ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter

MODULE 6 – NON-DISCRIMINATION

IN THE FRAMEWORK OF THE PROJECT "*ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES*" (ACTIONES)

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National Courts and the Charter:
Judicial Dialogue in tackling present and future challenges on non-discrimination[1]

Part I

I. State of Play

EU non-discrimination law has undergone significant transformation over the last (almost) two decades. It has grown from a narrowly tailored body of law on employment and market-related discrimination to a complex regime covering a much broader range of fields of application and a number of specified protected grounds.

There are three categories of challenges faced by national courts today in the implementation of Charter provisions on non-discrimination, or more specifically for the purpose of this module, of its Article 21.[2] These challenges are resulting from : (1) the European patchwork of legal sources on non-discrimination and the fact that non-discrimination is a field of shared competence between the EU and Member States;[3] (2) the evolution of CJEU's case law under Article 21; and (3) more systemic challenges such as social inequality, entrenched prejudices and gender roles as well as chronic underreporting of non-discrimination incidents.

Legal practitioners at the national level have been at the forefront of assisting social change in the field of non-discrimination as well as in tackling long-standing challenges. Progressive developments in non-discrimination law are explained both by a series of favorable judicial decisions and legislative developments but mostly by reference to the individual or concerted actions of different players – such as equality bodies, ombudsmen, NGOs, police authorities - rather than by a new societal or political consensus.

This transformation has (a) imprinted an increasingly access to justice and victim-centric approach to non-discrimination, with efforts aimed at increasing victims' confidence in the justice system;[4] (b) entrusted legal practitioners at the national level

[1] This handbook is complementary to the Handbook on the principle of non-discrimination on the grounds of age, race, gender, disability and sexual orientation by the Centre for Judicial Cooperation available at http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx

[2] Other Charter provisions on non-discrimination are its immediate predecessor, Article 20, providing a general guarantee of equality and Article 23 on equality between men and women. If, rather than focusing on a shared structure of equality and non-discrimination the focus is on the specific grounds then other Charter provisions are also interrelated such as rights of the elderly in Article 25 or the integration of persons with disabilities in Article 26.

[3] For example, the EU does not require that EU Member States extend the right to same sex-couples. In Römer, the Court stressed that "as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States". The drafters of the EU Charter of Fundamental Rights seemed to share the same view, when in the Explanations Relating to the Charter of Fundamental Rights, it was pointed out that the Charter Article providing the right to marry (Article 9) 'neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex'. It is not entirely clear whether refusing to an LGB Union citizen the right to be joined or accompanied in the host Member State by his or her same-sex spouse may constitute an obstacle to the application of free movement and family reunification EU law provisions.

[4] Article 25 of the Victims Directive requires Member States to ensure that all officials likely to come into contact with victims, such as police officers and court staff, receive appropriate training to enable them to deal with victims in an impartial, respectful, and professional manner. For example, the Court of Appeal of Helsinki (Helsingin *hov ioikeus)* took the initiative to conduct an internal study on discrimination and racism. It found instances of intolerant and racist behaviour among judges and the court staff, including racist jokes and degrading language used about

as being the driving force of tackling long-standing challenges such as fighting stereotypes and prejudice as well as underreporting;[5] (c) placed a stronger emphasis on remedies: appropriate remedies can have a dissuasive effect on those who would commit violations, as well as serving to redress the wrong done to victims.[6]

This module aims to identify trends and good practices by national courts that having led to a better implementation of the existing legal framework through the application of the Charter - in some cases even broadening the scope of protection – can be replicated in other Member States. [7]

II. Equality and Non-Discrimination in the EU

1. Overview of Legislation[8]

The principle of non-discrimination is a foundational principle of the EU legal order and the ECHR. Non-discrimination operates both in the EU and in the ECHR on the basis of an exhaustive list of grounds, but the two systems guarantee the enjoyment of different set of treatments. At the same time, the principle is laid down in the domestic legal orders of the Member States as a constitutional principle.[9]

In addition, as signatory States to numerous international human rights instruments such as the United Nations Convention on the Rights of People with Disabilities, the EU Member States have to ensure that both the national and European law meets with their obligations under such Treaties.

The following paragraphs provide a brief description of the relevant legal regimes governing the principle of non-discrimination in Europe.

A. EU level:

EU Treaty-based norms:

- Arts. 2 and 3 TEU: non-discrimination is a foundational value of the EU legal order;
- Art. 10 TFEU [1] stipulates six grounds for the principle of non-discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual

minorities in work-related situations and prominent use of derogatory expressions. *Tuohino, T. and Ojala, T. (2013), Yhdenvertaisuuja tasa arvoselvitys, yhteenveto, Helsinki, Helsinki Court of Appeal.*

[5] Courts are for example resorting to Charter provisions to support a better balance between professional and private life for both parents explicitly disrupting "traditional" gender roles, see Part II, case sheet 4.

[6] For more information on this see studies: by the European Commission (2009) and Fundamental Rights Agency (2011 and 2016) concerning "Access to justice"; Joint Report of European Commission on the Implementation of Race Directive and General Framework Directive (2014); Eurobarometer (2015); Equinet Report "The Sanctions Regime in Discrimination Cases and its Effects".

[7] For complementary information see FRA's Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives available at http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf

[8] This overview is partially based and at the same time complementary to the one on the Handbook on the principle of non-discrimination on the grounds of age, race, gender, disability and sexual orientation by the Centre for Judicial Cooperation available at http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx

[9] McCrudden, Christopher, and Sacha Prechal "The concepts of equality and non-discrimination in Europe: a practical approach".

orientation, and reflects the minimum protection against discrimination in EU equal treatment directives, while Article 21 of the EU Charter of Fundamental Rights includes a much longer list of grounds, including: language, membership in a national minority and property.

- Art. 18 TFEU: the principle of non-discrimination based on nationality. This is to be read in conjunction with its specific application in the field of free movement of workers (Art. 45 TFEU);
- Art. 19 TFEU: the Council has the power to pass legislation to fight discrimination on a limited set of grounds (sex, racial or ethnic origin, religion or belief, disability, age of sexual orientation);
- Art. 157 TFEU: the principle of non-discrimination based on sex (equal pay between men and women), which was heralded as a general principle of the EU since *Defrenne II*[10]

EU Charter:

- Art. 21 (below)
- Articles 20 and 23 share with Article 21 the structure of equality and non-discrimination. Article provides a general guarantee of equality before the law, Article 23 of Equality between men and women.

General principles of EU law developed by the CJEU

- The principle of non-discrimination was originally applied by the CJEU in a limited fashion to its Treaty-based expressions - *Defrenne II* on equal pay. These cases were mostly concerned with the preservation of fairness in commercial practices and the eradication of measures discriminating on grounds of nationality, which would hinder the exercise of economic freedoms (in particular, the freedom of movement of workers, the free movement of services and the freedom of establishment). Over time, it has extended its reach to all citizens (not just to persons having a role in the internal market) and it has developed into a fully-fledged fundamental right, gaining recognition as a general principle of EU law on non-discrimination. In *Mangold* the CJEU based the principle on Treaty provisions. *Kücükdeveci* was also based on Article 21, at a time when the Charter became legally binding.
  In the *Dansk Industries* case, another case of discrimination on the grounds of age, the Court - as well as the Advocate General - answered that the national judge was correct in considering the Directive as such was not applicable, given that the case involved litigation between private parties. It went a step further by making it clear that even if the directive establishing the obligation of non-discrimination is not applicable, then the principle – and the Charter - can be applied.[11]

Secondary legislation:

[10]See Case 43/75 *Gabrielle Defrenne v. Societé Anonyme Belge de Navigation Aerienne Sabena* [1976] E.C.R. 455: 'The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts.' See also Joined Cases C-402/07 and C-432/07 *Sturgeon & Others*, in which the principle of equality deduced from primary law was confirmed in matters concerning the compensation for flight delays.
[11] See Module I.

- The Racial Equality Directive,[12] prohibiting discrimination 'on the grounds of racial or ethnic origin'[13] applies to employment, social benefits and access to goods and services.[14]
- The Employment Equality Framework Directive [15] only applies to employment,[16] and prohibits discrimination 'on the grounds of religion or belief, disability, age or sexual orientation.' Legislative reform is currently under discussion to extend its scope to all three areas covered by the Racial Equality.
- The Gender Equality Directive (Recast)[17] and the Gender Goods and Services Directive, [18] which prohibit gender discrimination, apply respectively to employment[19] and access to goods and services[20] but *not* to access to the welfare system.
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decisions, articles 25, Recital 63 and 66.

[12]Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, 22-26.
[13]Art. 2(1).
[14] Art. 3(1).
[15]Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, 16-22.
[16]Art. 3(1) and (3).
[17]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), OJ L204, 26 July 2006, 23-36.
[18]Council 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, OJ L 373, 21 December 2004, 37-43.
[19]See Art. 1 of Directive 2006/54/EC.
[20]See Art. 4 of Directive 2004/113/EC.

See the chart below for an overview of the scope of application of the Equality Directives by ground and field:[21]

	Employment and vocational training	Workers' and employers' organizations	Social protection incl. social security	Social protection incl. healthcare	Social advantages	Education	Public Goods and services, incl. housing
Racial or ethnic origin	**Dir. 2000/43**	**Dir. 2000/43**	**Dir. 2000/43**	**Dir. 2000/43**	**Dir. 2000/43**	**Dir. 2000/43**	**Dir. 2000/43**
Gender	**Dir. 2006/54 Dir. 2010/41 (self-employment)**	**Dir. 2006/54**	**Dir. 79/7 (statutory social security only) Dir. 2006/54 (occupational social security only)**				**Dir. 2004/113**
Sexual orientation	**Dir. 2000/78**	**Dir. 2000/78**					
Religion or belief	**Dir. 2000/78**	**Dir. 2000/78**					
Disability	**Dir. 2000/78**	**Dir. 2000/78**					
Age	**Dir. 2000/78**	**Dir. 2000/78**					

- Other Regulations and Directives exist that guarantee the freedom of movement and residence of workers and citizens.[22] These acts may include provisions aimed at removing discriminatory measures but for the most part fall out of the scope of the present handbook

[21] Based on "Chart D" on p. 63 of the report on intersectional discrimination in EU gender equality and non-discrimination law of the European Network of Experts on Gender Equality and Non-discrimination, by Sandra Fredman, May 2016 available at http://ec.europa.eu/justice/gender-equality/document/files/intersectionality.pdf

[22] Most importantly, see 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, OJ L 158, 30 April 2004, 77–123.

In addition, the following instruments are applicable in the field of criminal law:

- Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law on Hate crime and Hate speech.
    - Article 1 - "Hate speech" - Member States must ensure that the following intentional conduct is punishable when directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin:
        - publicly inciting to violence or hatred, including by public dissemination or distribution of tracts, pictures or other material;
        - publicly condoning, denying or grossly trivialising:
            - crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court (hereinafter 'ICC'); or
            - the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or one or more of its members.
        - Article 1(2) of the Framework Decision: Member States may choose to punish only conduct which is either (i) carried out in a manner likely to disturb public order or (ii) which is threatening, abusive or insulting;
        - Article 1(4): any Member State may make punishable the act of denying or grossly trivialising the above-mentioned crimes only if these crimes have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only. This possibility is not provided for the act of condoning the above-mentioned crimes.
    - Article 4 - "Hate crime" - Member States must ensure that racist and xenophobic motivation is considered as an aggravating circumstance, or alternatively that such motivation may be taken into account by the courts in determining the applicable penalties.

- The Victims' Rights Directive uses the terms "crime committed with a discriminatory motive" (Recital 56), "bias crime" (Recital 56), "hate crime" (Recitals 56 and 57), and "crime committed with a discriminatory or bias motive" (Article 22(3)). All these terms are to be interpreted as an individual right to be protected against discrimination under Article 21 of the Charter and, correspondingly, under Article 14 of the ECHR. The Victim's Directive replaced Council Framework Decision 2001/220/JHA of 15 March 2001 on the

standing of victims in criminal proceedings.

B. International law instruments: ECHR, CERD, UNCRPD among others:

- Article 14 ECHR is the central provision laying down the principle of equality. However, it does not have an autonomous application, as it ensures everyone's equal enjoyment of *other* ECHR rights; Protocol 12 (2000) makes non-discrimination a self-standing right, but only 7 EU Members have ratified it so far (18 in total).

  The interaction between the CJEU and the ECtHR has intensified over time. The CJEU has drawn inspiration from the Convention as well as the corresponding case law to interpret EU fundamental rights.[23] At present, Article 52(3) Charter builds on Art. 6 TEU and includes the obligation to interpret Charter rights which correspond to rights guaranteed by the Convention in the same way as those laid down by the Convention. At the same time, this provision shall not prevent Union law from providing more extensive protection.

  In turn, the ECtHR has also drawn on EU legal sources, including the Treaties, the Charter, secondary law or CJEU case law, in order to interpret Convention rights.[24] By quoting each other, these courts have reinforced their legitimacy and authority vis-à-vis the Member States. Thus, despite episodes of tension, the ECHR and the CJEU have developed a positive dialogue.[25] [26]

- Article 4 of International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "CERD") imposes an obligation on states to take "immediate and positive measures"; paragraph (a) goes on to require that it should be an offence to "disseminate ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement

[23] See Part II, case sheet 6 where the CJEU relied on Roma rights judgments from the ECtHR (Nachova v Bulgaria and Sejdic and Finci v Bosnia and Herzegovina) and for the first time invoked ICERD Article 1.

[24] A strong influence of the Charter is visible in *Schalk and Kopf v. Austria*. Article 9 of the Charter made possible a new reading of Article 12 of the ECHR regarding the right to marry. The Court pointed out that in *Christine Goodwin*, it had already noted that there had been major social changes in the institution of marriage since the adoption of the Convention. For two examples of the impact of *Schalk and Kopf v. Austria* see Part II case sheets 10 and 11.

[25] There is a vast literature on the interaction between the Luxembourg and Strasbourg courts, among others, Dean Spielmann, Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities, and Bruno de Witte, The Past and Future Role of the European Court of Justice in the Protection of Human Rights, in Philip Alston (ed.), *The EU and Human Rights*, OUP 1999; Francis G. Jacobs, 'Judicial Dialogue and the Cross-fertilization of Legal Systems: the European Court of Justice' (2003) 38 Texas International Law Review 547, 550-552; Sionaidh Douglas-Scott; Johan Callewaert, 'The European Convention on Human Rights and European Union Law: a Long Way to Harmony' (2009) 6 European Human Rights Law Review 768. Douglas-Scott, Sionaidh; "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis (June 24, 2014) 43 (2014).

[26] In May 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Avotiņš v. Latvia*. This seems to be the ECtHR's first detailed appraisal of the so-called Bosphorus presumption (the rule on the relationship between EU law and the ECHR) after the Court of Justice of the European Union (CJEU) in Opinion 2/13 rejected a draft agreement providing for the accession of the EU to the European Convention of Human Rights (ECHR). In Opinion 2/13 the court considered that EU accession to the ECHR posed a threat to the principle of mutual trust that it would "upset the underlying balance of the EU and undermine the autonomy of EU law" (Opinion 2/13 para 194).

to such acts against any race or group of persons of another colour or ethnic origin"

- Article 3 of the *Istanbul Convention* 27 defines violence against women as a form of discrimination against women.

- **UNCRPD** has been ratified by 25 EU Member States and the EU itself. Some EU countries have extended protection against discrimination on the grounds of disability beyond employment and occupation, the areas already covered by EU law.[28] The application of specific provisions and concepts such as definition of disability and reasonable accommodation will be dealt with in section 3.

2. Players: dialogue between national courts and equality bodies.

Progressive developments in the field of non-discrimination are explained by trends of judicial decisions, legislative developments - to which the application of Charter has contributed - but also by reference to the individual or concerted actions of different players – such as courts, equality bodies, ombudsmen, NGOs and police authorities. [29]

Article 7 of the Racial Equality Directive provides that:

"*Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them*".

The Employment Equality Directive, the Gender Goods and Services Directive and the Gender Equality Directive (employment and occupation) recast, contain similar provisions.

Moreover, the Racial Equality Directive, the Gender Goods and Services Directive and the Gender Equality Directive require EU Member States to designate a body (or bodies) which:

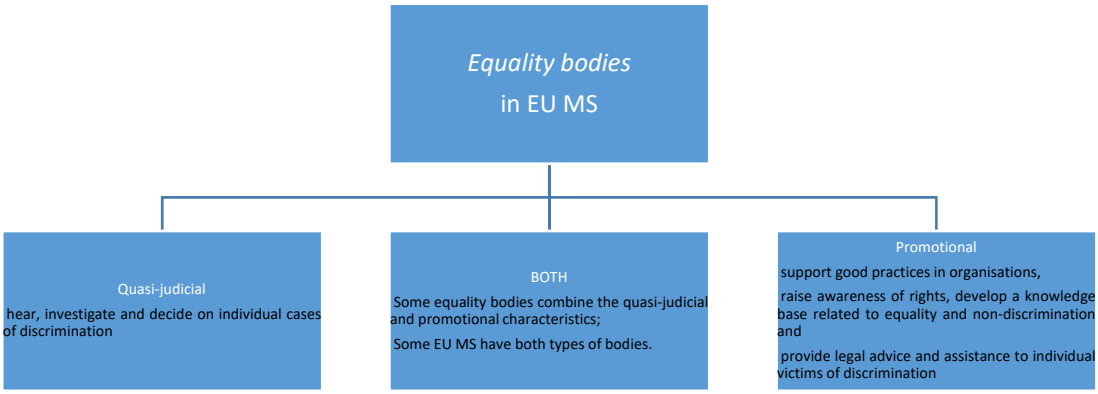
- provides independent assistance to victims of discrimination in pursuing their complaints;
- conducts independent surveys concerning discrimination;
- publishes independent reports and makes recommendations on any issue relating to such discrimination.

[27] Council of Europe Convention on preventing and combating violence against women and domestic violence available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680046031c

[28] Such as the areas of education and participation in public, politic and cultural life.

[29] For a detailed perspective from NHRI and Equality bodies see Charter click "Report on the use of the EU Charter on Fundamental Rights by National Human Rights Bodies and Practical Guidelines on the strategic use of the EU Charter by National Human Rights Bodies" available at http://52.58.51.113:3000/assets/documents/Report_on_the_use_of_the_Charter_by_NHRBs.pdf; and Equinet paper (European Network of Equality Bodies) on "The sanctions regime in discrimination cases and its effects", December 2015, available at http://www.equineteurope.org/The-Sanctions-Regime-in

The body or bodies designated on the basis of the provisions of these three directives are generally referred to as *equality bodies*. *Equality bodies* can in practice be divided into two basic types promotional or quasi-judicial. EU Member States have one or the other or both – forming three categories of systems.[30][31]



The EU equal treatment directives do not specify how equality bodies should be structured. Some Equality Bodies may be the designated National Human Rights Institution (NHRI) if they gather the requirements of the *Paris Principles*, the Ombudsman or part of a set of *Equality bodies* on different fields. The United Nations standards for human rights institutions, the Paris Principles, and the Council of Europe's European Commission against Racism and Intolerance's (ECRI) General Recommendations No. 2 and No. 7 on "specialised bodies" offer guidance on their establishment and operation.

The specificities at the national level determine the existence of different types of relationships between Equality bodies and national courts and whether they act as *deciding bodies*, as *parties in a dispute* or as *advisors/source of information for legislators*.

