion of the person who made them, the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory.

Conclusion of the Court

The Court concluded that:

'[T]he concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Directive 2000/78 must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical'.

The Court stated that whether the abovementioned link exists must be assessed by the national court hearing the case in the context of a comprehensive analysis of the circumstances characterising the statements concerned. The Court held that the criteria to be taken into consideration to that end are:

1. The status of the person making the statements and the capacity in which he or she made them, which must establish either that he or she is a potential employer or is, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer, or, at the very least, may be perceived by the public or the social groups concerned as being capable of exerting such influence, even if he or she does not have the legal capacity to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters.
2. The nature and content of the statements concerned. They must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer's intention to discriminate on the basis of one of the criteria laid down by Directive 2000/78.
3. The context in which the statements at issue were made (their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks) must be taken into consideration.

Impact on the follow-up case

In its decision No. 28646, of 11 November 2020, the Court of Cassation extensively relied on *NH* (C-507/18). In particular, the Court stated that in the present case, the fact that no concrete negotiations concerning employment were in progress when the discriminatory statements were made does not preclude that such statements could fall within the material scope of Directive 2000/78. The Court affirmed that in the instant case the connection between the lawyer's public statements with the conditions of access to employment in its legal firm was not merely hypothetical, as he owned such a firm and practiced law, and thus was a potential employer.

Moreover, the Court of Cassation confirmed the Court of Appeal decision, according to which the discriminatory content of conduct that infringes the anti-discrimination discipline at stake must be assessed taking into account the prejudice, even if only potential, that a category of individuals might suffer in terms of disadvantage or greater difficulty, compared to others who are not part of that category in finding employment.

Lastly, the Court also recalled the CJEU ruling with regard to the relationship between non-discrimination and freedom of thought and expression. In this respect, the Italian Court of

Cassation stated that the principles developed by the Court of Justice appear perfectly compatible with those of the Italian constitutional system. In fact, according to the Italian Constitution, the freedom of expression must be balanced with the other principles and rights guaranteed by the Constitution, including the principle of equality. Such principle imposes the removal of obstacles of an economic and social nature, which, by effectively limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic, and social organisation of the country (Article 3 of the Italian Constitution), the effective right to work and its protection in all its forms and applications (Articles 4 and 35 of the Italian Constitution).

Elements of judicial dialogue

In terms of horizontal dialogue in *NH,* the CJEU relied on its previous case law. In particular, the Court referred to *EB* (C-258/17), where it stated that **Directive 2000/78 is intended to establish a general framework for ensuring that everyone benefits from equal treatment 'in matters of employment and occupation' by providing effective protection against discrimination based on any of the grounds listed in Article 1 thereof, which include sexual orientation**. This interpretation seems to be settled in CJEU case law (see *Hütter*, C-88/08, paragraph 33, and *Bedi*, C-312/17, paragraph 28).

Furthermore, the Court relied on *Egenberger* (C-414/16), analysed in this Casebook in Section 2.1.1; in particular, the CJEU referred to the part of that case where the Court stated that Directive 2000/78 is a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in **Article 21 CFREU** (see *Egenberger*, paragraph 47).

With regard to the interpretation of the substantive provisions of the Directive, the CJEU relied on *Asociația Accept* (C-81/12) to recall that the Directive may cover public statements made in relation to a particular recruitment policy even though the system of recruitment under consideration is not based on a public tender or direct negotiation following a selection procedure requiring the submission of applications and pre-selection of applicants having regard to their interest for the employer.

Moreover, the CJEU relied on *Patriciello* (C-163/10) when addressing freedom of expression as a fundamental right.

The point made in *NH* that Directive 2000/78 is a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter has since been reiterated on numerous occasions by the CJEU (e.g. *HK v Danmark and HK/Privat*, C-587/20, ECLI:EU:C:2022:419; *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19; MIUR and Ufficio Scolastico Regionale per la Campania, C-282/19, ECLI:EU:C:2022:3). This was itself a reiteration of previous case law such as *Vital Pérez* (C-416/13) discussed in Section 1.3.3.1 and *Egenberger* (C414/16) discussed in Section 3.1.1 above.

3.2.4 Question 3b – Collective action for compensation

Could action for compensation be brought by an association of lawyers whose objective is the judicial protection of persons having a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons?

This analysis is also based on *NH* (C-507/18).

The case

The facts of the case are described in the paragraph concerning Question 3a. Nevertheless, for the purposes of this question some aspects have to be considered. Firstly, within the appeal brought by NH before the Court of Appeal of Brescia, he alleged *inter alia*, misapplication of national law in so far as the appeal court recognised that the Associazione had standing.

The standing of the Associazione was recognised by the Appeal Court in the light of the Associazione's statutes, according to which that association 'aims to contribute to the development and dissemination of the culture and respect for the rights of [LGBTI] persons', 'by drawing the attention of the legal world', and 'manages the formation of a network of lawyers …; [and also] fosters and promotes judicial protection and the taking of representative action before national and international jurisdictions'.

Then, the Italian Court of Cassation referred the question as to whether an association of lawyers, such as the Associazione, constitutes a representative entity for the purposes of Article 9(2) of Directive 2000/78. In that regard, the referring court observed that Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (OJ 2013 L 201, p. 60) and Communication COM(2013) 401 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards a European Horizontal Framework for Collective Redress', set out, among the relevant criteria for determining an entity's standing to bring a representative action, not only the link between the objective laid down by the statutes of the entity concerned and the rights which are claimed to have been infringed, but also the non-profit-making character of that entity.

Preliminary question referred to the Court

The referring court affirmed that, under Italian law, where discrimination in matters of employment is directed against a category of persons rather than against an identified victim, national law recognises the entities mentioned in that provision as having standing, those entities being regarded as representing the interests of the injured parties collectively. Nevertheless, the referring court is doubtful as to whether an association of lawyers whose principal objective is to provide legal assistance to LGBTI persons can, merely because its statutes provide that it also aims to promote respect for the rights of those persons, be recognised as having the standing to bring proceedings, including in respect of a claim for damages, against employment-related discrimination on the basis of its own direct interest.

Therefore, the Italian Court of Cassation referred the following question to the CJEU:

'Must Article 9 of Directive [2000/78] be interpreted as meaning that an association composed of lawyers specialised in the judicial protection of LGBTI persons, the statutes of which state that its objective is to promote LGBTI culture and respect for the rights of LGBTI persons, automatically, as a legal person having a collective interest and as a non-profit association, has standing to bring proceedings, including in respect of a claim for damages, in circumstances of alleged discrimination against LGBTI persons?'

Reasoning of the Court

The CJEU recalled that according to Article 9(2) of Directive 2000/78, Member States are to ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the Directive are complied with, may engage, either on behalf or in support of a complainant, with his or her approval, in any judicial and/or administrative procedure providing for the enforcement of obligations under the Directive. Then, the Court stated that the wording of that provision does not require an association such as that at issue in the main proceedings to be given standing in the Member States to bring judicial proceedings for enforcement of obligations under Directive 2000/78 where no injured party can be identified. Nevertheless, the Court observed that, according to Article 8(1) of Directive 2000/78, read in the light of recital 28 thereof, Member States can introduce or maintain provisions that are more favourable to the protection of the principle of equal treatment than those laid down in that Directive. In the light of the above, the Court stated that when a Member State chooses that option, it is for that Member State to decide under which conditions – such as that the association's for-profit or non-profit status – an association may bring legal proceedings for a finding of discrimination prohibited by Directive 2000/78 and for a sanction to be imposed in respect of such discrimination. Furthermore, the Court stated that it is for the Member State to specify the scope of such an action, in particular the sanctions that may be imposed at the end of it, **such sanctions being required, in accordance with Article 17 of Directive 2000/78, to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party.**

Conclusion of the Court

The CJEU stated that:

'Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party'.

Elements of judicial dialogue

With regard to horizontal dialogue within the CJEU, the Court relied on *Asociația Accept* (C-81/12) in two parts of its reasoning.

Firstly, the CJEU mentioned the case when interpreting Article 9 of Directive 2000/78. According to the judgment in *Asociația Accept*, Article 9 in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that Directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant (paragraph 37 of the judgment). Moreover, the CJEU referred to *Asociația Accept* (C-81/12) when recalling the

Court's affirmation that 'rules on sanctions put in place in order to transpose Article 17 of Directive 2000/78 into the national law of a Member State must in particular ensure, in parallel with measures taken to implement Article 9 of that directive, real and **effective legal protection of the rights deriving from it** […] while respecting the general principle of proportionality' (paragraph 63).

3.3. The burden of proof in non-discrimination cases

According to the preamble of Directive 2006/54, '[t]he adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced'.[37] It therefore plays a central role in effective protection from non-discrimination. The Court's findings regarding who should bear the burden of proof in non-discrimination cases is discussed below.

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 17 July 2008, *S. Coleman v Attridge Law and Steve Law*, Case C-303/06 ("**Coleman**")

➢ Judgment of the Court (Third Chamber) of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, Case C-81/12 ("**Asociația Accept**")

➢ Judgment of the Court of 18 December 2014, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, Case C-453/13 ("**FOA**") (reference case)

Main questions addressed

Question 1 According to EU law and in light of the principle of effective protection, does the burden of proof in non-discrimination cases fall on the claimant or the respondent?

Relevant legal sources

EU level

Recital 31 and Article 10(1) and 10(2) of Directive 2000/78

National level (Denmark)

The full text of the provisions can be found in Section 1.1.1 of this Casebook.

Paragraphs 1(1), 2(1), 2(a), 7(1) and 7(a) of Law No 1417 of 22 December 2004, transposing Directive 2000/78 into Danish law by amending the Law on the principle of non-discrimination in the labour market (lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.), as published by Consolidated Law No 1349 of 16 December 2008 ('the Law on anti-discrimination').

[37] As cited in the European Union Agency for Fundamental Rights and the European Court of Human Rights, 'Handbook on European non-discrimination law: 2018 edition' 2018) 226-227. Available at <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition> accessed 29 September 2020.

3.3.1 Question 1 – Allocation of the burden of proof in non-discrimination cases

This question was answered in *FOA* (C-354/13).

> According to EU law and in light of the principle of effective protection, does the burden of proof in non-discrimination cases fall on the claimant or the respondent?

The case

The facts of this case can be found in Section 1.1.1. of this Casebook.

Preliminary questions referred to the Court

One question referred by the national court dealt with this issue:

1. Should the Court find that there is a prohibition under EU law of discrimination on grounds of obesity in the labour market generally or in particular for public-sector employers, is the assessment as to whether action has been taken contrary to a potential prohibition of discrimination on grounds of obesity in that case to be conducted with a shared burden of proof, with the result that the actual implementation of the prohibition in cases where proof of such discrimination has been made out requires that the burden of proof be placed on the respondent/defendant employer …?

Reasoning of the Court

The Court discussed the allocation of the burden of proof in cases where individuals consider themselves to be a victim of discrimination. It recalled that in such cases, pursuant to Article 10(1) of Directive 2000/78, Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that when the claimant has 'establish[ed], before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the *respondent* to prove that there has been no breach of that principle.'[38] Further, according to Article 10(2) of the Directive, **the introduction by Member States of rules on the burden of proof that are more favourable to claimants than respondents is not precluded by Article 10(1**).

Although it was not mentioned by the Court in its judgment, Recital 31 of the Directive, which provides more nuance to the question of burden of proof, was raised as a relevant source of EU law. Recital 31 reflects the content of Article 10(1), but also specifies that despite the modified burden of proof in non-discrimination cases, 'it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation'. This suggests that it is for the applicant, in establishing a prima facie case of discrimination, that they have one of the characteristics protected under EU non-discrimination law.

Conclusion of the Court

The Court upheld the burden of proof found in Article 10 of Directive 2000/78, which stipulates that where a claimant has demonstrated facts from which direct or indirect discrimination may be presumed, it is for the *respondent* to prove that there has been no breach of the principle of non-discrimination (Article 10(1)). However, Member States may introduce rules more favourable to claimants (Article 10(2)).

[38] Emphasis added.

Elements of judicial dialogue

The issue of the burden of proof in non-discrimination cases had also been raised in the pre-Charter case of *Coleman* (C-303/06), although the Court did not refer to this case in *FOA*. The Court reiterated in *Coleman* that pursuant to Article 10(1) of Directive 2000/78, Member States are to take such measures as are necessary to ensure that when a claimant has established facts from which direct or indirect discrimination can be presumed to have occurred, the burden of proof then lies with the respondent to demonstrate that there was no breach of the principle of non-discrimination. It was also reiterated that Article 10(2) of the Directive allows Member States to introduce rules on the burden of proof that are more favourable to claimants than respondents, going a step further than the minimum standard prescribed by Article 10(1). An identical comment was made in *FOA* (C-354/13, ECLI:EU:C:2014:2463). This standard of a reversed shared burden of proof may have an impact on effective judicial protection in relation to non-discrimination by lowering the burden placed on individuals claiming to have been subjected to discriminatory treatment. Indeed, in *Coleman* the Court specifically stated the necessity of such a burden of proof in order to ensure the **'effective application'** of the principle of equal treatment.

Interestingly, in *Asociația Accept* (C-81/12), the Court was asked whether the right to privacy may, in some situations, make it impossible for the respondent to prove that there has been no discrimination. The case concerned a statement made in relation to the hiring practices of a football club, to the effect that they would not like to hire a homosexual footballer. The referring court wondered whether having to prove that footballers' sexual orientation was not considered during the hiring of players would conflict with the obligation under Article 10(1) of the Directive. The Court found that the Directive did not preclude the modification of the burden of proof, as provided for in Article 10(1), in situations in which there is not a direct victim in a case, but where an action against discrimination is brought by an association with the power to do so under national law, without acting on behalf or in support of a specific complainant or with the latter's approval. The Court found it unnecessary to discuss this in detail, since the referring court's questions suggested that it was indeed possible to apply the modified burden of proof laid down in Article 10(1), 'where appropriate and subject to the answers provided by the Court to' the remaining questions (paragraph 38).

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

While not referring to *FOA*, it is interesting to see how Member States such as Poland have allocated the burden of proof in non-discrimination cases. In Poland, the Act of 17 November 1964 (Code of Civil Procedure) applies to legal proceedings on discrimination brought under the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment. Article 14 of the Act of 3 December 2010 introduces a specific rule on evidence, providing that whoever alleges a breach of the principle of equal treatment makes the fact of its breach plausible (Section 2). Where the breach of the principle of equal treatment is made plausible, the person who is accused of breaching this principle is obliged to prove that he has not breached it (Section 3). The specific character of this rule, constituting an inverted burden of proof necessary to make safeguards against discrimination effectively available, has been stressed in a case heard by the Appeal Court (judgment of 18 November 2015, V Ca 3611/14), and the Regional Court hearing the case on lower instance (judgment of 9 July 2014, VI C 402/13).

In Italy, a reversed burden of proof in non-discrimination cases was introduced in Article 28 of Legislative Decree 150/2011. Following Article 10(1), the reversal is only introduced once the claimant has demonstrated facts from which one can 'precisely and consistently establish a presumption of the existence of discriminatory acts, agreements or behaviours'.[39] The case of 7 March 2017 decided by the Court of Appeal of Trento is of particular interest in that regard. In that case, concerning a discrimination based on sexual orientation, the Court developed a consistent interpretation of a quite ambiguous national provision concerning the burden of proof. The Court stated that that rule provides a reversal of the burden of proof to the detriment of the defendant, since this rules on evidence constitute an application of a principle set out in all anti-discrimination directives and considered fundamental by the CJEU case law for the effectiveness of anti-discrimination law.

3.4. National courts' reliance on Articles 21 and 47 CFREU in non-discrimination cases concerning access to justice

This section comprises a discussion of two cases heard by the United Kingdom Supreme Court, in which discrimination in access to effective remedies was discussed. The cases constitute interesting examples of how Articles 21 and 47 apply in such cases, with particular emphasis on the relationship between the Council of Europe human rights system and the protection of human rights within the European Union.

Relevant national cases in this cluster (United Kingdom)

UK Supreme Court, *R (on the application of UNISON) v Lord Chancellor* [2015] UKSC 51 (reference case, Question 1)

UK Supreme Court, *Benkharbouche/Janah v Sudan Embassy/Libya* [2017] UKSC 62 (reference case, Question 2)

Main questions addressed

Question 1 Are fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals and the employment appeal tribunal unlawful under Article 47 CFREU because of their potentially discriminatory effects on access to an effective remedy?

Question 2 Is national legislation which provides for a difference in treatment on the basis of nationality in relation to access to courts compatible with: (1) the principle of effective judicial protection found in Article 47 CFREU and Article 6 ECHR, and (2) the principle of non-discrimination, enshrined in Article 21 CFREU and Article 14 ECHR? If so, what are the consequences?

Relevant legal sources

EU level

Articles 21, 47 and 52(1) Charter of Fundamental Rights of the European Union

[39] European Network of Legal Experts in Gender Equality and Non-discrimination, 'Country Report, Non-discrimination: Italy 2019' (2019), 10. Available at <https://www.equalitylaw.eu/downloads/5014-italy-country-report-non-discrimination-2019-pdf-1-36-mb> accessed 7 October 2020.

3.4.1 Question 1 – Discrimination in access to justice due to different fees for different employment (appeal) tribunal proceedings

Is the imposition on claimants of different fees for different proceedings before employment tribunals and employment appeal tribunals contrary to Article 47 CFREU and the principle of effective protection?

This question was answered in *UNISON* ([2015] UKSC 51).

Relevant national law (United Kingdom)

Section 29 Equality Act 2010:

'(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

© by subjecting B to any other detriment.

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.'

The case

The trade union UNISON (the appellant), supported by the Equality and Human Rights Commission and the Independent Workers Union of Great Britain as interveners, challenged the lawfulness of a Fees Order made by the Lord Chancellor. This imposed fees for proceedings in employment tribunals and employment appeal tribunals with the purposes of transferring part of the cost burden of the tribunals from tax payers to users of their services, deterring the bringing of unmeritorious claims and encouraging earlier settlement of disputes. It was argued that the making of the Fees Order was not a lawful exercise of those powers, because the prescribed fees interfered unjustifiably with the right of access to justice under both the common law and EU law, frustrated the operation of Parliamentary legislation granting employment rights, and discriminated unlawfully against women and other protected groups. Specifically, it was argued that the effect of the Fees Order was discriminatory as it impeded access to justice for claimants with lower incomes. Accordingly, the appellant issued a claim for judicial review on the ground that the Fees Order was in violation of the EU principle of effectiveness.

Reasoning of the Court

The issues of non-discrimination were discussed by Lady Hale, once the Fees Order had been declared unlawful by Lord Reed. First, it was held that the prohibition of discrimination in Section 29 of the Equality Act 2010 was applicable to the Fees Order. The Court also reiterated that the United Kingdom is bound by the Charter of Fundamental Rights, in particular for this issue, Article 21(1).

Second, the Court addressed whether or not the Fees Order was indirectly discriminatory within the meaning of Section 19 of the Equality Act 2010, which is based on EU law. Specifically, the fact that different types of claims had different fees was questioned, as the type of claim with higher fees (Type B, which includes discrimination claims) was brought more often by women than the type with lower fees (Type A). This could put women at a particular disadvantage compared to men, requiring that the disparate impact be justified.

The Court then asked the question 'whether charging higher fees for Type B claims is consistent with the aims of the Fees Order as a whole'. It noted that linking price to the cost of proceedings, which had resulted in the disparity in fees, is one means of achieving the Order's aims of: transferring the cost of tribunals from the taxpayer to the users; deterring unmeritorious claims; and encouraging earlier settlements. However, according to Article 52(1) CFEU, read together with Article 47 CFREU (which the Supreme Court noted reaffirmed the general principle of effective judicial protection), this method had to be a *proportionate* means of achieving those aims (*SC Star Storage SA v ICI*, Joined Cases C-439/14 and C-488/14, ECLI:EU:C:2016:688). In applying this standard, the Supreme Court took note, pursuant to Article 52(3) CFREU, of the case law of the EctHR **on proportionality in relation to the right to a fair trial** enshrined in Article 6(1) ECHR. Ultimately, the Court found that the **limitation of the right to an effective remedy resulting from the Fees Order did not respect the essence of that right and was not a proportionate means of achieving the legitimate aims pursued**.

In addition, the effect of the fees for Type B claims resulted in meritorious claims being deterred, putting the people bringing those claims at a particular disadvantage. The Court stated that deterring discrimination claims is in itself discrimination against the people, by definition people with protected characteristics, who bring them; and could be even harder to justify than the charging of higher fees for Type B cases generally, given the importance that has always been attached in EU law to the goal of achieving equality of treatment in the workplace and to gender equality in particular.

However, reiterating the lower courts' reasoning, the Supreme Court noted that the provision, criterion or practice prohibited by Section 19(2)(a) Equality Act 2010 must apply to everyone, whether or not they share a particular protected characteristic. Under Section 19(2)(b), a provision, criterion or practice is discriminatory if it puts a sub-group of those people, who have a particular protected characteristic, at a particular disadvantage when compared with others who do not share that characteristic. Even if the sub-group of women who bring discrimination claims were focused on, they were not put at any greater disadvantage by the higher fees than other Type B claimants, for example men bringing unfair dismissal claims. There was no greater or different need to justify the higher fees in discrimination claims than there was in any other sort of Type B claim. Here, it can be inferred from the judgment that although Articles 21 and 47 may interact in claims regarding discrimination in access to effective remedies, access to effective remedy standards under Article 47 CFREU are to be applied whether or not Article 21 is at play in a particular case. This corresponds with the approach of the CJEU in the cases discussed above. In any case, it was found that the higher fees generally had a disparate impact and it was not shown that they were justified.

Conclusion of the Court

The Supreme Court concluded that:

'[T]he Fees Order [wa]s unlawful under both domestic and EU law because it ha[d] the effect of preventing access to justice. Since it had that effect as soon as it was made, it was therefore unlawful ab initio, and must be quashed.'

Elements of judicial dialogue

The most interesting aspects of judicial dialogue in this case concern the Supreme Court's discussion and application of European Court of Human Rights (EctHR) jurisprudence to a matter of EU law. Before embarking on its own reasoning, the Supreme Court noted unlike the arguments invoked before the lower instances, which focused mainly on CJEU and EctHR jurisprudence, the arguments in the case heard at final instance were based primarily on national common law, with less reliance on the EU and Council of Europe case law. In its own discussion of the right of access to justice, the Supreme Court made a very interesting comment regarding the relationship between EU and EctHR jurisprudence, stating that 'the case law of the Strasbourg court concerning the right of access to justice is relevant to the development of the [national] common law. It will be considered in the context of the case based on EU law, on which it also has a bearing' (paragraph 89). According to the national court, therefore, although the case may be based on EU law, the EctHR's case law has a clear influence on the application thereof. The Court went on to explain the basis of this in Article 52(3) of the Charter, before going on to inject, in its application of EU law, the notion from the EctHR that protection of rights be practical and effective rather than theoretical and illusory, and substantively relying on EctHR jurisprudence for the bulk of its reasoning concerning the limitation of the right to access to justice (and more specifically, the proportionality of the Fees Order in question). It therefore appears that, due to Article 52(3) CFREU, the approach of the national court towards the application of EctHR jurisprudence largely mirrors that of the Court of Justice of the European Union itself.

The CJEU's approach in this respect can be seen in *Hakelbracht and Others* (C-404/18 ECLI:EU:C:2019:523). The case dealt primarily with discrimination on the grounds of sex in the context of access to employment and working conditions, the Court noted that the principle of effective judicial protection has been given specific expression in Article 17 of Directive 2006/54, enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and reaffirmed in Article 47 CFREU (paragraph 32). This follows Article 52(3) CFREU and suggests that more generally, the principle of effective judicial protection under European law has a counterpart in the Council of Europe human rights system.

As there are only a very limited number of CJEU cases dealing with Articles 21 and 47 CFREU together, it is helpful to look to the jurisprudence of the European Court of Human Rights to see how the Court has applied the right of access to justice under the European Convention on Human Rights (Articles 6 and 13) in cases concerning discrimination in access to justice. The following box contains several pertinent examples of the EctHR's case law on this.[40]

[40] European Union Agency for Fundamental Rights and the European Court of Human Rights, 'Handbook on European non-discrimination law: 2018 edition' 2018) 140. Available at <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition> accessed 29 September 2020.

Example: In *Paraskeva Todorova v Bulgaria* (Application no. 37193/07), the national courts, when sentencing an individual of Roma origin, expressly refused the prosecution's recommendation for a suspended sentence, stating that a culture of impunity existed among the Roma minority and implying that an example should be made of the particular individual. The ECtHR found that this violated the applicant's right to a fair trial in conjunction with the right to be free from discrimination.

Example: In *Moldovan and Others v Romania (No. 2)* (Application nos. 41138/98 and 64320/01), it was found that excessive delays in resolving criminal and civil proceedings (taking seven years to deliver a first judgment) amounted to a violation of Article 6. The delays were found to be due to a high number of procedural errors and taken in conjunction with the pervading discriminatory attitude of the authorities towards the Roma applicants, it was found to amount to a violation of Article 14 in conjunction with Article 6 (and 8).

Example: In *Anakomba Yula v Belgium* (Application no. 45413/07), national law, which made it impossible for the applicant to obtain public assistance with funding a paternity claim on the basis that she was not a Belgian national, was found to amount to a violation of Article 6 in conjunction with Article 14. This is not to suggest that non-nationals have an absolute right to public funding. In the circumstances, the ECtHR was influenced by several factors, including that the applicant was barred because she did not have a current valid residence permit, even though at the time she was in the process of having her permit renewed. Furthermore, the ECtHR further observed that a one-year time bar existed in relation to paternity cases, which meant that it was not reasonable to expect the applicant to wait until she had renewed her permit to apply for assistance.

3.4.2 Question 2 – Effective judicial protection and the consequences of conflicts between UK and EU, and UK and Council of Europe law.

Is national legislation which provides for a difference in treatment on the basis of nationality in relation to access to courts compatible with: (1) the principle of effective judicial protection found in Article 47 CFREU and Article 6 ECHR, and (2) the principle of non-discrimination, enshrined in Article 21 CFREU and Article 14 ECHR?

This question was answered in *Benkharbouche* ([2017] UKSC 62).

Relevant national law (United Kingdom)

Section 3 of the Human Rights Act 1998 (HRA):

'Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a)applies to primary legislation and subordinate legislation whenever enacted;

(b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.'

Section 4 of the HRA:

'Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a)that the provision is incompatible with a Convention right, and

(b)that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

…

(6)A declaration under this section ("a declaration of incompatibility")—

(a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b)is not binding on the parties to the proceedings in which it is made.'

Section 1 of the State Immunity Act 1978, as amended (SIA):

'*Immunity from jurisdiction*

1.(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act.'

Section 3 of the SIA:

'3.(1) A State is not immune as respects proceedings relating to –

(a) a commercial transaction entered into by the State;

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

...

(3) In this section "commercial transaction" means –

1. (a) any contract for the supply of goods or services;
2. (b) any loan or other transaction for the provision of

finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.'

Section 4 of the SIA:

'4.(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if –

...

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or

(c) the parties to the contract have otherwise agreed in writing.'

Section 16 of the SIA:

'16.(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and

(3) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968.'

The case

The appellants, Ms B. and Ms J., were employees of the Sudanese and Libyan embassies in the UK, respectively. Both were dismissed and brought claims against the embassy for unfair dismissal and breach of the Working Time Regulation 1998. Additionally, Ms B. brought claims of failure to pay the minimum wage, and Ms J., arrears of pay, racial discrimination, and harassment.

These claims were turned down due to Section 16(1)(a) State Immunity Act 1978 (SIA) as the appellants were considered 'members of the mission'. While the tribunal recognised that this provision could breach Article 6 ECHR, it held that it could not disapply the SIA and allow the employment claims to go forward. This was upheld by the Employment Appeal Tribunal (EAT), but the claims under the Working Time Regulations and the race discrimination claim were allowed to proceed as they fell within the ambit of EU law. The EAT found that the rights to an effective remedy and to a fair trial under Article 47 CFREU were infringed. The case was appealed to the Court of Appeal, which affirmed the judgment of the EAT, disapplying the relevant provisions so far as they applied to the EU law claims.

It also made a declaration of incompatibility under Section 4 of the Human Rights Act 1998 affecting all the claims,[41] whether founded on domestic or EU law.

Reasoning of the Court

Both Articles 21 and 47 CFREU were relevant to this case, given the claim of discrimination in accessing an effective remedy. However, while the lower courts (including the Court of Appeal) referred explicitly to both provisions of the Charter, the Supreme Court only mentioned Article 47 CFREU.

The Court found Section 4(2)(b) SIA discriminatory on the grounds of nationality and a disproportionate limitation contrary to Article 6 ECHR, as no such limitation to the exception of immunity is required by customary international law or within the range of states' margin of appreciation.

Discussing the issue of discrimination in Ms J.'s case, the Court found that claiming the discriminatory character of Section 4(2)(b) of the Act to be a violation of Article 14 ECHR, read in conjunction with Article 6, 'add[ed] nothing to her case based on article 6 alone.' As Section 4(2)(b) unquestionably discriminated on grounds of nationality, the only question was whether the discrimination was justifiable by reference to international law. Since the Court had found that state immunity was no answer to the claim under Article 6 alone, it was no answer to the claim under the combination of Article 6 and Article 14. In the Court's view, the denial of access to the courts to persons in her position is unjustifiable whether it was discriminatory or not.

Accordingly, the Court also found a violation of Article 47 CFREU. While it stated that the scope of Article 47 is not identical to that of Article 6 ECHR, on the facts of the case, a violation of the latter provision meant that the former was also violated. The Court did not discuss Article 47 as a separate issue, but did note the difference of the effects of Article 47 CFREU vs. Article 6 ECHR, stating that 'a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.'

Conclusion of the Court

The Court affirmed the finding of the Court of Appeal that Sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 would not apply to the claims derived from EU law for discrimination, harassment and breach of the Working Time Regulations. Ms B.'s other claims were barred by those sections of the Act. But to that extent they were held to be incompatible with Article 6 ECHR, and also, in the case of Section 4(2)(b) with Article 6 read with Article 14 of the Convention. The Court of Appeal's statement of incompatibility under Section 4 of the Human Rights Act 1998 was upheld, as no compatible interpretation pursuant to Section 3 Human Rights Act was possible. Both cases were remitted to the Employment Tribunal to determine the claims based on EU law on their merits.

[41] A declaration of incompatibility is made by a UK court under Section 4 of the Human Rights Act 1998. It signifies that the Court considers a provision of domestic legislation to be incompatible with the European Convention on Human Rights. However, as UK courts do not have the power to strike down Acts of Parliament, there are no binding consequences for Parliament, which may decide to either keep the legislation in force as it is, amend it, or replace it. See Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edn, Cambridge University Press 2007) 272.

Elements of judicial dialogue

The Court's discussion of Article 6 ECHR (which the applicants claimed was violated in conjunction with the prohibition of discrimination in Article 14 ECHR), which includes a 'right to access to a court to determine a dispute' as well as the right to a fair trial (*Golder v United Kingdom*, Application no. 4451/70, cited in paragraph 14), was based heavily on case law of the European Court of Human Rights (ECtHR). For example, the Court followed the ECtHR's case law when stating that Article 6 is not absolute and that it does not impose substantive standards on states as to the content for civil rights and obligations but rather concerns states' judicial processes (paragraphs 14-15, citing *Ashingdane v United Kingdom*, Application no. 8225/78 and *James v United Kingdom*, Application no. 8793/79, paragraph 81, respectively). Crucially for current purposes, conferring immunity on 'large groups or categories of persons' would be inconsistent with the rule of law (*Fayed v United Kingdom*, Application no. 17101/90, paragraph 65).

Of particular interest, however, is the Supreme Court's reliance on *Fogarty v United Kingdom* (Application no. 37112/97), a case which also dealt with an employment dispute concerning discrimination between a state and non-diplomatic staff of one of its embassies. The ECtHR found in *Fogarty* that while Article 6 was engaged in the case, it was not violated due to the rule at stake being in line with 'current international standards'. Following an extensive discussion of international and European law, the Court concluded that (unlike in *Fogarty*) Section 4(2)(b) of the State Immunity Act could 'not [be] justified by any binding principle of international law' (paragraph 67). The same conclusion was reached in relation to Section 16(1)(a).

Ultimately, 'the United Kingdom had jurisdiction over Libya and Sudan as a matter of international law, and article 6 [wa]s engaged by its refusal to exercise it' and both Sections 4(2)(b) and 16(1)(a) of the SIA were incompatible with Article 6. Due to the subject matter at hand (state immunity) the Court also relied on case law of the International Court of Justice regarding the meaning of state immunity (e.g. *Germany v Italy: Greece Intervening (Jurisdictional Immunities of the State)* [2012] ICJ Rep 99; and *Congo v Belgium (Arrest Warrant of 11 April 2000)* [2002] ICJ Rep 3, paragraphs 59-61). Only one case of the CJEU (*Mahamdia*, C-154/11, ECLI:EU:C:2012:491) was referred to by the Supreme Court, once in relation to the distinction in the law on state immunity between public and private acts, and once in holding that if justified in international law, state immunity would provide an answer to questions concerning both Article 6 ECHR and Article 47 CFREU.

3.5. Issues relating to effective protection

Given the subject matter of the cases discussed in this chapter, several important issues regarding effective protection for what concerns non-discrimination are raised. The main pieces of general guidance regarding effective protection are provided in Section 3.6 below, and will not be discussed in detail in the current section. It suffices to state at this point that in relation to non-discrimination claims, the CJEU has addressed several issues of effective protection in cases concerning claims of non-discrimination, although its findings do not appear to be specific to non-discrimination cases. This includes, for example, the finding that, subject to certain constraints, time limits may be placed on the bringing of legal proceedings (discussed in *Starjakob* (C-417/13)).

The cases discussed above also demonstrate that on occasion, the CJEU does not discuss the Charter, and Articles 21 and 47 specifically, in cases concerning non-discrimination and access to justice. This is even the case when the national referring court explicitly mentioned the provisions in its questions, as occurred in *Starjakob*. However, this has not prevented the Court from discussing the principle of effective protection in such cases. Indeed, the CJEU based its conclusion in *Starjakob* on the principle of effectiveness.

With regard to effective remedies in non-discrimination cases, the analysis makes it clear that Member States do have a relatively broad margin of discretion to choose which remedies to make available to claimants, even when an individual victim is not identifiable. This is reflected in the brief comparison of enforcement systems and effective remedies for discrimination provided in Section 3.2, which provides several examples of the mechanisms and bodies available to ensure effective protection from discrimination at the national level. However, as the case of *Asociația Accept* (C-81/12) in particular shows, Members States' discretion is not limitless – purely symbolic sanctions are not regarded as being 'effective, proportionate and dissuasive' for the purposes of the relevant equality directives.

Furthermore, the principle of effectiveness plays an important role in the shaping of remedies. In particular, in *NH* (C-507/18) the CJEU, in relation to the remedy of compensation against discrimination, stated that Directive 2000/78 should be interpreted taking into account the need to provide everyone with effective protection against discrimination. Moreover, in setting the boundaries of the collective action for compensation the Court relied on Article 17 of Directive 2000/78, according to which sanctions against discrimination are to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party.

In relation to the burden of proof in discrimination claims (as discussed in *FOA*, C-453/13) it was recalled in these cases that pursuant to Article 10(1) of Directive 2000/78, Member States are to take such measures as are necessary to ensure that when a claimant has established facts from which direct or indirect discrimination can be presumed to have occurred, the burden of proof then lies with the respondent to demonstrate that there was no breach of the principle of non-discrimination. It was also reiterated that Article 10(2) of the Directive allows Member States to introduce rules on the burden of proof that are more favourable to claimants than respondents, going a step further than the minimum standard prescribed by Article 10(1). Recital 31 of the Directive, however, emphasises that it is not for the respondent to prove that an applicant has a characteristic protected by the prohibition of discrimination in the Directive. This presumably falls upon the applicant in establishing a prima facie case of discrimination. This standard of at least a shared burden of proof may have an impact on effective judicial protection in relation to non-discrimination by lowering the burden placed on individuals claiming to have been subjected to discriminatory treatment.

The judgments of the national case law considered above do demonstrate a relationship and some degree of comparison between effective protection under EU law on the one hand, and Council of Europe law on the other. In particular the scope of Article 47 CFREU and Article 6 ECHR has been addressed. The United Kingdom Supreme Court, for example, has explained that the two provisions do not have identical content, but that in some cases, a breach of Article 6 ECHR would automatically entail a breach of Article 47 CFREU.

While specific to the United Kingdom, effective protection in practice has also been shown to be protected to a different degree according to whether national legislation is held to be incompatible with the EU Charter or with the ECHR (see the UK Supreme Court's judgment in *Benkharbouche*). The incompatibility of national legislation with EU law has the consequence of striking down that legislation, whereas incompatibility with the ECHR does not. In the latter case, UK courts may only declare that the legislation is incompatible, with the consequence that the legislation continues to apply unless and until Parliament chooses to change the law itself. If the incompatibility of national legislation relates to Article 47 CFREU and Article 6 ECHR, this may mean that effective protection under the ECHR has a less significant immediate impact in practice than effective protection under the CFREU, as situations such as those that have caused the breach of effective protection in the relevant case may continue to arise unless Parliament takes action. Of course, if Parliament chooses not to amend the incompatible legislation, it may be possible for an individual to bring a successful claim against the United Kingdom before the European Court of Human Rights, which may require the United Kingdom to pay damages and/or make the necessary changes to the law.

3.6. Guidelines emerging from the analysis

Several guidelines can be extracted from the case law discussed in this section.

Effective judicial protection:

In the view of the Court of Justice, as expressed in *Starjakob* (C-417/13), and in the light of the principle of effectiveness and Article 47 CFREU:

- It is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty, to the extent that such time-limits are not:
    - Liable to make it in practice impossible; or
    - Liable to make it excessively difficult to exercise the rights conferred by EU law.

In the view of the Court of Justice as expressed in *Egenberger* (C-414/16), and in the light of the principle of effectiveness and Article 47 CFREU:

- Effective judicial review of the decisions of religious organisations, possibly relevant from the perspective of non-discrimination, must be allowed.

In the view of the Court of Justice as expressed in *IR* (C-68/17):

- An organisation whose ethos is based on religion or belief cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review.

Meaning of 'effective, proportionate and dissuasive sanctions':

In the view of the Court of Justice as expressed in *Asociația Accept* (C-81/12):

- The fact that a particular sanction is not pecuniary does not necessarily render it symbolic (particularly where there is a sufficient degree of publicity and if it aids a finding of discrimination in a possible action for damages).
- A 'purely symbolic sanction' is not compatible with the requirements of Directive 2000/78. This can be extended by analogy to Directive 2000/43.
- The severity of sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect while respecting the general principle of proportionality.
- The rules on sanctions put in place to transpose relevant equal treatment directives into national law must in particular ensure real and effective legal protection of the rights protected by the directives.
- Whether or not, in light of a possible reluctance of those with standing to assert their rights, the applicable rules on sanctions are genuinely dissuasive, is a matter for the referring court to ascertain.

Relationship and comparison of EU and Council of Europe human rights law:

- Both the CJEU and national courts invoke Article 52(3) CFREU in order to substantively apply case law of the ECtHR in cases based on EU law.

In the view of the United Kingdom Supreme Court in *Benkharbouche*:

- The scope of Article 6 ECHR is not identical to that of Article 47 CFREU. However, in some cases, it is possible to say that a violation of Article 6 necessarily entails a violation of Article 47.

Consequences of incompatibility of UK legislation with the CFREU vs the ECHR:

In the view of the United Kingdom Supreme Court in *Benkharbouche*:

- The consequences of a finding of a conflict between UK law and EU law differ from those of a conflict between UK law and the ECHR – when the former occurs, the conflict must be resolved in favour of EU law and the domestic law must be disapplied, but when the latter occurs, the Court may only make a declaration of incompatibility under Section 4 of the UK Human Rights Act 1998 (this has no binding effect and does not require the law to be amended or disapplied).

Consequences of preliminary rulings:

In the view of the Court of Justice as expressed in *Starjakob* (C-417/13):

- A preliminary ruling does not create or alter the law but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force.

Appendix on Article 21 of the Charter and the scope of application of EU law under Article 51[42]

Article 21 of the Charter relevant in two notable contexts going beyond the material contexts of the non-discrimination Directives. After all, as the CJEU has repeatedly held, the Directives are merely a specific expression within the fields they cover the general prohibition on discrimination laid down in Article 21 of the Charter (see e.g. the judgment of *NH*, C-507/18, EU:C:2020: 289, paragraph 38).

This section focuses on the circumstances in which violations of one of the prohibitions set out in Article 21 of the Charter are enforceable under EU law for non-compliance with them by an institution body, office or agency of the EU, or a Member State which is implementing EU law, as set out in the first paragraph of Article 51. It also offers some tentative reflections on the meaning of the prohibition on extension of the field of application of EU law by the recourse to the Charter in the second paragraph of Article 51.

Article 51 of the Charter reads:

1. The provisions of this Charter are addressed to the **institutions, bodies, offices and agencies** of the Union with due regard for the principle of subsidiarity and to the **Member States only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not **extend the field of application** of Union law beyond the powers of the Union or establish any new power or task for the Union**, or modify powers and tasks as defined in the Treaties.**

Article 51 therefore sets out the rules governing the applicability of the Charter, albeit without addressing in its text horizontal enforcement between two private parties. Thus, when the conditions established in Article 51 are present, the prohibitions set out in Article 21 of the Charter are legally enforceable, and must be protected by an effective remedy as provided for by Article 47 of the Charter.

<u>The institutions, bodies, offices and agencies of the Union</u>

The meaning of the text is straight-forward and the case law of the CJEU unequivocal. If any of the institutions, bodies, offices and agencies of the Union breach rights protected by the Charter as general principles of law, individuals are entitled to contest the measure concerned either (a) by way of direct action before the General Court upon satisfaction of relevant procedural laws and the standing requirements set out in the fourth paragraph of Article 263 TFEU (see recently on standing e.g. *Internacional de Productos Metálicos v Commission*, C-145/17 P, EU:C:2018:839; *Scuola Elementare Maria Montessori v Commission*, C-622/16P, EU:C:2018:873. See also notably the Opinion of Advocate General Bobek of 16 July 2020, *Région de Bruxelles-Capitale*, C-352/19P, EU:C:2020:588, or (b) before a Member State court on satisfaction of compliance with Member State rules on standing, and provided that the applicant 'without any doubt' could not have brought an action before

[42] The text in these paragraphs were drafted by Professor Angela Ward, Legal Secretary to former Advocate General Evgeni Tanchev of the CJEU.

the General Court for failure to comply with the standing requirements set by the fourth paragraph of Article 264 TFEU (on the meaning of 'without any doubt' see recently *Trace Sport*, C-251/18, EU:C:2019: 766. See also the Opinion of Advocate General Pitruzzela of 9 April 2019, EU:C:2019:295).

For example, a Commission decision was recently declared invalid for non-compliance with the GDPR, as interpreted in the light of Articles 7 (privacy), 8 (data protection) and 47 (effective remedies) of the Charter (see *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559). However, primary EU measures, such as legislation, will also be declared invalid if they cannot be interpreted in conformity with Charter rights (see, e.g., *Digital Rights Ireland*, C-293/12, EU:C.2014:238).

Linking cases concerned with validity review with the enforcement against Member States of EU anti-discrimination law is important to protect the coherency in the case law. This is exemplified by the Opinion of Advocate General Wathelet (*Coman*, C-673/16, EU:C:2018:2, at paragraph 57), *Coman* being a case in which a Member State was derogating from EU free movement rights, and therefore bound by fundamental rights as protected by the Charter (see in particular *Coman*, C-673/16, EU:C:2018:385, paragraph 47). AG Wathelet stated:

'[t]he solution adopted by the Court in the judgment of 31 May 2001, *D and Sweden* v *Council* (C-122/99 P and C-125/99 P, EU:C:2001:304), by which "according to the definition *generally accepted by the Member States*, the term marriage means a union between persons of the opposite sex" […] now seems to me outdated.'

This approach was not, however, adopted in the judgment of the CJEU, where the status of the judgment in *D and Sweden v Council* was rather left hanging.

The question then arises whether the prohibitions enumerated in Article 21 'rights' are protectable by legal challenge to EU measures for validity? An affirmative answer has been given with respect to the following cases:

- Judgment of 1 March 2011, *Test Achats*, C-236/09, EU:C:2011:100 (Article 21 and equal treatment of men and women);
- Judgment of 5 July 2017, *Fries,* C-190/16, ECLI:EU:C:2017:198 (Article 21 and the prohibition on discrimination on the basis of age); and
- Judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350 (Article 21 and the prohibition on discrimination on the basis of age).

While there are no rulings on whether the prohibition on discrimination on grounds of religion or belief, or sexual orientation, or race can be the basis for challenging the validity of EU measures, it is established that they are justiciable rights and general principles of EU law which can be relied on to challenge the compatibility of Member State action with EU law.[43]

[43] See: *Egenberger* (C-414/16) on Article 21 and non-discrimination in religion or belief; and *Coman* (C-673/16) on Article 21 and non-discrimination on the basis of sexual orientation (see further Jacquelyn MacLennan and Angela Ward, 'The Constitutional Dimension of Case C-673/16 Coman on the Prohibition of Discrimination on the Basis of Sexual Orientation: The Role of Fundamental Rights in Interpreting EU Citizenship', 26(2) Columbia Journal of European Law (2020) 36); *Maniero* (C-457/17); *Jyske Finans* (C-668/15)'; and *CHEZ Razpredelenie Bulgaria* (C-83/14) on Article 21 and non-discrimination on the basis of

As general principles of EU law, all these rights ground a basis for a challenge for validity. The other bases of discrimination prohibited under the first paragraph of Article 21 are colour, ethnic or social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth. Can these ground a challenge to the validity of a measure passed by an institution, office, body or agency of the European Union?

On the one hand, the CJEU held at paragraph 77 of its judgment in *Egenberger*, (C-414/16) that 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', and at paragraph 78 that Article 21 'is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.' This suggests that all of the rights mentioned in Article 21 of the Charter are general principles of law which can be relied by individuals to contest the validity of EU measures.

This, however, needs to be balanced against two factors. First, the CJEU ruled, effectively, in the judgment of *Jyske Finans* (C-668/15), that the applicant had been discriminated against on the basis of his birth, and not his race, so that he was unable to rely on Directive 2000/43 to challenge the compatibility with that Directive of conduct falling with the material scope of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15). However, if discrimination on the basis of birth, as protected by Article 21 of the Charter, is a general principle of EU law, how could Directive 2005/60 be valid? This question was not addressed either by the CJEU or the Advocate General, even though the referring court asked whether a practice potentially giving rise to indirect discrimination could in principle be justified as an appropriate and necessary means of safeguarding the enhanced customer due diligence measures provided in Article 13 of Directive 2005/60.

Second, the second paragraph of Article 51 precludes recourse to the Charter to extend the field of application of EU law. In the absence of EU legislation to protect against the forms of discrimination mentioned at paragraph 11 above, would vesting them with the status as general principles of law entail such an expansion? Perhaps not, because the principle of equal treatment, which requires that, within the scope of application of EU law, and whether in the context of validity review of EU measures or challenge to Member State implementation of EU law, comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified, existed under EU law prior to the Charter acquiring binding legal effect in 2007 (see e.g. *Ruckdeschel and Other*, C-176/76, EU:C:1977:160). This would suggest that unequal treatment with respect to the grounds of discrimination listed in Article 21 are protected by EU law, when they arise in the context of challenge to the validity of EU measures or Member State implementation of EU law.

Finally, it is worth noting that when the validity of a measure promulgated by an institution, body, office or agency of the Union is challenged for its compliance with a general principle

race. See further Angela Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: more a Whimper than a Bang?' 20 Cambridge Yearbook of European Legal Studies (2018) 32).

of law protected by Article 21, it is subject to the limitation provided under Article 52 (1) of the Charter. In the case law to date, no distinction is drawn between whether the discrimination is direct or indirect before recourse is made to Article 52 (1). (See *Fries*, C-190/16, ECLI:EU:C:2017:198, on the prohibition on discrimination on the basis of age, and Judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350 on the prohibition on discrimination on the basis of disability. Article 52 (1) of the Charter is also the relevant limitation provision when a general principle protected by Article 21 is invoked to challenge Member State implementation of EU law. (See *Léger*, C-528/13, EU:C:2015:288, on the prohibition on discrimination on the basis of sexual orientation and see further below).

Member States only when they are implementing Union law

All organs of the Member States are bound to comply with the prohibitions in Article 21 of the Charter when they implement Union law, in so far as those rights are reflective of general principles of EU law. This applies across the board in all areas of EU law. What, then, does this important phrase encapsulate?

(i) Justification of impediment of freedoms See *Commission v Hungary* (C-235/17, EU:C:2019:432, paragraph 65), where it was stated that:

'the use by a Member State of the exceptions provided for by EU law in order to justify an impediment to a fundamental freedom guaranteed by the Treaty must be regarded as 'implementing Union law' within the meaning of Article 51(1) of the Charter (judgment of 21 December 2016, *AGET Iraklis*, C 201/15, EU:C:2016:972, paragraph 64 and the case-law cited).'[44]

For example, if a derogation to a free movement right had a disproportionate impact on any of the groups listed in Article 21 of the Charter, it would be arguable that the purported derogation is inconsistent with the Charter.

(ii) Exercise of administrative discretions the authority for which springs from an EU measure. This has arisen in the cases in the context of administration of the Common European Asylum System. See e.g. *Jawo* (C-163/17, EU:C:2019:218, paragraphs 77-78 and 85), where it was stated that:

'In that regard, it must be noted, in the first place, that a Member State's decision to transfer an applicant pursuant to Article 29 of the Dublin III Regulation to the Member State which, in accordance with that regulation, is in principle responsible for examining the application for international protection, constitutes an element of the Common European Asylum System and, accordingly, implements EU law for the purposes of Article 51(1) of the Charter (see, by analogy, judgments of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 68 and 69, and of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraphs 53 and 54).

Moreover, it is settled case-law that the provisions of the Dublin III Regulation must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter, inter alia Article 4 thereof, which prohibits, without any possibility of derogation, inhuman or degrading treatment in all its forms and is, therefore, of fundamental importance, and is general and absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter (see, to that effect,

[44] See also, Judgment of 5 June 2018, *Coman* (C-673/16, paragraph 47).

judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 85 and 86, and of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraphs 59, 69 and 93) [...]

Thus, the Court has previously held that, pursuant to Article 4 of the Charter, the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of the Dublin II Regulation, the predecessor to the Dublin III Regulation, where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment, within the meaning of that provision (judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 106).'