A WIDE VARIETY OF PRACTICES IN THEIR DIALOGUE AND COOPERATION WITH NATIONAL COURTS, LEGISLATIVE BODIES - AND PRACTITIONERS IN GENERAL - HAVE EMERGED.

DO YOU KNOW HOW THE EQUALITY BODY/BODIES IN YOUR MS IS/ARE STRUCTURED AND WHAT IS THEIR RELATIONSHIP WITH NATIONAL COURTS?

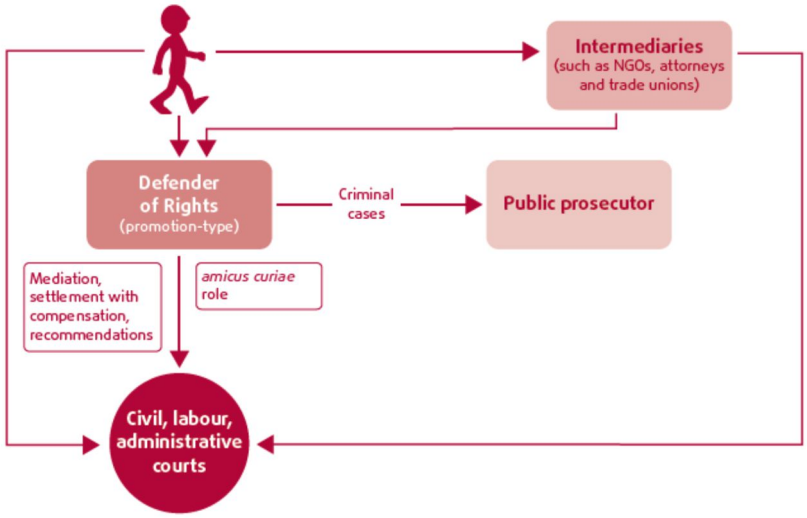
[30] For more information see FRA's report on Access to justice in cases of discrimination in the EU – Steps to further equality (2012) available at http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality

[31] For complementary information see Charter click report and guidelines for NHRIs available at

A FEW EXAMPLES BELOW ON HOW THE COOPERATION BETWEEN NATIONAL COURTS AND EQUALITY BODIES MAY RESULT IN AN INCREASED LEVEL OF PROTECTION OF FUNDAMENTAL RIGHTS.

Equality Body as the Deciding Body

The French High authority for the fight against discrimination and for equality – HALDE (now *Defenseur des droits*) - recalled that the principle of equal treatment in employment with regard to disabled persons determines that facilities be put in place by employers in order to provide access to employment. The High Authority stated that the obligation of reasonable accommodation is not intended to favour one person over another on the basis of their disability, but rather to compensate for the inequality by making available those facilities necessary to guarantee equal treatment. In doing so, it referred to Article 21.[32]
See the chart below for an overview of the relationship between equality bodies and national courts in France.[33]



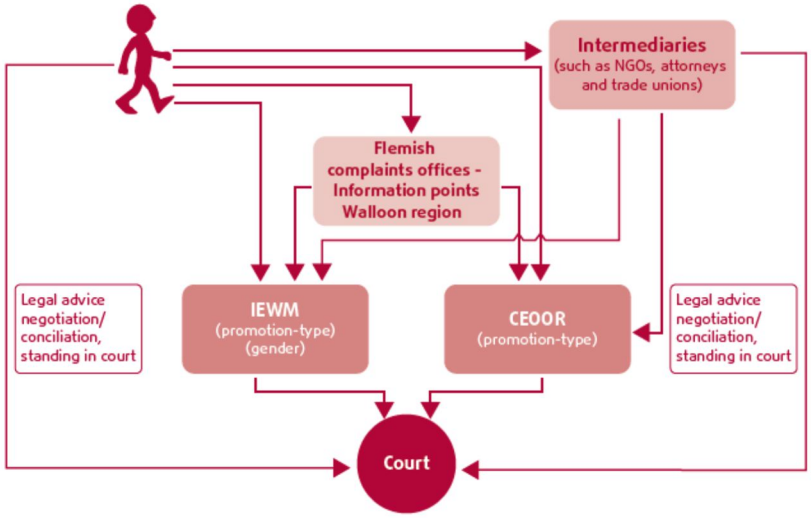
Equality Body as a Party to a Dispute

The *Feryn* case: following a number of public statements made by the director of the company Feryn to the effect that his undertaking was looking to recruit fitters but that it could not employ "immigrants" because its customers were reluctant to give them access to their private residences, the Centre applied to the Belgian labour courts for a finding that the company Feryn applied a discriminatory recruitment policy. Following the initial dismissal of the application by the Voorzitter van de arbeidsrechtbank te Brussel (President of the Labour Court, Brussels), the Center for equal opportunities

[32] For more details, see Case note of the Opinion delivered by the High Authority on access to employment for disabled persons in the private sector in light of the principles of equal treatment and non-discrimination, 2010-126, 18/04/2011, available in the CharterClick! Database.
[33] Chart from FRA's report on Access to justice in cases of discrimination in the EU – Steps to further equality (2012) available at **http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality** p. 26

and opposition to racism (CEOOR) appealed to the l'Arbeidshof te Brussel (Labour Court, Brussel), which decided to refer to the Court of Justice questions for a preliminary ruling concerning the terms 'discrimination', 'presumption of discrimination' and 'sanctions' within the meaning of Directive 2000/43/EC. The firm was found to have (the intent) to discriminate against migrants in its hiring practice. Moreover, the CJEU found that appropriate remedies could include the award of damages to the body bringing the proceedings, notwithstanding that such body is not the "direct victim". For more information on cases that followed Feryn see Case sheets 14 and 15.
This could provide an example for Equality bodies promoting equal opportunities in the context of disability.

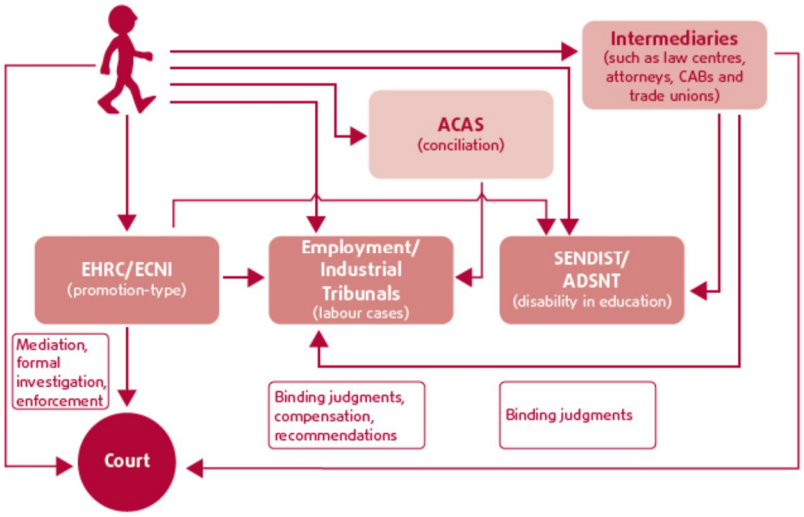
See the Chart below for an overview of the relationship between the Equality bodies and national courts in Belgium.[34]



In the *Benkharbouche v Sudan* and *Janah v Libya* case[35] the *UK Equality and Human Rights Commission* intervened in favour of the applicants, foreign domestic workers in London embassies of third countries, who complained of unfair dismissal, failure to be paid the minimum wage, harassment and racial discrimination which were argued to breach the Working Time Regulations 1998 and, *inter alia*, Articles 6, 13 ECHR and Article 47 EU Charter. The UK State Immunity Act was argued to violate the fair trial and effective remedy rights of domestic workers in London based embassies of third countries, as enshrined in both the ECHR and EU Charter. In this case the Charter provided for broader scope of protection from the remedies perspective.
This case shows how the relationship between ECHR and Charter reflects the complementarity of the existing European legal framework resulting in a broader scope of protection for individuals. For more information on this case see Part II, case sheet 7.

[34] Chart from FRA's report on Access to justice in cases of discrimination in the EU – Steps to further equality (2012) available at **http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality** p. 24
[35] *Benkharbouche v Sudan* and *Janah v Libya,* UK Court of Appeal, [2015] EWCA Civ 33.

See the Chart below for an overview of the relationship between the Equality bodies and national courts in the UK.[36]



Equality Body as Advisor/Source of Information for Legislator

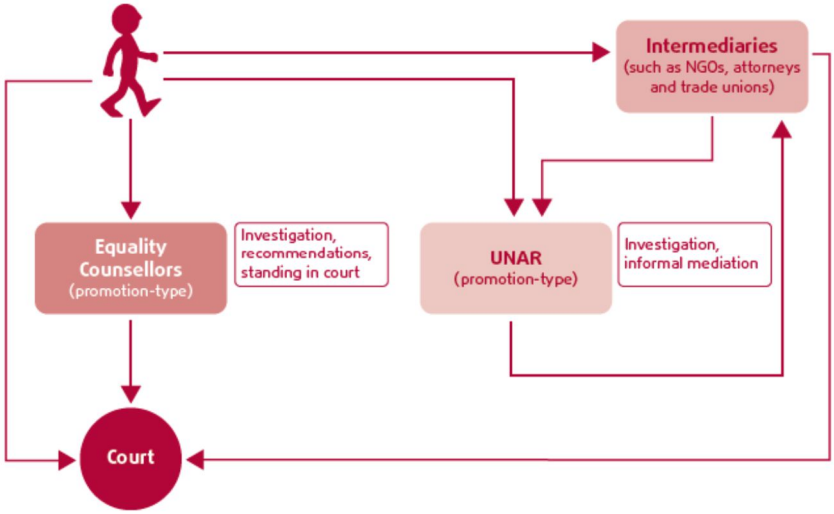
Following a 2011 enquiry by the Equality and Human Rights Commission (EHRC) into disability-related harassment, which demonstrated the high level of harassment and violence against people with disabilities, the UK government took steps to tackle disability hate crime more effectively. A progress report was published in late 2013, highlighting action already taken and that planned for the future. One change was an amendment to the Criminal Justice Act raising the minimum sentence for bias-motivated murders of people with disabilities to the same level as that for racially motivated murders. The Law Commission also examined other offences, such as incitement to hatred on the grounds of disability, for which it held consultations with a number of civil society organisations. The Code of Practice for Victims of Crime was reviewed with a view to improving services for persistently harassed victims, and the Crown Prosecution Service updated its disability hate crime action plan. In the area of education, the school inspectorate surveyed bullying and its consequences.[37]

In Italy, the equality body dealing with discrimination on grounds of race or ethnic origin – the National Office Against Racial Discrimination – established anti-discrimination offices and focal points in some locations in cooperation with local authorities and NGOs. In addition, equality counsellors, who address discrimination on the ground of sex, exist at national and regional levels; they are mandated to receive complaints, provide counselling and offer mediation services. They cooperate with labour inspectors who have investigative powers to establish the facts in discrimination

[36] Chart from FRA's report on Access to justice in cases of discrimination in the EU – Steps to further equality (2012) available at **http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality** p. 29

[37] For more information, see the UK government's response and progress update to the EHRC report 'Hidden in Plain Sight' https://www.gov.uk/government/publicatio ns/government-response-hidden-in-plain- sight-report

cases. They also have legal standing in court in cases of collective impact when no individual victim can be identified.[38]
See the chart below for an overview of the relationship between equality bodies and national courts in Italy.[39]



Equality Bodies and International Courts: Evolving Relationship

In Belov (C-394/11) the CJEU considered itself as not having jurisdiction to answer the questions referred to it in this case, due to the fact that the body referring the case was not considered to be either as a court or a tribunal. Only national courts and tribunals are allowed to apply for the preliminary ruling from the CJEU, and the CJEU considered that the body in the mentioned case did not have compulsory jurisdiction nor "*sufficient guarantees as to its independence*", nor did the proceedings pending before it were "*intended to lead to a decision of a judicial nature*".

In its opinion the Advocate General examined the case-law elements defining a national "court or tribunal" with the power to refer cases to the Court for such rulings, and came to the conclusion that this equality body should be considered as fulfilling the conditions of that case-law.

The criteria which were questioned by the defendants regarding the admissibility of a reference for a preliminary ruling by this quasi-judicial equality body were its independence, the compulsory character of its jurisdiction and the judicial nature of its decisions. These were examined in detail by the Advocate General with reference to the settled case-law of the Court, and it was found that the only element which could be questioned was the compulsory character of the equality body's jurisdiction, considering that an alternative legal remedy exists for taking action against discrimination before a civil court. However, understanding 'compulsory' as meaning the binding character of the decisions taken by the equality body and not its

[38] FRA (2012), Access to justice in cases of discrimination in the EU – Steps to further equality, p. 28.
[39] Chart from FRA's report on Access to justice in cases of discrimination in the EU – Steps to further equality (2012) available at **http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality** p. 28

exclusiveness, the Advocate General invited the Court to seize the opportunity presented by this case to clarify its case-law on this point, and to consider that the Commission for Protection against Discrimination is a "court or tribunal".

In addition, and on the substance of the case, Advocate-General Kokott looked beyond the Racial Equality Directive to Article 21 of the Charter. The Advocate-General reasoned that the prohibition in Article 21 is a general principle of EU law and so, if Bulgarian law cannot be read to give effect to the Directive, Article 21 would require that national law be disapplied to ensure that the prohibition on race discrimination is available to Belov.[40]

3. Role of Article 21 at the National Level

Article 21 of the Charter

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 Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

The application of this Article is limited to the scope of EU law - as defined by Arts. 51 and 52 Charter. Hence, the existence of secondary legislation is at times decisive in triggering the application of non-discrimination guarantees.

This implies that for the courts Article 21 would only be important when these acts are analyzed or their validity is reviewed. The CJEU has developed a general principle of EU law that has developed into a fundamental right against discrimination on the grounds of age. As such it could provide the basis for direct claims or for positive measures. The principle of non-discrimination as developed by the CJEU - unlike the Charter or directives – also applies in disputes between private parties, adding to the complexity of overlapping legal regimes. See below how courts have reacted to the development of the principle.

Moreover, the CJEU has also stated that where EU law applies, will also apply the Charter[41].

Finally, it should be noted that in relation to Article 21 (2) discrimination on the grounds of nationality is considered to be part of the freedom of movement provisions in EU law, rather than the antidiscrimination provisions.

[40] For more information see Equinet (European Network of Equality bodies) http://www.equineteurope.org/Bulgarian-quasi-judicial-equality
[41] Case C-617/10, Fransson. See also Module 1, Casesheet n. 1.*

In this context, it is possible to identify three trends in how Article 21 is cited in rulings at the national level:

- Article 21 as an echo of the Racial Equality Directive, the Employment Equality Directive and the Gender Equality Directive (Scenario A).
- Article 21 in the exercise of a power and obligation (Scenario B).
- Article 21 as a catalyst of change or to maintain the *status quo* (Scenario C)
- Article 21 gives bite to relatively new concepts (Scenario D)

Scenario A: Echo of the Equality Directives

Scenario A comprises a set of two different groups of national case law.

(1) First, national case law where there is *no mention* of Article 21 and the existence of secondary legislation is decisive in triggering or applying non-discrimination guarantees. In these cases, national courts do not recognize added value in mentioning the Charter explicitly. Judges refer only to national law provisions on non-discrimination and/or the directives. When referring to the directives judges assess whether the EU legislation has been adequately transposed at the national level.

Greece, Council of State, case number 3729/2011, Supreme Administrative Court, November 24 th 2011.

The Council of State found that, according to the combined interpretation of Article 21, paragraph 2, 3 and 6 of the Constitution and the relevant provisions of Directive 2000/78/EC, *the State has a special positive duty to provide reasonable accommodation for people with disabilities in public competitions, in order for them to compete on an equal footing with the remaining candidates*. In the absence of specific State legislation on the issue, each competition's committee has the duty to take all proper measures for the reasonable accommodation. The lack of toilet for people with disabilities was by itself enough to undermine the plaintiff's capacity to perform according to her abilities and, thus, annulled the competition and ordered the competition's committee to repeat the exams taking all appropriate measures to enable the candidate to have access to adequate facilities. [42][43]

Here, the open questions are the following:
- Would it make sense to cite the Charter in these cases?
- Would there be an added value or would referring to Charter provisions be of ornamental value (*ad abundantiam)?*

(2) Second, national case law where there is no explicit mention of Article 21 but the existence of other international law provisions on non-discrimination assume a supportive or interpretive role in the national decision. Judges refer both to national law provisions on non-discrimination, sometimes one of the equality directives and either

[42] For more information on this case visit the ACTIONES database.
[43] For other cases – for example Romania, Cluj Court of Appeal, 408/33/2013, ordinary, 31 May 2013 – see our database.

the ECHR, the UNCRPD or other international legal instruments. This might but does not necessarily result from strict interpretations of the scope of application of the different sources or obey to hierarchy of norms. In these cases, the judge opts for **consistent interpretation**.

Greece, Council of State, case number 4596/2014, Supreme Administrative Court, December 18th, 2014.

The applicant, a priest of the Eastern Orthodox Church, was punished by the ecclesiastical court for the ecclesiastical offence of "arsenokitia" (same-sex sexual intercourse). He was removed from sacred orders and his civil servant status was terminated. The applicant challenged that decision before the Council of State. The Council of State examined the alleged violation of article 14 ECHR taken together with article 8 ECHR. The Court cited the relevant case law of the ECHR (Grand Chamber, judgement of 12 June 2014, Fernandez Martinez v. Spain, no 56030/07 and judgement of 23 September 2010, Obst v. Germany, no 425/03). In this regard, Council of State found that priests have voluntarily accepted the special obligations and restraints that derive from their status as religious ministers and that the Church may, up to a point, interfere with the exercise of some of their fundamental rights, including their right of respect for their personal life, at the core of which lies sexual freedom. This interference is justified by the autonomy of religious communities, a principle that allows the churches to demand from their religious ministers to attain to certain standards regarding their personal conduct. Hence, the Court found that there has not been a violation of article 14 taken together with article 8 ECHR and rejected the application for annulation.[44]

The Prague High Court Date of decision: 17 February 2014

In 2013, the Czech Supreme Court ruled that the Prague High Court had to reconsider a claim for financial compensation again and explain properly why in this case an apology would be sufficient to compensate the claimant. The Supreme Court recalls "discrimination is almost every time a breach of significant personal rights" according to Article 13 section 1 of the Czech Civil Code. It also recalls CERD decision CERD/C/56/D/17/1999 on how denial of service on the grounds of ethnicity requires monetary compensation.

The case concerned a claim for compensation for a racially motivated infringement of the claimant's personal rights. The infringement consisted of the conduct of a restaurant owner, who displayed in his restaurant premises a statue of an ancient Greek goddess holding in its hand a baseball bat with the visible inscription 'Go and get the gypsies'. The claimant is of Roma origin. Originally, both the Prague City Court and the Prague High Court rejected the claim. They found the defendant's act merely 'inappropriate". After the decision of the court of appeal (the Prague High Court) was repealed by the Constitutional Court in 2010, the High Court reconsidered the case and at the end of 2011 ruled for the first time in favour of the claimant, finding that the conduct of the restaurant owner was discriminatory. However, the court dismissed the claim for financial compensation, arguing that an apology provided adequate satisfaction under the current circumstances.

[44] For more information on this case visit the ACTIONES database.