For example, if, for geopolitical reasons, Member State A decided not to apply this prohibition to nationals of an given country, it would result in breach of the prohibition on discrimination on the basis of nationality in Article 21 of the Charter, second sub-paragraph. Note that 'nationality' in this provision refers to 'nationality' within the 'scope of application of the Treaties' and not Member State nationality. It is arguable, therefore, that the protection it affords extends to third country nationality, once EU law is triggered.

(iii) Otherwise, the Charter is 'applicable in all situations governed by EU law'. This somewhat enigmatic formulation remains the touchstone, having been established in *Akerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19). Further guidance can be found in, for example, *Siragusa* (C-206/13, EU:C: 2014:126):

- Are there specific measures of EU law capable of affecting the Member State measure argued to be in implementation of EU law? (paragraph 25);
- Does a measure of EU law impose an obligation on a Member State, the exercise of which is being challenged? (paragraph 26; see also in this regard, e.g., *Delvigne*, C-650/13, EU:C:2015:648);
- Is the objective pursued by the national rule being challenged the same as the objective appearing in EU legislation (paragraph 28); and
- Does the Member State rule challenged have a direct impact on an EU policy? (paragraph 29).

All in all, what is required is 'a degree of connection between an EU legal measure and the national measure in question' (see *Adusbef and Others*, C-686/18, EU:C:2020:567). For example, the situation considered by the CJEU in *Léger* (C-528/13).

Part 2: Discrimination in specific contexts

Chapter 4: Discrimination in the context of migration and asylum

This chapter considers cases from the Court of Justice of the European Union dealing with discrimination in the context of migration and asylum. The purpose is twofold: to show whether and to what extent the CJEU's approach to non-discrimination law has special features in this area compared with others; and to understand whether the combination of two sets of principles and legislation (non-discrimination law and asylum law) has an impact on effective protection of fundamental rights.

Section 4.1 discusses migration and discrimination on the grounds of nationality or national origin. Section 4.2 concerns preliminary rulings regarding migration and asylum and discrimination on the grounds of sexual orientation. As will be seen below, the case law discussed in this chapter provides guidance on several key matters: limitations on the principle of equal treatment in the context of housing benefits; the right of residence and sexual orientation; and sexual orientation as a ground of persecution under the Geneva Convention and Directive 2004/83. Finally, the cases provide insight into the role of the Charter in cases concerning discrimination. Section 4.3 offers reflection on aspects of effective protection present in the cases discussed, and Section 4.4 provides general guidance on discrimination in the context of migration and asylum that can be extracted from the foregoing analysis.

4.1. Migration and discrimination on the grounds of nationality or national origin

The following sub-section sheds light on the CJEU's approach to Member States placing limitations on the principle of equal treatment in the context of housing benefits on the basis of the nationality of an individual, on the basis of the Charter of Fundamental Rights of the European Union as well as Directives 2000/43 and 2003/109.

Relevant CJEU cases

➢ Judgment of the Court (Grand Chamber) of 24 April 2012, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, Case C-571/10 ("**Kamberaj**") (reference case)

➢ Judgment of the Court (Third Chamber) of 10 June 2021, *Land Oberösterreich v KV*, Case C-94/20 ("**Land Oberösterreich**")

Main question addressed

Question 1 Should European Union law, in particular, Articles 2 TEU and 6 TEU, Articles 21 and 34 of the Charter, and Directives 2000/43 and 2003/109, be interpreted as precluding national or regional legislation such as that at issue in the main proceedings which provides, with regard to the grant of housing benefit, different treatment for long-term third-country nationals compared to that accorded to citizens of the Union?

Relevant legal sources

EU Level

Articles 1, 2(1), 2(2) and 15 of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Recitals 2 to 4, 6, 12 and 13 in the preamble to Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Chapter II and Article 11(1) of Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Articles 21 and 34 of the Charter of Fundamental Rights of the European Union

National legal sources (Italy)

Legislative decree No 3 of 8 January 2007, transposing Directive 2003/109 incorporated the provisions of that Directive into the provisions of Legislative Decree No 286 of 25 July 1998 (Ordinary Supplement to GURI No 191 of 18 August 1998; 'legislative decree No 286/1998').

Article 9(1) of Legislative Decree No 286/1998:

'A foreign national who, for at least five years, has held a valid residence permit, who shows that he has an income of not less than the annual amount of the social benefits and, regarding an application concerning members of his family, a sufficient income … and appropriate accommodation satisfying the minimum conditions [of national law], may request the prefect of police to issue him with a long-term EC residence permit for himself and his family members …'

Article 9(12) of Legislative Decree No 268/1998:

'In addition to the provisions laid down with respect to foreign nationals lawfully residing in Italy in national territory, the holder of a long-term residence permit may:

…

(c) be entitled to social assistance and social security benefits and to those relating to subsidies for health, education and social matters, and those relating to access to goods and services made available to the public, including access to the procedure for obtaining accommodation managed by the public authorities, unless otherwise provided and on condition that it is shown that the foreign national actually resides in national territory …'

Under the third paragraph of Article 3 of the Presidential Decree of 31 August 1972, the Autonomous Province of Bolzano, on account of the specific composition of its population which is divided into three linguistic groups (Italian-, German- and Ladin-speaking) ('the three linguistic groups') enjoys specific conditions of autonomy.

Under Article 8(25) of Presidential Decree No 670/1972, that autonomy includes the power to adopt legislative provisions concerning public assistance and allowances.

The second paragraph of Article 15 of Presidential Decree No 670/1972 provides that the Autonomous Province of Bolzano is to use its funds, apart from exceptional cases, for welfare, social and cultural aims, in direct proportion to the size of each linguistic group and in accordance with the extent of the needs of each group.

A housing benefit is provided for in Article 2(1)(k) of Provincial Law No 13 of 17 December 1998, in the version in force at the date of the facts in the main proceedings ('the provincial law'). That benefit, which is a contribution to the payment of the rent for low income tenants to enable them to meet those costs, is allocated among the three linguistic groups in accordance with Article 15(2) of presidential decree No 670/1972.

Article 5(1) of the Provincial Law provides that the funds for the actions referred to in Article 2(1)(k) thereof must be allocated among the applicants from the three linguistic groups in proportion to the weighted average of their numbers and the needs of each group. According to Article 5(2) of the provincial law, the needs of each linguistic group are determined annually on the basis of the applications submitted in the last ten years.

Citizens of the Union who reside and work in the provincial territory, and who satisfy the other conditions to which the grant of housing benefit is subject must, in accordance with Article 5(6) of the provincial law, produce a declaration that they belong to or elect to join one of the three linguistic groups.

Pursuant to Article 5(7) of the Provincial Law, the Government determines each year the amount of funds reserved for third-country nationals and stateless persons who, on the date of submission of their application, have resided permanently and lawfully in the provincial territory for at least five years and who have worked there for at least three years. The number of rented dwellings which may be allocated to those nationals and stateless persons is also determined in proportion to the weighted average between, first, the number of third-country nationals and stateless persons who satisfy the abovementioned criteria and second, their needs.

It is apparent from Decision No 1885 of the Government of 20 July 2009 relating to the amount of funds for third-country nationals and stateless persons for 2009 ('decision No 1885') that, with respect to the weighted average, their numerical importance was accorded a multiplier of 5, whereas their needs were given a multiplier of 1.

4.1.1 Question 1 - Limit of access to basic benefits to non-national holders of a long-term resident permit

> In view of the principle of equal treatment contained in Articles 20 and 21 of the CFREU, can the Member States treat third-country nationals who are holders of a long-term residence permit differently from citizens of the EU with regard to the granting of housing benefits?

The question was dealt with in *Kamberaj* (C-571/10).

The case

Mr K. was an Albanian national and holder of a residence permit for an indefinite period who had resided and been employed in the Autonomous Province of Bolzano since 1994. For the years 1998 to 2008, Mr K. received the housing benefit provided for under Article 2(1)(k) of the provincial law. On 22 March 2010, the IPES informed the applicant that his application for the benefit for the year 2009 had been rejected. The ground for the rejection was that the funds for third-country nationals had been exhausted.

Mr K. sought a declaration from the Tribunale di Bolzano that the rejection amounted to discrimination against him. He argued that the relevant national law (provincial law and

decision No 1885) was incompatible, *inter alia*, with Directives 2000/43 and 2003/109 as it placed third-country nationals who were long-term residents in a less favourable position than citizens of the Union (whether Italian or not) with regard to housing benefit (due to differences in the budget available for housing benefits for the two categories of individuals). The Autonomous Province of Bolzano argued that a proportionate allocation of benefit to the province's linguistic groups was necessary in order to preserve social peace among persons seeking social assistance. Providing some context, the referring court explained that the resident population of the Autonomous Province of Bolzano is divided into two categories: (1) citizens of the Union (whether Italians or not) who, without distinction, must, in order to obtain the housing benefit, produce the declaration that they belong to one of three linguistic groups; and (2) third-country nationals, who do not have to make that declaration. The Tribunale acknowledged that Mr K. was provisionally entitled to housing benefits during the period for which his application was denied, but requested guidance from the CJEU in relation to the interpretation of the relevant EU law.

Preliminary questions referred to the Court

Although seven questions were referred by the national Court, the CJEU only declared two of them admissible, of which one dealt with non-discrimination and Article 21 CFREU:

1. Does European Union law, in particular, Articles 2 [TEU] and 6 TEU, Articles 21 and 34 of the Charter and Directives 2000/43 … and 2003/109, preclude a provision of national [more correctly: regional] law, such as that contained in Article 15[2] of presidential decree No 670/1972 read in conjunction with Articles 1 and 5 of the provincial law … and in [Decision No 1865], inasmuch as that provision, with regard to the allowances concerned, and in particular the so-called 'housing benefit', attaches importance to nationality by treating long-term resident workers not belonging to the European Union or stateless persons worse than resident Community nationals (whether or not Italian)?

Reasoning of the Court

In answering the question, the Court noted that pursuant to Articles 4, 5, and 7 of Directive 2003/109, it is for the national court to determine whether Mr K. could be considered a 'long-term resident' in order to benefit from the principle of equal treatment enshrined in Article 11(1) of the Directive. Accordingly, the Court moved to examine whether mechanisms for allocation of funds for housing benefit such as the one in question are in conformity with the principle of equal treatment enshrined in Article 11.

First assessing the difference in treatment and comparability of the situations, the Court found that 'the difference between the multipliers concerning the numbers of third-country nationals, on the one hand, and of Union citizens (whether Italian or not), belonging to the three linguistic groups, on the other, creates a difference in treatment between the two categories of beneficiaries' (paragraph 73). Moving to the comparability of the two groups' situations, the Court noted the Autonomous Province of Bolzano's argument that because different methods were used to determine the size of the groups and quantify their needs, they were not in comparable situations. However, no convincing reason was provided as to why the situations of third country nationals having acquired the status of 'long-term resident' who have complied with the procedure and conditions provided for by Directive 2003/109 and do not have enough resources to pay for housing, was not comparable to the situation of an EU citizen with the same economic need.

Having determined a difference in treatment of individuals in comparable situations, the Court then looked at whether it fell within the scope of Article 11(1)(d) of Directive 2003/109, and therefore the **scope of the principle of equal treatment** with nationals as regards social security, social assistance and social protection, as those concepts are defined by national law. The absence of an 'autonomous and uniform definition of 'social security', 'social assistance' and 'social protection [under EU law] does not mean that the Member States may undermine the **effectiveness** of Article 11(1)(d) of Directive 2003/109 when applying the principle of equal treatment provided for in that provision'. The Directive itself 'respects the fundamental rights and observes the principles recognised, inter alia, by the **Charter**', **which has the same legal effect as the Treaties** and must be respected by Member States in their implementation of EU law. In particular, Article 34(3) on the 'right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources', must be followed. Ultimately, though, it is for national courts to determine whether the difference in treatment falls within Article 11(1)(d).

The Court then discussed whether the principle of equal treatment as enshrined in Article 11(1) can be limited by applying Article 11(4) (which allows Member States to limit equal treatment in respect of social assistance and social protection to 'core benefits', but does not make it possible to derogate from that principle with regard to benefits falling under social security as defined by national law). The Court noted that the concept of core benefits covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care (see recital 13 of Directive 2003/109). This list is not meant to be exhaustive. Therefore, the fact that housing benefits are not included in that list does not mean that they do not constitute core benefits to which the **principle of equal treatment** must in any event be applied.

The Court then considered that it was not clear that the Italian Republic had stated that it meant to use the derogation in Article 11(4), recalling that a public authority can rely on the derogation only if the bodies in the Member State responsible for the implementation of that Directive have clearly stated that they intended to rely on that derogation. The derogation must be interpreted strictly because the general rule is the integration of third-country nationals who are long-term residents in Member States and the right of those nationals to equal treatment in the sectors listed in Article 11(1). Ultimately, the possibility of limiting the equal treatment enjoyed by long-term residents must be understood with the exception of social assistance or social protection benefits granted by public authorities which enable individuals to meet their basic needs such as food, accommodation and health. In that regard, according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources. The housing benefits in the current proceedings therefore have to be understood to be a part of 'core benefits' within the meaning of Article 11(4). The meaning and scope of the concept of 'core benefits' must take into account the context of the provision and the objective pursued by the Directive. This objective is the integration of third-country nationals who have resided legally and continuously in the Member States.

Conclusion of the Court

The Court concluded that:

'Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as

precluding a national or regional law, such as that at issue in the main proceedings, which provides for different treatment for third-country nationals enjoying the status of long-term resident conferred pursuant to the provisions of that Directive compared to that accorded to nationals residing in the same province or region when the funds for the benefit are allocated, in so far as such a benefit falls within one of the three categories referred to in that provision [social security; social assistance; and social protection] and Article 11(4) of that Directive does not apply.'

Elements of judicial dialogue

In the *Kamberaj* judgment, dialogue is present in the interpretation by the Court of Directive 2003/109 and the guidance provided to the referring national court as to how various assessments should be carried out. The Court essentially recalled the supremacy of Union law, informing the national court that the lack of a uniform and autonomous definition of the concepts of social of social security, social assistance and social protection in EU law **does not allow Member States to undermine the effectiveness of applicable EU law** (here, Directive 2003/109) **when applying the principle of equal treatment** found in that provision. In other words, the Court emphasised that a Member State does not have unlimited discretion in applying the principle, and is bound to respect the Charter of Fundamental Rights of the European Union when implementing Union law. Furthermore, while it is not explicitly stated in the provision itself, in this decision the Court limited Member States' ability to derogate from Article 11(1)(d) of the Directive by invoking Article 11(4). This has also been upheld in *ASGI and Others* (C-462/20, ECLI:EU:C:2021:894).

Additionally, horizontal dialogue is also present in the reference of the CJEU to its previous ruling in *Elf Aquitaine v Commission* (C-521/09, ECLI:EU:C:2011:620, paragraph 112), in order to reiterate that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. The Court also relied on its previous judgments in reaching its findings on the limits to permissible derogations from the principle of equal treatment found in Article 11(1)(d) of Directive 2003/109. This included *Ekro* (C-327/82, ECLI:EU:C:1984:11, paragraph 14) used to assert the margin of appreciation of Member States in defining in national law the exact scope of the concepts of social security, social assistance and social protection for the sake of respecting differences between states. The Court's judgment in *Chakroun* (C-578/08, ECLI:EU:C:2010:117, paragraph 43) was then relied upon to reiterate that **the derogation to the principle of equal treatment regarding benefits must be interpreted strictly**.

The Court's judgment in *Kamberaj* was discussed and upheld in *Land Oberösterreich* (C-94/20). In its request for a preliminary ruling, the referring court stated that the application of the principles laid down in *Kamberaj* to the context of the national case (housing assistance) was not clear. Relying on its previous judgment, the CJEU emphasised that the the derogation provided for in Article 11(4) of Directive 2003/109 must be interpreted strictly. Following its reasoning in Kamberaj concerning Article 34 CFREU, the Court found that 'a benefit intended to enable persons who lack sufficient resources to meet their housing needs so as to ensure that they lead a decent existence constitutes a "core benefit" within the meaning of Article 11(4) of Directive 2003/109', and that housing assistance appeared to constitute such a benefit. However, also following *Kamberaj*, it was for the referring court to determine whether that was the case, considering the 'purpose of the

housing assistance, the conditions subject to which it is awarded and the place of that benefit in the national system'.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Poland

Several national decisions in Poland refer to the *Kamberaj* judgment in childcare benefits matters:

(1) Wyrok Wojewódzkiego Sądu Administracyjnego w Olsztynie z dnia 3 listopada 2016 r. (II SA/Ol 995/16) / Judgment of the Regional Administrative Court in Olsztyn, 3 November 2016 (II SA/Ol 995/16)

The case concerned a refusal to grant a long-term resident a childcare benefit. In the refusal, the administrative authority indicated that the status of an EU long-term resident is not mentioned in national law as a status making its holder eligible for a childcare benefit. The applicant appealed the decision to a higher administrative authority in reference to *inter alia* provisions of the Directive and the Constitution insofar as it foresees protection of children. The higher administrative authority upheld the decision indicating that the applicant does not have a status explicitly listed in the national law as making her eligible for the benefit, and does not have a residence permit with an annotation on her access to the labour market (that would also make her eligible). It also stated that it is not in the powers of this authority to rule on the compatibility of national rules with EU law and the Constitution.

According to the national court, interpretation such as that presented by the administrative authorities clearly leads to a differentiation in the status of long-term residents as compared to other foreigners and their exclusion from access to the benefit in question. The court noted that long-term residents have access to the labour market *ex lege*, without any need for additional annotations in that regard, and as a consequence such annotations are not made on their residence permits. The fact that the annotation does not feature on the applicant's residence permit should not however bear any negative consequences for her, in particular as she did not have control over the content of the documents issued for her. The law aimed to grant access to benefits to foreigners with access to the labour market, not foreigners with respective annotation of their residence permit. An interpretation to the contrary would lead to an unjustified differentiation between different groups of foreigners based on the kind of documents they held (with or without annotation) and their children themselves based on their origin and/or nationality.

The court referred directly to the *Kamberaj* judgment: "Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as precluding a national or regional law, such as that at issue in the main proceedings, which provides, with regard to the grant of housing benefit, for different treatment for third-country nationals enjoying the status of long-term resident conferred pursuant to the provisions of that directive compared to that accorded to nationals residing in the same province or region when the funds for the benefit are allocated, in so far as such a benefit falls within one of the three categories referred to in that provision and Article 11(4) of that directive does not apply."

It also recalled the reasoning from paragraphs 85-87 of the CJEU judgment. The national court observed that the concept of 'core benefits' stated in Article 11(4) of Directive 2003/109 is not exhaustive. It noted that the integration of third-country nationals who are long-term residents in the Member States and the right of those nationals to equal treatment in the sectors listed in Article 11(1) of Directive 2003/109 is the general rule. The derogation provided for in Article 11(4) thereof must be interpreted strictly, and public authorities might rely on the derogation provided in the Directive only if the legislation clearly states that it makes use of such derogation. No such derogation was made in national law, even if the legislator did not foresee how the provisions of national law and the Directive might interplay, resulting in the documents of long-term residents having no annotations about their access to the labour market. No provision of this law aimed to exclude the children of foreigners with residence permits and allowed to access the labour market in Poland, including long-term residents who enjoy such status *ex lege*, from access to the benefits. The Directive makes it clear that long-term residents have the right to equal treatment in reference to certain national benefits. Member States have the right to limit access to such benefits according to the Directive. However, the court had no doubt that a childcare benefit should be treated as a core benefit, as the goal of the benefit is to support parents and other carers in the upbringing of their children. Hence, the principle of equal treatment must in any event be applied.

As a result, the national court found the decision of the administrative authorities to be incorrect. It obliged the administrative authorities to re-consider the case taking into account the judgment and the teleological and systemic interpretation presented therein.

A similar application of *Kamberaj* in the following cases demonstrates an established line of case law on this matter in Poland.

(2) Wyrok Wojewódzkiego Sądu Administracyjnego w Łodzi z dnia 12 kwietnia 2017 r. (II SA/Łd 49/17) / Judgment of the Regional Administrative Court in Łódź, 12 April 2017 (II SA/Łd 49/17)

(3) Wyrok Wojewódzkiego Sądu Administracyjnego w Bydgoszczy z dnia 15 października 2019 r. (II SA/Bd 583/19) / Judgment of the Regional Administrative Court in Bydgoszcz, 15 October 2019 (II SA/Bd 583/19)

(4) Wyrok Wojewódzkiego Sądu Administracyjnego w Łodzi z dnia 12 lutego 2020 r. (II SA/Łd 978/19) / Judgment of the Regional Administrative Court in Łódź, 12 February 2020 (II SA/Łd 978/19).

United Kingdom

Although no reference was made to *Kamberaj*, the United Kingdom has also dealt with cases concerning government subsidies and alleged discrimination against refugees. In the case of *SK and LL v Secretary of State for Work and Pensions* [2020] UKUT 145 (AAC), the CJEU's judgments in *Milkova* and *Glatzel* were referred to by the Upper Tribunal of the Administrative Appeals Chamber. The case concerned two claims of discrimination in relation to a rule laid down in national legislation that a claimant for the 'Sure Start Maternity Grant' in respect of an infant will not be eligible if there is another child aged under 16 in the family for whom they are responsible (the "first child only rule"). The issue was whether those conditions discriminated unlawfully against the Appellants under EU law and/or under human rights law. The first claimant, SK, had come to the UK in 2015

and claimed asylum with her son of 3.5 years old. She was granted leave to remain in 2017 and made a claim for the maternity grant when pregnant with her daughter, who was born in the UK. SK's claim was refused on the basis that she was not eligible for the grant under national law because there was an existing member of her family under the age of 16 for whom she was responsible (i.e. her son, who had been born in Iraq), and her situation did not fall within the exceptions to the first child only rule.

In response to SK's claim of direct discrimination the respondent argued that the claim did not fall under EU non-discrimination law, which unlike the prohibition of discrimination under Article 14 ECHR, was restricted to specific, limited grounds of discrimination. The Court noted that while this is correct, the CJEU had noted in *Milkova*, on the basis of *Glatzel* and other previous cases, that the principle of equal treatment enshrined in Article 20 and 21 CFREU is a general principle of EU law. The Tribunal understood this to mean that the prohibition of discrimination under EU law could not be limited to the extent that the respondent sought to argue. However, the Tribunal did not discuss this in any more detail, as the judge found that the situation was more suited to claim of indirect discrimination on the grounds of nationality. The Court ultimately concluded that there was no indirect discrimination because it was not intrinsically more likely that the 'first child only' test would affect refugees more than it would affect UK nationals, even though refugees with pre-flight children were likely to be disadvantaged in terms of the greater severity of the impact of the provision on them given their likely lack of baby items.

4.2. Migration and asylum and discrimination on the grounds of sexual orientation

This sub-section addresses the relationship between discrimination on the grounds of sexual orientation and residence in the EU, on the one hand, and with migration and asylum, on the other. Several cases by the Court of Justice have addressed the issue of discrimination on the grounds of sexual orientation and the recognition of refugee status. Moreover, the Court has also expressed an opinion with regards to third-country spouses in same-sex marriages who reside in an EU country which does not recognise that type of union in its legislation.

4.2.1 Right to residence and sexual orientation

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 5 June 2018, Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, intervener: Consiliul Național pentru Combaterea Discriminării* ("**Coman and Others**")

Main question addressed

Question 1 Is an EU Member State (which does not recognise same-sex marriage in its domestic legislation) required to grant a third-country national who entered a lawful same-sex marriage abroad with an EU citizen a right to residence in its territory?

Relevant legal sources

EU level

Recital 31 and Articles 2(2)(a), 3(1) and (2)(a) and (b) and 7(2) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Articles 7, 9, 21, 45 and 52(3) Charter of Fundamental Rights of the European Union

Council of Europe

Articles 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

National legal sources (Romania)

Article 259(1) and (2) of the Codul Civil (Romanian Civil Code):

'1. Marriage is the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law.

2. Men and women shall have the right to marry with a view to founding a family.'

Article 227(1), (2) and (4) of the Romanian Civil Code):

'1. Marriage between persons of the same sex shall be prohibited.

1. Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania.

…

4. The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable.'

4.1.1.1 Question 1 – Right to residence for same-sex spouses

Does Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require an EU Member State which does not recognise same-sex marriage in its domestic legislation to grant a third-country national who entered a lawful same-sex marriage abroad with an EU citizen a right to residence in its territory?

This question was answered in *Coman and Others* (C-673/16).

The case

Mr C. (a Romanian and American citizen) and Mr H. (an American citizen) married in Brussels on 5 November 2010. The Romanian Civil Code did not recognise same-sex marriage, so an extension of Mr H.'s right of temporary residence in Romania could not be granted on grounds of family reunion. Mr C. lodged an application in court to declare the applicable provisions of the Civil Code unconstitutional.

The Constitutional Court had doubts as to the interpretation to be given to several terms employed in the relevant provisions of Directive 2004/38, read in the light of the Charter of Fundamental Rights of the European Union and of recent case-law of the CJEU and the European Court of Human Rights. It decided to stay the proceedings and refer several questions to the Court for a preliminary ruling.

Preliminary questions referred to the Court

The national court referred four questions to the CJEU, two of which were answered:

1. Does the term 'spouse' in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?
2. If the answer [to the first question] is in the affirmative, do Articles 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union?

Reasoning of the Court

The Court first noted that Directive 2004/38 governs only the conditions determining whether a Union citizen can enter and reside in a Member State other than that of which he is national and does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national. In the present case, Mr H., in his capacity as member of Mr C.'s family, expected to obtain a derived right of residence in Romania. It followed that Directive 2004/38, which the national court asked the CJEU to interpret, could not confer a derived right of residence on Mr H. Nonetheless, although the referring court had limited its questions to the interpretation of Directive 2004/38, the CJEU emphasised that it could still provide the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating the case.

Turning to the first question, the Court addressed whether, in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with Article 7(1) of Directive 2004/38, in a Member State other than that of which he is a national, and, whilst there, has married a third-country national of the same sex, Article 21(1) TFEU must be interpreted as precluding the authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise same-sex marriage. This naturally affords such individuals protection again discrimination on the grounds of sexual orientation.

The Court found that to allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that State, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another.

The obligation of a Member State to recognise a marriage between persons of the same sex concluded in another Member State is for the sole purpose of granting a derived right of residence to a third-country national, and therefore does not undermine the institution of marriage in the first Member State, as regulated by its national law.

The Court then turned to the second question. It found that when a citizen of an EU Member State creates or strengthens family life while residing in a member State other than his own, the **effectiveness of the rights** conferred to him by Article 21 TFEU requires that that citizen's family life in that Member State may continue when he returns to the Member of State of which he is a national, through the grant of a derived right of residence to the third-country national family member concerned. Hence, the CJEU answered this question in the affirmative.

In view of the answer given to the first and second questions, there was no need for the Court to answer the third and fourth questions.

Conclusion of the Court

The Court concluded that a third-country national who married an EU citizen of his or her same sex has a right of residence in the Member State of which the latter is a national, even if the Member State does not recognise same-sex marriage in its legislation. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38. Essentially, **Member States cannot discriminate against same-sex spouses, where one spouse is a third-country national and the other an EU citizen, in their enjoyment of the right of residence.**

Elements of judicial dialogue

In terms of horizontal judicial dialogue, *Coman and Others* expands the CJEU ruling in *O* (C-456/12, EU:C:2014:135), which had declared that third-country nationals who had created or strengthened a family life with an EU citizen during a genuine residence in a member State should be granted a right of residence in the country of which the EU citizen was a national. In essence, *Coman and Others* applies the rule from *O* to same sex unions.

Aspects of the judgment in *Coman and Others* have also been reiterated in more recent case law. For example, the CJEU's finding that '[a] measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective' was upheld in *Ligue des droits humains* (C-817/19, ECLI:EU:C:2022:491). The Court then went on to add that 'a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 58 and the case-law cited).'

The CJEU relied on Article 52(3) CFREU and the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) in noting that the right contained in Article 7 CFREU and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms have the same meaning and scope. The Court then used case law from the European Court of Human Rights (ECtHR) (*Vallianatos and Others v Greece* CE:ECHR:2013:1107JUD002938109, paragraph 73; and *Orlandi and Others v Italy*, CE:ECHR:2017:1214JUD002643112, paragraph 143) to state that relationships between same-sex couples are covered by the notions of 'private life' and 'family life' as much as heterosexual couples in the same situation. In *Orlandi*, the ECtHR had found a violation of Article 8 of the ECHR on account of Italy's refusal to grant any kind of legal recognition to the same-same marriage entered by the applicants abroad (when Italian legislation itself

did not admit that type of union). In that sense, in *Coman and Others* the CJEU followed the ECtHR in requiring Romania to recognise the applicants' same-sex marriage, at least to the extent of affording the spouse who is a third-country national a right of residence in Romania. The reliance of the CJEU on ECtHR case law in the present case therefore mirrors the Court's use as explained elsewhere in this Casebook – the Court does not appear to hesitate in relying on the more developed and established case law of its sister court. While this is perhaps a logical consequence of Article 52(3) CFREU, it is not stipulated in the Charter explicitly.

In terms of vertical judicial dialogue, the CJEU also demonstrated in *Coman and Others*, as it has in previous case law (*Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 48, and *Lounes*, C-165/16, EU:C:2017:862, paragraph 28 and the case-law cited), that it may look beyond the EU law specifically mentioned in referrals for preliminary rulings and 'provide the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it' (paragraph 22). Making use of this, the Court turned to Article 21(1) TFEU, bringing this into its reasoning in providing advice for the referring court.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Poland

So far, there has been no application of the *Coman* case in its very strict meaning/context (the right to residence of same-sex married couples). This case was however invoked in judgments rendered in several administrative proceedings on the refusal of the transcription into Polish personal civil status records of a foreign birth certificate indicating that the child has two parents of the same sex. The Supreme Administrative Court held, quashing the transcription refusal and referring to *Coman*, that 'the transcription obligation indicated in Article 104 section 5 of the Act on civil status records, implemented solely to protect the rights of the child by enabling him to certify his identity, does not contradict the basic principles of the legal order of the Republic of Poland (principles of public order)' (judgment of 10 October 2018, II OSK 2552/16). In other administrative court judgments, the transcription refusals were upheld. Referring to the *Coman* judgment, the Provincial Administrative Court in Lublin stated that 'civil status matters and the related rules on marriage are matters within the competence of the Member States and EU law does not infringe this competence' (judgment of 7 January 2020, III SA/Lu 445/19). The jurisprudence line has been shaped by a resolution of seven judges of the Supreme Administrative Court adopted on 2 December 2020 (II OPS 1/19). It was held there that legislation on civil status falls under the competence of the Member States and EU law does not prejudice this competence, and a refusal to transfer a foreign document to the national civil status register may be justified by the application of a national public policy clause.

4.2.2 Persecution on the grounds of sexual orientation in refugee status assessments

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Fourth Chamber) of 7 November 2013, *Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), intervening parties: Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen*, Joined Cases C-199/12 to C-201/12 ("**X and Others**") (reference case, Questions 1a and 1b)

➢ Judgment of the Court (Grand Chamber) of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie, intervener: United Nations High Commissioner for Refugees*, Joined Cases C-148/13 to C-150/13 ("**A, B and C**") (reference case, Question 1c)

Main questions addressed

Question 1 In the context of 'persecution' on the grounds of sexual orientation in refugee status assessments:

a. May homosexuals may be regarded as being members of a 'particular social group' under Article 10(1) of Directive 2004/83?

b. Does the criminalisation of homosexual acts amount to 'persecution' for the purposes of Article 1 of the Geneva Convention on the Status of Refugees and, in particular, discriminatory prosecution or punishment pursuant to Article 9(2)(c) of Directive 2004/83?

c. What are the limits applicable to the What limits do Article 4 of Directive 2004/83 and the Charter of Fundamental Rights of the European Union, in particular Articles 3 and 7 thereof, impose on the credibility assessment of asylum applications based on persecution on the grounds of sexual orientation, and are these the same in relation to other grounds of persecution?

Relevant legal sources

EU level

Articles 1, 2, 3, 6, 7(1) and (2) and 10(1) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Recital 3, 10, 16, 17 Preamble, Articles 1, 2(c) and 2(k), 4(3) and 4(4), 9, 10, 13 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

Article 13 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

Articles 2, 4, 5(1), 7, 21(1) and 49(1) and (2) Charter of Fundamental Rights of the European Union

Council of Europe

Articles 8, 14 and 15 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

International legal sources

Article 1(A)(2) of the Convention Relating to the Status of Refugees (1951)

'A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: […]

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular

social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

4.2.1.1 Question 1a – Sexual orientation as a 'particular social group'

> For the purposes of assessing the grounds of persecution which are relied on in support of an application for refugee status, may homosexuals be regarded as being members of a 'particular social group' under Article 10(1) of Directive 2004/83, which should be read in light of the Charter of Fundamental Rights of the European Union?

This question was dealt with in *X and Others* (Joined Cases C-199/12 to C-201/12).

Relevant national law (The Netherlands)

Article 28(1)(a) of the Law of 2000 on foreign nationals (Vreemdelingenwet 2000, Stb 2000, No 495) empowers the Minister to accept, to refuse or not to consider an application for a residence permit for a fixed period.

In accordance with Article 29(1)(a) of the Law of 2000 on foreign nationals, a residence permit for a fixed period, as referred to in Article 28, may be granted to a foreign national 'who is a refugee under the terms of the [Geneva] Convention'.

The Guidelines on the Implementation of the Law on foreign nationals of 2000 (Vreemdelingencirculaire 2000) ('the Guidelines'), in its version in force at the date on which the applications concerned were lodged, provides, in point C2/2.10.2:

'If an asylum applicant relies on the fact that he or she has experienced problems as a result of his or her homosexuality, it can under certain circumstances lead to the conclusion that the person concerned is a refugee within the meaning of the [Geneva] Convention. …

If punishment is possible on the basis of a penal provision which applies only to homosexuals, it is an act of persecution. That is the case, for example, if being homosexual or expressing specifically homosexual feelings is made a criminal offence. To support the finding that the person concerned has refugee status the punitive measure concerned must be of a certain level of severity. A simple fine would thus generally be insufficient to lead to the conclusion that refugee status is warranted.

The mere fact that homosexuality or homosexual acts are criminalised in a country does not automatically lead to the conclusion that a homosexual from that country is a refugee. The asylum applicant must make a plausible case (if possible with supporting documents) that he personally has a well-founded reason to fear persecution.

Persons with a homosexual orientation are not expected to conceal that preference on their return.

...'

The case

X, Y and Z, Nationals of Sierra Leone, Uganda and Senegal, respectively, lodged an application for asylum in the Netherlands. They alleged that, in their countries of origin, they would be persecuted on the grounds of their homosexuality. In particular, the

applicants claimed to have been subject, in different respects, to violent reactions by their families and entourage, or to acts of repression by the authorities in their respective countries of origin on account of their sexual orientation. In all three countries, homosexuality was punished by law.

The Dutch Minister for Immigration and Asylum found that although the sexual orientation of the applicants was credible, they failed to demonstrate that on return to their respective countries of origin they had a well-founded fear of persecution by reason of their membership of a particular social group. Following the rejection of their applications for residence permits for a fixed period (asylum), X and Z appealed before the District Court of the Hague. Y lodged an application for interim measures before the same court.

X and Y's appeal was upheld, but Z's was dismissed on the grounds that his account was not credible and it was not sufficiently shown that homosexuals were routinely persecuted. The Minister appealed against the decisions regarding X and Y before the Council of State, where Z also appealed. The Council of State decided to stay the proceedings and request a preliminary ruling from the CJEU.

Preliminary question referred to the Court

1. Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?

Reasoning of the Court

As a preliminary observation, the CJEU noted that the 1951 Geneva Convention was the cornerstone of the international regime for the protection of refugees. Directive 2004/83 was meant to provide a common guidance for EU States to implement their obligations under the Convention. Hence, the Directive must be interpreted in accordance with its scheme and purpose, in a manner consistent with the Geneva Convention and other relevant international materials, most notably the Charter of Fundamental Rights of the European Union. In relation to Article 21 CFREU, it can be noted that Article 9(2)(c) of Directive 2004/83 includes **disproportionately discriminatory** prosecution or punishment as one form in which acts of persecution can be taken.

First, giving context to the question, the Court noted that under Article 2(c) of Directive 2004/83, the term 'refugee' refers, in particular, to a third-country national who is outside the country of his nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, owing to such fear, unwilling to avail himself of the protection of that country. The individual must have a well-founded fear that he personally will be subject to persecution for at least one of the five reasons listed in the Directive and the Geneva Convention, one of which is 'membership of a particular social group'.

The Court then turned to the definition of 'particular social group in Article 10(1) of the Directive. Two conditions must be met. First, members of that group have to share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity that a person should not be forced to renounce it. Second, that group needs to have a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

Sexual orientation in the countries concerned fulfils both requirements. Therefore, Article 10(1)(d) of Directive 2004/83 must be interpreted as meaning that the existence of criminal

laws which specifically target homosexuals supports the finding that those persons must be regarded as forming a 'particular social group'. Consequently, a third-country national outside of their country of nationality owing to a well-founded fear of being subject to disproportionately discriminate prosecution or punishment (persecution) on the grounds of their sexual orientation may be granted the status of 'refugee'.

Conclusion of the Court

The Court concluded that the existence of criminal laws which specifically target homosexuals supports the finding that sexual orientation constitutes a 'particular social group' for the purposes of asylum applications.

Impact on the follow-up case

In the three Dutch follow-up cases of 18 December 2013 (ECLI:NL:RVS:2013:2422), the Dutch Court of Appeal incorporated the CJEU ruling by restating that it is up to the national authorities to analyse all the relevant facts of the country of origin of a person who claims that homosexual actions in his country of origin are punishable. In this regard, it is especially relevant to determine whether the person concerned has a well-founded fear of facing a term of imprisonment – and whether this term is actually applied. Only in that case will this punishment be considered **discriminatory.**

Further, when determining whether the person concerned has a well-founded fear of persecution, the national authorities also need to take into account *how* this person will express his sexual orientation in his country of origin. In these cases, the Dutch Secretary of State had not assessed how the persons concerned would express his sexual orientation and to what extent that would have resulted in a well-founded fear of persecution. In turn, the Court concluded that the appeals were well-founded.

Elements of judicial dialogue

In relation to the present question, *X and Others* does not contain judicial dialogue, other than to refer back to its own previous case law to establish that Directive 2004/83 must be 'interpreted in a manner consistent with the rights recognised by the Charter' (*Abed El Karem El Kott and Others*, Case C-364/11, ECLI:EU:C:2012:826), including Article 21. Aspects of judicial dialogue concerning other parts of the Court's judgment in *X and Others* are discussed below in Sections 4.2.2.2.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Poland

X and Others was referred to by the Warsaw Provincial Administrative Court (Wojewódzki Sąd Administracyjny) in case IV SA/Wa 3635/15, judgment of 21 March 2016, to ascertain if there had been persecution of the relevant individual seeking international protection in Poland. For the violation of fundamental rights to constitute persecution within the meaning of Article 1 Section A of the Geneva Convention, it must have a certain level of seriousness (referring to paragraphs 51-53 of *X and Others*).

From the perspective of discrimination, the court's discussion of persecution originating in the conduct of non-state actors is interesting. The condition for granting protection due to the risk of persecution by a non-state actor is, firstly, demonstrating a well-founded fear of persecution characterised as acts which, due to their nature or repetition, constitute a

serious violation of human rights, in particular rights the derogation of which is inadmissible pursuant to Article 15(2) of the ECHR or defined as an accumulation of various actions or omissions, including those constituting a violation of human rights, the impact of which is severe. The second condition for covering a foreigner with protection in a situation where the risk of persecution by a non-state actor is not related to the ECHR, is to show that the inability or refusal of a State to provide protection is nevertheless related in a way to that Convention. Having referred to the relevant administrative courts' jurisprudence, the court considered that **serious acts of discrimination or other acts of violence by the local community or its individual members can also be regarded as persecution if tolerated by the authorities, or if the authorities refuse or are unable to provide effective protection.** In the case at hand, the reasons invoked for seeking asylum could not be attributed to the nature of persecution by the authorities or persecution against which the authorities would not be able to provide the citizen with due protection. The case was ultimately found against the claimant.

4.2.1.2 Question 1b – Criminalisation of homosexual acts

Does the criminalisation of homosexual acts amount to 'persecution' for the purposes of Article 1 of the Geneva Convention on the Status of Refugees and, in particular, discriminatory prosecution or punishment pursuant to Article 9(2)(c) of Directive 2004/83, which must be read in light of the Charter of Fundamental Rights of the European Union?

This question was dealt with in *X and Others* (Joined Cases C-199/12 to C-201/12).

The case

The facts of the case are explained in Section 4.2.2.1 of this Casebook.

Preliminary question referred to the Court

One of the questions referred to the CJEU addressed this issue:

1. Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?

Reasoning of the Court

The Court addressed the question of whether Article 9(1)(a) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution. If not, the question of what *would* amount to persecution would be considered.

First, the Court noted that for a violation of fundamental rights to constitute persecution according to Article 1(A) of the Geneva Convention, it must be sufficiently serious. Article 9(1)(a) of the Directive also states that the relevant acts must be 'sufficiently serious' as to constitute a 'severe violation of basic human rights', in particular the non-derogable rights under Article 15(2) of the European Convention on Human Rights. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that threshold.

The rights linked to sexual orientation, such as the right to respect for private and family life (Article 8 of the ECHR; Article 7 of the Charter), read together with the prohibition of discrimination in Article 14 ECHR (on which Article 21(1) of the Charter is based), are not among the fundamental rights from which no derogation is possible. Hence, the mere existence of legislation criminalising homosexual acts does not reach the level of seriousness necessary to constitute persecution under Article 9(1) of the Directive. However, the term of imprisonment attached to homosexual acts is capable of amounting to an act of persecution, provided that it is actually applied in the country of origin. The Court noted that 'such a sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive' (paragraph 57).

Conclusion of the Court

The Court concluded that:

'Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.' Such a sanction would also infringe Article 8 ECHR and Article 7 of the Charter.

Impact on the follow-up case

The impact on the follow-up case can be found in Section 4.2.2.1 above.

Elements of judicial dialogue

There is little judicial dialogue present in this part of the judgment in *X and Others*. However, the Court did provide guidance to the referring court that as part of an assessment of the facts and circumstances under Article 4 of the Directive 'an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied, as provided for in Article 4(3)(a) of the Directive, should be undertaken by the relevant national authorities' (paragraph 58).

It is very interesting to note the tension that arose from the adoption of the ruling of the CJEU in *X and Others* in subsequent case law of the ECtHR on the same matter. In *ME v Sweden* (Application no. 71398/1), which concerned the credibility of an asylum seeker's alleged homosexuality claim and his chances of being persecuted on that ground in Libya, the ECtHR used the standards set by the CJEU to dismiss the case. Particularly, it found that the fact that no trials were being conducted against homosexuals indicated that there was no real risk of persecution. Judge Gaetano's dissent criticised the Court's adoption of the CJEU rule according to which the existence – but non-enforcement – of laws criminalising homosexual acts did not amount to persecution, considering it a setback from the ECtHR's precedent.

Significantly, the role of the **principle of proportionality** appears to be different in asylum cases than in non-discrimination cases. Unlike in cases based directly on non-discrimination law (as seen in Part 1 of this Casebook), proportionality is not explicitly assessed by the Court in the asylum cases discussed in this section, whether in the context of possible justifications of discriminatory treatment, or more generally. However, the fact that an

individual may be granted refugee status where they would be subject to **disproportionately discriminate prosecution or punishment** on the grounds of their sexual orientation suggests that the **principle of proportionality** nevertheless plays a key role in asylum cases involving persecution on the basis of discrimination. The Court has not adjudicated here on what would make discriminatory prosecution or punishment disproportionate for the purposes of persecution. The Court's suggestion in *X and Others* that whether the punishment is applied in practice is key to determining whether an applicant would be persecuted, was interpreted in the national follow-up decisions as meaning that discrimination will only have occurred for the purposes of persecution if punishment is actually imposed on an individual (see Section 4.2.2.1 above).

4.2.1.3 Question 1c – Credibility assessment of asylum applications based on persecution on the grounds of sexual orientation

> Despite the discriminatory impacts which they may have, are stereotyped notions on homosexuality permitted to form the basis of credibility assessments of asylum applications based on persecution on the grounds of sexual orientation, and are these the same in relation to other grounds of persecution? What roles do the Charter and the principle of non-discrimination have in this respect?

This question was dealt with in *A, B and C* (Joined Cases C-148/13 to C-150/13).

Relevant national law (The Netherlands)

According to Article 31(1) of the Law on Foreign Nationals 2000, read in conjunction with Article 3.111(1) of the Decree on Foreign Nationals 2000, it is for the applicant for asylum concerned to establish the plausibility of the grounds on which the grant of a temporary residence permit (asylum) is sought, the applicant being required to provide, on his own initiative, all relevant information in order to enable the authority to make a decision on the application. The Staatssecretaris determines whether the grant of that authorisation is well founded in law.

Under paragraph 1 of Article 3.111 of the Decree on Foreign Nationals 2000, when an applicant for asylum requests the grant of a residence permit referred to in Article 28 of the Law on Foreign Nationals 2000, that applicant is to provide all the information, including the relevant documents, on the basis of which the Staatssecretaris can determine, in cooperation with the applicant for asylum concerned, whether there is a legal basis for the permit to be granted.

In accordance with paragraph C14/2.1 of the Foreign Nationals Circular 2000, the assessment of the credibility of the statements made by an applicant for asylum is to concern the facts and the circumstances that he sets out. The factual circumstances are the facts relating to the person of the applicant for asylum concerned, inter alia, his sexual orientation.

Under paragraph C14/2.2 of the Foreign Nationals Circular 2000, an applicant for asylum is required to tell the truth and to cooperate fully in the determination, which is to be as complete as possible, of all the facts. The applicant must, as soon as possible, inform the Immigration and Naturalisation Service of all the events and factual circumstances that are important for the consideration of his application.

According to paragraph C14/2.4 of the Foreign Nationals Circular 2000, it suffices in principle that an applicant for asylum has made his statements plausible. For that purpose, he is expected to produce documents in support of his application. However, in order to assess the credibility of the statements that the applicant for asylum made in support of his application, it is not a matter of deciding whether, and if so to what extent, those statements can be proved. In many cases applicants for asylum have demonstrated that they are not in a position to prove their statements and that it would not be reasonable to require them to adduce convincing evidence in support of their account.

The Staatssecretaris may consider the statements made under Article 3.35, paragraph 3, of the Regulation on Foreign Nationals 2000 to be credible and, therefore, not to require them to be confirmed, if it was possible for the general credibility of the applicant for asylum to be established.

The case

A, B and C lodged applications for asylum in the Netherlands. They alleged a well-founded fear of persecution on account of their homosexuality in their home countries. All three applications were rejected by the State Secretary for Security and Justice for not being credible. Their appeals were dismissed by the District Court of the Hague. Subsequently, they appealed before the Council of State.

The applicants argued that, because it is impossible to determine the sexual orientation of applicants for asylum, the authorities should base their decisions solely on their assertions. They argued that the questions asked during the proceedings had violated their basic human rights, in particular the right to human dignity and to respect for private life. According to the State Secretary, it was necessary to verify not whether the applicants were homosexuals, but whether it was plausible that they belonged to a specific social group in the terms of the Geneva Convention on the Status of Refugees.

The Council of State considered that whatever method is adopted to verify the declared sexual orientation, the risk of infringing the fundamental rights of the applicants for asylum, such as those guaranteed by Articles 3 and 7 of the Charter, could not be excluded. Thus, it decided to refer the case to the CJEU.

Preliminary question referred to the Court

1. What limits do Article 4 of [Directive 2004/83] and [the Charter], in particular Articles 3 and 7 thereof, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?

Reasoning of the Court

After making some preliminary observations, the Court noted that applications for asylum on the basis of a fear of persecution on the grounds of sexual orientation may, in the same way as applications based on other grounds, be subject to an assessment process, provided for in Article 4 of Directive 2004/83. However, the methods used by the authorities to assess the evidence must be consistent with Directives 2004/83 and 2005/85 and with the fundamental rights guaranteed by the Charter, such as the rights to respect for human dignity (Article 1) and for private and family life (Article 7).

The Court noted that although questions based on stereotyped notions could help competent authorities, an assessment based *only* on stereotyped notions associated with homosexuals does not fulfil the requirements in Article 4(3)(c) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 concerning the manner in which evidence is assessed and interviews are conducted. This is because such an assessment would prevent the authority from considering the individual situation and personal circumstances of the applicant concerned. Therefore, the Court held that the inability of an asylum applicant to answer such questions cannot constitute sufficient grounds for concluding that the applicant lacks credibility.

The Court also found that questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter, in particular, to the right to respect for private and family life (Article 7). Similarly, in relation to the option for the national authorities of allowing homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production of evidence such as films of their intimate acts, such evidence would of its nature infringe human dignity (Article 1 of the Charter).

Despite the discriminatory implications that the use of stereotyped notions on homosexuality could entail, the Court did not ban their use altogether. Instead, it allowed national authorities to use them when they would help the asylum seeker substantiate his submissions, while disqualifying them when they would lead to a negative finding on the credibility of the application. In other words, stereotypes may only work in favour of asylum seekers, never against them. Paradoxically, though intimate questions about the applicant's sexual practices might be as enlightening as the use of stereotypes, the Court forbade them to prevent credibility assessments from intruding into the applicant's private life.

Finally, the Court noted that Member States may consider it the duty of the applicant to submit 'as soon as possible' all elements needed to substantiate the application for international protection, having regard to the sensitive nature of questions relating to a person's sexual orientation. However, it cannot be concluded that the declared sexual orientation lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

Conclusion of the Court

The Court concluded that applications for asylum on the grounds of persecution on account of sexual orientation can be subjected to a credibility assessment like any other application. However, though decision-makers can rely on questions based on stereotyped notions to test the applicant's credibility, applications cannot be evaluated only on the basis of such questions, as they do not sufficiently account for the applicant's individual situation. In addition, questions about the applicant's sexual practices are contrary to the rights to private and family life (Article 7 of the Charter), and the submission of filmic evidence or performance of sexual acts violates applicants' human dignity (Article 1 of the Charter). Finally, reticence to disclose information about his sexual orientation does not impair the applicant's credibility.

Impact on the follow-up case

The follow-up case (ABRvS, 08-07-2015, ECLI:NL:RVS:2015:2170) quotes paragraphs 49-54, 57 and 61-70 of the CJEU's judgment. The relevant question was how the State Secretary should assess the credibility of an alleged sexual orientation in the light of EU law, for the first and subsequent applications from asylum seekers.