This time, in the repeated proceedings in 2014, the Prague High Court found that it was necessary to provide the claimant with monetary compensation. The court awarded the claimant EUR 926 (CZK 25 000).[45] The Court stated that the defendant "had placed an inscription in his shop - a place publicly accessible and by virtue of its purpose made for the public - for people of Roma ethnicity and that this act is and constitutes a unlawful interference of personal rights, the right to equality and furthermore diminishes in significant amount the basic personality value - value of human dignity - interfering with the rights of all people which consider themselves of Roma ethnicity". According Article 13 section 1 of the Czech Civil Code the "natural person" has the right to demand "an appropriate satisfaction" if "human dignity" has been "significantly diminished". In that case that person has a right to monetary compensation for the immaterial harm.

Here, the open questions are the following:

- Why did national courts cite the ECHR but not the Charter?
- Was it in the strict application of rules on scope of application?
- What would have been the added value of citing the Charter, if any?

Scenario B: Exercise of Power and Obligation

The vast majority of cases in which national courts have requested the assistance of the CJEU through the preliminary reference procedure (Article 267 TFEU) have been related to age and sex. More specifically, article 6 (1) of the Employment Equality Directive is open to interpretation and is often at the core of litigation before the CJEU when age discrimination is at stake. Race, sexual orientation and disability have been dealt with sporadically.

Two preliminary references on religion and belief have reached the court in 2015: *Bougnaoui* Case C-188/15 and *Achbita* Case C-157/15.[46] Both cases were references for preliminary rulings on the interpretation of the prohibition on discrimination in the workplace and have made explicit reference to Article 21 although ad abundantiam.

(1) The circumstances of the cases are not precisely the same and the questions asked by the referring courts are also different: In *Achbita*, the Belgian court asks whether the employer's neutrality rule amounts to *direct* discrimination, while in *Bougnaoui*, the French court asks whether the neutrality requirement can amount to an occupational requirement (art 4(1), employment equality Directive) if it is a client demand.

[45] Prague High Court, 17 February 2014, František Kroščen v. Bohemia Travel, n. 1 Co 99/2006.

[46] *Bougnaoui* Case C-188/15 and *Achbita* Case C-157/15 are different from the ECtHR case *SAS v France*, which concerned a ban to wear the burqa and the niqab in *public spaces* (and not within a *private* company, as it was the case in *Bougnaoui* and *Achbita).* The ECtHR has dealt with this issue for example in *Eweida v UK* , where –like in *Bougnaoui* and *Achbita*– the religious accommodation conflict arose within a private company. The CJEU has dealt with religious freedom issues but in the context of the internal market (see *Van Duyn v Home Office*) or the right to asylum (see *Bundesrepublik Deutschland v Y and Z*). It is the first time that the CJEU has been asked about religious discrimination under the Employment Equality Directive. At the national level see the Danish case *Føtex*, 22/2004 No.U.2005.1265. H, Supreme Court, 21 January 2005; the UK case *Azmi v Kirklees MBC* [2007] ICR 1154, EAT; the Belgian case *Hema*, Tongres Labour Court, 2 January 2013 and the French case *Association Baby Lou*, decision No S 13/02981, Court of Appeal of Paris, 27 October 2013.

These cases have led to diverging Opinions, by Advocates General Kokott and Sharpston on the characterisation of religion:

- Advocate General Kokott has characterised religion as a matter of belief and ideology – a "mode of conduct based on a subjective decision or conviction" (para 45)[47]
- Advocate General Sharpston has characterised religion as a form of identity, in similar terms to race or gender: "to someone who is an observant member of a faith, religious identity is an integral part of that person's very being" (…) "it would be entirely wrong to suppose that, where as one's sex and skin colour accompany one everywhere, somehow one's religion does not" (para 118).[48]

For more details see part II, case sheets 12 and 13.

(2) In a few landmark cases the CJEU has subsequently attributed a pivotal role to Article 21 following a preliminary reference by a national court:

- In the *Test-Achats* case (2011) the CJEU struck down a legislative provision restricting gender equality in Directive 2004/113/EC for being contrary to Articles 21 and 23 of the Charter. Such an approach seems to confirm the confirmation of that provision in the implementation of the EU legal framework on non-discrimination at a national level. [49]
- In *Mangold*, *Kücükdeveci* and most recently *Dansk Industries* (2016) the CJEU has developed the *general principle of non-discrimination on the grounds of age*.
  In *Dansk Industries* the CJEU clarifies the difference between uniform interpretation and the application of the general principles. The Court holds that the principle of non-discrimination is applicable as long as the directive is not applicable, providing it with a *subsidiary direct effect.* It also reaffirmed, along the lines of the AMS case, that it is not just the CJEU which has the power to disapply a EU provision but every single EU national court as regards national provisions.[50]
  The conceptualization of non-discrimination in the more than 14 grounds listed in Article 21 of the Charter has been somewhat put aside by the development of a new general principle (on the grounds of age). It is not yet entirely clear whether national courts should conclude that the exactly the same status is to be accorded to all the different grounds of discrimination included in the Charter (Article 21) or listed in the Treaty (Article 19 TFEU) namely on the horizontal

[47] See Opinion of Advocate General Kokott delivered on 13 July 2016 at http://curia.europa.eu/juris/document/document.jsf?text=&docid=179082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=635022.

[48] See Opinion of Advocate General Sharpston delivered on 13 July 2016 at http://curia.europa.eu/juris/document/document.jsf?text=&docid=181584&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=632212. For complementary analysis see Barnard & Peers available at http://eulawanalysis.blogspot.no/search?q=religion

[49] For more on *Test-Achats* visit our database.

[50] See Module 1, casesheets n. 1.* and 1.*

effect of the Charter.[51] For more on how national courts apply the general principle of non-discrimination on the grounds of age see Part II, Case sheet 1 and 2. For examples of age discrimination cases see Part II case sheets 1 and 2; for how a different take on the horizontal effect of the Charter see also Part II, Case sheet 7.

(3) In other cases, the CJEU has answered questions that explicitly cite Article 21 by answering with reference to the Directive and/or attributing the Charter a mere contributory role.

- In *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* C-571/10 (Third Country nationals (TCNs)), the CJEU ruled in favor of TCNs but turned down the national court's invitation to use article 21 as a means for dealing with the discrimination between EU citizens and TCNs. It based the answer on the TCNs Directive and article 34 of the Charter.

- In *Tyrolean Airways* C-132/11, the Austrian court asked whether a rule of a collective agreement infringed article 21 of the Charter and Articles 1, 2, 6 of the Employment Directive. CJEU did not refer to the Charter in its answer but to another CJEU case, *Prigge*.

- In C-40/11 *Yoshikazu lida v. Stadt* (Judgment of 8 November 2012) the referring court attempted to clarify whether the general principle and Article 21 provide entirely separate, independent grounds of protection:

  "*Can the unwritten fundamental rights of the European Union developed in the Court's case-law from Case 29/69 Stauder*[52] *up to, for example, Case C-144/04 Mangold*[53] *be applied in full even if the Charter is not applicable to the specific case in other words, do the fundamental rights which continue to apply as general principles of Union law under article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6 (1) TEU* ?

  However, due to the fact that the connection with EU law was not found based on the specific facts of the case, this fundamental question about the status and correlation of the principle of non-discrimination and the Charter remained unanswered.

The cases in Scenario B (2) often show how national courts are seeking clarification of already existing CJEU case law, such as the cases identified in Scenario B (1). The CJEU's take on Article 21 – and despite *Test-Achats and Dansk Industries* - remains close to that resulting from the scope of application of the Charter.

[51] See Module 1, at ***.
[52] [1969] ECR 419, paragraph 7
[53] [2005] ECR I-9981, paragraph 75

Scenario C: Catalyst of Change vs. Protector of Status Quo

Scenario C comprises a set of two different groups of national case law. In this scenario Article 21 always assumes a central role in the definition of fundamental rights standards at the national level. Courts resort to **consistent interpretation** and/or the use of **comparative method**. In all of these cases there is a spill-over effect. These are cases in which there is also a dialogue between national courts and the legislator.

(1) Scenario C (1): Article 21 is cited as reactant to the Equality Directives. The reference to Article 21 is often made to support change on a previous interpretation.

Italian Supreme Court -19.5 – 9.9.2016

The plaintiff was employed with a fixed-term contract on the basis of a convention with public authorities, which favours employment of persons with disabilities.

The Tribunal and the Court of Appeals decided that the system favouring employment of persons with disabilities (Law 68/1999), which allows conventions between public authorities and companies for the employment of persons with disabilities, sets special rules, which don't include the rules set by D. Lgs. 368/2001 on the need of indication of technical, productive, organisational or replacing reasons justifying the fixed-term, as a derogation to the general rule that the standard of employment relations is indeterminate of the duration of employment. The Supreme Court, on the contrary, affirmed that the fixed-term employment of a person with disabilities requires an indication of technical, productive, organisational or replacement reasons justifying the fixed-term, as a general rule for all workers. The Supreme Court compared the case with a previous national judgment of the Supreme Court (Cass. 13825/2010). In this judgment it overrules the previous understanding on the basis of European and international sources. It concludes, the special laws on employment of persons with disabilities provide fiscal incentives for companies, but that derogation from rules on control of justification of fixed-term work would amount to a discrimination of such persons in comparison with other workers contrary to Article 21 of the Charter.[54]

(2) Scenario C (2): reference to Article 21 without a reference to the Directives. This is often made in context of review of constitutionality of legislation – either to support legislative change or to maintain the *status quo*.

As some of the cases in part II demonstrate, National Courts sometimes consider that in the field of non-discrimination:

"[The Charter] *is the next stage in [its] evolution*"[55]

[54] For more information on this case visit our database. For a recent case in which CJEU cited article 33 (4) of the Charter (parental leave) as a reaction to one of the Directives and advocating for a better balance between professional and private for both parents life see Part II, case sheet 4.

[55] Poland/Supreme Court/I PK276/13 available at http://fra.europa.eu/en/charterpedia/article/21-non-discrimination

It is unlikely that the CJEU would adopt this approach. The scope of application of the Charter and the Explanations are quite clear. The CJEU has been the subject of criticism in the past for fear that it could go beyond the boundaries of Article 19 TFEU, having the EU overstepping its competencies and breaching the subsidiary character of non-discrimination provisions. [56] EU law does evolve in a dynamic way, through case law, legislative changes and national case law under Scenario C contributes to that same evolution.

It should be noted that this approach to Charter provisions enables simultaneous advancement of opposing stances on equality and non-discrimination, practically at the same time, in different EU Member States. This facilitates a multi-tiered evolution of anti-discrimination standards at the EU level. For example, on sexual orientation see Austrian Constitutional Court (Case B166/2013) vis-à-vis the Spanish Constitutional Court (STC 198/2012, 6 November 2012). In these two decisions both Article 21 and *Schalk and Kopf* (Case 30141/04) are interpreted to support the adoption of opposite solutions at the national level.

Austria, Verfassungsgerichtshof, Case B166/2013, 13 March 2014.

The Austrian Constitutional Court Decision concerned a homosexual couple from the Netherlands who wanted to repeat their marriage in Tyrol. The couple's claim, based on the non-discrimination clause (Article 21) of the Charter, was rejected with the argument that the national non-discrimination provision in question does not have to be in compliance with Article 21 of the Charter, as it does not aim to implement any Union law. Moreover, the national provisions are outside the scope of application of the EU equality directives, so that "there is no provision of Union law which is specific to this area or might influence it". Therefore, the Constitutional Court continued, the Union rules in the present case do not formulate obligations of the Member States and the fundamental rights of the Charter are not applicable regarding the national rules which determine this case. The decision concludes with a hypothetical statement. Building on the case law of the ECtHR, the Constitutional Court states that, even if the Charter were applied in the given case, it would not make any difference to its outcome. As the ECtHR has shown in *Schalk and Kopf* (Case 30141/04) – so the Constitutional Court emphasizes – the decision on the question of whether or not homosexual couples have to have the same access to marriage as heterosexual couples presupposes the assessment of societal developments, which might be different in the different Member States of the EU. Returning to EU law, the Court states: "Regarding the question of access to marriage of same sex couples a competence for the Union is missing, therefore [Article 21 of the Charter] is not opposed to the fact that the requirements stemming from the prohibition of discrimination diverge amongst member states, as long was – which is true for the case in question as the quoted jurisprudence of the ECtHR shows – the understanding and scope of the prohibition of discrimination corresponds to Art. 14 ECHR [...]." [57] For more information on this case see part II of Module IV, Case sheet

[56] Article 21 (1) does not create any power to enact anti-discrimination laws in these areas of MS or private action, nor does it lay down a "sweeping ban" of discrimination in such wide-ranging áreas.

[57] For more information on same-sex couples and freedom of movement within the EU see A. Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition' (2015) *Columbia Journal of European Law* (forthcoming), C. Casonato and A. Schuster (eds), 'Rights on the Move: Rainbow Families in Europe: Proceedings of the Conference: Trento, 16-17 October 2014' available at

11.

Spanish Constitutional Court (STC 198/2012, 6 November 2012)

The Spanish Constitutional Court followed an evolutionary interpretation of the Constitution and held that Article 32 of the Constitution did not prevent the legislator from passing Law 13/2005 to allow for same sex marriage. The Constitutional Court opted for a consistent interpretation of Article 32 of the Constitution in light of the ECtHR's case-law and EU obligations. In *Schalk and Kopf v. Austria*, the Strasbourg Court had issued an evolutionary interpretation of Article 12 ECHR, drawing support from the literal tone of Article 9 of the EU Charter of Fundamental Rights, which does not explicitly refer to men and women. It is worth noting that the Constitutional Court does not simply mention these authorities *ad abundantiam*, but as decisive evidence that strengthened the Tribunal's belief that the institution of marriage as a union between a man and a woman is fading out. The Constitutional Court repeats this exercise when it turns to the rationale of Law 13/2005. It identifies the purpose of the law in the "equation between the legal status of homosexual and heterosexual persons," and evokes Art. 21 of the EU Charter of Fundamental Rights as evidence that this purpose is underpinning a general trend. The case-law of the Strasbourg Court is also heavily cited starting with *Fretté v. France* to demonstrate that States enjoy a wide margin of discretion in regulating the possibility of extending the institution of marriage to same-sex couples. For more information on this case see part II of Module IV, case sheet 10.

In both these cases the national courts are supporting the legislator. Are you aware of cases in which the same exercise was done against the legislator?

Scenario D: Gives bite to relatively new concepts

Article 21 and 26 of the Charter can support judges in areas which are relatively new, such as the implementation of concepts enshrined in the UNCRPD and which are crucial for the establishment of remedies and sanctions. In these cases, national courts have either followed the CJEU's lead, in the case of the *definition* of disability or decided *ex officio* to explore the mutually reinforcing relationship between UNCRPD and the Charter in the case of the definition of *accessibility* or *reasonable accommodation* (Scenario B).

The definition of "persons with disabilities" has been the subject of CJEU cases in recent years. In particular, since the EU's ratification of the CRPD, the Court has changed its approach in *Chacon v Navas* in order to bring it into line with the Court's understanding of Article 1 of the CRPD. The Court has thus held that "disability" must be understood as "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". Whilst this new approach represents a considerable improvement on the Court's earlier approach,

http://eprints.biblio.unitn.it/4448/ and D. Gallo, L. Paladini and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014) and Barnard & Peers available at http://eulawanalysis.blogspot.com/2015/06/same-sex-marriage-eu-is-lagging-behind.html

there are concerns that it continues to fall short of what the CRPD requires.[58] In particular, the need to show hindrance of "professional life" appears to be inconsistent with the CRPD.

X v the Governing Body of a School [2015] UKUT 0007 (AAC), 6 January 2015

In *X v the Governing Body of a School* a six-year old girl whose autism resulted in some violent behaviour to others, was unable to claim that her exclusion from school constituted disability discrimination (e.g. through failure to provide her with appropriate accommodations) because her 'tendency to physical abuse' placed her outside the scope of the meaning of 'disability'. Such exclusions are, it is suggested, problematic and potentially inconsistent with the Employment Equality Directive and the CRPD.

This case does not cite the Charter. Would an interpretation of the obligations of the UNCRP and the Equality Directives would have benefited from article 21 and 26 of the Charter?

The UNCRPD defines "reasonable accommodation" and classifies the denial of reasonable accommodation as a form of discrimination. But it is not always clear at the national level what reasonable accommodation entails. The Charter provisions have, on occasion, through **consistent interpretation** aided national courts to concretise the concept.

Slovenian Constitutional Court, Ruling no. U-I-146/07-34 of 13 November 2008.

In Slovenia, in 2008 the Constitutional Court declared the Civil Procedure Act unconstitutional to the extent that it did not provide for people with visual impairments to access court files and court writings in an accessible format and ordered the legislature to amend the law in one year. The Court cited Charter of Fundamental Rights of the European Union which emphasises that persons with disabilities must be ensured not only formal (legal) equality, but also *de facto* (substantive) equality, which is intended to ensure equal opportunities and equality of results in order to eliminate *de facto* inequalities. According to the Court, the first paragraph of Article 21 of the Charter not only emphasises that discrimination based on disability is prohibited, but Article 26 explicitly recognises and guarantees persons with disabilities the right to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

In this case Article 21 and 26 of the Charter were key to give bite to what practical measures would need to be taken to conform to the existing legislation. This type of remedy aims to introduce systemic changes. Not only do they respond to the victim's suffering (as do civil remedies in general) or to the State's need to punish minor crimes (as do administrative and criminal remedies), but they create the conditions to prevent further discrimination, to educate and to raise awareness. For more information on this case see Part II, case sheet 9.

[58] See Part II case sheet 8 for the most recent CJEU case on definition of disability.

III. Access to Justice, Remedies and Sanctions

1. Overview of Legislation

Access to justice can be broken down into five elements. These reflect the right to a fair trial and the broader right to a remedy contained in Articles 6 and 13 of the European Convention on Human Rights (ECHR), Articles 2 (3) and 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter. Together, they encompass a broad concept of judicial as well as non-judicial means of accessing justice composed of the:

- right to effective access to justice;
- right to fair proceedings;
- the right to timely justice;
- the right to adequate redress;
- the principle of efficiency and effectiveness.[59]

The following paragraphs provide a brief description of some of the relevant legal provisions governing remedies and sanctions on non-discrimination in Europe.
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A. International level

- Article 13 ECHR – provides for the right to an effective remedy for persons whose rights and freedoms as set forth in the convention are violated. The provision establishes a minimum requirement linked to the protection of other and more specific provisions, such as under Article 5 (4) and (5) ECHR and Article 6 ECHR (right to a fair trial etc.). In addition, substantive provisions such as Article 2 ECHR (right to life) and Article 3 ECHR (prohibition of torture) also have remedial aspects, although the requirements of Article 13 ECHR are broader than, for example, the procedural obligation under Article 2 ECHR to conduct an effective investigation.

- Article 6 CERD – refers to *just* and *adequate* reparation or satisfaction for any damage suffered as a result of racial discrimination. The meaning of the concepts of reparation and satisfaction has been explained by the Committee on the Elimination of Racial Discrimination in particular in General Recommendation 26 where the Committee mentioned both pecuniary and moral damage.

[59] For more details on these elements see Module III.

- Article 2(c) of the Convention on the Elimination of Discrimination Against Women (CEDAW) refers to the adoption of *appropriate* legislative and other measures, including *sanctions* where appropriate, prohibiting all discrimination against women.

- Article 45 of the Istanbul Convention mentions that offences established in accordance with this Convention should be punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.[60]

- Article 13 of the UNCRPD refers *to access to justice* but does not refer to sanctions and remedies. Article 5 mentions *reasonable accommodation*, a concept that is being developed in the context of discrimination claims, in close dialogue with legislators and employers. The CJEU in *Ring and Skouboe Werge* affirmed that "the concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with others".