In regard to the moment at which the sexual orientation is declared the case quotes considerations 69 and 70 from the CJEU case and concludes that when answering the question whether the sexual orientation is put forward at a later date, and thus whether a foreign national has put forward his sexual orientation as a motive for asylum as soon as is reasonably possible for him, the State Secretary must also demonstrate that they have carried out an individual assessment, in which they have included all elements eligible for this. Furthermore, in order to answer the question whether that sexual orientation is a newly revealed fact or circumstance, it may not be invoked against a foreigner that he has not previously stated about his sexual orientation. The administrative court can then review the position of the State Secretary on the credibility of that sexual orientation, on the basis of the grounds of appeal put forward against it, as if it were a first refusal to grant an asylum permit.

The court considered the limits of the assessment of the sexual orientation in the light of consideration 49 and 50 of the CJEU judgment. EU law does not preclude the State Secretary from investigating and assessing whether a foreign national has the sexual orientation he claims. On the other hand, EU law does not oblige the State Secretary to do so. As the State Secretary explained at the hearing, in investigating the credibility of the alleged sexual orientation, he assumes that a foreign national can rarely provide evidence of his sexual orientation and the problems he may have encountered in that regard. The State Secretary therefore grants a foreign national the benefit of the doubt if he considers the statements of a foreign national to be coherent and plausible and has established that the relevant foreign national is broadly credible.

When applying the CJEU judgment, the court considered that the investigation by the State Secretary regarding the sexual orientation is consistent with EU law. The State Secretary also ensures that during the hearing no questions may be asked about the sexual activities and sexual acts of a foreigner. If a foreign national makes a statement about this of his own accord, the State Secretary, as he explained at the hearing, will not include those statements in his investigation and assessment.

The position of the State Secretary that he may ask questions – which are based on stereotypical views regarding sexual orientation as referred to in consideration 62 of the CJEU judgment – and that he may include the answers in his investigation is consistent with the judgment. At the hearing, the State Secretary also explained that, in his opinion, he only included answers he believed to be correct in his investigation in order to consider them credible. However, the State Secretary did not make it clear which questions he qualifies as questions that are based on stereotypical views regarding sexual orientation.

Due to the absence of a policy rule or a fixed line of conduct of the State Secretary regarding the way in which he investigates and assesses an alleged sexual orientation, while that investigation and assessment within the Dutch administrative law system is primarily up to him, it is not possible for the administrative court to effectively review how the State Secretary conducts that investigation and assessment in a specific case and thus takes a

carefully prepared and properly motivated decision about the credibility of a sexual orientation as an asylum motive. Within this system, it is not for the administrative court but the State Secretary to give further substance to this in the design and implementation of the asylum policy.

The court concluded that the State Secretary has not sufficiently clarified how he conducts the investigation regarding the credibility of the sexual orientation and how his assessment thereof takes place after he has completed the investigation, he has provided inadequate reasons in the various decisions as to why the sexual orientation of the foreign national in question is not credible.

For this reason, the court has wrongly considered in the various judgments that there is no ground for the claim that the State Secretary could not reasonably take the position that the sexual orientation of the foreign national in question is not credible. The appeals are well founded. The judgment must be annulled and the State Secretary has to decide again on the applications.

Elements of judicial dialogue

While *A, B and C* does not contain a huge amount of horizontal judicial dialogue, it did reiterate its findings in the case of *X and Others* (Joined Cases C-199/12 to C-201/12, EU:C:2013:720, paragraph 40, discussed in Sections 4.2.2.1 and 4.2.2.2 above) with regard to the relationship between Directive 2004/83, the Geneva Convention and the Charter of Fundamental Rights of the European Union. In this respect, the Court stated that the Directive must be interpreted: (a) in light of its general scheme and purposes, and in a manner consistent with the Geneva Convention, and other relevant treaties referred to in Article 78(1) TFEU; and (b) in a manner consistent with the rights recognised by the Charter.

The Court refrained from mentioning Article 21 CFREU in its judgment. Indeed, the principle of non-discrimination did not appear to play a role in the Court's reasoning in *A, B and C* at all, as discrimination was not mentioned explicitly. It is therefore not possible to conduct a thorough comparison on the basis of this case between the application of EU non-discrimination law in asylum cases and its application in non-discrimination cases. However, the conclusion of the Court does have the effect that individuals applying for asylum on the basis of their sexual orientation are protected from discriminatory treatment that could potentially arise from the reliance of national authorities on stereotyped notions of homosexuality.

Interestingly, although the Court of Justice did not refer to jurisprudence of the European Court of Human Rights (ECtHR), there exists judicial dialogue between the two courts initiated by the ECtHR. In *F.G. v Sweden* (Application no. 43611/11) the ECtHR cited the CJEU's decision in *A, B and C* to declare that an asylum seeker's initial reticence to disclose the grounds of his asylum application (in the case, persecution on account of his religious conversion) should not, as such, disqualify his application. Judge Jäderblom's partial dissent, however, criticised the transposition by the Court of this standard, which the CJEU had used for sexual orientation, to cases based on religious persecution. In his opinion, sexual orientation, unlike religion, was a particularly sensitive and intimate matter which the applicant might justifiably wish to conceal.

4.3. Issues relating to effective protection

While there is not a great deal of direct reference to effective protection in the cases discussed in this chapter, some interesting examples are present. The cases of *Kamberaj* and *Coman and Others* demonstrate that **Member States must not undermine the effectiveness of provisions EU law when applying the principle of equal treatment provided for in those provisions.** This includes when certain terms are not defined by the relevant Directives, leaving Member States with a certain margin of discretion. In *Kamberaj* the Court also provided some explicit guidance concerning what the effectiveness of rights conferred upon individuals in Article 21 TFEU requires (see Section 4.1.1) taking a more specific approach than in its other, more general comments on effective protection.

Another interesting aspect relating to effective protection can be seen in the Polish case discussed in Section 4.2.2.1 (IV SA/Wa 3635/15, judgment of 21 March 2016). Here, the Warsaw Provincial Administrative Court found that should Member States be unable or unwilling to provide **effective protection** from serious acts of discrimination by non-state actors (most notably the local community or its individual members) or tolerate such conduct, this can amount to persecution for the purposes of an asylum application. This essentially mirrors the positive obligation to protect individuals' enjoyment of human rights from the harmful conduct of non-state actors which is broadly applied within regional and international human rights law to allow the 'indirect horizontal effect' of rights.[45] In the present context, the finding has the result that, where effective protection from discrimination is not afforded by states of origin, in some instances this protection can be provided through the application of refugee law. The approach here, relying on the 'indirect horizontal effect' of human rights, is somewhat different from the CJEU's approach as seen in Chapter 3 in relation to Article 21 CFREU. The consequences for the personal scope of protection from discrimination is therefore not quite the same as the horizontal effect here is indirect, but the approach nevertheless has the consequence of extending effective protection from discrimination, as well as the protections offered through the granting of asylum, to a broader range of situations. The fact that this approach has so far only been seen at the national level, and has not been taken by the CJEU itself, must be taken into account when considering its impact for effective protection from non-discrimination.

Of further interest in the context of effective protection, during an application for asylum, it is for the applicant to demonstrate that they have a well-founded fear of being persecuted on the basis of a protected ground of discrimination. While the application procedures are not cases *per se*, this contrasts with the approach in non-discrimination cases falling under the scope of the equal treatment directives, in which applicants are only required to demonstrate a *prima facie* case of discrimination, which is for the respondent to prove did not amount to discrimination.

[45] For a discussion in relation to the European Convention on Human Rights, see Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights' (Council of Europe 2007). Available at <https://rm.coe.int/168007ff4d> accessed 25 September 2020; and for a discussion in relation to international human rights law, see Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice' (2018) 5(1) European Journal of Comparative Law and Governance 5.

Finally, in relation to effective remedies, it is interesting to note that in the cases discussed above concerning migration, the remedies sought are the same as those in some of the non-discrimination cases discussed in Part 1 of this Casebook (a declaration of discrimination, and a declaration of unconstitutionality of national legislation). The remedy sought in some asylum cases (e.g. *X and Others*) is also the annulment of a decision by a public authority. However, asylum itself may also be sought. According to Recital 27 of Directive 2000/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status (relied on in the case of *A, B and C*) '[i]t reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an **effective remedy** before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole'. Article 39 of the Directive then lays down more specific rules to be followed, including in relation to what kind of decisions applicants for asylum have the right to an effective remedy before a court and tribunal. Member States must also, where appropriate, provide for rules in accordance with their international obligations dealing with various issues of effective remedies in asylum cases, including whether or not a remedy has the effect of allowing an applicant to remain in the country of asylum pending its outcome, and the possibility of legal remedy or protective measures where this effect is not granted by a remedy. The rules on effective remedies in asylum cases are therefore different from those in true non-discrimination cases, where, as seen in Chapter 3.2.1 of this Casebook, remedies must be 'effective, dissuasive and proportionate'.

4.4. Guidelines emerging from the analysis

Various guidelines can be extracted from the discussions of the CJEU's cases in this chapter. As well as more specific guidance, the judgments of the Court of Justice shed light on the role afforded to the Charter in cases concerning potential instances of discrimination.

Limitations on the principle of equal treatment and housing benefits

In the view of the Court of Justice as expressed in *Kamberaj* (C-571/10):

- Member States may not treat third-country nationals who are holders of a long-term residence permit differently from citizens of the EU with regard to the granting of housing benefits, to which the principle of equal treatment must be applied.

Right of residence and sexual orientation

In the view of the Court of Justice as expressed in *Coman and Others* (C-673/16):

- A third-country national who married an EU citizen of his or her same sex has a right of residence in the Member State of which the latter is a national, even if the Member State does not recognise same-sex marriage in its legislation.
- Member States cannot discriminate against same-sex spouses, where one spouse is a third-country national and the other an EU citizen, in their enjoyment of the right of residence.

Sexual orientation as a ground of persecution under the Geneva Convention and Directive 2004/83

In the view of the Court of Justice as expressed in *X and Others* (Joined Cases C-199/12 to C-201/12):

- Directive 2004/83 must be interpreted in accordance with its scheme and purpose, in a manner consistent with the Geneva Convention and other relevant international materials, most notably the Charter of Fundamental Rights of the European Union.
- In relation to Article 21 CFREU, it can be noted that Directive 2004/83 includes disproportionately discriminatory prosecution or punishment as one form in which acts of persecution can be taken.
- To constitute a 'particular social group' for the purposes of the Directive, two conditions must be met:

  Members of that group have to share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity that a person should not be forced to renounce it;

  That group needs to have a distinct identity in the relevant country because it is perceived as being different by the surrounding society.
- A third-country national outside of their country of nationality owing to a well-founded fear of being subject to disproportionately discriminate punishment (persecution) on the grounds of their sexual orientation may be granted the status of 'refugee'.
- The criminalisation of homosexual acts is not a serious enough violation of fundamental human rights to amount to persecution, unless a punishment of imprisonment is enforced in practice. In such cases there would be a violation of the right to private life in conjunction with the prohibition of discrimination under Articles 8 and 14 of the ECHR and Articles 7 and 21 of the Charter.
- Applications for asylum on the grounds of persecution on account of sexual orientation can be subjected to a credibility assessment like any other application. However, though decision-makers can rely on questions based on stereotyped notions to test the applicant's credibility, applications cannot be evaluated only on the basis of such questions, as they do not sufficiently account for the applicant's individual situation.

<u>Role of the Charter in cases concerning discrimination</u>

- The application by the CJEU of the Charter in the cases above has been disparate. While in *Coman and Others* the referring Court mentioned extensively the Charter as one of the relevant sources of the case, the CJEU merely framed the issue of same-sex marriage under Article 7 (on private and family life), but answered the question mostly by referring to Article 21 of the TFEU (on freedom of movement). The CJEU may have perceived that it was preferable to settle the matter in accordance with more technical aspects of EU law, rather than resorting to a human rights framework which both in the CJEU and the ECtHR has been useful to force recognition of same-sex marriages to states that have still not done so.

Conversely, the Court more freely used different provisions of the Charter in *X and Others* and in *A, B and C* to interpret, through a human rights lens, EU regulations on assessment

of asylum applications and ground of persecution that merit recognition of refugee status. However, the incidence of the Charter in these decisions is different. Whereas Article 7 was used in *A, B and C* to prevent credibility assessments from becoming an occasion to intrude into the private life of applicants, in *X and Others* the Court referred to Articles 7 and 21 of the Charter (and Articles 8 and 14 of the ECHR) to argue that, since these were not non-derogable rights, sole criminalisation of homosexual acts, without actually enforcing any punishment, did not amount to a serious violation that would justify a finding of persecution on the grounds of sexual orientation.

Chapter 5: Discrimination in the context of health and in the context of disability

Many of the cases adjudicated by the Court of Justice of the European Union concerning health and matters of discrimination have related to discrimination on the grounds of disability, with a much smaller jurisprudence on discrimination on the grounds of sexual orientation in health-related matters. Of course, not all cases concerning disabled persons involve health aspects, neither the present analysis suggests that the position and the role of disabled persons in society should be regarded from the perspective of the fundamental right health only or mainly.

This chapter will first discuss those cases related to discrimination on the grounds of disability (Section 5.1) before moving on to discuss the Court's jurisprudence on health and discrimination on the grounds of sexual orientation (Section 5.2). Issues relating to effective protection will be discussed in Section 5.3, and general guidance that emerges from the analysis of the cases will be summarised in Section 5.3.

The purpose of the analysis is to show whether and to what extent the need to ensure the protection of the fundamental right to health does play a role in enforcing the principle of non-discrimination.

5.1. Health and disability

The majority of the Court's judgments concerning health and discrimination on the grounds of disability deals with the meaning and scope of 'disability', both under Article 21 CFREU and relevant secondary instruments of EU law. These cases will be summarised in Section 5.1.1. Section 5.1.2 is dedicated to the limitations on the right to non-discrimination on the grounds of disability as found in Article 21 CFREU.

5.1.1 Meaning of 'disability' for the purposes of Article 21 CFREU

While disability is a ground of discrimination prohibited by Article 21 CFREU, as well as Directive 2000/78, no concrete definition of 'disability' is provided by EU legal instruments. For this reason, the Court of Justice has received multiple referrals from national courts requesting guidance on the definition and scope of 'disability'. The Court has by now established a strong line of case law on the matter, which takes into primary consideration the meaning of the concept of disability under the UN Convention on the Rights of Persons with Disabilities.[46]

Relevant CJEU cases in this cluster

➢ Judgment of the Court (Grand Chamber) of 17 July 2008, *S. Coleman v Attridge Law and Steve Law*, Case C-303/06 ("**Coleman**") (reference case, Question 2)

➢ Judgment of the Court (Second Chamber) of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe*

[46] UN General Assembly, Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS vol. 2515, p. 3.

Werge, v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation, Joined Cases C-335/11 and C-337/11 ("**HK Danmark**") (reference case, Question 1a)

➢ Judgment of the Court (Grand Chamber) of 18 March 2014, *Z. v A Government department and The Board of Management of a Community School*, Case C-363/12 ("**Z.**")

➢ Judgment of the Court (Fifth Chamber) of 22 May 2014, *Wolfgang Glatzel v Freistaat Bayern*, Case C-356/12 ("**Glatzel**")

➢ Judgment of the Court of 18 December 2014, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, Case C-453/13 ("**FOA**") (reference case, Question 1b)

➢ Judgment of the Court (Third Chamber) of 1 December 2016, *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal,* Case C-395/15 ("**Daouidi**") (reference case, Question 1c)

➢ Judgment of the Court (Second Chamber) of 9 March 2017, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, Case C-406/15 ("**Milkova**")

➢ Judgment of the Court (Third Chamber) of 18 January 2018. *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, Case C-270/18 ("**Conejero**")

➢ Judgment of the Court (First Chamber) of 11 September 2019, *DW v Nobel Plastiques Ibérica* SA, Case C-397/18 ("**Nobel Plastiques Ibérica**")

➢ Judgment of the Court (Third Chamber) of 10 February 2022, XXXX v *HR Rail*, Case C-485/20 ("**HR Rail**")

Main questions addressed

Question 1 Does EU law on protection against discrimination on the grounds of disability in employment include as a ground of discrimination:

a. Sickness;

b. Obesity; and

c. Temporary incapacity?

Question 2 Does EU law on protection against discrimination on the grounds of disability protect only individuals who are themselves disabled or also members of their family or other persons associated to them?

Relevant legal sources

EU level

Articles 136, 147(1)(2) EC

Community Charter of the Fundamental Social Rights of Workers, point 26.

Recitals 1, 11, 12, 15, 28 and 31 and Articles 1, 2, 3, 5, 8(2) and 10(1)(2)(5) of Directive 2000/78

Articles 3, 15, 21(1), 30, 31, 34(1) and 35 of the Charter of Fundamental Rights of the European Union

International level

Article 2 United Nations Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965, entered into force on 4 January 1969) United Nations, Treaty Series, vol. 660, p. 195:

'Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'

5.1.1.1 Question 1a – Sickness as a ground of discrimination

> Must the concept of 'disability' in Directive 2000/78 (which gives specific expression to the principle of non-discrimination now found in Article 21CFREU) be interpreted as including the state of health of a person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work, for a period that will probably last for a long time, or permanently? Additionally, must that concept be interpreted as meaning that a condition caused by a medically diagnosed incurable illness may be covered by that concept, that a condition caused by a medically diagnosed curable illness may also be covered by that concept, and that the nature of the measures to be taken by the employer is decisive for considering that a person's state of health is covered by that concept?

This question was considered in *HK Danmark* (Joined Cases C-335/11 and C-337/11).

Relevant national law (Denmark)

Paragraph 2 of the Law on the legal relationship between employers and salaried employees (Lov om retsforholdet mellem arbejdsgivere og funktionærer, 'the FL'):

'1. The employment contract between the employer and the employee may be terminated only after prior notice has been given in accordance with the rules stated below. This shall also apply to the termination of a fixed-term employment contract before expiry of the employment contract.

Paragraph 5 of the FL:

'1. If the salaried employee becomes unable to carry out his work because of illness, the resulting absence from work shall be regarded as lawful absence on his part unless he has contracted the disease intentionally or by gross negligence during the employment relationship or he has fraudulently failed to disclose at the time when he took on the job that he was suffering from the disease in question.

2. However, it may be stipulated by written agreement in the individual employment relationship that the employee may be dismissed with one month's notice to expire at the end of a month, if the employee has received his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months. The validity of the notice shall be dependent on it being given immediately on the expiry of the 120 days of illness and while the employee is still ill, but its validity shall not be affected by the employee's return to work after the notice of dismissal has been given.'

Paragraph 2a of Law No 1417 amending the law on the prohibition of discrimination on the labour market (Lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.) of 22 December 2004 ('the Anti-Discrimination Law'), which transposed Directive 2000/78 into national law:

'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 enable a person with a disability to undergo training. This does not however apply if such measures would impose a disproportionate burden on the employer. This burden shall not be regarded as disproportionate if it is sufficiently remedied by public measures.'

The case

Although various issues were dealt with in this case, only those pertaining to the definition of disability will be addressed in the subsequent paragraphs.

The first applicant, Ms R., was absent from work on several occasions from 6 June 2005 to 24 November 2005 due to untreatable lumbar pain. No prognosis could be made as regards the prospect of returning to full-time employment. She was dismissed, from her position in accordance with Paragraph 5(2) of the FL, after which the employer made changes to the workstation Subsequently started a new job, working for 20 hours a week, at a normal workstation with an adjustable height desk.

The second applicant, Ms S. W., was on sick leave from her job for three weeks in after being involved in a road accident in December 2003 and was subsequently absent because of illness for a few days only. In November 2004 Ms S. W. agreed with her employer to be on part-time sick leave for four weeks. In January 2005 she eventually went on full-time sick leave due to her inability to work, and was dismissed in April 2005. Ms S.W. subsequently underwent an assessment procedure which concluded that she could work for eight hours a week at a slow pace.

The trade union HK, acting on behalf of the two applicants in the main proceedings, brought proceedings against their employers, submitting that both employees were suffering from a disability. HK also argued that Paragraph 5(2) of the FL does not apply when absences are the result of disability.

The employers disputed that the applicants' state of health amounted to 'disability', since they were only incapable of working full-time.

Preliminary questions referred to the Court

The national court referred several questions to the CJEU, two of which concerned the meaning of the word 'disability':

1. (a) Is any person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in Paragraph 45 of the judgment [in *Chacón Navas*] covered by the concept of disability within the meaning of [Directive 2000/78]?

   (b) Can a condition caused by a medically diagnosed incurable illness be covered by the concept of disability within the meaning of the Directive?

   (c) Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the Directive?

2. Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in [Directive 2000/78]?

Reasoning of the Court

The Court first noted that Directive 2000/78 includes disabilities that are caused by curable or incurable long-term illnesses which, in interaction with various barriers, may hinder the effective participation of a person in professional life on an equal basis with other workers, regardless of whether this person can work only to a limited extent or cannot work at all.

The Court began by acknowledging that 'disability' is not defined by Directive 2000/78 itself, but had been defined in its judgment in *Chacón Navas* (C-13/05, ECLI:EU:C:2006:456, paragraph 43), 'as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.' Next, the CJEU noted the definition of 'disability' under the UN Convention on the Rights of Persons with Disabilities, with which the interpretation of Directive 2000/78 should be in conformity. It therefore found that "'disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers', and that the impairments be long-term. This definition appears to be specific to the context of non-discrimination. According to the definition, the Court found that illnesses as such are not a ground of discrimination under the Directive (*Chacón Navas*, paragraph 57), but if limitations having the abovementioned effects on a long-term basis are caused by an illness, it can be covered by the concept of 'disability'.

However, 'disability' does not necessarily equate to total exclusions from work or professional life, but can also cover situations where a person can only work to a limited extent. Similarly, it need not make an individual incapable of exercising an activity, as long as it provides a hindrance to exercising it.

Conclusion of the Court

The Court concluded that:

'[T]he concept of "disability" in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.'

Elements of judicial dialogue

This case is central to the Court's definition of 'disability' under Article 1 of Directive 2000/78, and therefore to determining which situations of potential discrimination on the grounds of disability fall within the scope of Article 21 CFREU (see discussion below concerning the judicial dialogue of *Daouidi* (C-395/15)). Indeed, although the case itself is

not based on the Charter of Fundamental Rights, it has been relied on in subsequent cases which *do* deal with the Charter, such as (*HR Rail*, C-485/20, ECLI:EU:C:2022:85), *Milkova* (C-406/15), *Daouidi* and *Glatzel* (C-356/12).

In *Z.* (C-363/12), which involved the question of whether, having regard to Article 21 CFREU, the refusal to grant paid leave from employment equivalent to maternity and/or adoptive leave to a woman who suffered from a disability preventing her from giving birth, whose genetic child was born through surrogacy, and who was responsible for caring for the child from birth, fell within the scope of discrimination on the grounds of disability for the purposes of Directive 2000/78. The CJEU repeatedly relied on *HK Danmark*, particularly in finding that the definition to be afforded to 'disability' under Directive 2000/78 should be that found in the UN Convention on the Rights of Persons with Disabilities, considering the primacy of international agreements concluded by the EU over secondary instruments of EU law.[47] In the case, the Court acknowledged that the woman in question (Ms Z) had a condition that hindered the possibility of her bearing her own child. However, the purpose of Directive 2000/78 is to enable people with a disability to have access to or participate in employment. The Court found that Ms Z's condition did not prevent her from having access to or participating in her professional life. Hence, Ms Z's condition was not a disability within the meaning of the Directive 2000/78. The Court then found it unnecessary to examine the validity of Directive 2000/78 in the light of Article 10 TFEU and Articles 21, 26 and 34 of the Charter, which the referring court had also requested in the event that the answer to the first question was positive.

In *Glatzel* (paragraph 45), the CJEU built on this strand of case law and noted that Article 21 CFREU does not itself define 'disability', and followed its previous case law on the meaning of disability for Directive 2000/78, which is read in light of Article 2 of the Convention on the Rights of Persons with Disabilities. This thus extends the definition adopted in relation to Directive 2000/78 to Article 21 CFREU, and beyond the context of employment, which the cases in the current cluster deal with, but which is not at issue in *Glatzel* (see below, Section 5.1.2.1 for a full summary of the case).

Also relevant to *HK Danmark*'s importance as a stepping stone in the Court's path to a comprehensive definition of 'disability' is its reliance on the case of *Chacón Navas* (C-13/05 ECLI:EU:C:2006:456), which itself lay the groundwork for a concrete definition of disability in the lack of such a definition in the text of Directive 2000/78. The significance of *Chacón Navas* can be seen above in the Court's reasoning in *HK Danmark*.

A more in-depth discussion of the vertical judicial dialogue in relation to *HK Danmark* can be found below in relation to *Daouidi*. The CJEU confirmed interpretation of the notion of disability adopted in its previous case law in *Conejero* (C-270/16).

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Italian judges relied on the concept of disability shaped by the CJEU. For example, the Tribunal of Padua, in its judgment of 13 May 2020, dealing with a case concerning discrimination in the workplace, relied expressly on the definition of disability adopted by the CJEU in *HK Danmark* (C-335/11 and C-337/11) and *Carlos Enrique Ruiz Conejero* (C-

[47] For further discussion of *Z.*, see Chapter 1.2.1 of the present Casebook.

270/16). Accordingly, the Tribunal stated that the notion of disability does not necessarily imply total exclusion from work or professional life.

In addition, the United Kingdom's Employment Appeal Tribunal relied on the CJEU's decision when discussing the definition of disability in *Sobhi v Commissioner Of Police Of The Metropolis (Disability Discrimination: Disability)* [2013] Eq LR 785. Referring to the CJEU's reiteration of the Chacon Navas case, the Tribunal stated that Directive 2000/78 should be interpreted consistently with the United Nations Convention on the Rights of Persons with Disabilities. In the words of the Tribunal, "[y]ou look to see whether the impairment which the worker has may hinder their full and effective participation in professional life on an equal basis with other workers" (paragraph 18).

5.1.1.2 Question 1b – Obesity as a ground for discrimination

Should Directive 2000/78, which gives specific expression to the principle of non-discrimination now found in Article 21, be interpreted as meaning that 'obesity' can be considered a 'disability'?

This question was answered in *FOA* (C-453/13).

Relevant national law (Denmark)

Paragraph 1(1) of Law No 1417 of 22 December 2004, transposing Directive 2000/78 into Danish law by amending the Law on the principle of non-discrimination in the labour market (lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.), as published by Consolidated Law No 1349 of 16 December 2008 ('the Law on anti-discrimination'):

'Discrimination for the purposes of this law shall be understood to mean direct or indirect discrimination on the basis of race, skin colour, religion or belief, political affiliation, sexual orientation, age, disability or national, social or ethnic origin.'

Paragraph 2(1) of the Law on anti-discrimination:

'An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.'

Paragraph 2a of the Law on anti-discrimination:

'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. This burden shall not be regarded as disproportionate when it is sufficiently remedied by public measures.'

Paragraph 7(1) of the Law on anti-discrimination:

'Persons whose rights have been infringed by breaches of Paragraphs 2 to 4 may be awarded compensation.'

Paragraph 7a of the Law on anti-discrimination:

'When persons who consider themselves wronged by a failure to comply with Paragraphs 2 to 4 establish facts from which it may be presumed that there has been direct or indirect

discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

The case

The Municipality of Billund hired Mr K. as a childminder to take care of children in his own home. For the entire period during which Mr K. was employed (approximately 15 years), he was 'obese' within the meaning of the definition of the World Health Organization.

Mr K. tried to lose weight and received financial assistance from the Municipality. After succeeding, he regained the weight he had loss. In March 2010, after a leave of one year due to family reasons, Mr K. resumed working as a childminder. Thereafter, he was visited by the head of the childminders, who observed that his weight had remained unchanged.

Owing to the decrease in the number of children in the Municipality, from the 38th week of 2010, Mr K. had only three children to take care of instead of four, as originally authorised, so when faced with a requirement to dismiss one employee, the head of the childminders chose Mr K. for dismissal.

During a meeting with the head of the childminders, Mr K. asked why he was the only childminder to be dismissed. The parties agreed that Mr K.'s obesity was mentioned but they differ over how it was mentioned and on the extent to which it influenced the decision.

The FOA, acting on behalf of Mr K., brought an action before the Retten i Kolding (District Court, Kolding) claiming that, during his dismissal, Mr K. had been discriminated against on the basis of obesity and that he ought to receive compensation for that discrimination.

Preliminary questions referred to the Court

The following four of the referring court's questions are relevant here:

1. Is it contrary to EU law, as expressed, for example, in Article 6 TEU concerning fundamental rights, generally or particularly for a public-sector employer to discriminate on grounds of obesity in the labour market?
2. If there is an EU prohibition of discrimination on grounds of obesity, is it directly applicable as between a Danish citizen and his employer, a public authority?
3. Should the Court find that there is a prohibition under EU law of discrimination on grounds of obesity in the labour market generally or in particular for public-sector employers, is the assessment as to whether action has been taken contrary to a potential prohibition of discrimination on grounds of obesity in that case to be conducted with a shared burden of proof, with the result that the actual implementation of the prohibition in cases where proof of such discrimination has been made out requires that the burden of proof be placed on the respondent/defendant employer …?
4. Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC … and, if so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination [on] grounds of disability as laid down in that Directive?

Reasoning of the Court

In relation to the first question, the Court noted that since Article 19 TFEU does not refer to discrimination on grounds of obesity, it cannot constitute a legal basis for measures of the Council of the European Union to combat such discrimination. Nor does European Union secondary legislation lay down a general principle of non-discrimination on grounds of obesity. In particular, Directive 2000/78 does not mention obesity as a ground for discrimination.

According to the case law of the Court, the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof. Therefore, obesity cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination. Consequently, the Court found nothing to suggest that the situation at issue, in so far as it related to a dismissal purportedly based on obesity as such, would fall within the scope of EU law. This then meant that the provisions of the Charter of Fundamental Rights of the European Union were likewise inapplicable to the case.

Given these findings, the Court deemed it unnecessary to answer the second and third questions referred by the national court.

The CJEU did answer the fourth question, reformulating it to ask whether Directive 2000/78 must be interpreted as meaning that the obesity of a worker can constitute a 'disability'. The Court first noted that following the ratification by the EU of the UN Convention on the Rights of Persons with Disabilities, 'the concept of "disability" must be understood as referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers' (see judgments in *HK Danmark* Joined Cases C-335/11 and C-337/11; *Z.*, C-363/12, EU:C:2014:159, paragraph 76; and *Glatzel*, C-356/12, EU:C:2014:350, paragraph 45).

Obesity does not in itself constitute a 'disability' within the meaning of Directive 2000/78, because, by its nature, it does not necessarily entail a limitation. However, in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.

Ultimately, it was for the referring court to ascertain whether, in the case in the main proceedings, Mr K.'s obesity entailed a limitation which met the above-mentioned condition.

Conclusion of the Court

The Court concluded that obesity is not, as such, a ground of discrimination under Directive 2000/78. However, if in a particular case obesity entails a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers Sickness cannot as such

be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination, it can be subsumed under the concept of 'disability'.

Elements of judicial dialogue

In *FOA* the judicial dialogue is predominantly horizontal. The approach taken by the Court matches that of the other cases in this cluster, which are relied on in the Court's reasoning (in particular *HK Danmark*, which is relied on repeatedly). As also seen elsewhere in this cluster, the Court also relied heavily on the pre-Charter case of *Chacón Navas* in determining what can be considered a disability for the purposes of Directive 2000/78, as well as *Coleman* (C-303/06 ECLI:EU:C:2008:415). Here, the Court reiterated that 'the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof' (*FOA* paragraph 36). This approach in itself has been consistently applied by the Court, which has refused to extend the scope of the prohibition of discrimination beyond those specified in the relevant EU law (see also *Milkova*, C-406/15). Thus, while the wording of Article 21 of the Charter, which states that 'discrimination based on any ground *such as* […]' suggests that the list of grounds found in the provision is not exhaustive, in practice only those instances of discrimination falling within the scope of grounds listed in the relevant Directive have been held to be prohibited under EU law. This makes the overall scope of the prohibition of discrimination under EU law more restrictive than that under the Council of Europe human rights system. According to Article 14 of the European Convention on Human Rights, the prohibition of discrimination applies to 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[48] The European Court of Human Rights (ECtHR) has interpreted 'other status' to include grounds not explicitly mentioned in Article 14, such as sexual orientation, disability and discrimination.[49] Interestingly, other characteristics such as 'health or any medical condition' have also been held by the ECtHR to be protected grounds, greatly widening the scope of protection as compared to that of Directive 2000/78 (for example) as interpreted by the CJEU.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU[50]

Obesity as a ground of discrimination arose in a Belgian case in 2016. Here, the applicant had applied for a job as a driving instructor. After an interview, her application was rejected because according to the respondent, her 'physical profile' was not suitable for the job, and it was suggested that her weight was a 'handicap for this job'. The Labour Court hearing the case followed the definition of disability provided by the CJEU in *HK Danmark* (followed in *FOA* in relation to obesity) and found that direct discrimination had occurred.

[48] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[49] European Union Agency for Fundamental Rights and the European Court of Human Rights, 'Handbook on European non-discrimination law: 2018 edition' 2018) 226-227. Available at <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition> accessed 24 June 2020.

[50] This information is taken from the European University Institute, 'ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter: Module 6 – Non-discrimination' (2017) 70-71. Available at <https://cjc.eui.eu/projects/actiones/actiones-platform/> accessed 7 October 2020.

The difference in treatment could not be justified on the basis of a genuine and determining occupational requirement, as argued by the respondent (on the basis of students' and instructors' need for security) as the respondent could not apply the justification in concrete terms to the specific case at hand. There had also been no reasonable accommodation provided by the respondent.

5.1.1.3 Question 1c – Temporary incapacity as a ground for discrimination

> Should Directive 2000/78 be interpreted as meaning that the fact that a person finds himself or herself temporarily unable to work, as defined in national law, for an indeterminate period of time by reason of an accident at work implies, by itself, that the limitation of that person's capacity can be defined as 'long-term', within the meaning of 'disability' under that Directive?

This question was dealt with in *Daouidi* (C-395/15).

Relevant national law (Spain)

Article 9(2) Spanish Constitution:

'It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.'

Article 14 Spanish Constitution:

'Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.'

Paragraphs 3 to 6, Article 55 of Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers' Statute) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654), in its version applicable at the time of the facts in the main proceedings ('the Workers' Statute'):

'3. Dismissals shall be classified as fair, unfair or null and void.

4. A dismissal shall be regarded as fair when the failure to perform duties alleged by the employer in the letter of notice is proved. If that is not the case, or if its form does not satisfy the requirements under paragraph 1 of the present article, the dismissal shall be considered unfair.

5. Any dismissal on one of the grounds of discrimination prohibited by the Constitution or by law or occurring in breach of the fundamental rights and public freedoms of workers shall be void. …

6. Nullity of a dismissal shall entail the immediate reinstatement of the worker, with payment of unpaid wages or salary.'

Article 56(1) of the Real Decreto Legislativo 1/1995:

'Where a dismissal is declared to be unfair, the employer, within five days of notice of the judgment being served, may choose either to reinstate the worker or to pay compensation

Article 96(1) of Ley 36/2011, reguladora de la jurisdicción social (Law 36/2011 governing social jurisdiction) of 10 October 2011 (BOE No 245 of 11 October 2011, p. 106584):

'In proceedings in which the applicant's allegations give rise to an inference that there are substantiated indicia of discrimination on grounds of sex, sexual orientation or identity, racial or ethnic origin, religion or beliefs, lack of capacity, age, harassment and in any other case of infringement of a fundamental right or public freedom, the defendant shall be required to produce objective, reasonable and adequately proved justification for the measures adopted and for their proportionality.'

Article 2 of Real Decreto Legislativo 1/2013, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social (Royal Legislative Decree 1/2013 on the rights of persons with disabilities and their social inclusion) of 29 November 2013 (BOE No 289 of 3 December 2013, p. 95635) contains the following definitions:

'…

(a) "Disability" refers to the situation of persons with long-term impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

…

(c) "Direct discrimination" refers to a situation in which a person with a disability finds himself or herself being treated less favourably than another person in a comparable situation, on grounds of, or as a result of, his or her disability.

(d) "Indirect discrimination" exists if a statutory or regulatory provision, a clause in an agreement or contract, an individual agreement, a unilateral decision, a criterion or practice, or an environment, product or service, ostensibly neutral, is liable to give rise to a particular disadvantage for one person in comparison with another on grounds of, or by reason of, disability, on condition that, objectively, it does not satisfy a legitimate objective and the means of achieving that objective are not appropriate and necessary.

…'

The case

Mr D. was hired by Bootes Plus to work as a kitchen assistant. On 10/03/2014, he slipped on the kitchen floor and dislocated his left elbow, which had to be put in plaster. That day, he commenced the procedure to have his temporary incapacity for work recognised. On 11/26/2014, he received a notice of disciplinary dismissal.

He submitted that his dismissal was null and void (according to Article 108(2) of Law 36/2011), on the basis that: 1) it had violated his right to physical integrity (Constitution, Article 15), since the manager had asked him to return to work while he was still not able to do so; 2) it was discriminatory, because his temporary incapacity amounted to 'disability'.

The referring court, while noting that Spanish case-law indicated that dismissal on grounds of illness or temporary disability was not discriminatory, observed that such dismissals could infringe EU norms, namely: principle of non-discrimination, protection against unjustified dismissal, right to fair and just working conditions., entitlement to social security benefits, right to health protection (Articles 21(1), 30, 31, 34(1) and 35 of the Charter, respectively).

The court also enquired as to whether there is discrimination based on 'disability' (according to Directive 2000/78).

Preliminary questions referred to the Court

1. Must the general prohibition of discrimination affirmed in Article 21(1) of the Charter of Fundamental Rights of the European Union be interpreted as including, within the ambit of its prohibition and protection, the decision of an employer to dismiss a worker, previously well regarded professionally, merely because of his finding himself in a situation of temporary incapacity for work — of uncertain duration — as a result of an accident at work, when he was receiving health assistance and financial benefits from Social Security?
2. Must Article 30 of the Charter be interpreted as meaning that the protection that must be afforded a worker who has been the subject of a manifestly arbitrary and groundless dismissal must be the protection provided for in national legislation for every dismissal which infringes a fundamental right?
3. Would a decision of an employer to dismiss a worker previously well regarded professionally merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, come within the ambit and/or protection of Articles 3, 15, 31, 34(1) and 35(1) of the Charter (or any one or more of them)?
4. If the three foregoing questions (or any of them) are answered in the affirmative and the decision to dismiss the worker, previously professionally well regarded, merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, is to be interpreted as coming within the ambit and/or protection of one or more articles of the [Charter], may those articles be applied by the national court in order to settle a dispute between private individuals, either on the view that — depending on whether a "right" or "principle" is at issue — that they enjoy horizontal effect or by virtue of application of the "principle that national law is to be interpreted in conformity with an EU Directive"?
5. If the four foregoing questions should be answered in the negative, would the decision of an employer to dismiss a worker, previously well regarded professionally, merely because he was subject to temporary incapacity — of uncertain duration — by reason of an accident at work, be caught by the term "direct discrimination on grounds of disability" as one of the grounds of discrimination envisaged in Articles 1, 2 and 3 of Directive 2000/78?

Reasoning of the Court

The Court found it most appropriate to deal with the fifth question first. It noted as a preliminary point, that disability is a protected ground of non-discrimination in Article 1 of

Directive 2000/78. Pursuant to Article 3(1)(c) the Directive applies, within the limits of the areas of competence conferred on the European Union, to all persons, in both the public and private sectors, in relation to, inter alia, the conditions governing dismissal.

The Cnourt then reiterated its finding in *HK Danmark* (paragraph 38) that 'disability' under Directive 2000/78 should be interpreted in line with the United Nations Convention on the Rights of Persons with Disabilities (see Section 5.1.1.2 above). Therefore, 'if an accident entails a limitation resulting in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and if that limitation is long-term, it may come within the concept of 'disability' within the meaning of Directive 2000/78. The question to ask was whether the injury that was preventing the individual from carrying out his professional duties (due to his elbow being in a cast) was reversible in principle.

Going further, the Court noted that the fact that the person concerned finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by Directive 2000/78, read in the light of the United Nations Convention on the Rights of Persons with Disabilities.

The evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered.

In the context of the verification of that 'long-term' nature, the CJEU found that the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data. The Court did not mention which party has the burden of providing such evidence (see Section 5.3 below).

Moving to the remaining issues, the Court noted that it only has jurisdiction over legal situations falling within the scope of EU law. The Charter, which formed the core of the previous questions discussed by the Court, is only addressed to Member States when they are implementing EU law – the Charter cannot on its own form the basis of the Court's jurisdiction over a dispute (*Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 22; and *Aiudapds*, C-520/15, not published, EU:C:2016:124, paragraph 20). Since the CJEU had established that temporary incapacity for work for an indeterminate period of time due to an accident that happened at work does not on its own mean that the individual is suffering from a 'disability' for the purposes of Directive 2000/78, the Court did not find it necessary to answer the remaining issues.

Conclusion of the Court

The Court concluded that Directive 2000/78 has to be interpreted under the light of the United Nations Convention on the Rights of Persons with Disabilities. Incapacity should be regarded as long-term and, therefore, covered by the provisions concerning disability of Directive 2000/78 when: a) it does not display a clearly defined prognosis of short-term

progress; or b) it is likely to be significantly prolonged before that person has recovered. The above-mentioned factors should be assessed on the basis of current medical and scientific knowledge and data.

Elements of judicial dialogue

Significantly, this case builds on the CJEU's case law discussed in Questions 1a and 1b above. As mentioned above, the Court in *Daouidi* applied the same definition of 'disability' as was developed and adopted in *HK Danmark* (Joined Cases C-335/11 and C-337/11). The CJEU relied on the latter case repeatedly in finding that an accident may come within the meaning of 'disability' if it causes long-term physical, mental or psychological impairments that result in limitations which, in interaction with various barriers, may hinder the full and effective (but not necessarily complete) participation of the person concerned in professional life on an equal basis with other workers. The pre-Charter case of *Chacón Navas* (C-13/05), which was cited repeatedly by the Court in *HK Danmark* and *FOA* (see above, Sections 5.1.1.1 and 5.1.1.2, respectively) was also referred to in *Daouidi*, solidifying this strand of case law and the Court's concrete definition of 'disability' for the purposes of Article 1 of Directive 2000/78.

In turn, this also strengthens the vertical dialogue built up throughout the cases in this cluster – a clear and concrete rule for national courts as to a) what can be considered a disability for the purposes of the prohibition of non-discrimination; and b) when legal situations ostensibly concerning discrimination on the grounds of disability can be adjudicated on the basis of Article 21 CFREU. Although the cases in this cluster unfortunately do not apply the Charter, they shed much light on when the Charter could be applied to situations of discrimination – to know when the Charter applies, it is first necessary to know when Directive 2000/78 (or another source of EU law) applies. The guidance provided in *Daouidi* is therefore, as in *HK Danmark*, of importance to national courts.

Furthermore, *Daouidi* has been relied on in subsequent cases applying the Charter. For example, in the judgment of *DW v Nobel Plastiques Ibérica* SA (C-397/18), the Court reiterated its comments on how to determine whether a limitation is "long-term" for the purposes of discrimination on the grounds of disability.

Further, in *Milkova* (C-406/15), the CJEU applied the definition of disability provided in *Daouidi* (and indeed developed throughout this cluster of cases). The Court held that the mental illness from which the applicant suffered (for which she had a disability rating of 50%) did fall within the meaning of 'disability' in Directive 2000/78. In *Milkova*, it was therefore possible for the Court to apply the Charter of Fundamental Rights of the European Union, since, unlike in *Daouidi*, the situation fell within the scope of EU law. The Court therefore went on to apply the principle of equal treatment as enshrined in Articles 20 and 21 CFREU to make an assessment of whether there was: (1) a difference in treatment of comparable situations (which requires an assessment in the light of all the factors characterising those situations, and in a specific and concrete manner in the light of the objective and of the aim of the national legislation creating the distinction at issue – paragraph 57); and (2) if so, whether this was justified ('based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment', following the judgment of *Glatzel*, C-356/12 – see Section 5.1.2.1 below). It therefore

appears that the Court follows, in the context of health and disability, the same steps as were set out in Chapter 1 of this Casebook – see e.g., the case of *MB* (C-451/16, ECLI:EU:C:2018:492). This supports an ultimate conclusion that across the different grounds of discrimination listed in Directive 2000/78 and Article 21 CFREU, the Court applies the same general guidelines when determining whether or not discrimination has occurred in a particular case.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

The CJEU's judgment in Daouidi has been relied on by the Employment Appeal Tribunal of the United Kingdom. In the case of *Britliff v Birmingham City Council (Disability Discrimination) (Rev 1)* [2019] UKEAT 0291_18_1608, the Claimant was a social worker employed by the Respondent from December 2008 until he was dismissed with effect on 15 May 2017. The reason given by the respondent at the time of the claimant's dismissal was capability. Following this, the Claimant presented a claim to the Employment Tribunal complaining of treatment over a number of years, and in respect of the dismissal. The Claimant argued that he was a person with disabilities for the purposes of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and therefore the Equality Act 2010 and EU Directive 2000/78 as read in the light of the CRPD. This was due to suffering from either depression, anxiety, dysexecutive syndrome or sleep apnoea, and sometimes all of them, at all times material to the case as well as a 'disposition to long-term impairments of sleep apnoea and depression in the future'.

The Respondent denied that there had been any unlawful discrimination and asserted that the Claimant had been fairly dismissed for a reason related to capability arising from long-term ill health. In the decision of the Employment Tribunal, the judge found that the national CPRD was not incorporated into UK law and did not provide the Claimant with a route to claim for disability discrimination outside of the Equality Act 2010, to which he claimed to have been subjected. The Claimant appealed to the Employment Appeal Tribunal. In reiterating that the CRPD has indirect effect in the UK, the Appeal Tribunal referred, as the Claimant had done, to the CJEU's judgment in *Daouidi*, C- 395/15. The Tribunal noted that 'it has been clearly held by the CJEU that the CRPD may be relied upon for the purposes of interpreting [Directive 2000/78] which must, so far as possible, be interpreted in a manner consistent with it.'

Consequently, the Claimant was able to seek to rely on any provision of the CRPD as 'having a bearing, by any of the techniques which may be deployed, in accordance with the *Marleasing* jurisprudence, on the interpretation of any relevant provision' of the Equality Act (paragraph 42).

5.1.1.4 Question 2 – Personal scope of protection from discrimination on the grounds of disability

Does EU law on protection against discrimination on the grounds of disability protect only individuals who are themselves disabled or also members of their family or other persons associated to them?

This question was dealt with in *Coleman* (C-303/06).

Relevant national law (United Kingdom)

According to Section 3A(1) of the Disability Discrimination Act 1995 ('the DDA'), as amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 ('the DDA as amended in 2003'):

'… a person discriminates against a disabled person if –

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified.'

Section 3A(4) of the DDA as amended in 2003 nonetheless specifies that the treatment of a disabled person cannot be justified if it amounts to direct discrimination falling within Section 3A(5), according to which:

'A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.'

'Harassment' is defined in Section 3B of the DDA as amended in 2003:

'(1) ... a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect.'

Under Section 4(2)(d) of the DDA as amended in 2003, it is unlawful for an employer to discriminate against a disabled person whom he employs by dismissing him or by subjecting him to any other detriment.

Section 4(3)(a) and (b) of the DDA as amended in 2003 provides that it is also unlawful for an employer, in relation to employment by him, to subject to harassment a disabled person whom he employs or a disabled person who has applied to him for employment.

The case

Ms C. worked as a secretary for a law firm in London. She had a severely disabled child, for whom she was the primary carer. In 2005, she accepted a voluntary redundancy, which ended her employment contract. As a response, Ms C. lodged a claim with the Employment Tribunal, claiming that she had been subject to unfair constructive dismissal. Ms C. listed numerous occasions on which she was subjected to treatment less favourable than that of other employees on the basis that she was the primary carer of a disabled child.

Preliminary questions referred to the Court

The Employment Tribunal referred the following questions to the CJEU:

1. In the context of the prohibition of discrimination on grounds of disability, does [Directive 2000/78] only protect from direct discrimination and harassment persons who are themselves disabled?
2. If the answer to Question (1) above is in the negative, does [Directive 2000/78] protect employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?
3. Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by [Directive 2000/78]?
4. Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by [Directive 2000/78]?

Reasoning of the CJEU

The Court dealt with the first half of question one together with questions two and three, and then answered the second part of question one together with question four.

As to the first part, the Court looked at the problem of assessing whether the Directive in question is limited to persons who are themselves disabled. The Court noted the Directive's purpose of combatting *all forms of discrimination* on grounds of disability, and that the principle of equal treatment enshrined in Directive 2000/78 'applies not to a particular category of person but by reference to the grounds mentioned in Article 1' of the Directive (paragraph 38). Further, although some provisions of Directive 2000/78 apply only to people who are themselves disabled (e.g., the obligation of reasonable accommodation in Article 5), this is because the provisions concern either positive discrimination in favour of disabled people, or specific measures that would be meaningless or disproportionate if not limited to disabled persons.

Ultimately, the Court emphasised that the **principle of equal treatment** and the scope of the Directive *ratione personae* should not be interpreted strictly. It also emphasised that 'limiting [the Directive's] application only to people who are themselves disabled is liable to deprive that directive of an important element of its **effectiveness** and to reduce the protection which it is intended to guarantee' (paragraph 51).

The Court then turned to the issue of burden of proof, based on Article 10(1) and (2) of Directive 2000/78. Pursuant to Article 10(1), Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that when the claimant has 'establish[ed], before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the *respondent* to prove that there has been no breach of that principle' (paragraph 52).[51] Further,

[51] Emphasis added.

according to Article 10(2) of the Directive, **the introduction by Member States of rules on the burden of proof that are more favourable to claimants than respondents is not precluded by Article 10(1)**. Ms C. must therefore establish the facts from which it could be presumed that direct discrimination contrary to the Directive had occurred. If this were done, 'the **effective application** of the **principle of equal treatment** then requires that the burden of proof should fall on the respondents' (paragraph 54) to show that there was no breach of the principle by, for example, demonstrating that the difference in treatment was justified according to the Directive.

The same reasoning was applied to the referring court's questions regarding harassment on the grounds of disability, prohibited by Article 2(3) of Directive 2000/78. Here, the Court held that where 'unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment' (paragraph 63).