B. EU level

EU Charter

- Article 47 embodies *access to justice* in the EU law context. It establishes that everyone whose rights and freedoms guaranteed by the law of the Union are violated (in implementation of EU law) has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.[61] Article 47 has a strong connection with the general principle of equality set out in Article 20 of the Charter. The two provisions overlap by determining 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*)[62].

Secondary legislation

Remedies under the Equality Directives must also be "effective, proportionate and dissuasive":

- Paragraph 35 of the preamble to Directive 2006/54/EC mentions "effective, proportionate and dissuasive penalties", Article 18 mentions "compensation or reparation" and Article 25 introduces the notion of "penalties";

[60] The EU Commission has proposed that the EU would sign and ratify the Convention alike what was done with the UNCRPD. By October 2016, 14 Member States of the EU have ratified the convention so far. For updated information on the status of ratification http://www.coe.int/en/web/conventions/home/-/conventions/treaty/210/signatures?p_auth=EQB2dTov

[61] In Case C-279/09 DEB, Dec. 2010, the CJEU stated "according to the explanations relating to that article [47], which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR" (para 32).

[62] For more information see Peers, Steve, et al., eds. *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, 2014 and *The Commentary of the Charter of Fundamental Rights by the European Network of Independent Experts*, June 2006, p. 359 ss.

- Article 15 of Directive 2000/43/EC and Article 17 of Directive 2000/78/EC mention "sanctions" and "compensation".
- The Framework Decision states in its Recital 13 that "ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties, cannot be sufficiently achieved by the Member States individually" (…) "the Union may adopt measures, in accordance with the principle of subsidiarity".

  The Victims' Rights Directive (2012/29/EU) confers directly effective rights on victims, rather than indirect effect only (as had been established before by CJEU in *Pupino*[63]). There are a number of substantive changes such as the right to review a decision not to prosecute (Article 11), although this does not go so far as to require all Member States to *ensure* a prosecution following every complaint by a victim (which some Member States provide for already in principle). [64]

  In EU Member States

m=Member states enjoy great procedural autonomy enabling a wide array of mechanisms:

- civil/criminal/administrative remedies,
- victim-focused/perpetrator-focused/broader remedies aiming at societal impact;
- non-punitive/ punitive damages;
- backward/forward-looking;
- compensation, non-pecuniary damages or substantive damages aimed at addressing discrimination comprehensively.
  This has led to asymmetries at the national level, leaving judges, NEBs and other entities with different options to address non-discrimination for example:[65]

A limited number of countries sanction discrimination as a criminal or administrative/minor offence, such as France.[66]

Civil remedies are granted through judicial award of damages.

Other remedies are provided through orders annulling the discriminatory provisions of a contract or decision (Belgium, France, Romania), orders requiring respondents to stop violation and refrain from reoffending (Bulgaria, Hungary), orders to provide a plan to

[63] See C-105/03, 16 June 2005, available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-105/03

[64] While the "procedural rules" for such reviews are determined by national law, Member States do not have any discretion as regards the underlying obligation to provide for such reviews, or to limit the *substantive* grounds which might be pleaded in such challenges. For instance, it should always be possible to argue that a decision not to prosecute was discriminatory, in light of the obligation to deal with victims and respond to victims" complaints in a non-discriminatory manner (Art 1(1)). The preamble (recital 44) suggests that this right also applies "where a prosecutor decides to withdraw charges or discontinue proceedings'. For more information see EU Justice and Home Affairs Law, EU Justice and Home Affairs Law: Volume II, Oxford European Union Law Library, 2016.

[65] For a comprehensive overview see *Discrimination and its Sanctions – Symbolic vs. Effective Remedies*, Romanita Iordache, Iustina Ionescu, European Anti-Discrimination Law Review, November 2014, Issue 19.

[66] For an assessment see

remove acts and effects of discrimination (Italy, the United Kingdom), or orders requiring a private apology such as a letter or publication in the media (Croatia, the Czech Republic, Hungary, Italy, Latvia, Romania, Slovakia).

There are also countries in which the national legislation does not provide for administrative sanctions in cases of discrimination such as Belgium, Denmark, Germany, Liechtenstein, Luxembourg, the Netherlands, Poland, Spain or the United Kingdom

Administrative punitive remedies include administrative warnings or fines, criminal fines, disciplinary measures etc. They are issued by the national equality body (Bulgaria, Cyprus, Hungary, Lithuania, Portugal and Romania), by the courts (Croatia, Finland, Greece, Italy, Spain, the United Kingdom) or by specialised entities with powers in relation to labour (Austria, the Czech Republic, Greece, Hungary, Slovakia, Portugal) or education (Hungary, Slovakia) or consumer protection (Hungary). In some cases, NEBs can publish non-binding opinions (Austria, the Netherlands), or can issue recommendations and then initiate procedures before the relevant authorities or courts if the recommendations are not implemented (Austria,). In some countries only victims, prosecutors or national equality bodies can file complaints, thus *de facto* limiting the potential role of NGOs (Austria, Croatia, Finland, Hungary).

In countries where the general anti-discrimination legislation or anti-discrimination clauses in general legislation provide for fines, these can be issued either by a court of law or by national equality bodies and specialised agencies. Minimum or maximum levels of fines may be established leaving room for discretion, or a flat fine may be specified for a particular offence.

2. Role of national judges

Implementation of (the Equality) Directives

Here, the open questions are the following:

- Would it make sense to cite the Charter in these cases?
- Would there be an added value or would again referring to Charter provisions be of ornamental value (*ad abundantiam)?*

➢ National courts as conflict solvers

The reference to Article 47 of EU Charter may offer a means of circumventing scope application rules and enabling further complementarity between the ECHR and the Charter. In these cases national courts resort to consistent interpretation.

Benkharbouche v Sudan and *Janah v Libya* illustrated the relationship between the ECHR and the Charter in the UK.[67] The case involved two domestic workers bringing employment law complaints against the respective embassies of Sudan and Libya,

[67] For complementary information on this case see Part II, case sheet 7.

which responded to the complaints by claiming state immunity, based on a UK Act of Parliament (the *State Immunity Act*) which transposes a Council of Europe Convention on that issue.

Did invoking state immunity for these employment claims amount to a breach of human rights law According to Article 6 of the ECHR and Article 47 of the Charter? Some of the claims concerned EU law issues (Equality Directives). Other claims, such as for ordinary wages and unfair dismissal, were not linked to EU law.

On remedies, the Court of Appeal, following the prior judgment of the Employment Appeal Tribunal: (1) resorted to consistent interpretation of ECtHR case law, concluding that state immunity could not be invoked against all employment law claims, but only against those claims concerning core embassy staff – issuing a "declaration of incompatibility";[68] (2) also ruled that the relevant provisions of the *State Immunity Act* had to be disapplied, to the extent that they were applied as a barrier to the claims based on EU law.[69] Only the higher court could contemplate issuing a declaration of incompatibility with the ECHR; while courts of any level can disapply the law based on Article 47 of the Charter. In addition, the remedy of disapplying an Act of Parliament clearly has a more significant impact than a declaration of incompatibility, allowing the case to proceed on the merits (as far as it relates to EU law) rather than having to wait for Parliament to change the law in order to do so.[70][71]

- National Courts as gatekeepers of the *principle of equivalence and the principle of effectiveness*

These two principles limit and direct the procedural autonomy of the Member States.[72] It is up to national courts to ensure legal certainty and consistency when looking into national legislation that implements the directives or when deciding on the application of a particular remedy or sanction.

In practice, the *principle of equivalence* is an extension of the general principle of non-discrimination to the legal framework of remedies; while the *principle of effectiveness* is the requirement that the enforcement of EU rights at national level must reach a basic threshold of judicial protection.

Amongst the landmark cases in this field are *Von Colson*, *Dekker* and *Pontin*.[73] In Van Colson the Court established that a Member State implementing the Gender Equality

[68] At lower levels, the tribunals cannot rule on the claims for breach of the ECHR, since the UK's Human Rights Act establishes that only higher courts can issue a 'declaration of incompatibility' of an Act of Parliament based on a breach of the ECHR. So the Court of Appeal was therefore the first court that could issue such a declaration, which it did in this case.

[69] Any national court or tribunal has the power to disapply an act of parliament if necessary to give effect to EU law.

[70] United Kingdom, England and Wales Court of Appeal, [2015] EWCA Civ 33, A2/2013/3062, *Benkharbouche & Anor v. Embassy of Sudan (Rev 1)*, Appellate, 5 February 2015) available at **https://www.judiciary.gov.uk/wp-content/uploads/2015/02/benkharbouche-and-janah-v-embassy-republic-sudan-others.pdf**

[71] For more information on the impact of this case see Barnard & Peers, Rights, remedies and state immunity: the Court of Appeal judgment in Benkharbouche and Janah, 6 February 2015, http://eulawanalysis.blogspot.com/2015/02/rights-remedies-and-state-immunity.html

[72] For more information see Module III.

[73] See Case 14/83 Van Colson [1984] ECR 1891, Dekker v Stichting voor Jong Volwassen (VJV) Plus [1990] ECR I-3941, Case C-63/08 Pontin [2009] ECR I-10467. See also Case C-186-98 Nunes et de Matos [1999] ECR I-4883 [9] – [11] with reference to Case 68/88 Commission v Greece [1989] ECR 2965 [23].

Directive should do so in a way granting sanctions, which would dissuade violation and should guarantee real and effective judicial protection by inter alia having "a real deterrent effect" on a person breaching the objectives of the Directive. In addition, the absence of a specific provision in the Directive gives Member States the freedom to establish the sanctions regime – public, private, administrative or criminal – as long as these "are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event make the penalty effective, proportionate and dissuasive". [74]

Guidance on the application of this *principle of equivalence* was established in *Pontin*, a case against dismissal whilst being pregnant, in which it applied a remedy of annulment of the dismissal but denied the claim for damages that was otherwise available under Luxembourg law. The Court considered this to be in violation of *effectiveness* and *equivalence.*

Both Article 21 and Article 47 now represent these principles in the scope of application of the Charter. Its wider use by national courts through **consistent interpretation** could contribute to ensure consistency in the application of EU law standards within the wide range of remedies and sanctions that result from EU's member states procedural autonomy.[75]

- National Courts in using the preliminary reference procedure itself as an effective remedy

The ECtHR's judgment in *Schipani vs. Italy*, of 21 July 2015 confirmed the breach of the ECHR by a national court for failing to make a preliminary reference. *Schipani vs. Italy* reaffirms *Dhahbi vs. Italy (2014)* where the ECtHR stated that a refusal by a national court of last instance to make a reference to the Court of Justice, *providing no reasoning at all when justifying its decision*, entails a breach of Article 6 ECHR (the right to a fair trial).

Dhahbi was refused a family allowance because he was a Tunisian (Third Country National) rather than Italian national. He appealed, arguing that the family allowance was "social security" under the Euro-Mediterranean Agreement and thus he was entitled to enjoy equal treatment vis-à-vis with Italian workers. The Italian authorities argued the benefit was "social assistance", and so outside the scope of the Agreement. Dhabi rejoined that this categorization referred to national law, not the criteria developed by the CJEU. His case reached the Italian Court of Cassation. He asked the court to refer a preliminary question to the CJEU to clarify whether under the Euro-Med agreement a Tunisian worker could be denied the family allowance payable to Italian workers. The Italian Court of Cassation has referred questions to the CJEU in other cases. However, it did not refer any questions on Dhabi's case to the CJEU.

Following *Schipani vs. Italy*, in *Ferreira da Silva*, despite not being a case in the field on non-discrimination, the CJEU for the very first time in history found that a supreme

[74] Case C-186/98 Nunes et de Matos [1999] ECR I-4883 [9]-[11] with reference to Case 68/88 Commission v Greece [1989] ECR 2965 [23].

[75] For example in C-200/14 the referring court - Tribunalul Sibiu (Regional Court, Sibiu, Romania – framed the principles of equivalence and effectiveness with both Article 21 and 47 of the Charter. In C-543/14 the referring court framed the right to an effective remedy and equality of arms with Articles 21 and 47 of the Charter.

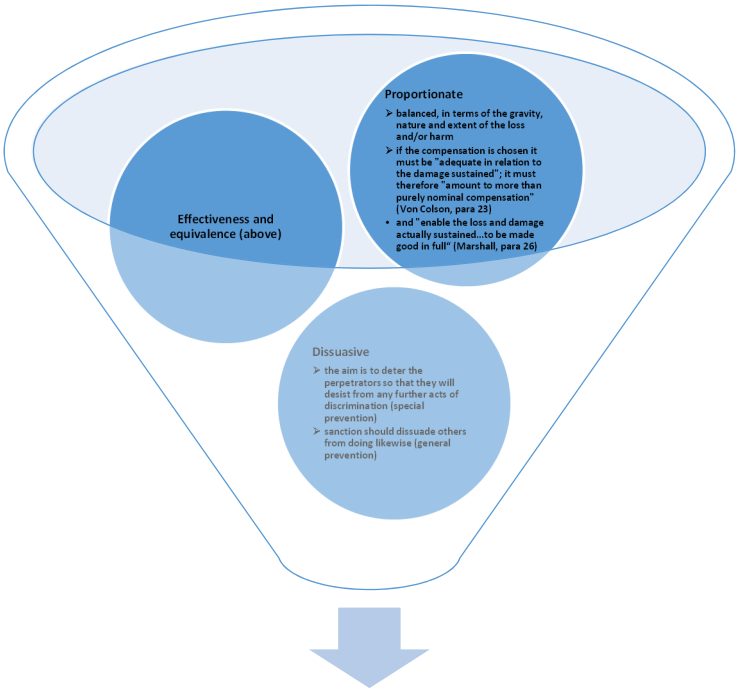
court had breached its duty to make a preliminary reference under article 267 (3) TFEU.

Asymmetries in the two legal order resulting in cases such as *Schipani vs. Italy and Dhahbi vs. Italy* have created situations of true horizontal dialogue between ECtHR and CJEU resulting in better protection of individuals.

The spirit of Article 47, as embodying *access to justice*, can be used at the national level to increase recourse to the preliminary reference procedure thereby stimulating the vertical cooperation and dialogue between national courts and the CJEU. This can be a particularly useful tool to advance on the scope of protection of Third Country Nationals in the EU and preventing situations such as in the case of *Dhahbi vs. Italy (2014)*.[76]

- National Courts as the game changers of effective, proportionate and dissuasive remedies in the scope of application of the Equality Directives.

It is possible to have either civil or criminal sanctions to meet the requirements of the directives. Whatever method is chosen must be effective, proportionate and dissuasive.



Two developments at EU level should be taken into account by judges in EU Member states .

- According to the CJEU, the formulation in the Directives "on the grounds of"

[76] For more information on the case see Part II, case sheet 5.

should not be limited to protecting those who actually possess the protected characteristics. The protection should extend to those associated with the protected group, or merely perceived (even mistakenly) as being members of the protected group. In *Coleman* (2008), the CJEU has extended the scope of protection to carers of people with disabilities (discrimination by association). In *CHEZ* (2015), the CJEU has extended the scope of protection to a non-Roma plaintiff; there is an emphasize in condemning stigmatising stereotypes and there is discrimination because of the existing bias against the plaintiff on the basis of his actual or merely perceived status.[77]

- In 2013 *ACCEPT* the CJEU stated that a purely symbolic sanction cannot be regarded as compatible with the correct and effective implementation of the Directive 2000-78-EC and that this requirement should apply individually to each available remedy.[78] Interestingly, the Court of Appeal, resuming the main proceedings in light of the preliminary ruling, found no discrimination. However, this case has had a strong spill-over effect and is resonating in several EU Member States.[79]

For an overview of how CJEU case law contributed to define what are effective, proportionate and dissuasive remedies see the chart below:

[77] For further details on this see Part II case sheet 6.
[78] CJEU, C-81/12, *Asociația ACCEPT,* para. 64.
[79] For more details on this case see Part II, case sheet 15.

Grounds/Remedies	Constitutional review		Administrative		Civil						Criminal							
	Cassation of decision	Cassation of law	Fine	Revocation of permit	finding of discrimination	prohibitive injunction	apology/public statement	affirmative injunction	reinstatement	award of actual damages/lost wages	injury to feelings	punitive damages	guidelines and recommendations	imprisonment	fine	alternative sanctions (public work)	probation
Nationality																		
Sex		Test Achat			Test Achat													
Racial or ethnic origin					Feryn		Feryn											
Age		Kucukdeveci																
Disability					Coleman													
Sexual orientation			Accept		Accept					Maruko								

Religion or other belief																	

On upper ceiling limits the general rule is that it is not acceptable. In addition, a lump sum is also not in essence dissuasive (*Marshall*, para 32) unless the adverse effect (not being given the job) would have occurred in any case, regardless of the discrimination that took place (*Draehmpaehl*, para 33). In case of past situations, interest must be awarded (para 32). At the national level, the majority of countries do not have a limitation on amounts awarded as compensation. Some guidelines establishing limits were imposed by the Supreme Courts of Croatia and Sweden. The UK has applied "benchmarking" to sanctions in UK establishing 3 bands. Germany has for example prescribed a compensation of three-months' salary in the event of non-recruitment.[80]

National courts through consistent interpretation and at the same enjoying a wide margin of appreciation decide the level of the sanctions. It is possible to identify a tendency to increase compensation or seek for more appropriate redress.[81]

In Italy, a case of a student with disabilities confronted with a hostile attitude by his teacher saw compensation calculated by taking into account the "seriousness of the offenses, their number and their length as well as the emotional stress". In this case the court mentioned the Charter. [82]

The European Commission's January 2014 report on the state of play in the Member States 13 years after the adoption of the EU's landmark anti-discrimination Racial Equality and Employment Equality Directives notes that while the correct transposition of the rules on sanctions proved to be challenging in the initial stages, "the sanctions provided for by law are generally appropriate". At the same time, the Commission's report notes that national authorities "still need to make sure they provide effective protection to victims of discrimination on the ground." The report particularly observes the tendency to apply the lower level of sanctions provided for by national legislation and the minimum in terms of the level and amount of compensation awarded. In order to justify the need for its continuing monitoring of the remedies provided, the report cites the 2013 *Asociaţia ACCEPT*[83]

Hate Crime and Hate Speech: Crime and Punishment

- Through addressing the discriminatory aspect of certain crimes, National Courts can send a powerful counter-message to communities, which can stop the cycle of escalation in bias speech and violence.

[80] For a comprehensive comparative overview of remedies provided by courts and equality bodies see European Anti-Discrimination Law Review, n19, 2014, "Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Anti- discrimination Law", Romanița Iordache, Iustina Ionescu Available at http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf

[81] See below Slovenian Constitutional Court, Ruling no. U-I-146/07-34 of 13 November 200 on reasonable accommodation.

[82] Tribunal of Livorno, Decision of July, 6th 2015.

[83] COM(2014)2, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf (20.01.2014).

Hate crimes and hate speech are extreme manifestations of intolerance and violate equality. These crimes occur because of the perpetrator's bias or animus against the victim on the basis of actual or perceived status. The individual victim of these types of attacks is often "irrelevant", selected at random, as a mere representative of their group, defined on the grounds of race, religion, national or ethnic origin, gender, gender identity, sexual orientation, or disability. It is the victim's community which is targeted through message of rejection – explicit in case of hate speech and implicit in case of a hate crime. That is why both hate speech and hate crimes carry in them seeds of retaliation, escalation and potentially broader societal conflict – thus being also a security issue. [84] [85]

Both hate speech and hate crime are symptoms of the same intolerance. Groups targeted by either will also often be otherwise marginalized and/or discriminated against. Discrimination and intolerant discourse create the environment in which violent hate crime can also flourish.

The criminal justice system is the main tool available to respond to hate crimes and EU member states are obliged to criminalize certain forms of hate speech, although the boundaries of the freedom of expression need to be carefully re-examined in each hate speech case. Considering the damaging impact on the individual victim, on the victim's community, on the cohesiveness of the society at large, the "messaging mechanism" and the risk of retaliation and escalation, the role of judges in these criminal law cases cannot be overstated:

- **Hate crime**

Hate crimes are criminal offences committed with bias. The two-tier definition means that any crime in the Criminal Code can "become" a hate crime, if the perpetrator acted out of bias. Bias can manifest itself in the selection of the target of the crime because of race, religion, national or ethnic origin, gender, gender identity, sexual orientation, or disability or other protected characteristic; or in the demonstration of hostility on those same grounds before, during or after such crime.

Each instance of hate crimes should be interpreted as a violation of an individual's right to be protected against discrimination under Article 21 of the Charter and, correspondingly, under Article 14 of the ECHR.[86]

The role of national judges vis-à-vis prosecution (prosecutors and investigative police) depends on the extent to which the criminal justice system at the national level is more of an inquisitorial or adversarial in nature. In addition, the role of national judges in the prosecution of *hate crime* largely also depends on the type of national provisions on hate crime:

- Hate crime as a *stand-alone crime, substantive offence.*
- *Specific penalty enhancement* qualifies the crime, the base offence, with bias motivation becoming an element of such qualified crime form.

[84] See Hate Crime laws, A practical guide, available at http://www.osce.org/odihr/36426?download=true
[85] It is possible to argue that this is also the case under discrimination cases covered by the equality directives. For example, in France discrimination occurring in employment, recruitment or the provision of goods and services can be punished by three years in prison and/or a fine of up to €45,000.
[86] This is EU Fundamental Rights Agency assessment. See page 13, 15 and 27 of FRA's Opinions on "Making hate crime visible in the European Union: acknowledging victims' rights" available at http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf

- *General penalty enhancement* is a sentencing provision, which can usually be used in connection with any crime in the Criminal Code. This type of provision does not aggravate the crime but the perpetrator's standing. [87]

"In the spirit of non-discrimination", it would be preferable to widen the existing criminal law provisions (or to read the existing open-ended ones) to include equally all grounds of discrimination covered by Article 14 of the ECHR or Article 21 of the Charter of Fundamental Rights of the European Union.[88] While most countries have a combination of different types of hate crime laws mentioned above, clearly, the role of the judges increases where the general penalty enhancement type provision is the dominant one. Where this is not the case,

- The judge can trigger the use of such hate crime provision, and in so doing to reclassify an ordinary offence as a hate crime.

Many hate crimes are never reported to the authorities. Furthermore, the vast majority of those hate crimes that are reported are nevertheless for various reasons not prosecuted and punished as hate crimes. Where the authorities do respond correctly it is vital that

- The judge includes a strong discussion of the bias aspect of the case in the public version of the judgment in a very clear way – even if this is just one of several aggravating circumstances that were considered.

There has been a sequence of cases at EU level that highlight the role of practitioners in conducting *vigorous investigations* when the crime at stake might have potentially been committed with bias:

- In the landmark decision of *Nachova and Others v. Bulgaria*,[89] the Court held that there was a duty to investigate possible racist motives behind acts of violence by state authorities, and that Bulgaria's failure to do so constituted a violation of the non-discrimination provision in Article 14 of the Convention.
- In a subsequent series of cases, the Court expanded this same reasoning to cover also hate crimes motivated by bias on the basis of religion[90], political opinion[91], and sexual orientation.[92]
- In *Balázs v. Hungary*,[93] the ECtHR confirmed the need to vigorously investigate and elaborated on what its findings, highlighting the use of *bias indicators* in order to identify hate crimes in the decision. The ECtHR found that state authorities failed to effectively investigate a racist attack against a person of Roma origin. The court reiterated that offences against members of particularly vulnerable population groups require vigorous investigation and found – by six votes to one – a violation of Article 14 (prohibition of discrimination), read in conjunction with Article 3 (prohibition of

[87] International organizations have different typologies to record what are the practices at the national level. While the EU Fundamental Rights Agency distinguishes between only two types "enhanced penalties" and "aggravating circumstance" OSCE uses the above mentioned tripartite typology.
[88] See "Making hate crime visible in the European Union: acknowledging victims' rights" available at http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf
[89] Nachova and Others v. Bulgaria, Judgment of the European Court of Human Rights (Grand Chamber), 6 July 2005, paragraphs 160-168, available at http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=
[90] Milanovic v. Serbia, Judgment of the ECHR of 14 December 2010 (Application no. 44614/07)
[91] Virabyan v. Armenia, Judgment of the ECHR of 2 October 2012 (Application no. 40094/05)
[92] M.C. and A.C. v. Romania, Judgment of the ECHR of 12 April 2016 *(Application no. 12060/12)*
[93] ***, No. 15529/12

torture, inhuman and degrading treatment) of the ECHR. It ordered Hungary to pay € 10,000 in damages to the applicant. Pursuant to Article 43(1) of the ECHR, the government of Hungary requested the referral of the judgement to the court's Grand Chamber.

While the Court has not demanded the introduction of specific legislation against hate crime, it has explicitly recognized that hate crimes require a criminal justice response proportionate to the harm caused. The ECtHR applied these principles in:

- *Secic v. Croatia*, a case involving an attack by skinheads on a Roma man. There, the Court reiterated that "… when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights."[94]
- Austria's Supreme Court issued a landmark decision, holding that using the motive behind a crime of incitement to hatred as an aggravating circumstance in sentencing does not violate the prohibition of double jeopardy. The case involved an individual convicted of incitement to hatred against Jews and Israeli citizens under section 283 (2) of the Criminal Code. In the judgment, a stronger sentence had been applied because of the racist motive underlying the crime. Austria, Supreme Court (Oberster Gerichtshof, OGH), 15Os75/15s, 22 July 2015.[95]

- **Hate speech**

There is no agreed definition of hate speech and the notion is much broader than those forms of hate speech which are often criminalized.[96]

In Feryn, the Advocate-General began his Opinion by stating: "Contrary to conventional wisdom, words can hurt."[97] The Framework decision prescribes several forms of speech which member states should have criminalized (public incitement to violence and hatred; condoning, trivialization and denial of the Holocaust; incitement through public dissemination or distribution of tracts, pictures or other material).[98]

Criminal forms of hate speech are such speech offences where the discriminatory element is inherent to the offence itself. At the national level hate speech is always a *stand-alone crime*, a substantive offence. In national criminal codes it usually appears under "Incitement to hatred" or "incitement to violence" but in practice it frequently it falls under "harassment". For example:

[94] Secic v Croatia, Judgement of the European Court of Human Rights, (Chamber Judgement), 31 May 2007, paragraph 66, available at http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=
[95] For more information on this case visit our database.
[96] See ECRI General Recommendation no.15 on combating hate speech.
[97] Advocate-General Opinion on Case C-54/07, Centrum voor gelijkheid van kansen en voor racisme bestrijding v. Firma Feryn NV, [2008], para 1.
[98] In M'Bala M'Bala v. France (No. 25239/13), the ECtHR held that a comedian's stand-up performance – which promoted hatred, antisemitism, and Holocaust denial – could not be regarded as entertainment, but instead was an expression of an ideology that runs counter to values of the ECHR, namely justice and peace. The court therefore ruled that the applicant's performance was not entitled to the protection of Article 10 of the ECHR, which guarantees freedom of expression.

- After a teenage girl was murdered in Kiskunlacháza, the local mayor whipped up anti-Romani sentiments through various speech acts. The Hungarian Helsinki Committee as act poplars claimant launched a complaint against him with the Equal Treatment Authority (hereafter "ETA"). Following a long legal battle, the Supreme Court upheld the ETA's decision in which it found the mayor liable for harassment against a member of the Roma national minority, and ordered the publication of its decision. The publication of the decision is in this case part of the set of remedies strengthening the idea that sanctioning hate speech implies sending a strong message to the community, of not condoning the discriminatory behaviour and preventing escalation. In this case the court cited Feryn. [99]

On hate speech and hate crime, the open questions are the following:

- Have you ever been confronted with a case in which *bias motivated* or *incitement to hatred* provisions were cited?
- In the above mentioned cases why do (national) courts often cite the ECHR but not the Charter?
    - Was it in the strict application of rules on scope of application?
- What would have been the added value of citing the Charter, if any?

IV. The use of judicial dialogue techniques in non-discrimination[100]

More often than not national judges bypass Charter provisions and use secondary legislation. When national courts do refer to Article 21 they do so for consistent interpretation[101] or through the preliminary reference procedure (Article 267 TFEU).[102] It is also the case that national courts will cite Charter provisions for emphasis without being exactly clear of its added value vis-à-vis secondary legislation (*ad abundantiam*).[103]

In a number of cases, the dialogue between national courts and CJEU has had an impact on subsequent jurisprudence, at the national and international level.[104] In most cases the effect is not only internal as also external. It is noticeable that the same reasoning behind a CJEU decision has been used for rulings with an opposite outcome.[105] This outcome sometimes shows different levels of collaboration between national courts and CJEU, leading to further conflicts of interpretation.

In some cases, the dialogue between national courts and the CJEU also has an impact on the decisions of the legislator.[106] Here too there are spillover effects to other Member States to avoid the disapplication of national provisions, which are deemed to be non-compliant with EU law. This outcome is not immediate, as it depends on several factors: first, on nature of the CJEU decision, such an outcome is more probable in cases where the Court provides for a clear

[99] See Part II, case factsheet 14; Supreme Court of Hungary, Kfv.III.37.848/2014/6, 29 October 2014

[100] This assessment is complementary to the one on the Handbook on the principle of non-discrimination on the grounds of age, race, gender, disability and sexual orientation by the Centre for Judicial Cooperation, pp. 11-28 available at http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx as well in the Final Handbook on Judicial Interaction Techniques – their potential and use in european fundamental rights adjudication available http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/JUDCOOPdeliverables/FinalHandbookUseofJudicialInteractionTechniquesinthefieldofEFRs.pdf

[101] For example, Part II, case sheet 1 and 2.

[102] For example, Part II, case sheet 12 and 13.

[103] For example, Part II, case sheet 3.

[104] For example, Part II, case sheet 15.

[105] For example, Part II, case sheet 10 and 11.

[106] For example, Part II, case sheet 10.

final decision, establishing not only the conflict but also the solution that the national judge may adopt; secondly, on the impact that the solution indicated by the CJEU may have on the national system; and finally, on the level of responsiveness of the legislator to EU decisions.

In general, judicial dialogue techniques present themselves in the case of non-discrimination as cross-national and cross-country mechanisms of mutual learning. From the Case Sheets on Part II it is possible to conclude that this cooperation has contributed to overcoming conflicts and enhancing consistent application of the existing legal framework at national and international level - even when there is no explicit mention to the Charter. In a few cases, an explicit mention to the Charter has even enabled the scope of protection to be broadened thus changing the status quo.

Part II – Selection of cases

1. Introductory remarks

The case sheets that follow are based on the cases that have been provided by the national experts that participated to the ACTIONES working group on non-discrimination.

The selection has been made in line with the following criteria:

1. **Problem-based:** the national jurisprudence reflects in so far as possible the problems, questions, and ambiguities that national judiciary face in relation in the use of the Charter in the field of non-discrimination.

2. **EU relevance:** the national jurisprudence identifies in so far as possible issues of EU- wide relevance, that touch upon the application (or omission of application) of the Charter in connection with the application of EU primary and secondary sources in the field of non-discrimination.

3. **EU Charter of Fundamental Rights:** Priority is given to cases that cite the Charter of EU Fundamental rights. Additionally, cases that may have cited the Charter but omitted to do so (i.e. where the Charter was applicable) as well as the possible motives for doing or not doing so may be highlighted.

4. **EU Charter of Fundamental Rights level of protection:** particular attention is paid to national jurisprudence where the EU Charter was used to broaden the scope of protection compared to the protection ensured by the EU secondary legislation.

5. **Judicial Dialogue:** a special emphasis is placed on national jurisprudence that used one or more of the following judicial interaction techniques: preliminary reference procedure under Art. 267 TFEU, direct reference to the case law of CJEU or ECtHR, references to the jurisprudence of foreign national courts, disapplication of national legislation implementing EU secondary legislation.

6. **Divergent positions of national judiciary:** national jurisprudence highlighting divergent positions of national courts is considered: lower level courts vs. high courts/constitutional courts/other specialised national courts.

7. **CJEU case law connection:** national jurisprudence highlighting the difference or common approach to legal issues also faced by the CJEU.

2. Selected sets of cases

On the basis of the decisions provided by national experts, the case sheets that will follow address the most interesting cases where the use of the EU Charter, of judicial dialogue techniques, and of specific remedies may provide interesting insights for further developments of the jurisprudence at national level.

i. Age

Case sheet n. 1 – (Italy) Tribunal de Milano, 7 January and 22 July 2005; Court of Appeal

Firenze, 27 March 2006.

Case sheet n. 2 – (Italy) Court of Appeal of Milano, Lavoro e Previdenza, RG 1044/13 (Abercrombie case), 15 April 2014.

ii. Sex, gender identity

Case sheet n. 3 - (Poland) District Court in Wrocław, Śródmieście, X P 20/16, 3rd August 2016
Case sheet n. 4 - (Greece) Council of State, case number 1113/2014, Supreme Administrative Court, March 20th 2014

iii. Nationality

Case sheet n. 5 – Dhabhi v. Italy 2014 (ECtHR)

ii Race, colour, ethnic or social origin, genetic features

Case sheet n. 6 – Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, judgment of The Court (Grand Chamber), 16 July 2015

Case sheet n. 7 – United Kingdom, England and Wales Court of Appeal, [2015] EWCA Civ 33, A2/2013/3062, *Benkharbouche & Anor v. Embassy of Sudan (Rev 1)*, Appellate, 5 February 2015)

iv Disability

Case sheet 8 – Denmark, District Court in Kolding, Fag og Arbejde (FOA), acting on behalf of Mr. Karsten Kaltoft v. Kommunernes Landsforening (KL), acting on behalf of municipality of Billund, first instance court, 25 June 2013 (Definition)

Case sheet 9 – Constitutional Court of the Republic of Slovenia (2014) (Ustavno *sodišče Republike Slovenije,* US RS),Decision No. U-I-156/11, Up-861/11, 13 May 2014 (reasonable accommodation)

v. Sexual Orientation

Case sheet 10 -Spain Constitutional Court, STC 198/2012, 6 November 2012

Case sheet 11 - Austrian Constitutional Court, Case B166/2013

viii Religion and Belief

Case Sheet 12 - Asma Bougnaoui, Association de defense des droits de L'Homme (ADDH) v Micropole Univers SA, C-188-15

Casesheet 13 - Samira Achbita, Centrum voor gelihkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV (Case C-157/15)

ix Combating Racism, Xenophobia and related intolerance

Case sheet 14 - Supreme Court of Hungary, Kfv.III.37.848/2014/6, 29 October 2014

Case sheet 15 - Court of Appeal of Bucharest, judgment of 12 October 2011 between the NGO ACCEPT (claimant) and the National Council for Combating Discrimination

Casesheet 6.1 - (Italy) Trib. Milano, 7 January and 22 July 2005; Court of Appeal Firenze, 27 March 2006.[107]

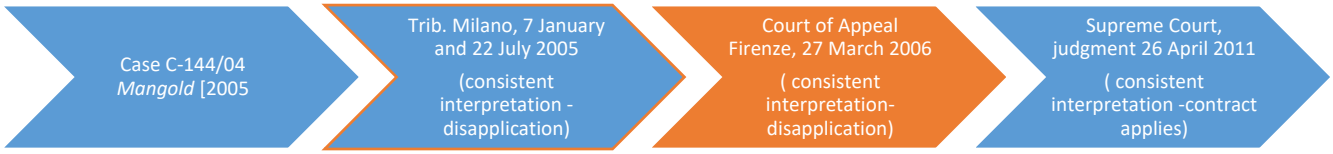
1. Core issues

Can collective contracts prioritise dismissal of employees who are closer to retirement age?
Ordinary Courts: No, equality prevails over contractual autonomy.
Supreme Court: Yes, reasonable criterion (analysis of proportionality)

2. At a glance

Area	Country	Reference to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	• Italy	•General principle of non-discrimination •Article 21	•Consistent interpretation	•CJEU •National Courts •Italian Supreme Court

3. Timeline representation



4. Case law description

Italian ordinary courts (Tribunal of Milano and Court of Appeal of Florence) were asked by the claimants to declare the unlawfulness of their dismissals for alleged discrimination on grounds of age. In both cases the claimants had been selected for dismissal in accordance with the guidelines set in the collective agreement concluded by the employer, which identified reaching of the minimum pensionable age as a priority criterion for dismissal in the event of collective dismissal procedures. [108]

These clauses, which were routinely included in the collective agreements concluded by the trade union representatives and employers' associations, have historically been considered lawful. In particular, the Italian Supreme Court had held repeatedly that the proximity to pensionable age could constitute a reasonable justification for differential treatment. Even if this rule could in effect have a detrimental impact on older workers, the social impact would be

[107] Based on the case note in the Handbook on the principle of non-discrimination on the grounds of age, race, gender, disability and sexual orientation, by the Centre for Judicial Cooperation available at http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx

[108] Trib. Milano, 7 January and 22 July 2005; Court of Appeal Firenze, 27 March 2006.

narrower than if younger workers were affected, and in any case the choice of an objective criterion was legitimate insofar as it was not open to the discretion of the employer.[109]

The matter of discrimination on grounds of age in the field of job relationships is governed by Directive 2000/78, transposed into Italian law by Legislative Decree No. 216/2003. In interpreting this source, the ordinary judges in the instant cases held that the criterion of proximity to pensionable age is indirectly discriminatory because it puts older workers at a clear disadvantage. In assessing the reasonable justifications advanced to maintain such discrimination, the courts considered that the discriminatory effect is unlawful in those situations where the number of workers to be dismissed by reason of redundancy is determined without a reference to the organizational needs of the firm. In those situations, it is not possible to review the rational link between the industrial adjustments required to implement the redundancy scheme and the single dismissal.[110]

However, the Supreme Court acknowledged that collective agreements must comply with the principle of non-discrimination, though it is nevertheless still keen to accept clauses allowing the employer to terminate the relationship based on the worker having reached a pensionable age. In particular, the Supreme Court has reversed[111] another judgment of the Court of Appeal of Florence, deeming that the choice of the proximity to retirement, based on work seniority rather than age, was not discriminatory on grounds of age, and in any case constituted an absolutely reasonable criterion upon which to carry out a redundancy scheme.[112] The Supreme Court, recalling its previous case-law, gave assurance that this approach is compatible with the obligations stemming from the European commitments of Italy.

5. *Analysis*

a. *Role of the Charter*

In other words, the ordinary courts, referring to the reasoning of the CJEU in *Mangold*,[113] emphasized the horizontal application of the general principle of non-discrimination on grounds of age and reviewed the compatibility of certain typical clauses of collective agreements with the prohibition of discrimination of Legislative Decree No. 216/2003, interpreted in conformity with EU law obligations. Their findings concerned specifically the rationale for the justification of discriminatory policies: proximity to pensionable cannot in itself constitute a reasonable ground of justification, unless the redundancy scheme clarifies which organizational purpose could be achieved through the planned dismissals. Although at the time the general principle of non-discrimination was not grounded on Article 21 of the Charter, it is today.