Conclusion of the Court

The Court concluded that:

'Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).'

Impact on the follow-up case

In the follow-up case to the CJEU's ruling,[52] the Employment Appeals Tribunal confirmed that the Disability Discrimination Act 1995 should be interpreted to provide protection from 'associative discrimination'. In other words, the Act covers discrimination not only for individuals who have a disability themselves, but also those who are discriminated against due to their association with a person with disabilities.

Elements of judicial dialogue

In *Coleman*, the CJEU discussed in some detail the case of *Chacón Navas* (Case C-13/05, ECLI:EU:C:2006:456). The United Kingdom, Italian and Dutch Governments had contended that the judgment in *Chacón Navas* provided that the scope *ratione personae* of Directive 2000/78 must be interpreted strictly. In *Chacón Navas*, the CJEU had held that the prohibition of discrimination in Directive 2000/78 precluded 'dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post' (*Coleman*, paragraph 45). That does not, however, lead to the conclusion that the principle of equal

[52] *EBR Attridge Law LLP v Coleman* (2009) UKEAT 0071/09.

treatment and the prohibition of direct discrimination in the Directive could not apply to a situation such as that at hand regarding the primary carer of a child with disabilities. Further, while the Court in *Chacón Navas* found that the scope of Directive 2000/78 cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the Directive, it 'did not hold that the principle of equal treatment and the scope *ratione personae* of that directive must be interpreted strictly with regard to those grounds'. In other words, the limitations on the scope *ratione materiae* of the prohibition of discrimination on the grounds found in Article 1 of Directive 2000/78 does not have a limiting effect on the scope *ratione personae* of the prohibition.

The judgment in *Coleman* has been relied upon in subsequent cases, most notably that of *CHEZ Razpredelenie Bulgaria* (C-83/14, ECLI:EU:C:2015:480).[53] The Court's ruling in that case, which concerned Directive 2000/43, in effect confirms that the main finding in *Coleman* is not limited to situations of discrimination on the grounds of disability (or other grounds protected by Directive 2000/78), but also to other grounds of discrimination prohibited by EU law, given that the principle of equal treatment applies across the scope of EU law. With reference to *Coleman* by analogy, in *CHEZ Razpredelenie Bulgaria* the Court found that the **principle of equal treatment** 'applies not to a particular category of person but by reference to the grounds mentioned in Article 1 [of the Directive], so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds' (paragraph 56). Therefore, since ethnic origin was the factor on the basis of which the claimant considered that she had suffered less favourable treatment or a particular disadvantage, it did not matter that the claimant herself was not of the relevant ethnic origin and therefore did not have the protected characteristic. The Court's approach in *CHEZ Razpredelenie Bulgaria* was further solidified in *Maniero* (C-457/17, ECLI:EU:C:2018:912). In this case, the Court reiterated in paragraph 23 that:

"'discrimination on the grounds of ethnic origin", referred to in Article 1 and in Article 2(1) of Directive 2000/43, is intended to apply without distinction, irrespective of whether the measure concerned affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the particular disadvantage resulting from that measure.'

The fact that these later cases (particularly *CHEZ Razpredelenie Bulgaria*) did concern Article 21 CFREU, whereas *Coleman* did not, supports suggestions made earlier in this Casebook that the meaning and scope of non-discrimination under Article 21 CFREU is the same as that under the relevant directives. Presumably, this is due to the fact that across cases of alleged discrimination contrary to EU law, the principle of equal treatment, which was first given expression in the directives and is now enshrined in Article 21 CFREU, applies.

Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

The Court's decision in *Coleman* was relied on by the Supreme Court of the Czech Republic (ECLI:CZ:NS:2017:30.CDO.2260.2017.1). The case concerned the interpretation of the term "the person affected by such act" as stated in section 10 (1) of the Anti-discrimination

[53] Other aspects of this case have been discussed in Part 1 of this Casebook, and the case will be dealt with more fully in Chapter 6.

Act and whether this term should be interpreted restrictively and include only the person that was subject of such discriminatory act.

The applicants' daughter died. The applicants argued that the daughter's state of health required her to be transferred to the department of anaesthesiology, resuscitation and intensive medicine. However, the doctors repeatedly refused to do so, as they argued that her state of health would result in her death regardless. The applicants argued that she was therefore discriminated against based on her state of health and was denied healthcare which resulted in her death. They demanded a written apology and financial compensation from the defendant (Fakultní nemocnice Motol/University hospital Motol) for the non-pecuniary damage suffered based on the Anti-discrimination Act.

In its reasoning, the Supreme Court referred to the CJEU's decision in Coleman, stating that the interpretation of discrimination in national law should be in line with the aim of the Directive 2000/78/EC and the CJEU's case law. If an interpretation in conformity with European law is possible, preference will be given to such an interpretation.

Further, the Supreme Court ruled that the wording of Section 10 of the Anti-discrimination Act should not be interpreted restrictively in a way that only the person affected by such an act shall have the right to claim before a court. This term 'discrimination' also includes persons that are close to the person directly affected by the discrimination. Therefore, the applicants had the right to claim before the court.

The Court's decision in *CHEZ Razpredelenie Bulgaria* has also been upheld in countries other than the that of the referring court. For example, the Employment Appeal Tribunal of the United Kingdom upheld the CJEU's findings in *The Chief Constable of Norfolk v. Coffey* 2018] ICR 812. Discussing the concept of "perceived discrimination" in relation to discrimination on the grounds of disability, the Tribunal noted that the CJEU has consistently upheld that the Equality Directive and the Racial Discrimination Directive should not be interpreted restrictively. Rather, they should apply not only to persons who have a protected characteristic themselves, but also "to persons who suffer less favourable treatment or particular disadvantage by virtue of a prohibited characteristic even if those persons do not themselves have the protected characteristic" (paragraph 49). While finding this to be clear, the Tribunal went on to discuss that it is not always straightforward to determine whether someone was actually "perceived" to be disabled.

5.1.2 Disability, effective protection and education

On the question of effective protection in the context of discrimination on the grounds of disability, the European Court of Human Rights has some very recent jurisprudence in the context of education, which provides helpful guidance that could be applied in relation to Article 21 of the CFREU. For this reason, the analysis in this section will focus on the ECtHR's case law, with reference, as relevant to that of the CJEU in the section on judicial dialogue below.

Relevant case law

➢ European Court of Human Rights, *G.L. v Italy*, Application n. 59751/15, 10 September 2020

Main questions addressed

Question 1 Could a State, due to budgetary reasons, not adopt positive measures provided for by the law, and aimed at avoiding discrimination between students with and without disability in education? Does the principle of effective judicial protection of persons with disabilities play a role in that regard?

5.1.2.1 Question 1 – Non-discrimination and effective protection of persons with disabilities in the field of education

Could a State, due to budgetary reasons, not adopt positive measures provided for by the law, and aimed at avoiding discrimination between students with and without a disability in education? Does the principle of effective judicial protection of persons with disabilities play a role in that regard?

The case

The case concerns the impossibility for the applicant, a young non-verbal autistic girl (aged 13 at the time proceedings were brought) to benefit from specialised tutoring during her first two years of primary school (2010/2011 and 2011/2012). In particular, during her first year of primary school (2010-2011), the applicant did not benefit from specialised assistance provided for by Italian law. Such assistance service aims at helping children with disabilities to develop their autonomy and personal communication skills and to improve their learning, their inter-personal life, and their integration in school, in order to prevent them from being marginalised. On 10 August 2011, in view of the start of the school year, the applicant's parents asked the Town Hall to ensure that their daughter would benefit from the specialised assistance provided for by Italian law. In the absence of an answer from the municipal authorities, they filed a new request on 30 January 2012, and the administration remained silent. As of January 2012, they paid for private specialised assistance so that their daughter could benefit from educational support not provided by the administration. On 19 March 2012, the administration informed them that it would be difficult to establish public specialised assistance, but that it was nevertheless hoped that the applicant would benefit from it at short notice. Then, the applicant did not benefit from specialised assistance.

On 15 May 2012, the applicant's parents, acting in her name and on her behalf, brought an action before the Administrative Court of the Campania Region. They complained that their daughter was unable to benefit from the specialised assistance to which she was entitled under Italian law, and they requested the court to acknowledge the right's infringement and to order the administration to compensate their daughter. By judgment of 27 November 2012, the Administrative Court dismissed their claims. It considered that the municipality had taken the necessary steps in good time and took account of the fact that the Region had had to cope with a reduction in the resources allocated by the State. The applicant's parents challenged this judgment before the Council of State. Their appeal was dismissed in 2015.

Applicant's claims before the ECtHR

The claimant complained before the ECtHR that her right to education had been infringed. In this regard, she stated that for two school years she was unable to benefit from the specialised assistance provided for by law. Therefore, she considered that the State had failed in its positive obligation to guarantee equal opportunities for persons with disabilities.

She invoked Article 2 of Protocol No. 1, according to which no person shall be denied the right to education. The applicant also stated that she had suffered discriminatory treatment on the grounds of her disability, in violation of Article 14 of the Convention.

Furthermore, the applicant argued that her right to privacy (Article 8 ECHR) had been violated in a discriminatory manner: she considered that the failure to receive special education services had harmed her personal and intellectual development and had adversely affected her present and future chances of leading a dignified life.

Reasoning of the Court

The Court examined the case firstly under Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1. The ECtHR relied on its previous case law, stating that the scope of Article 14 ECHR encompasses not only the prohibition of discrimination based on disability, but also the obligation of States to provide 'reasonable accommodation' to correct factual inequalities which, if unjustified, would constitute discrimination.

The Court stated, **in the light of its jurisprudence, that in a democratic society the right to education is indispensable to the realisation of human rights and occupies a fundamental place and that education is one of the most important public services in a modern State**. At the same time, the Court recognised that education is a complex service to organise and expensive to manage and that the resources that authorities can devote to it are necessarily limited. Therefore, the Court admitted that in deciding how to regulate access to education, the State must balance the educational needs with its limited capacity to meet them. However, the Court attached importance to the fact that, unlike certain other public services, education is a right directly protected by the Convention.

In this vein, the Court stated that Article 2 of Protocol No. 1 must be interpreted in the light, *inter alia*, of Article 8 ECHR, which sets out the right of everyone 'to respect for his or her private life', and that in the interpretation and application of Article 2 of Protocol No. 1, account must be taken of any rules and principles of international law applicable to relations between the Contracting Parties, such as the provisions on the right to education in instruments such as the Revised European Social Charter or the United Nations Convention on the Rights of Persons with Disabilities (CRPD). In this vein, the Court stated that in the exercise of the right to education the fundamental principles of universality and non-discrimination apply, as established in international texts. In the Court's view, these instruments recognise that the most appropriate means of guaranteeing these fundamental principles is through **inclusive education, which aims to promote equal opportunities for everyone, including persons with disabilities**. **The ECtHR, relying on its previous case law, stated that inclusive education is thus unquestionably a component of States' international responsibility in this area.**

With regard to discrimination, the Court recalled that discrimination consists in treating persons in comparable situations differently without objective and reasonable justification and that differentiated treatment is devoid of objective and reasonable justification where it does not pursue a legitimate aim or where there is not a reasonable relationship of proportionality between the means employed and the aim pursued. Nevertheless, Article 14 does not prohibit a Member State from treating groups differently in order to correct factual inequalities between them. Moreover, in certain circumstances, it is the absence of differential treatment to correct an inequality which, if not based on an objective and reasonable justification, may result in a violation of this provision.

The contracting States enjoy a **certain margin of appreciation** in determining whether and to what extent differences between situations in other similar respects justify distinctions in treatment. In that regard, the Court stated that where a restriction of fundamental rights applies to a particularly vulnerable category of the population which has suffered significant discrimination in the past, the margin of appreciation available to the State is significantly reduced and only very strong considerations should lead the State to apply the restriction in question. The Court, in its previous caselaw had identified some vulnerable categories who are victims of differential treatment on account of their characteristics or situation, including their disability. Moreover, the Court stated that all actions relating to children with disabilities must pursue, as a matter of priority, the **best interests of the child**.

The Court noted that the Italian legal system guarantees the right to education of children with disabilities in the form of inclusive education in ordinary schools. In Italy, all children are enrolled in one type of school for the entire duration of compulsory education: children with disabilities are integrated into the ordinary classes of the public school, and the State has created psycho-pedagogical services which must ensure the presence in these classes of a so-called 'support-teacher', and, if the student's situation so requires, other professionals whose mission is to promote autonomy and socialisation.

In the present case, the applicant, a non-verbal autistic child, alleged that she had not been able to benefit from the specialised assistance provided for by law.

The Court assessed the diligence with which the authorities reacted to the situation brought to their attention. Firstly, the Court emphasised that, in providing for the inclusion of children with disabilities in ordinary educational institutions, the national legislature chose within its margin of appreciation. In the present case, although the law provides measures consisting in reasonable accommodations without leaving the administration any room for *manoeuvre* in that regard, the competent national authorities did not specify in concrete terms how those accommodations should be implemented from 2010 to 2012, and the applicant thus did not receive specialised assistance during that period corresponding to her specific educational needs.

Reiterating that the Convention aims to **guarantee concrete and effective rights, the Court recalled that it must take account of developments in international and European law** and react, for example, to any consensus that may emerge at those levels as to the standards to be achieved in the area at issue in the present case.

The Court thus considered that Article 14 of the Convention must be interpreted in the light of the requirements set out in the above-mentioned texts, and in particular the CRPD. In this vein according to provisions concerning '**reasonable accommodation**', persons with disabilities are entitled to expect 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise of all human rights and fundamental freedoms, on an equal basis with others' (Article 2, CRPD). Furthermore, the notion of discrimination on the basis of disability includes all forms of discrimination, including denial of reasonable accommodation. In that regard, the Court stated, in the light of its previous case law, that the purpose of reasonable accommodation is to correct factual inequalities.

In the present case, therefore, **the Court examined, in the light of the fact that the State had planned to provide inclusive education for children with disabilities, whether the administration had valid reasons for depriving the applicant of access to specialised assistance**. In this respect, the Court considered that there can be no doubt that the applicant was unable to continue attending primary school in conditions equivalent to those enjoyed by students without disabilities and that this difference in treatment was due to her disability. The Court observed that for two school years, the applicant did not receive the specialised assistance to which she was nevertheless entitled, and which should have enabled her to benefit from the educational and social service offered by the school on an equal footing with the other students.

Moreover, the Court noted that at no time did the national authorities consider the possibility that the lack of resources or the extraordinary need to give priority to the care of persons suffering from serious illnesses might be compensated not by a change in the reasonable accommodation needed to ensure equal opportunities for children with disabilities, but by a reduction in the educational provision distributed equally between students with and without disabilities. The ECtHR considered in this connection that, given the model of inclusive education adopted in Italy, where all students are placed in the same stream, **any budgetary restrictions must have an equivalent impact on the provision of education for students with and without disabilities**.

In this vein, the Court recalled Article 15 of the European Social Charter, according to which States must ensure 'the **effective exercise of the right** of the physically or mentally disabled to vocational training, rehabilitation and resettlement', through adequate measures for the provision of training facilities, and recalled similar provisions of the CRPD. In the instant case, the Court stated that the applicant should have received specialised assistance aimed at promoting her autonomy and personal communication and improving her learning, her interpersonal life and her integration into school, in order to avoid the risk of marginalisation.

Conclusion of the Court

The Court concluded that in the present case the authorities did not seek to determine the applicant's real needs and the solutions likely to meet them in order to enable her to attend primary school under conditions equivalent as far as possible to those enjoyed by the other children without imposing a disproportionate or undue burden on the administration. The Court further considered that the discrimination suffered by the applicant is particularly serious because it took place in the context of primary education, which provides the basis for education and social integration and the first experiences of living together, and which is compulsory in most countries.

In the light of all these factors, **the Court concluded that, in the instant case, the Government had not shown that the national authorities reacted with due diligence to ensure that the applicant enjoyed her right to education on an equal footing with the other teachers, striking a fair balance between the competing interests at stake**.

Accordingly, the Court stated that there had been a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1.

In the light of the above, the ECtHR considered that the applicant's claim concerning the violation of Article 8 ECHR jointly with Article 14 ECHR was closely linked to the other one and therefore that it was not necessary to examine it separately.

Elements of judicial dialogue within European courts

The ECtHR extensively relied on its previous case law. The Court recalled its case law on the relationship between Article 14 ECHR and Article 2 of Protocol No. 1 (*Oršuš and others v Croatia*, Application no. 15766/03, 16 March 2010, *Ponomaryovi v Bulgarie*, Application no. 5335/05, 21 June 2011; *Enver Şahin v Turquie*, Application no. 23065/12, 30 January 2018), the jurisprudence concerning the importance of the right to education as necessary for the realization of human rights (*Velyo Velev v Bulgaria*, Application no. 16032, 27 May 2014) and the one related to the States' obligation to ensure 'reasonable accommodation' (*Glor v Suisse*, Application no. 13444/04, 2009; *Şanlısoy v Turquie* (déc.), Application no. 77023/12, 8 November 201').

For the purposes of this Casebook, two judicial trends recalled by the ECtHR are of particular interest. The first one concerns the importance of interpreting the ECHR in the light of other legal documents, such as the European Social Charter and the UN Convention on the Rights of Persons with Disabilities (*Çam v Turkey*, Application no. 51500/08, 23 February 2016; referring to other international instruments, such as the Convention on the Rights of the child : *Timichev v Russia*, Application nos. 55762/00 and 55974/00, 13 December 2005; *Catan and others v Moldova and Russia*, Applications nos. 43370/04, 8252/05 and 18454/06, 19 October 2012). Secondly, the Court built on some previous judgments where the Court recalled the importance of proportionality in assessing the existence of discrimination. In the Court's case law, 'for the purposes of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised' (*Molla Sali v Greece*, Application no. 20452/14, 19 December 2018, paragraph 135. See also: *Biao v Debmark*, Application no. 38590/10, 24 May 2016, and *Çam v Turkey*, Application no. 51500/08).

Case law of the CJEU has also discussed the issue of reasonable accommodation, as provided for in Article 5 of Directive 2000/78. However, here, discussion has focused on what reasonable accommodation is, and what it can require of, for example, employers. In *HK Danmark* (Joined Cases C-335/11 and C-337/11), for instance, reasonable accommodation in the context of employment was discussed, answering the referring court's question of whether a reduction in working hours may constitute an accommodation measure. As the ECtHR did, the CJEU based its understanding of reasonable accommodation on Article 2 CRPD, which it found to prescribe a broad definition of the term, including organisational measures as well as material ones. Further, the list of measures for adapting workplaces for people with disabilities in recital 20 of Directive 2000/78 is not exhaustive. However, without prejudice to this, individuals must still be 'not competent, capable and available to perform the essential functions of the post concerned', and accommodation measures (which may include a reduction of working hours) must not constitute a **disproportionate burden** on the employer. While this is for national courts to decide, 'account must be taken in particular of the financial and other costs entailed by such a measure, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or any other assistance.'

In further case law of the CJEU, the Court has emphasised that the fact that reasonable accommodation measures have not been adopted in respect to an applicant, does not affect a finding of whether or not that applicant is disabled for the purposes of the relevant directive prohibiting discrimination on the grounds of disability. Indeed, in *FOA* (C-453/13), relying on *HK Danmark*, the Court found that such measures are 'the consequence, not the constituent element, of the concept of "disability"'.

Relevant national case law

Italy

With regard to the importance of ensuring that education services are not discriminatory against students with disabilities regardless existing financial constraints, the case law of the Constitutional Court, of the Court of Cassation and of the Council of State are of particular interest.

Firstly, the Constitutional Court confirmed its previous case law in its decision No. 83, of 20 February 2019, and stated that the effective enjoinment of the indefectible core of the rights of people with disabilities cannot depend on the financial choices of the legislator.

Secondly, the Court of Cassation in its decision no. 25011, of 25 November 2014, stated that the administration's failure to ensure the provision of the support provided for in the individualised educational plan restricts the right of the person with disabilities to equal opportunities within the school service and, if it is not accompanied by a corresponding reduction in the educational offer for students without disabilities, this restriction constitutes indirect discrimination (see also: the Court of Cassation's judgment No. 9966 of 20 April 2017). Moreover, the Court in its decision no. 51202, of 8 October 2019, affirmed that indirect discrimination can also result from an omission on the part of the public administration responsible for the organisation of the school service, which puts the students with disabilities at a disadvantage compared to other students.

Furthermore, a recent opinion adopted by the Council of State is of particular interest. The Council, in its opinion No. 1331 of 8 July 2020, stated that learning and school integration of persons with disabilities are fundamental prerequisites for their employment and social integration, and they are the basis of societies informed by the principles of solidarity and equality. In that opinion, the Council of State, relying also on the ECtHR case law (case *Cam v Turkey*, 23 February 2016, cited above), stated that the school integration of the person with disabilities requires both logistical and didactic adaptations, through the definition of individualised educational paths that reflect the specific difficulties of each student with disabilities and the characteristics of the group in which the integration must be carried out (see also Council of State, No 2023/2017, Council of State, No. 758/2018). Moreover, the Council of State in the abovementioned opinion stated that the right to education of the person with disabilities is not in contrast to that of students without disabilities. These interests should not, therefore, be considered as conflicting but, on the contrary, as potentially convergent. According to the Council of State, school integration does not only represent the implementation of the individual rights of persons with disabilities but the realisation of a social project coherent with the constitutional values of cohesion, solidarity, and recognition of differences as a source of richness of social dynamics. The convergence between the interests of students with and without disabilities can only be achieved if the school has the necessary resources to individualise education where and to the extent that this is necessary due to the different abilities of the students.

5.1.3 Limits of differences in treatment of persons with disabilities in the context of driving licences

The case discussed in this section concerns the scope of permissible limitations placed the enjoyment of the right to non-discrimination on the grounds of disability protected by Article 21 CFREU.

Relevant CJEU case

➢ Judgment of the Court (Fifth Chamber) of 22 May 2014, *Wolfgang Glatzel v Freistaat Bayern*, Case C-356/12 ("**Glatzel**")

Main questions addressed

Question 1 What is the scope of Article 21 CFREU, and how do Article 52(1) CFREU and the principle of equal treatment apply in the context of discrimination on the grounds of disability in relation to applications for driving licences?

Relevant legal sources

EU level

Articles 20, 21 and 26 Charter on Fundamental Rights of the European Union

Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 (Recast)

National legal sources (Germany)

Paragraph 2(2) of the German road traffic act (Straßenverkehrsgesetz):

'A driving licence must be issued for the category concerned where the applicant

…

3. is fit to drive motor vehicles,

…'

Paragraph 2(4) of the German road traffic act (Straßenverkehrsgesetz)

'Any person who satisfies the physical and mental requirements for driving power-driven vehicles who has not committed any serious or repeated offences against the road traffic provisions or the provisions of criminal law is to be deemed fit to drive power-driven vehicles.'

Point 2.2.1 of annex 6 to that regulation:

'Central daytime visual acuity:

Any sight defect must be corrected, provided that such correction is possible and well tolerated, so as to comply with the following minimum values of visual acuity: acuity of the better eye or binocular visual acuity of 0,8; acuity in the worse eye of 0,5,

…

In certain special cases, taking into account driving experience and the use of the vehicle, the visual acuity of the worse eye may be less than 0,5 for categories C, CE, C1 and C1E, provided that it is no less than 0,1'

5.1.3.1 Question 1 – Minimum standard of vision for driving licences

> What is the scope of Article 21 CFREU, and how do Article 52(1) CFREU and the principle of equal treatment apply in the context of discrimination on the grounds of disability in relation to applications for driving licences?

This question was dealt with in *Glatzel* (C-356/12).

The case

After he had driven under the influence of alcohol, Mr G. lost his driving licence by a judgment delivered in April 2010. By an administrative decision in November 2010, the Landratsamt Schwandorf partially upheld Mr G.'s application for a new driving license regarding the categories A, A1 and BE. However, it refused his application for a new driving licence for categories C1 and C1E, which allow him to drive heavy goods vehicles. The decision was justified on the ground that the visual acuity in Mr G.'s right eye did not satisfy the requirements laid down by German law for the issue of a driving licence for vehicles in the latter categories. After unsuccessfully objecting against that decision, Mr G. brought an action before the Administrative Court Regensburg. Since that court dismissed his action, he filed an appeal before the referring court, the Bayerischer Verwaltungsgerichtshof. The Bayerischer Verwaltungsgerichtshof took the view that Mr G.'s appeal should be upheld and that he should be issued with a driving licence for vehicles in categories C1 and C1E. Nonetheless, it decided to stay the proceedings and to refer to the CJEU for a preliminary ruling.

Preliminary question referred to the Court

1. Is point 6.4 of Annex III to Directive 2006/126 compatible with Article 20, Article 21(1) and Article 26 of the Charter in so far as that provision requires — without permitting any derogation — that applicants for Category C1 and Category C1E driving licences have a minimum visual acuity of 0,1 in their worse eye even if those persons use both eyes together and have a normal field of vision when using both eyes?