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109 See for instance Supreme Court, judgment no. 9866 of 24 April 2007: '*va considerato razionalmente adeguato il criterio della prossimità al trattamento pensionistico (...) stante la giustificazione costituita dal minore impatto sociale e il potere dell'accordo di cui alla legge n. 223 del 1991, art. 5 comma 1 di sostituire i criteri legali e di adottare anche un unico criterio di scelta, a condizione che il criterio adottato escluda qualsiasi discrezionalità del datore di lavoro (Cass. n. 1760/1999; n. 13691/1999; n. 4140/2001; n. 13962/2002; n. 12781/2003*).'

110 See Tribunale di Milano, judgment of 22 July 2005: '*viene ad essere pregiudicata ogni possibilità di controllo sull'effettivo nesso causale tra la prospettata riduzione e l'esigenza riorganizzativa dell'impresa e quindi sulla giustificatezza di ogni singolo licenziamento.*'

111 Supreme Court, judgment 26 April 2011, No. 9348, see http://www.cslavoro.it/archivio/fonti/fonte33_11pp02.pdf.

112 See para. 26: '*una volta accertato che sussisteva la necessità di licenziare parte dei lavoratori, la scelta, condivisa dai sindacati, di individuare i lavoratori da licenziare in coloro che avevano i requisiti per passare dal lavoro alla pensione, mantenendo in servizio coloro che invece sarebbero passati dal lavoro alla disoccupazione rimanendo privi di fonti di reddito, è una scelta di cui è difficile negare la ragionevolezza*.' See similarly in decision Supreme Court 22914/2015; 11690/2015 and 13794/2015.

113 Case C-144/04 *Mangold* [2005] ECR I-9981.

b. Judicial dialogue
vertical (domestic court – CJEU)

Ordinary judges are confronted with CJEU's precedents and can draw inspiration to interpret national provisions, even distancing their interpretation from the one adopted by their supreme courts.

National ordinary courts can set aside (**disapplication**) domestic norms (including those included in collective agreements) on the basis of a conflict with EU law. The ordinary courts objected to a well-established approach followed by the Supreme Court, invoking the EU law obligations and the *Mangold* doctrine on the horizontal application of the general principle of non-discrimination on grounds of age. In the view of ordinary courts, these elements implied a consistent interpretation of domestic statutes, rendering the relevant provisions in the collective agreements unlawful. The Supreme Court, however, contested this reading, alleging that choice of seniority as a preferred requisite for dismissal is a perfectly reasonable one and is not necessarily relating to the age of the employer.

Supreme courts are able to reverse the instances of consistent interpretations carried out by lower courts, providing reasons. Their interpretation remains good law unless the CJEU issues a decision to the opposite effect (perhaps upon a request for a preliminary ruling). A **preliminary ruling** could clarify the actual scope of the relevant provisions of Directive 2000/78 and Art. 21 of the EU Charter of Fundamental Rights, and reconcile this divergence of views that has emerged in the Italian judiciary.

Casesheet 6.2 (Italy) Corte d'Appello di Milano – sezione Lavoro e Previdenza RG 1044/13 (Abercrombie case)

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	• Italy	•Article 21 •Directive 2000/78/EC	•Consistent interpretation (disapplication)	•CJEU •National Courts

Special employment contracts for young and elder workers – Dismissal of a worker only for reaching a given age (25 years) – Compatibility with EU Law and with the general principle of non-discrimination.

1. *Timeline representation*

2. *Case law description*

The worker was employed with an on-call contract, on the basis of a national law which allows such contract for person with less than 25 years or more than 45 Years (if unemployed). He claims that his dismissal when he reached 25 years of age is a discrimination on grounds of age, and asks that such discrimination to be ended, through the re-instatement of the working relation and compensation.
Following its rejection from the Tribunal of Milano, which stated that the company's decision was in conformity with the law with the discrimination being proportionate to the current crisis of the job market, the Court of Appeals of Milano reversed the judgment, disapplying national law in conflict with EU law and principles, and ordered the ceasing of the discriminatory conduct of the employer by re-instating the employee to his previous job and paying him damages.

The company appealed the decision to the Supreme Court of Cassation. The Supreme Court referred the case to the ECJ, seeking an answer to the following question: Is the Italian law relating to on-call contracts which contains special provisions for access and dismissal for under 25 contrary to the principle of non-discrimination on the grounds of age enshrined in Directive 2000/78/EC and Article 21(1) of the Charter.

The CJEU concluded that the Directive does not preclude national legislation from providing that specific contracts are applicable only to workers under 25, provided that such legislation pursues a legitimate aim linked to the employment and labour market and achieves that aim by means which are appropriate and necessary.

3. *Analysis*

a. *Role of the Charter*

The Court of Appeals of Milano, following reasoning on the special procedure provided for by D. Lgs. 216/2003, implementing Directive 2000/78/CE, noted that the rules on job on-call set by art. 34 D. Lgs. 276/2003, referring only to age, are in conflict with art. 6 Directive 2000/78/CE, which also require objective and reasonable justification by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and that the means of achieving that aim are appropriate and necessary.
The Court recalls ECJ judgments *Mangold* (22.5.2005, case C-144/04*)* and *Kucukvedeci* (19.1.2010, case C-555/07).
The Court comes to the conclusion that national law, which didn't require objective and reasonable justification to the discrimination on ground of age, was not proportionate to the aim of favouring the employment of young workers, in particular where allowing automatic dismissal upon the reaching of 25 years of age of the worker, and therefore should be disapplied.
The Court affirms that the principle of non-discrimination is a general principle of EU Law, as enshrined in art. 21 EUCFR, which has the same legal value of the EU Treaties on the basis of art. 6 TEU, and also applies in private relationships.
The Italian government put forward a number of legitimate aims for the provision including the promotion of flexibility in the job market, fostering the entry of young people into the labour market. The CJEU considered the aims legitimate and cited in this regard the judgment of 10 November 2016, *de Lange*, C-548/15, EU:C:2016:850, paragraph 27. As well as judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraphs 35 and 36.

The CJEU concluded that the Directive does not preclude national legislation from providing that specific contracts are applicable only to workers under 25. Article 21 was referred to ad abundantiam.

b. Judicial dialogue

Vertical cooperation (National Courts – CJEU)

National courts apply a conform the interpretation of domestic law to the case-law of the CJEU to solve conflicts of judicial interpretation involving fundamental rights enshrined in the EU Charter. Through the setting aside (**disapplication**) of the domestic provision excluding the relevance of unpaid leave, the Tribunal adjusted the domestic regime.

Following an appeal and a request for preliminary reference the CJEU overturned the decision of the national court.

Casesheet 6.3 - (Poland) District Court in Wrocław, Śródmieście, X P 20/16, 3rd August 2016

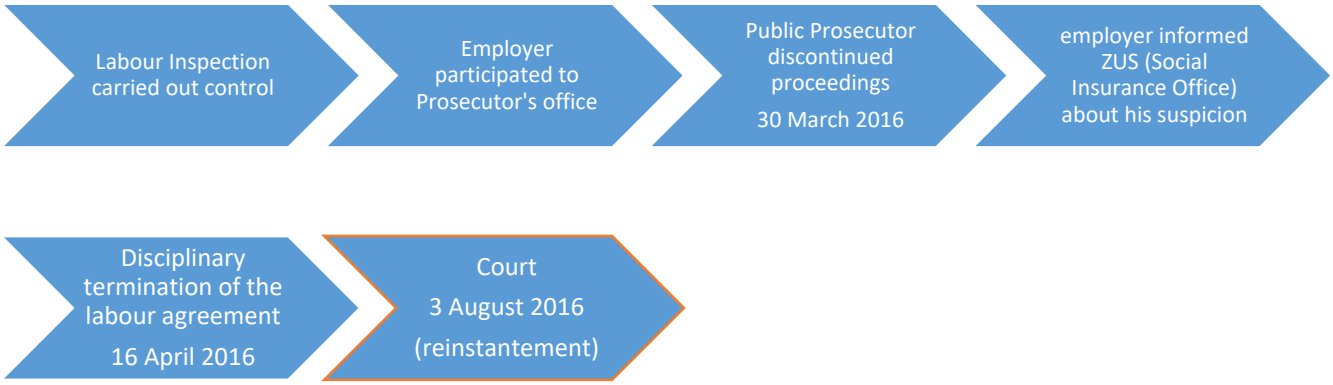
1. Core issues

Termination of contract Discrimination on the basis of gender

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	•Poland	• Article 21 and Article 33 •directive 92/85/EEC	•Consistent interpretation	•Employer •National authorities •National Court •CJEU

3. *Timeline*



4. *Case law description*[114]

The plaintiff, Ms Ewa W. was employed for several years as a secretary in the defendant's office. She was assessed very well until she became pregnant with her first child. The plaintiff suffers from diabetes and hypothyroidism and because of that her pregnancy was threatened. When the plaintiff informed the employer about her pregnancy, he refused to pay her the extra stipend attributed to pregnant employees according to the rules of the office.

Due to a risk of miscarriage, the plaintiff asked to take early the maternity leave. After the birth of the child, she asked for an extension of the maternity leave with an annual leave, according to Polish Labour Code provisions 163 § 3. The employer refused because of the long absence from work. After the Labour Inspection carried out a control, the employer allowed the plaintiff to take an annual leave, however the employer did not pay her remuneration for that time.

[114] For the full text of the case see http://orzeczenia.wroclaw-srodmiescie.sr.gov.pl/content/$N/155025500005021_X_P_000020_2016_Uz_2016-08-03_002

During the annual leave the plaintiff realised that she was pregnant again and that she was suffering from an ovary tumour. In light of these circumstances she was placed on the sick leave. When the plaintiff was placed on the sick leave, the defendant employer sent the information to the prosecutor office about the possibility of obtaining leave under false pretences. Under a decision taken on 30 March 2016 the Public Prosecutor discontinued proceedings against the plaintiff because he did not find any false or unfair conduct in prescribing the sick leave.
Subsequently, the employer informed ZUS (Social Insurance Office) about his suspicion connected to the plaintiff's conduct and effort in failing to obtain social insurance during sick leave. After a check, ZUS did not find any false or unfair conduct in prescribing the sick leave by a doctor or exploiting its sick leave by the plaintiff. In the meantime, the employer, made his own investigations regarding the manner in which the sick leave was being used by the plaintiff and ordered several inspections of the plaintiff's absence at home. As a result of those controls the plaintiff stayed at home, however one time she was absent because she went to a hospital.
On 15 April 2016, the plaintiff received the employer's unilateral decision to terminate the labour agreement on disciplinary grounds. The employer clarified that the plaintiff Ewa W. had breached a duty of loyalty because she used several sick leaves, the employer had no contact with her, and that she probably wished to unfairly obtain social benefits.
Appeal from the decision of the employer has been filled. It is not final yet.

5. *Analysis*

a. Role of the Charter

The judgement which reinstating the plaintiff on 3 August 2016 was based on articles 45 § 3, 56 § 2, 177 § 1 Labour Code and also articles 21 and 33 Fundamental Charter of EU, art. 18 Constitution of Poland and art. 10 directive 92/85/EEC and additionally on the well established case law from the Court of Justice of European Union (Dekker versus Stichting Vormingscentrum voor Jong Volwassenen, sygn. C-177/88).

The court held that all the evidence demonstrated that the disciplinary dismissal of the plaintiff was connected to her pregnancy and illness. In the opinion of the court, the dismissal was prohibited direct discrimination on the grounds of gender.

b. Judicial dialogue

Vertical cooperation (national courts – CJEU) : consistent interpretation.

National law, must be interpreted in conformity with EU law obligations. National courts are called to respect these obligations, at least through the duty of **consistent interpretation** of their content and related case-law.

Casesheet 6.4 – (Greece) Council of State, case number 1113/2014, Supreme Administrative Court, March 20th 2014

1. Core issues

The provisions of Directives 96/34 and 2006/54 must be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, *unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child*?

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	•Greece	•Art 33 (2) CFREU •Directive 96/34/EC •Directive 2006/54/EC	•Consistent interpretation •Preliminary reference •Disapplication	•Council of State •CJEU

3. *Timeline representation*

4. *Case law description*

The applicant, a judge in Greece, submitted an application to the Ministry of Justice seeking paid parental leave of nine months for the purpose of bringing up his child. According to relevant domestic law, a male civil servant (or judge) is not entitled to parental leave if his wife does not work or exercise any profession. Greek law curtailed this benefit in two ways: first of all by limiting it to judges who are mothers; and secondly by attaching strict conditions as regards fathers, which didn't apply to mothers. If a mother stays at home to look after the child (as in this case), a father could only obtain the leave if the mother was unable to look after the child due to illness or injury. The applicant stated that his wife was at the time unemployed, thus his application was rejected. Finally, the applicant lodged a complaint *(application for annulment)* against that decision before the Greek Council of State. The Greek courts had already ruled that the first limit was inapplicable. The Greek Council of State now asked the CJEU if the second limit breached EU law (compliance of the aforementioned provision of the Civil Service Code to Directives 96/34 and 2006/54).

5. *Analysis*

a. Role of the Charter

The Council of State first analysed the settled case-law of the CJEU on parental leave (C*ommission* v *Luxembourg*, C-519/03, EU:C:2005:234, paragraph 33, *Chatzi*, C-149/10, EU:C:2010:534, paragraph 37), stressing that there is an individual right of workers to take parental leave in order, on the one hand, to reconcile family and professional life, and on the other hand to promote women's participation in the labour force. However, the Court noted that it was not clear and it has not been clarified by the ECJU whether national legislation excluding fathers from taking parental leave in the case that their wives were unemployed or not exercising any profession was compatible with Directives 96/34/EC and 2006/54/EC.
The Court cited the relevant anti-discrimination provisions of the Charter (right after citing the relevant equality provisions of the Greek Constitution), and mentioned that equality between men and women is a fundamental principle of EU law. No further analysis of the Charter was contained in the judgment.

The CJEU answered that EU law must be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, *unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child* (para 53). "The provision at issue in the main proceedings constitutes direct discrimination on grounds of sex, within the meaning of Article 14(1) of Directive 2006/54, read in conjunction with Article 2(1)(a) of that directive, in respect of fathers who are civil servants, as regards the granting of parental leave." (para 52).
It constitutes direct discrimination because:

- The parental leave agreement states that parental leave is an "individual right" which is "non-transferable", applied to *each* parent (see, to that effect, judgment in *Commission* v *Luxembourg*, C-519/03, EU:C:2005:234, paragraph 33) (para 32 and 33). The possible limits referred to in the Directive make no provision for denying parental leave based on the employment status of the spouse. This literal interpretation is reinforced by the overall context of the agreement: "enable men and women to reconcile their occupational and family obligations"; Men should be encouraged to assume an "equal share of family responsibilities", inter alia by taking parental leave (para 40). "It was with the same objective" that the right to parental leave was included in Article 33 (2) of the Charter (para 39).

- Secondly, the Greek rule also violated the Directive because parental leave was a working condition, and the position of men and women was "comparable" as regards bringing up children (see judgments in *Commission* v *France*, 312/86, EU:C:1988:485, paragraph 14; *Griesmar*, C-366/99, EU:C:2001:648, paragraph 56; and *Commission* v *Greece*, C-559/07, EU:C:2009:198, paragraph 69).The Greek law attached a condition to fathers that it did not attach to mothers, and therefore constituted sex discrimination.

This distinction "is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties (see, to that effect, judgments in *Lommers*, C-476/99, EU:C:2002:183, paragraph 41, and *Roca Álvarez*, C-104/09, EU:C:2010:561, paragraph 36)" (para 50). While the Directive does provide that it is "without prejudice" to the parental leave agreement and the pregnant workers' Directive, the "deprivation' of a father's parental leave "in no way" helps the health and safety of pregnant workers or new mothers, which is the purpose of the latter Directive.

c. Judicial dialogue

<u>Vertical cooperation (national courts – CJEU)</u>

Preliminary reference to the CJEU (Case C-222/14).[115] The Court found that the national norm could probably not be reconciled with EU law and thus sought clear interpretation of the relevant Directives from the CJEU.

Horizontal cooperation (national courts)

The Court cites its own jurisprudence on matters of parental leave (Symvoulio tis Epikrateias 2/2006, 1006/2010 and 4519/2012). In those decisions the Council of State extended the right to parental leave to men exercising the profession of judge and had specified that the terms and conditions according to which judges are entitled to parental leave are similar to those set forth in the Civil Service Code.

d. Impact of CJEU decision

The national provision in question in the present case had already been abolished by Law 4210/2013 (i.e. two years after the rejection of the applicant's application), probably because the national legislator foresaw that the provision would be found to be incompatible to EU law. The referring court (Symvoulio tis Epikrateias) has yet to issue a decision after the preliminary ruling of the CJEU (decision of July 16, 2015, C-222/14).

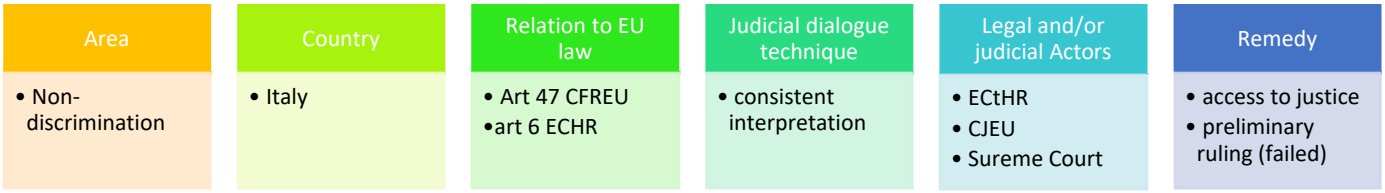
[115] Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=165905&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=359055

Casesheet 6.5 - (Italy) Dhahbi v. Italy, 8 April 2014

1. Core issues

The ECtHR ruled that Article 6(1) require EU Member states' courts to give reasons whereby they refuse to refer a question to the CJEU, or if the correct application of EU law is so obvious to leave no room for reasonable doubt.
The court concluded that the refusal to pay family allowance was based solely on his nationality.

2. At a glance



3. *Timeline representation*

4. Case law description[116]

A Tunisian national, Mr Dhahbi, was living in Italy on a work permit and was insured by the Italian Social Security Agency, having paid the required contributions. Being married and with children, Mr Dhahbi applied to the Agency for the family allowance, claiming he was eligible under the Euro-Mediterranean Agreement between the European Union and Tunisia. The Marsala District Court rejected the application as the applicant was Tunisian and not an Italian national. In the appeal decision from the Palermo Court of Appeal, the court affirmed that the allowance in question was based solely on the income and family situation of the recipients, it fell within the sphere of social assistance (assistenza sociale). The allowance had initially been intended only for Italian citizens and had subsequently been extended to all European Union nationals. However, the Euro-Mediterranean Agreement related only to social-security benefits (prestazioni previdenziali) and was therefore not applicable to the family allowance provided for by section 65 of Law no. 448 of 1998. The case eventually reached the Italian Court of Cassation, which however dismissed the appeal.

In each action, Mr Dhahbi asked the courts to refer a preliminary question to the CJEU to clarify whether under the Euro-Med agreement a Tunisian worker could be denied the family

[116] Case of Dhahbi v. Italy Available at http://hudoc.echr.coe.int/eng#{"fulltext":["dhahbi"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-142504"]}

allowance payable to Italian workers. However, none of the courts have submitted such a preliminary ruling, providing any justification for such decision.

Lacking any additional remedy, Mr Dhahbi appealed to the ECtHR complaining a violation of Article 6(1) ECHR on the right to a fair hearing over the Court of Cassation's failure to provide the legal reasoning for its refusal to refer his case. He also complained under Article 14 (prohibition of discrimination) that Italian social security law violated the principle of equality.

The ECtHR ruled that Article 6(1) required EU Member states' courts to give reasons when they refuse to refer a question because it is deemed not relevant or if deemed to be already interpreted by the CJEU, or if the correct application of EU law so obvious as to leave no room for reasonable doubt. The Supreme Court judgment, in ECtHR opinion, did not provide any information in this sense, nor was there any reference to any CJEU case law on the point of law. Therefore, the ECtHR found a violation of Article 6(1).

Under Article 14, the ECtHR noted that Mr Dhahbi was paying taxes and social insurance contributions as an EU citizen would, thus contributing to country's resources. The court concluded that the refusal to pay family allowance was based solely on his nationality. Thus, the different treatment of the government fell under Article 14 and Article 8 (right to family life). The ECtHR maintained that a difference in treatment based exclusively on the grounds of nationality requires very weighty reasons in order to be justified and that the budgetary arguments put forward by Italy did not constitute a sufficient justification.

5. Analysis

a. Role of the Charter

No mention of the Charter.

b. Judicial dialogue

Vertical (national courts – EctHR – eventually CJEU)

Horizontal (EctHR – CJEU)

Although the ECtHR did not mention in any part of its reasoning the CJEU jurisprudence (relied upon by the parties arguments and by the Italian government observations), the coordination between the two courts is confirmed by the fact that the ECtHR did not interfere with the competences of CJEU, rather it provides only a form of 'external' control of the compliance with the CJEU caselaw (in particular the *Cilfit* decision): the court does not verify the substance of the analysis regarding the decision of the national court to refuse the preliminary question, rather it requires the national court to provide at least an explanation of such a decision.

c. Remedies

The case addresses the problem of access to justice, given the limitation of standing applicable to the presentation of a preliminary reference to the CJEU. The CJEU has already addressed the obligations of national courts acting as courts against whose decisions there is no judicial remedy, in exercising their jurisdiction to issue a reference for a preliminary ruling. In the *Cilfit* judgment, the CJEU stated that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the CJEU, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been

interpreted by the Court (*acte éclairé*) or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*). The settled case-law also indicates that national courts remain, in any event, entirely at liberty to bring a matter before the CJEU if they consider it appropriate to do so.

Case sheet 6.6 – (Bulgaria) C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, judgment of The Court (Grand Chamber) 16 July 2015

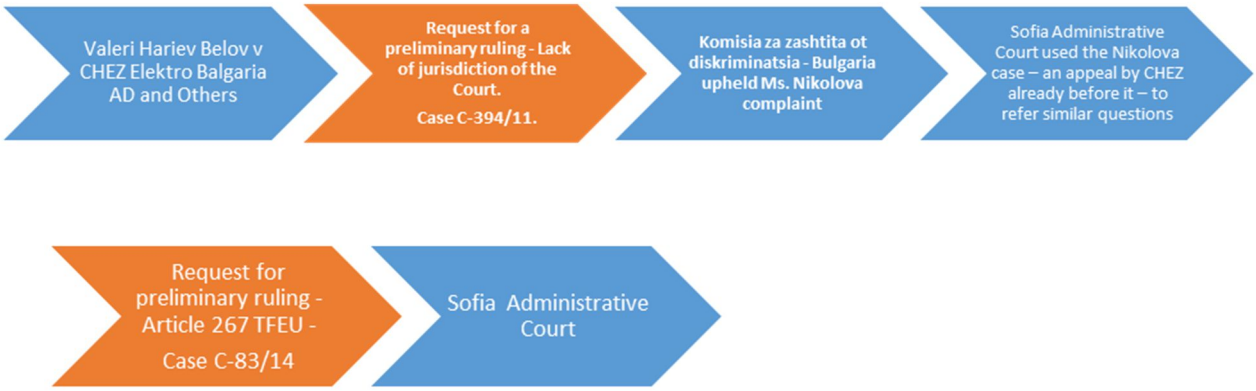
1. Core issues

Principle of equal treatment between persons irrespective of racial or ethnic origin
Concepts of 'direct discrimination' and 'indirect discrimination' — Burden of proof —
Offensive and stigmatising effect of the measure [117]

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	•Bulgaria	• art 21 CFREU •Directive 2000/43/EC •Directives 2006/32/EC and 2009/72/EC	•Preliminary reference	• CJEU •Sofia Administrative Court •Bulgarian Anti-Discrimination Commission

3. Timeline representation



4. Case law description

In December 2008, Ms Nikolova lodged an application with the Bulgarian Commission for Protection from Discrimination (KZD) in which she contended that the reason for placing electric meters on 6-7 m high pyles in the 'Gizdova mahala' district was the inhabitants` Roma origin, and that she accordingly suffered direct discrimination on the grounds of nationality. She complained that she was unable to check her consumption and making sure that the bills sent to her, which in her view overcharged her, were correct.

[117] C-83/14 CHEZ v Nikolova available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=165912&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7777

On 6 April 2010, the KZD issued a decision concluding that the practice constituted indirect indiscrimination on the grounds of nationality. That decision was annulled by judgment of the Supreme Administrative Court of 19 May 2011, in particular on the ground that the KZD had not indicated the other nationality in relation to the holders of which Ms Nikolova had suffered discrimination. The case was referred back to the KZD.

On 30 May 2012, the KZD found that CHEZ RB had discriminated directly against Ms Nikolova on the grounds of her 'personal situation', by placing her, on account of where her business was located, in a disadvantageous position compared with CHEZ RB's other customers whose meters were in accessible locations.

CHEZ RB challenged that decision before the Administrative Court in Sofia. In its order for reference, that court finds, as a preliminary point, that the RED implements the general principle prohibiting discrimination based on racial or ethnic origin which is in particular enshrined in Article 21 of the Charter and that the situation at issue in the main proceedings falls within the RED's material scope.

According to the referring court, the protected ground must be seen in relation to the common Roma 'ethnic origin' of most inhabitants of the 'Gizdova mahala' district, while the Roma community constitutes an ethnic community, which is recognized as an ethnic minority in Bulgaria.

The form of discrimination needs to be clarified. Even though the referring court is inclined to agree with the KZD's conclusion that the practice at issue gives rise to direct discrimination, it notes that, in her Opinion delivered in *Belov* (C-394/11, EU:C:2012:585, point 99), AG Kokott concluded that a practice such as the one at issue amounted prima faciae to indirect discrimination. It also observes that in similar cases the Administrative court concluded that there was no direct or indirect discrimination on the grounds of ethnic origin. In the event the practice amounted to indirect discrimination, the referring court doubts that it can be regarded as objectively justified, appropriate and necessary within the meaning of that provision. It points out in particular the lack of evidence in this regard.

The questions referred to the CJEU concern

1. the meaning of "ethnic origin" in the Racial Equality Directive and the Charter,
2. the permissibility of comparison between districts on the grounds of ethnic origin
3. whether less favorable treatment had occurred in the case
4. the applicability of the concept of direct and indirect discrimination to the present case in light of the phrase used to define direct ('less favorable treatment') and indirect discrimination ('in a particularly less favourable position') under Article 2(2) Racial Equality Directive. Does the latter cover only serious, obvious and particularly significant cases of unequal treatment?

5. *Analysis*

a. Role of the Charter

Article 21 is attributed a pivotal role in answering question 1 by legitimating a purposeful and wide interpretation of the personal scope of the Racial Equality Directive. The directive "is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter, the scope of that directive cannot be defined restrictively (judgment in *Runevič-Vardyn and Wardyn*, C391/09, EU:C:2011:291, paragraph 43)" (para 42 of CJEU).

The concept of 'discrimination on the grounds of ethnic origin', for the purpose of the Racial Equality Directive, must be interpreted as being intended to apply to `all` persons, including those who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, from the less favourable treatment or particular disadvantage. (para 57).

According to the CJEU (para 58) this results from the wording of Article 19 TFEU and of the principle of non-discrimination on grounds of race and ethnic origin enshrined in Article 21 of the Charter, to which the directive gives specific expression in the substantive fields that it covers (see judgment in *Runevič-Vardyn and Wardyn*, C391/09, EU:C:2011:291, paragraph 43, and, by analogy, judgment in *Felber*, C529/13, EU:C:2015:20, paragraphs 15 and 16). Analogy with the judgment in *Coleman* is also implied, C303/06, EU:C:2008:415, paragraph 38).

It is held that "Directive 2000/43 gives specific expression, in its field of application, to the principle of non-discrimination on grounds of race and ethnic origin which is enshrined in Article 21 of the Charter" (para 72). Article 21 is used to support a higher level of protection against the practice in the case. The CJEU establishes that CHEZ RB's practices are "offensive and stigmatising" (para 84, 87, 108) and constitute direct discrimination (para 76) but this is a matter which is for the referring court to determine (para 91).

According to the CJEU the comparators are not districts with the same levels of interference with the meters, because "in principle, all final consumers of electricity who are supplied by the same distributor within an urban area must … be regarded as being, in relation to that distributor, in a comparable situation" (para 90).

The CJEU refers back to the national courts for the proper assessment of the facts (see, to this effect, judgment in *Meister*, C415/10, EU:C:2012:217, paragraph 42)". The CJEU stresses that CHEZ RB`s assertion, namely that the "damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin" suggest that the practice at issue is based on "ethnic stereotypes or prejudices". It highlights that CHEZ RB affirmed that this is "common knowledge". Bulgarian citizens of Roma origin are being considered "as a whole...potential perpetrators". The Court recalls that such a perception may also be relevant for the overall assessment of the practice at issue (see, by analogy, judgment in *Asociația Accept*, C81/12, EU:C:2013:275, paragraph 51).

If it is apparent that a measure which gives rise to a difference in treatment has been introduced for reasons relating to racial or ethnic origin, that measure must be classified as 'direct discrimination' within the meaning of Article 2(2)(a) of Directive 2000/43. If, however, the practice is found not to amount to direct discrimination within the meaning of Article 2(2)(a) of the directive, it 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 and therefore constituting indirect discrimination.

The concept be understood not as designating a practice whose neutrality is particularly 'obvious' or neutral 'at first glance', but as being 'ostensibly' neutral. It is the Court's settled case-law that indirect discrimination may stem from a measure which, albeit … not related to the protected characteristic, nonetheless works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it (see in particular, to this effect, judgments in *Z.*, C-363/12, EU:C:2014:159, paragraph 53 and the case-law cited, and *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 28 and the case-law cited). No

particular degree of seriousness is required so far as concerns the particular disadvantage referred to in the RED.

The CJEU ruled that any measure disadvantaging a Roma majority district which is not applied to non-Roma majority districts needs to be objectively justified. Combating fraud and criminality constitute legitimate aims recognised by EU law (see *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraphs 46 and 55) but the objective justification must be interpreted strictly.

Even though the practice is said to ensure the quality and security of electricity distribution in the interest of all users, the company has the task at the very least of establishing objectively, first, the actual existence and extent of that unlawful conduct and, second, in the light of the fact that some 25 years have since elapsed, the precise reasons for which there is, as matters currently stand, a major risk in the district concerned that such damage and unlawful connections to meters will continue.

It will also be necessary to establish, that that practice constitutes an appropriate and necessary means for the purpose of achieving those aims. Would other appropriate and less restrictive measures not enable the problems encountered to be resolved?

Furthermore, assuming that no other measure as effective as the practice at issue can be identified, the referring court will also 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 (see to this effect, in particular, judgments 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.).

b. Judicial dialogue

Vertical cooperation (equality body - national courts – CJEU)

This preliminary reference originates in a complaint launched in 2008. It was made in the context of strategic litigation seeking to qualify and terminate the 'practice in the case', which had led to various negative judgments by Bulgarian courts so far. It was in essence the subject of a reference made by the KZD in Belov in 2011, when CHEZ had already been reviewed for the first time at the domestic level (C-394/11, EU:C:2012:585). However, *Belov* had been left unanswered by the CJEU, which found the KZD lacked standing to make a preliminary reference.

The referring national court relied on *Belov* and *Feryn*, two CJEU judgments in the field of discrimination based on racial or ethnic origin.

Horizontal cooperation (CJEU – ECHR)

In order to define 'ethnicity' and racial discrimination, the CJEU relied on Roma rights judgments from the ECtHR (Nachova v Bulgaria and Sejdic and Finci v Bosnia and Herzegovina) and for the first time invoked ICERD Article 1.

c. Impact of CJEU decision

This is the first substantive judgment on anti-Roma discrimination delivered by the CJEU. The threshold of protection is very high and may not be followed in cases dealing with other grounds (McCrudden).

The CJEU returned the case to the Sofia Administrative Court for it to be resolved. The CJEU analysis is geared towards finding direct discrimination. This is important because previous cases had failed before Bulgarian administrative courts. Importantly, in contrast with the restrictive interpretation of administrative courts, civil courts regularly established indirect ethnicity based discrimination. The case is still pending at the domestic level..

Casesheet 6.7 - (UK) *Benkharbouche v Sudan* and *Janah v Libya Court of Appeal, 5 February 2015*

1. Core issues

Racial discrimination; Immunities and Privileges of Diplomatic Missions; jurisdiction over employment disputes between service staff of a diplomatic mission and the foreign state; Compatibility of the State Immunity Act 1978 with Article 6, ECHR and Article 47, Charter

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	•UK	• Article 21 CFREU •Article 47 CFREU	•Consistent interpretation •Disapplication	•Foreign courts •National Courts •CJEU •ECtHR

3. *Timeline representation*

4. Case law description [118]

Two separate claims of unfair dismissal, failure to pay (both claims) and racial discrimination and harassment (one of them) were brought by two Moroccan service and domestic staff members working for Sudanese, and Libyan Embassy in London, respectively. The *UK Equality and Human Rights Commission* intervened in favour of the applicants.
In both cases, the claimants argued breach of the Working Time Regulations by their respective employers, and the respective embassies claimed immunity under the State Immunity Act (SIA). The SIA excludes certain categories of embassy employees from the protection under national law – exclusions that both Moroccan claimants fell within. The first instance courts considered that for this reason (exclusion from protection under Working Time Regulations), the claims could not be granted.
The courts of first instance considered Art. 47 of the EU Charter to be *part of national law and directly effective*. They, however, considered that Art. 47 *did not provide a means of enforcing rights over and above that provided by the Human Rights Act (HRA)*. The second first instance decision (in the discrimination case) added that there was *significant doubt over enforceability of the EU Charter before the courts*.

[118] **United Kingdom, England and Wales Court of Appeal, [2015] EWCA Civ 33, A2/2013/3062, *Benkharbouche & Anor v. Embassy of Sudan (Rev 1)*, Appellate, 5 February 2015) available at https://www.judiciary.gov.uk/wp-content/uploads/2015/02/benkharbouche-and-janah-v-embassy-republic-sudan-others.pdf**

The Appellate Court (which heard the two cases together) accepted that the SIA on its face grants procedural immunity from suit, but considered whether application of relevant national SIA provisions would engage ECHR art. 6, and if so, whether they could be conceivably interpreted in a manner consistent with it. The Court concluded that while the notion of state immunity under the SIA might have once struck the right balance with the need for foreign governments to exercise their public governmental functions, this was no longer the case and the non-application of national law in the two claims was therefore no longer justified. So the application of the SIA would breach the ECHR art. 6.
For the same reasons, the provisions of the SIA were also in *conflict with the right to access to a court under art. 47 of the Charter, which was a general principle and a fundamental right* under EU law. To the extent tht both claims fell within the scope of the EU law (employment, racial discrimination, harassment), the Appellate court was required to *disapply the national provisions* of the SIA.
The second appellate court agreed with these views of the first appellate court and stated that the application of the concerned SIA provisions breached articles 6 and also 14 (non-discrimination) of the ECHR. The Court has argued that the *content of the art 47 of the Charter is (for the purposes of this case) identical to that of art. 6 ECHR*, and it considered art 6 ECHR to also be violated. On these grounds, the Second Appelate Instance Court *declared concerned provisions of the SIA incompatible* with the above mentioned provisions of the ECHR and the Charter. The declaration of incompatibility is a signal to the parliament but does not affect the operation or validity of the SIA.

5. Analysis

a. Role of the Charter

The Charter was mentioned and analysed in the various national decisions as to its scope, direct enforceability, and compatibility of the rights conferred under it with rights conferred under national laws.

The two initial national judgments found the cases to be within the scope of the Charter, pointing to the second connection under *Siragusa* (C-206/13) and *Julian Hernandez and others* (C-198/13) case law (*national law is capable of hindering/affecting the level of protection that the EU act aims at establishing*).

The appellate decision considered the two initial claims to be within the material scope of the EU law on discrimination in employment, and, in addition, within the EU fundamental right of access to a court, while certain national provisions (of the SIA) by restricting access of the claimants to national jurisdiction courts, effectively restricted the scope of protection against discrimination afforded them under the EU law.
The second appellate decision recapitulates that under art. 51 and 52(5) Charter, the Charter does not apply to claims based solely on national law. The court considered that claimants had both kinds of claims – under national law and under EU law (the latter being primarily the Working Time Regulation, racial discrimination and harassment claims).

The second appellate court also dealt with the question of the *horizontal direct effect of the Charter,* in order to answer the question as to whether the applicants can rely on the Charter even when Libya and Sudan are not EU member states or EU institutions. To do so, the court cites CJEU cases *Mangold v Helm, Kücükdeveci v Swedex* and *Association de Mediation Sociale (AMS)* to conclude that:

- Art. 21 EU Charter now supports the existence of a general principle of non-discrimination;
- Art. 47 EU Charter now contains the right to an effective remedy which is a general principle of EU law; and accordingly
- Both provisions have direct horizontal effect.

In sum, the first instance courts considered the conflict between art. 6 ECHR and art. 47 Charter on one hand, and the SIA provisions on the other, and decided not to disapply the SIA provisions.
These decisions were overturned on appeal, where the national provisions were disapplied for incompatibility with art. 6 ECHR and art. 47 Charter.
From perspective of the application of the Charter application, the most interesting point examined by the Court of Appeal was the application of the "horizontal direct effect" of Charter rights. Since non-EU States are not bound by EU law as States, the court assimilated them to private parties.

b. Judicial dialogue

Vertical cooperation (CJEU – national courts): consistent interpretation

Case C144/04 *Mangold v Helm* [2005] ECR I9981

Case C555/07 *Kücükdeveci v Swedex* [2010] IRLR 346

Case C176/*12 Association de Mediation Sociale (AMS)* [2014] ECR I000 ("*AMS*")

(described above)

Horizontal ccooperation (national courts – foreign courts): consistent interpretation

On the issue of state immunity and its relationship with art. 6 ECHR, the second appellate instance court cites extensively prior decisions of the UK courts, the ECtHR, of national Tribunals, as well as foreign sources.