National court's decision to refer the case to the CJEU

Judgment of Verwaltungsgerichtshof München (Administrative Court of Munich), 5.07.2012, 11 BV 11.1764

The Administrative Court of Munich took the view that Mr G.'s appeal should be upheld, that both the decision by the Landratsamt Schwandorf and the judgment of the Administrative Court Regensburg should be set aside and that G. should be issued with driving licences for categories C1 and C1E. It argued that point 6.4 of Annex III to Directive 2006/126 is invalid, because it is in breach of the fundamental right to equality before the law (Article 20 CFREU), the right to non-discrimination on the grounds of disability (Article 21(1) CFREU) and the right to integration of persons with disabilities (Article 26 CFREU). Furthermore, it argued that there were no 'necessary' reasons pursuant to Article 52(1) CFREU for restricting the right of people with a visual acuity under 0,1 on one eye to drive heavy goods vehicles in so far as: the person concerned has binocular visual

acuity that meets the requirements of point 6.4 of Annex III to the Directive when using both eyes together, and if they learned to compensate for any existing deficiencies.

As the court is not competent to rule on matters concerning the validity of EU law, it decided to stay the proceedings and to refer the abovementioned question to the Court of Justice of the European Union.

Reasoning of the CJEU

First, the Court highlighted the need to address whether the EU rules at issue, laying down requirements for visual acuity for the drivers of vehicles in categories C1 and C1E, were contrary to Article 21(1) of the Charter, which prohibits any discrimination against persons with disabilities. It then turned to Article 52(1) of the Charter, which 'provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. Subject to the **principle of proportionality**, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

Considering the meaning of disability, the Court noted that it is not defined in Article 21 CFREU. It therefore relied on its previous case law in which a definition of 'disability' under Directive 2000/78 (and therefore in the context of employment) was developed.[54] Moving on to apply the definition of disability to Mr G., the Court noted that he suffered from a 'long-term sensory impairment' but still had 'full acuity' when he used both eyes. Therefore, the Court did not have enough information to determine whether or not this constituted a disability for the purposes of Article 21 CFREU. Nonetheless, the Court found that this was not necessary in order to move on to assess whether the difference in treatment could be objectively justified in the light of overriding conditions of road safety.

The Court recalled its previous case law on the **general principle of equal treatment** in the context of the grounds of age and sex (concerning age discrimination: *Wolf*, C-229/08, EU:C:2010:3, paragraph 35; and *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66; and concerning sex discrimination: *Johnston*, C-222/84, EU:C:1986:206, paragraph 40; and *Sirdar*, C-273/97, EU:C:1999:523, paragraph 25) whereby, 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate' (paragraph 49). Extending this to the context of Mr G.'s situation, which was not in the field of employment, the Court noted that the **difference in treatment in question may not be contrary to Article 21(1) if it (a) fulfils an objective of public interest; (b) is necessary; and (c) is not a disproportionate burden**.

According to the Court, Directive 2006/126 aims to improve road safety and thus to attain an objective of general interest. Regarding the necessity of the minimum standards for vision of drivers, the Court held that the more someone's visual function is reduced, the

[54] This case law was discussed in Section 5.1.1 of the present chapter. The definition as applied in *Glatzel* reads as follows: '[A] limitation resulting, in particular, from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other persons, unless such a difference in treatment is objectively justified'. *Glatzel*, paragraph 46.

more it becomes necessary to take into consideration requirements relating to road safety. The minimum standards for vision of drivers were therefore indeed necessary and constituted an effective means of improving road safety. It remained to be determined whether such a prohibition constitutes a disproportionate burden. Drawing on previous case law again,[55] it was held that **proportionality** required 'the **principle of equal treatment** to be reconciled as far as possible with the requirements of road safety which determine the conditions for driving motor vehicles' (paragraph 56). Considering that according to Article 8 of Directive 2006/126, in the case of scientific uncertainties, the EU legislature may give priority to considerations relating to the improvement of road safety, the fact that the legislature decided not to eliminate all minimum requirements for visual acuity of the worse eye for group 2 drivers, could not make the adaptation measure disproportionate. Finally, as regards to the question whether the treatment of Mr G. may constitute discrimination under Article 2 of the UN Convention on Disabilities the Court found that as it does not contain 'unconditional and sufficiently precise conditions', said provision of the UN Convention does not allow a review of the validity of the measure of EU law in the light of the provisions of that Convention. However, due to the primacy of international agreements concluded by the EU, secondary legislation, including Directive 2006/126, must be as far as possible interpreted in a manner consistent with the Convention.

Bearing all of the considerations in mind, the Court was unable to find that the validity of point 6.4 of Annex III to Directive 2006/126 was affected by Article 21(1) of the Charter.

Secondly, the Court had to determine whether Article 26 of the Charter, which enshrines the principle of integration of persons with disabilities, precludes point 6.4 of Annex III to Directive 2006/126. It stated that although Article 26 of the Charter requires the EU to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. Rather, it must be given more specific expression in European Union or national law. Article 26 cannot therefore by itself confer on individuals a subjective right which they may invoke as such (see *Association de mediation sociale*, C-176/12, EU:C:2014:2, paragraphs 45 and 47, in relation to Article 27 CFREU).

Thirdly, the Court had to determine whether it was contrary to Article 20 of the Charter (equality before the law) that drivers of certain heavy goods vehicles did not have the opportunity to show, by means of an individual medical examination, that they were fit to drive such vehicles, whereas other drivers of certain other types of vehicles did have such a possibility. Article 20 of the Charter aims to ensure that comparable situations do not receive different treatment. However, due to differences in characteristics of the vehicles concerned, the situations of those drivers of such vehicles were not comparable and could not therefore violate the right of drivers to equality before the law.

Conclusion of the Court

The Court concluded that:

'[T]he examination of the question does not reveal any information capable of affecting the validity of point 6.4 of Annex III to Directive 2006/126/EC of the European Parliament

[55] *Johnston,* C-222/84, EU:C:1986:206, paragraph 38; *Sirdar*, C-273-97, EU:C:1999:523, paragraph 26; and *Kreil*, C-285/98, EU:C:2002:2, paragraph 23.

and of the Council of 20 December 2006 on driving licences, as amended by Commission Directive 2009/113/EC of 25 August 2009 in the light of Articles 20, 21(1) or 26 of the Charter of Fundamental Rights of the European Union.'

Impact on the follow-up case

Judgment of Verwaltungsgerichtshof München (Administrative Court of Munich), 14.01.2015, 11 BV 14.1345

Based on the CJEU's preliminary ruling, the Administrative Court of Munich decided to reject Mr G.'s appeal, meaning that he would not be issued with driving licences for categories C1 and C1E.

Elements of judicial dialogue

Interestingly, despite having discussed the comparability of situations in recent previous cases (see Section 1.2.1.2 of this Casebook), in *Glatzel* the Court did not refer to the guidelines applied in these cases when determining whether the situations in question were, in fact, comparable. However, the circumstances taken into account in *Glatzel* (namely, the characteristics of the vehicles concerned – see paragraph 83) do suggest that the same general approach was taken by the Court as it established, for example, in *MB* (C-451/16 ECLI:EU:C:2018:492).[56]

The Court did explicitly rely heavily on its previous jurisprudence in assessing first the meaning of disability under Article 21 CFREU, and second, whether or not the difference in treatment at play in *Glatzel* could be justified. Interestingly, many of the cases referred to did not deal with Article 21, and many were situations concerning employment and Directive 2000/78 (e.g., *Wolf*, C-229/08, ECLI:EU:C:2010:3). As mentioned above in the discussions of judicial dialogue in Section 5.1, the reliance on these cases in *Glatzel*, at the core of which is the Charter of Fundamental Rights of the European Union, demonstrates that the Court's understanding of 'disability' under the Charter is the same as that under Directive 2000/78. Furthermore, the same steps are taken by the Court to determine whether or not discrimination exists (i.e., whether there is a difference in treatment on a particular ground and if so, whether this can be justified in certain situations – see Section 1.2.1 above) regardless of whether or not the Charter (or Directive 2000/78) is applied in a particular case.

Moreover, *Conejero* (C-270/18) is of particular interest. In that judgment the CJEU stated that national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, is consistent with Article 2(2)(b)(i) of Directive 2000/78 only if that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim. The Court stated that that assessment is a matter for the referring court.

The judicial dialogue relating to *Glatzel* also demonstrates the impact that the case has had on the CJEU's subsequent jurisprudence. For example, the relationship between Articles 20 and 21 CFREU was laid out in *Glatzel*, with the Court stating in paragraph 43 that 'the **principle of equal treatment** is a general principle of EU law, enshrined in Article 20 of the Charter, of which the **principle of non-discrimination** laid down in Article 21(1) of

[56] For a full discussion of this case, see Chapter 1.2.1.2 of the present Casebook.

the Charter is a particular expression.' Cases concerning both Article 20 and Article 21 since *Glatzel*, such as *Léger* (C-528/13, ECLI:EU:C:2015:288, paragraph 48 – also in the context of health),[57] have applied this same understanding. Further, although the judgment in *Glatzel* is itself based on previous case law for what concerns the general conditions for assessing whether discrimination has occurred or not, it has been repeatedly used as an authority on this matter (also in cases not dealing with health as a fundamental right), particularly for the more specific conditions for determining whether a difference in treatment can be justified (see *Fries*, C-190/16, ECLI:EU:C:2017:198, paragraph 59; *Milkova*, C-406/16, ECLI:EU:C:2017:198, paragraph 55; *RPO*, C-390/15, ECLI:EU:C:2017:174, paragraph 53).

Finally, *Glatzel* has recently be referred to in a case concerning the meaning of genuine and determining occupational requirement and discrimination on the ground of disability (*Komisia za zashtita ot diskriminatsia*, C-824/19, ECLI:EU:C:2021:862). In this judgment, the Court reiterated that 'ision has an essential function for driving power-driven vehicles, so that a requirement for minimum visual acuity imposed by the EU legislature for the purpose of employment as a lorry driver is in accordance with EU law with regard to the objective of ensuring road safety'. In this case, the question had arisen whether the specific disability of a permanently blind person, as a characteristic constituting a genuine and determining requirement of the activity of a juror, justified a difference of treatment and did not constitute discrimination based on the characteristic of 'disability'.

Overall, the Court's approach to the justification of otherwise discriminatory treatment in *Glatzel* is very similar to its approach in non-health related cases (i.e., those discussed in Chapter 1 of this Casebook). However, the Court's decision here is based on Article 52(1) of the Charter, rather than the relevant provisions of the equal treatment directives allowing for the justification of differences in treatment. With the addition of being 'provided for by law and respect[ing] the essence of […] rights and freedoms' protected in the CFREU, Article 52(1) reflects the same requirements for justifications as some of the types of justifications provided for in the equal treatment directives. This includes justification of indirect discrimination, which can be objectively justified in order to achieve a legitimate aim, and justifications on the specific grounds of age. Each of these justifications essentially require differences in treatment must be necessary and appropriate to the achievement of a legitimate aim, and that they must be proportionate. This is reflected in Article 52(1), which provides that '[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. It is interesting that the CJEU also made reference to 'genuine and determining occupational requirements' in *Glatzel* despite the fact that Mr G.'s complaint did not relate to employment. All of this suggests that the common requirements of most justifications found in the equal treatment directives are applicable, through Article 52(1), in situations in which the relevant source of secondary EU law applicable is not one of the equal treatment directives themselves. In relation to the need to respect the essence of rights and freedoms found in the Charter, the specific context of health did not seem to play a role in the Court's reasoning, as focus was placed entirely on non-discrimination and Article 21 CFREU.

[57] This case is summarised in the FRICoRe Casebook on health law.

5.2. Health and sexual orientation

This section examines how the Court of Justice has applied the Charter of Fundamental Rights of the European Union in cases concerning possible discrimination on the grounds of sexual orientation in the context of health. While there is only one case dealing with this issue, helpful guidance is provided by the Court, particularly for what concerns, pursuant to Article 52(1) CFREU, limitations placed on the right to non-discrimination found in Article 21 of the Charter.

Relevant CJEU case

➢ Judgment of the Court (Fourth Chamber) of 29 April 2015, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, Case C-528/13 ("**Léger**")

Main question addressed

Question 1 Does the sexual relationship of a man with another man itself constitute a sexual conduct placing him at a substantial risk of severe infectious disease transmitted by blood that can trigger a permanent ban from the blood donation for the purposes of Annex III of Directive 2004/33?

Relevant legal sources

EU level

Articles 20, 21(1), and 52(1) Charter of Fundamental Rights of the European Union

Articles 1, 2(1), 18, 19, 20(1), 29, Annex IV, and Recitals 1, 2, 24 and 29 in the preamble to Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003

Articles 3 and 4, and Annexes 1 and 3 of Commission Directive 2004/33/EC of 22 March 2004

National legal sources (France)

Article 1(V)(1) of Decree of 12 January 2009 laying down the selection criteria for blood donors:

'At the interview prior to donation, it is for the person authorised to carry out the selection of donors to assess the possibility of donation in the light of any contraindications and their duration, precedence in time and development, using questions supplementary to the questionnaire prior to the donation.

…

The prospective donor shall defer giving blood if he presents a counter indication mentioned in one of the tables set out in Annex II to the present decree…

…'

5.2.1 Question 1 – Deferrals from donating blood based on sexual orientation

This question is dealt with in *Léger* (C-528/13).

> Do Articles 20, 21 of the Charter of Fundamental Rights of the European Union, giving expression to the principles of equal treatment and non-discrimination, together with Article 51(2) allow permanent deferral from blood donation for men having engaged in sexual relations with another man, or merely a temporary deferral?

The case

Mr L. attended the collection centre of the Établissement français du sang (French Blood Agency) in Metz, France, in order to give blood.

By decision of 29 April 2009, the doctor responsible for donations refused the blood donation on the ground that Mr L. had had sexual relations with another man. The doctor based his decision on the Decree of 12 January 2009. Table B in Annex II thereto provides, as regards the risk of exposure of a prospective donor to a sexually transmissible infectious agent, for a permanent contraindication to blood donation for a man who has had sexual relations with another man.

Mr L. brought an action against that decision before the Tribunal administratif de Strasbourg (Administrative Court, Strasbourg) arguing, *inter alia*, that Annex II to the Decree of 12 January 2009 was incompatible with the provisions of Directive 2004/33.

Preliminary question referred to the Court

1. In the light of Annex III to Directive [2004/33], does the fact that a man has sexual relations with another man constitute in itself sexual conduct placing him at a risk of acquiring severe infectious diseases that can be transmitted by blood and justifying a permanent deferral from blood donation for persons having engaged in that sexual behaviour, or is it merely capable of constituting, in the light of the circumstances of the individual case, sexual behaviour placing him at a risk of acquiring infectious diseases that may be transmitted by blood and justifying a temporary deferral from blood donation for a period determined after cessation of the risk behaviour?'

Reasoning of the Court

The Court established that Directive 2004/33 itself distinguishes between temporary and permanent deferral, based on the degree of the risk of the transmission. Therefore, if the person in question engaged in an activity with a high risk of transmitting an infectious disease, the permanent ban would be an appropriate response in the light of Directive 2004/33.

The Court noted that Member States have leeway in implementing the Directive with regards to the categories of persons and actions reaching the threshold of 'high risk'. Firstly, the Court discussed the gravity of sexually transmitted diseases among men in a sexual relationship with another man, by referring to two statistics. Secondly, the Court went on to discuss whether a permanent deferral from blood donation, such as that at issue in the main proceedings, may be compatible with the fundamental rights recognised by the EU legal order. The Court made a particular reference to non-discrimination on the grounds of sexual orientation (Article 21(1) of the Charter) and equal treatment (Article 20 of the Charter). The Court noted that in that regard, Table B of Annex II to the Decree of 12

January 2009 treated homosexual men less favourably than it treated heterosexual men, constituting discrimination. Accordingly, the Court moved to discuss the justifications for this kind of discrimination in the light of Article 52(1) of the Charter.

Firstly, **according to Article 52(1), the basis of the limitation must be provided by law**, which the Court confirmed in this case (given its basis in the Decree of 12 January 2009). Secondly, it **must respect the essence of the right** (read here as the principle of non-discrimination), which the Court also confirmed, as 'the limitation concerned only the question, which is limited in scope, of deferrals from blood donation in order to protect the health of the recipients' (paragraph 54). Next, the Court discussed whether the **limitation met an objective of general interest**. The aim of the limitation to 'minimise the risk of transmitting an infectious disease to recipients' contributed to the general objective of ensuring a high level of human health protection. This is an objective recognised by EU law (Articles 152(4)(a) and (5) EC and Article 35 CFREU). The Court then looked at the proportionality of the restriction. Applying the same meaning of proportionality as seen throughout Part 1 of this Casebook, the Court stated that 'it follows from the case-law of the Court that the measures laid down by national legislation must **not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued** by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued' (paragraph 58).

The Court accepted that in the light of the **principle of proportionality**, there were less onerous means than targeting the whole group of homosexual men. Nonetheless, the effectiveness of such measures was contested by the French authorities and the Court left the question to the referring Court. Overall, the lawfulness of the restriction would depend upon the proportionality test and whether there are less onerous measures available, which is left for the referring Court to decide.

Conclusion of the Court

The Court concluded that:

'Point 2.1 of Annex III to Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components must be interpreted as meaning that the criterion for permanent deferral from blood donation in that provision relating to sexual behaviour covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behaviour puts those persons at a high risk of acquiring severe infectious diseases and that, with due regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication for ensuring a high level of health protection of the recipients. It is for the referring court to determine whether, in the Member State concerned, those conditions are met.'

Elements of judicial dialogue

Léger constitutes one of the CJEU's most comprehensive discussions of Article 21 CFREU, with the Court's reasoning being based almost exclusively on the Charter. This was perhaps to be expected given that the Directive applicable in the case (2004/33/EC) does not itself deal with discrimination or equal treatment (unlike the directives applicable in case law discussed elsewhere in this Casebook), but is very interesting given that the referring court did not actually mention Article 21 (or indeed the Charter more generally) in the preliminary questions referred to the CJEU. The judgment can therefore be said to fill some gaps left by the Court's other case law on non-discrimination, particularly for what concerns the definition of discrimination under Article 21 and the justifications for limitations of rights contained in the CFREU laid out in Article 52(1) of the Charter.

In applying the **principle of proportionality**, as mentioned in Article 52(1), to the situation in *Léger*, the Court built on previous case law concerning the principle to find that 'the measures laid down by national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued (see judgments in *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; *Urbán*, C-210/10, EU:C:2012:64, paragraph 24; and *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 52).' The same meaning of proportionality is therefore to be applied in the context of Article 52(1) and the justification of limitations to Article 21 as in the context of the objective justification of an apparently neutral provision, criterion or practice for the purposes of determining an instance of indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation, under Article 2(2)(b)(i) of Directive 2000/78 (see Section 1.3.2 of this Casebook). Furthermore, the same test of proportionality appears to be applied by the Court whether or not a fundamental right, such as health, is at play in a particular case. This brings coherence to the application of EU law on non-discrimination, even when the law itself is somewhat fragmented. Interestingly, while the Court had referred to the fact that 'Member States must make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with […] fundamental rights' (and thereby, in their application of directives, ensure that they respect fundamental rights, including health and non-discrimination) earlier in its judgment, fundamental rights were not mentioned at all in the Court's discussion of proportionality.

5.3. Issues relating to effective protection

A very significant issue concerning effective protection raised in the cases discussed in this chapter is the scope *ratione personae* of non-discrimination as found in the relevant EU directives. It is significant that in *Coleman*, and later in *CHEZ Razpredelenie Bulgaria* (C-83/14, ECLI:EU:C:2015:480) the CJEU emphasised that the personal scope of the principle of equal treatment is not to be interpreted strictly, and explicitly stated that if only persons with a protected characteristic were to be afforded protection from discrimination, this was likely to deprive the directives (and therefore protection from discrimination) 'of an important element of its **effectiveness** and to reduce the protection which it is intended to guarantee' (paragraph 51). Thus, in order to make protection from discrimination truly

effective, it is crucial that individuals who are treated differently on the basis of a particular protected characteristic fall within the scope *ratione personae* of the principle of non-discrimination. This would include, for example, the primary carer of a person with disabilities. This aspect of effective protection in non-discrimination cases is not specific to health and disability – the extension of protection from disability for those who do not possess a protected characteristic themselves has been upheld at least in the context of discrimination on the grounds of ethnicity or ethnic origin, as seen in *CHEZ Razpredelenie Bulgaria*, and not only in relation to disability.

As also seen in the paragraph discussing judicial dialogue in Section 5.2.2, there does not appear to be a difference in the proportionality test applied in cases concerning the fundamental right to health. This test has been applied in the same way in cases concerning health and disability as in cases that do not concern other fundamental rights (i.e., those discussed in Chapters 1-3 of this Casebook). There therefore does not appear to be any correlation between effective protection, non-discrimination and health as a fundamental right, beyond the fact that in applying secondary EU law (e.g., the equal treatment directives) Member States are obliged not to rely on interpretations of that law which conflict with the fundamental rights protected by the Charter.

Finally, the same rules concerning the burden of proof in the non-discrimination cases discussed in Part 1 (i.e., those found in Article 10 of Directive 2000/78), have been applied in the specific context of health. However, although the CJEU is very clear in its definition of disability in its jurisprudence, its guidance does raise a question concerning where the burden of proof should fall in cases requiring the provision of scientific evidence to establish whether an applicant has a disability (e.g., *Daouidi*). The Court did not mention on which party the burden of proof falls in providing such evidence. However, it can be inferred from Recital 31 of Directive 2000/78 that the burden would not fall on the respondent. As Recital 31 states, although the burden of proof falls on respondents once an applicant has demonstrated a *prima facie* case of discrimination, 'it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, *has a particular disability*, is of a particular age or has a particular sexual orientation.'[58] Since this evidence falls under the question of whether or not an applicant does indeed have a disability, it may be inferred that it is for the applicant to provide such evidence in order to establish a *prima facie* case of discrimination. From the perspective of effective protection and Article 47 CFREU, this does not appear to place a greater burden of proof on the applicant than that envisaged in the modified burden of proof under Article 10(1) – although the greater burden falls on respondents, applicants would in any case (unless it could be considered a rule more favourable to applicants under Article 10(2) of Directive 2000/78 not to do so) need to demonstrate a *prima facie* case of discrimination, which would presumably include demonstrating that they have a protected characteristic.

5.4. Guidelines emerging from the analysis

Several general guidelines concerning non-discrimination in health-related cases can be extracted from the case law of the CJEU discussed in this chapter, most of which relate to cases brought concerning discrimination on the grounds of disability:

[58] Emphasis added.

- The scope *ratione materiae* of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof. This matches the approach taken in cases discussed in previous chapters of this Casebook, such as *MB* (C-451/16, ECLI:EU:C:2018:49, see Chapter 1.2.2 above). This does not appear to be impacted by the fact that health is a fundamental right. However, the definition of disability itself, which is relatively broad, allows individuals with health issues such as sickness and obesity to be protected from discrimination on the ground of disability in some circumstances despite the fact that these are not protected grounds in themselves.

Effective protection

In the view of the CJEU as expressed in *Coleman* (C-303/06):

- In order to ensure effective protection from discrimination, it is crucial that individuals who are treated differently on the basis of a particular protected characteristic fall within the scope *ratione personae* of the principle of non-discrimination. This would include, for example, the primary *carer* of a person with disabilities.

Role and position of the UN Convention on Persons with Disabilities

In the view of the CJEU as expressed in *HK Danmark* (Joined Cases C-335/11 and C-337/11):

- As an international agreement concluded by the EU, the Convention has primacy over secondary instruments of EU law.
- This requires that relevant parts of Directive 2000/78 (i.e., the concept of 'disability') be interpreted in compliance with the Convention.

Definition and scope of 'disability'

- 'Disability' is defined by the CJEU in the same way whether or not the Charter applies in a particular case. It can therefore be inferred that 'disability' has the same definition when applied in relation to Article 21 of the Charter as in relation to Directive 2000/78, suggesting in turn that there is a common concept of disability regardless of which source of EU non-discrimination law applies. This definition is based on that found in the UN Convention on the Right of Persons with Disabilities.

In the view of the CJEU as expressed in *HK Danmark* (Joined Cases C-335/11 and C-337/11):

- For the purposes of EU non-discrimination law, 'disability' means a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.
- Illnesses as such are not a ground of discrimination under the Directive (*Chacón Navas*, paragraph 57), but if limitations having the abovementioned effects on a long-term basis are caused by an illness, they can be covered by the concept of 'disability'.

- 'Disability' does not necessarily equate to total exclusions from work or professional life, but can also cover situations where a person can only work to a limited extent.
- A 'disability' need not make an individual incapable of exercising an activity, as long as it provides a hindrance to exercising it.

In the view of the CJEU as expressed in *FOA* (C-453/13):

- If the obesity of a worker causes a limitation as explained above, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.
    - 'Long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered.
    - A national court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data. Since this evidence falls under the question of whether or not an applicant does indeed have a disability, it may be inferred that it is for the applicant to provide such evidence in order to establish a *prima facie* case of discrimination (based on the rules of burden of proof established in Recital 31 and Article 10 of Directive 2000/78 – see Section 3.3 of this Casebook).

Article 52(1) CFREU

In the view of the CJEU as expressed in *Glatzel* (C-356/12):

- When assessing whether a limitation on the right to non-discrimination contained in Article 21 of the Charter is permissible under Article 52(1) of the same Charter, it is for national courts to determine whether the limitations respect the principle of proportionality.
- From the Court's application in this case, it appears that the limitations allowed under Article 52(1) generally mirror the justifications for differences in treatment found in the equal treatment directives (as discussed in Chapter 1). In the cases discussed in this Casebook, health as a fundamental right did not appear to play a role in the proportionality test applied, beyond the requirement in Article 52(1) CFREU that limitations to rights and freedoms protected by the Charter 'respect the essence of those rights and freedoms'.