A number of foreign courts' decisions are mentioned and also discussed: Sengupta v. Republic of India (as common law source before the SIA entered into effect); Canada, Norway, Turkey, Germany, Brazil; USA, Australia; New Zealand, Japan, Singapore; several EU member states; ECtHR and CJEU case.

c. Remedies

The Court of Appeal:

(1) resorted to consistent interpretation of ECtHR case law, concluding that state immunity could not be invoked against all employment law claims, but only against those claims concerning core embassy staff – issuing a "declaration of incompatibility";[119]

(2) ruled that the relevant provisions of the *State Immunity Act* had to be disapplied, to the extent that they were applied as a barrier to the claims based on EU law.[120]

[119] At lower levels, the tribunals cannot rule on the claims for breach of the ECHR, since the UK's Human Rights Act establishes that only higher courts can issue a 'declaration of incompatibility' of an Act of Parliament based on a breach of the ECHR. So the Court of Appeal was the first court that could issue such a declaration, and it did so in this case.
[120] Any national court or tribunal has the power to disapply an act of parliament if necessary to give effect to EU law.

Only the higher court could contemplate issuing a declaration of incompatibility with the ECHR; while courts of any level can disapply the law based on Article 47. Plus, the remedy of disapplication of the Act of Parliament is obviously stronger than the declaration of incompatibility, allowing the case to proceed on the merits (as far as it relates to EU law) rather than having to wait for Parliament to change the law in order to do so.

Of course the case has to be linked to EU law in order for the Charter to apply: only the race discrimination and working time claims benefit from the disapplication of provisions of the Act of Parliament, and so only those claims can proceed to court as things stand.[121]

[121] For more information on the impact of this case see Barnard & Peers, Rights, remedies and state immunity: the Court of Appeal judgment in Benkharbouche and Janah, 6 February 2015, http://eulawanalysis.blogspot.com/2015/02/rights-remedies-and-state-immunity.html

Casesheet 6.8 - Case C-354/13 Kaltoft V Municipality of Billund, 16 December, 2014

1. Core issues

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?

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?

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 …?

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?

2. *At a glance*

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	• Denmark	•Art. 21, 26 CFREU	•Preliminary reference •Consistent interpretation	• National Courts •CJEU

3. *Timeline representation*

4. *Case law description* [122]

After 15 years of working as a municipality's babysitter in Billund, and following a decline in the number of children requiring care, Mr. Kaltoft was dismissed in November 2010. He was the only babysitter of approx.. 135 to have his employment terminated. He had been severely

[122] Full texto of the case available at ur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0354

obese during his whole career and several times his employer had offered assistance to help Mr. Kaltoft lose weight. His obesity was also mentioned in a meeting where Mr. Kaltoft inquired about the reason why he had been dismissed. Mr. Kaltoft claimed that he was dismissed on account of his obesity and he filed a suit before the Court in Kolding claiming discriminatory dismissal due to obesity and compensation.

5. Analysis

a. Role of the Charter

The national court was uncertain as to whether obesity is a grounds for discrimination addressed under EU discrimination law, and referred questions to that effect to the CJEU. The national decision invokes art. 6 TEU as a potential source where obesity could be found as a discriminatory ground, and the Directive 2000/78/EC, where obesity could potentially be found within the meaning of "disability". The onnecting factor in this case is the implementation of an EU act (Directive 2000/78/EC) by the national legislation (Law on anti-discrimination).

The CJEU applied *Chacón Navas* C-13/05 (Court declined to extend the list of protected grounds to 'sickness') to answer the first question. The CJEU recognizes the existence the general principle of non-discrimination but notes that the exhaustive list of discrimination grounds in Article 1 of Directive2000/78/EC cannot be extended by analogy. The CJEU also reiterated *Åkerberg Fransson* C-617/10, summarily pointing out that the EU Charter was inapplicable in this case because obesity discrimination does not fall within the scope of EU law.

AG Jääskinen Opinion stated that the Charter does not apply because:

- The general non-discrimination clause of Article 10 TFEU and the legal basis of Article 19 TFEU do not refer to obesity;
- The Equality Directives do not refer to obesity either, and the fact that this case concerns an area falling within the Union's competence (i.e. employment policy) 'is an insufficient foundation for concluding that a Member State (…) is "implementing" EU law.'

Hence, even if the list of discrimination grounds in Article 21 of the EU Charter is open-ended, there is not a sufficient 'degree of connection with EU law' to consider obesity as a free-standing ground of discrimination on the basis of the EU Charter.

To answer the second question the CJEU analysed whether, under some circumstances, obesity could fall within the concept of disability developed in *HK Danmark* C-335/11 - 'disability' as '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' (*Kaltoft*, para 53, citing *HK Danmark*, para 38). The CJEU agrees with AG Jääskinen that, in some circumstances, obesity may hinder the full and effective participation of some persons in professional life on a long-term basis (e.g. if it leads to mobility problems), and in those cases, obesity discrimination can fall within the EU concept of 'disability discrimination'

b. Judicial dialogue

<u>Vertical cooperation (national court – CJEU)</u>

In this case the national court refers preliminary questions to the CJEU in order to establish whether the discrimination on grounds of obesity falls within the scope of Charter's (and other EU law – namely the TEU) conceptualization of discrimination, or disability discrimination (under and Directive 2000/78/EC), respectively.

c. *Impact of CJEU decision*
The CJEU decided that:

- EU law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation.

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the obesity of a worker constitutes a 'disability' within the meaning of that directive where it 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. It is for the national court to determine whether, in the main proceedings, those conditions are met.

- Before the Danish city court, the Danish trade union, on behalf of Mr Kaltoft, claimed that international convention obligations (UNCRPD) include fundamental rights regarding anti-discrimination, including a prohibition against discrimination based on obesity. These convention obligations can be enforced by the Danish courts, as Denmark has incorporated or adopted the conventions in question. The Danish city court has yet to deliver its judgment. The judgment may subsequently be appealed by both parties to the Danish High Court.

Spill-over effect to other EU Member States:

Belgium, Labour Court/Tribunal du travail de Liège, 20/06/2016[123]

By an e-mail sent on 21.02.2016, Ms B answered to M. D's application for a job as a driving instructor. The e-mail contained the following sentences: "After our interview, and due reflection, unfortunately your physical profile does not fit for the job of driving instructor in my undertaking. Did you ever think about losing weight? I think this is a handicap for this job".

According to the Labour Court, which referred to the relevant case-law of the Court of Justice (Case C-335/11, 11 April 2013, *HK Danmark* Case C-354/13, 18 December 2014), obesity is not as such a prohibited ground of differentiation. However, it may become a disability when it 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

[123] Case available at http://unia.be/files/Documenten/2016_06_20_Trib._trav._Li%C3%A8ge.pdf

professional life, on an equal basis with other workers. In this particular case, M. D was treated less favourably than another person in a comparable situation so that the distinction in question should be regarded as a direct discrimination. As regards the possible ground of justification namely the genuine and determinative occupational requirement, the Labour Court pointed out that the Ms B. relied upon the students and driving instructors' security but this justification was only based on theorical and general assertions, Ms B. remaining unable to concretely apply this justification in the circumstances of the case. Moreover, the defendant did not provide for reasonable accommodation (by instance by examinating whether M. D. could have been hired only for the theorical part of the driving lessons).

Case sheet 6.9 – (Slovenia) Constitutional Court (Ustavno sodišče RS), U-I-146/07, 13.11.2008

1. Core issues

The petitioner challenges Article 102 of the Civil Procedure Act (hereinafter referred to as the CPA), which regulates the right of participants in proceedings to use their language at hearings and during other oral parts of the proceedings. He alleges that the challenged provision is inconsistent with the Constitution as it does not regulate the right of blind persons to Braille transcripts of court documents and the written applications of parties and other participants in proceedings.

CPA is inconsistent with the Constitution as it does not explicitly regulate the right of blind persons to free access to court documents and the written applications of parties and other participants in proceedings in Braille.[124]

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	• Slovenia	•Article 21 •Article 26	•Consistent interpretation	•Civil Court •Constitutional Court

3. Timeline representation

4. Case law description

In a procedure before the civil court, the Petitioner demanded a copy of the application and other documents in Braille and that the costs be covered by other party. The Court rejected his request on the ground that the Civil Procedure Act does not provide any basis on which the court should provide a blind person the copies of the pleadings in the Braille alphabet. The petitioner then made an application for the constitutionality of this law to be assessed by the Constitutional Court, claiming that blind people who litigate before courts face indirect discriminated.

The Constitutional Court established that the legislature's failure to ensure blind persons the necessary and appropriate accommodations that would enable them to exercise their right to

[124] For an english version of the decision see http://odlocitve.us-rs.si/en/odlocitev/AN03157?q=U-I-146%2F07

fair treatment in civil proceedings on an equal basis with others is an interference with their right to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution). The court then analysed if such interference is constitutionally admissible. An interference with human rights is constitutionally permitted if it is based on a constitutionally permitted, i.e. objectively substantiated, aim (the third paragraph of Article 15 of the Constitution) and if it is in accordance with the general principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution).

The Constitutional Court established that there exists a legal gap in the regulation of civil proceedings that cannot be filled and that it is deficient to such an extent that filling it in specific cases would be arbitrary as there exist no predictable and legally reliable criteria that would indicate how to proceed in individual cases.

From the principle of non-discrimination (as a fundamental element of the principle of equality) determined by the first paragraph of Article 14 of the Constitution there follows not only the requirement of formal equal treatment, but of *de facto* equal treatment as well. Therefore, not only direct but also indirect discrimination is constitutionally prohibited. Indirect discrimination exists if individuals or social groups are formally ensured equal rights or an equal scope of rights and who nonetheless are in a *de facto* less favourable position and are disadvantaged with regard to the exercise of their rights or the fulfilment of their obligations. In order to ensure the equal treatment of such disadvantaged social groups or individuals (who are at a particular disadvantage due to a personal circumstance as determined by the first paragraph of Article 14 of the Constitution), in certain instances the prohibition of discrimination can also entail the requirement to make necessary and appropriate accommodations in order to prevent these groups or individuals from being placed in a disadvantaged position. Positive measures adopted for this purpose do not entail an interference with the principle of equality but are intended for its implementation. Therefore, the omission or denial of necessary and appropriate accommodations in such instances entails an interference with the right to equal (i.e. non-discriminatory) treatment as determined by the first paragraph of Article 14 of the Constitution. Such unequal treatment is constitutionally permitted only if it passes the strict test of proportionality. Despite the fact that blind and partially sighted persons are an objectively disadvantaged social group, the existing regulation of civil procedure does not ensure the necessary and appropriate provisions that would enable them to exercise their right to fair treatment in proceedings (Article 22 of the Constitution) on an equal basis with others. Such an omission on the part of the legislature entails a constitutionally impermissable interference with their right to non-discriminatory treatment.

5. *Analysis*

a. Role of the Charter

The Court cited Charter of Fundamental Rights of the European Union which emphasises that persons with disabilities must be ensured not only formal (legal) equality, but also *de facto* (substantive) equality, which is intended to ensure equal opportunities and equality of results in order to eliminate *de facto* inequalities. The first paragraph of Article 21 of the Charter namely not only emphasises that discrimination based on disability is prohibited, but Article 26 explicitly recognises and guarantees persons with disabilities the right to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

b. Judicial dialogue

Vertical cooperation (constitutional court – EU law)

As this is a matter of a constitutional nature, the Constitutional Court is keen to draw from external sources and engage in **consistent interpretation** to support its opinion. The use of EU law is used to demonstrate that its judgment reflects a a global trend.

c. Remedies

The National Assembly must remedy the established inconsistency within a period of one year from the publication of this Decision in the Official Gazette of the Republic of Slovenia.

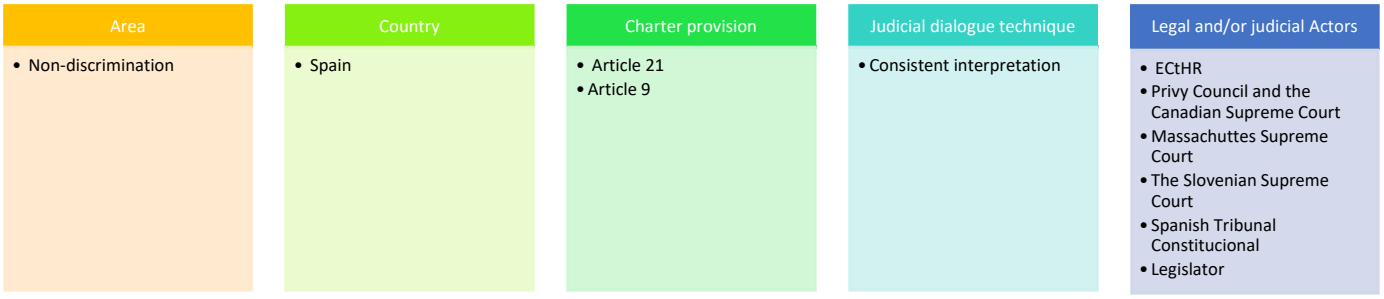
Until the established inconsistency is remedied, courts in civil proceedings must provide blind and partially sighted persons, upon their request, access to court documents and written applications of parties and other participants in proceedings in a form accessible to them. The costs required for such are to be paid from the funds of the court.

Casesheet 6.10 – (Spain) Constitutional Court, STC 198/2012, 6 November 2012[125]

1. Core issues

Does the Spanish Constitution allow for same-sex marriage?

2. At a glance



3. Timeline representation

4. Case law description

The Civil Code was amended by Law 13/2005 to allow for same sex marriage. This law was challenged before the Constitutional Court by more than 50 Deputies of the Popular Party. The applicants claimed that the recognition of same sex marriage clashed, *inter alia*, with Article 32 of the Spanish Constitution, establishing that that men and women have the right to marry.
The Spanish *Tribunal Constitucional* followed an evolutionary interpretation of the Constitution and held that Article 32 of the Constitution did not prevent the legislator from passing a law to allow for same sex marriage[126]. The Court indicated that the recognition of same sex marriage was a legislative option supported by the principle of equality, but failed to ground its decision upon the right to non-discrimination on the basis of sexual orientation.
The *Tribunal Constitucional* made use of comparative law, by making reference to the legislation and court decisions of other countries. The *Tribunal* initially referred to a Privy Council precedent solely to borrow the image of the Constitution as a "growing tree,"[127] but it then mentioned the use of this analogy in the Canadian Supreme Court's judgment on same-sex marriage,[128] displaying a clear comparative effort used to support the assessment of the very legal point before it. Similarly, the *Tribunal* introduced a full overview of the jurisdictions that recognise same-sex marriage, either under their laws or subsequent to a judicial decision (see

[125] This case sheet is based on the case note in the Handbook on the principle of non-discrimination on the grounds of age, race, gender, disability and sexual orientation, pp 51-53, by the Centre for Judicial Cooperation available at http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx

[126] Constitutional Court, STC 198/2012, 6 November 2012, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106.

[127] Privy Council, *Edwards v A.G. Canada* [1930] AC 123, 1 DLR 98 (PC).

[128] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

the reference to the Massachusetts Supreme Court [129] and the Constitutional Court of Slovenia).[130]
Also, the *Tribunal Constitucional* opted for a consistent interpretation of Article 32 of the Constitution in light of the ECtHR's case-law. In *Schalk and Kopf v. Austria*, the Strasbourg Court had issued an evolutionary interpretation of Article 12 ECHR, drawing support from the literal tone of Article 9 of the EU Charter of Fundamental Rights, which does not explicitly refer to men and women..

5. Analysis

a. Role of the Charter

It is worth noting that the *Tribunal* does not simply mention these authorities *ad abundantiam*, but as decisive evidence that strengthened the Tribunal's opinion that the institution of marriage as a union between a man and a woman is fading out.[131]
Moreover, the *Tribunal* repeats this exercise when it turns to the rationale of Law 13/2005. It identifies the purpose of the law in the "equating the legal status of homosexual and heterosexual persons," and evokes several ECtHR decisions, as well as Art. 21 of the EU Charter of Fundamental Rights as evidence that this purpose is underpinning a general trend. The case-law of the Strasbourg Court is also heavily cited[132] to prove that States enjoy a wide margin of discretion in regulating the possibility to extend the institution of marriage to same-sex couples.
Significantly, the *Tribunal* takes also the opportunity to mention a case [133] (regarding discrimination on grounds of sexual identity), in which its position on the equal treatment rights granted to a transsexual parent was later sanctioned by the Court of Strasbourg.[134]

b. Judicial dialogue

- <u>*vertical*</u> (constitutional court – ECtHR; constitutional court – EU law)

National law, including the constitution, must be interpreted in conformity with ECHR and EU law obligations. Since Spain shares the constitutional instruments on fundamental rights that belong to the EU and ECHR systems, it cannot ignore their content and the case-law that stems therefrom, and possibly it is called to respect them, at least through the duty of **consistent interpretation** codified in Art. 10(2) of the Constitution. Interestingly, the *Tribunal* cites the *Schalk v. Kopf* case, that several other national courts put forward as example of the absence of an obligation to recognize same-sex marriages. The *Tribunal*, instead, highlights the passages where the ECtHR acknowledges that marriage is not necessarily a heterosexual union. Together with *Fretté* and the other similar cases, this judgment serves the purpose of validating the ECHR-compliance of Ley 13/2005, and crowns the Tribunal's effort to frame it as a normal expression of evolutionary constitutionalism, rather than an unconstitutional extravagance.

- <u>*horizontal*</u> (constitutional court – foreign courts). Foreign legislation and case-law can provide useful <u>*elements*</u> to reinforce judicial reasoning in constitutional cases. In this

129 *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).
130 Judgment of 2 July 2009, *Blažič and Kern v. Slovenia* U-I-425/06-10.
131 See Fundamento no. 9: '[the comparative survey provided above] nos lleva a afirmar que la institución del matrimonio como unión entre dos personas independientemente de su orientación sexual se ha ido asentando, siendo prueba de ello la evolución verificada en Derecho comparado y en el Derecho europeo de los derechos humanos respecto de la consideración del matrimonio entre personas del mismo sexo.'
132 Starting with the leading case of 2002 *Fretté v. France* (App. no. 36515/97).
133 STC 176/2008, of 22 December 2008.
134 See the 2010 judgment in *P.V. v. Spain* (App. no. 35159/09).

case, Supreme Court of Slovenia[135], Supreme Court of Massachuttes,[136] Privy Council and Canadian Supreme Court.

This case is a prime example of the **use of a comparative method** to strengthen judicial reasoning in fundamental rights adjudication. Interestingly, and somewhat differently from the other cases in this handbook, this judgment is in response to a challenge to provisions establishing advanced same-sex rights (in the other instances, the proceedings usually originate from challenges to *the lack* of similar provisions, or invocations of equal treatment by members of a discriminated group). In other words, in this instance the case of the claimants is built on the assumption that equal treatment does not serve the purpose of equality, since it concerns two situations that are so different that fairness would require the law to treat them differently. This being a matter of purely constitutional nature, the *Tribunal* is keen to draw from external sources and engage in comparative analysis to bring ammunition to its opinion. The intensive use of normative and judicial examples from other jurisdictions is geared towards the demonstration that a global trend is in action, and that therefore the constitutional soundness of the law impugned is out of question.

[135] Judgment of 2 July 2009, *Blažič and Kern v. Slovenia* U-I-425/06-10.

[136] *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

Casesheet 6.11 - (Austria) Constitutional Court, Case B166/2013, 13 March 2014

1. Core issues

The case concerned a homosexual couple from the Netherlands who wanted to repeat their marriage in Tyrol, Austria.

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	• Austria	•Article 21 •Articles 51 and Article 52 para. 3 •Art 8 ECHR	•consistent interpretation •spill-over effect	•ECtHR •National Authorities •Austrian Constitutional Court, Case B166/2013, 13 March 2014

3. Timeline representation

4. Case law description

On 18 August 1998, the complainants, two male Dutch nationals, entered into a registered partnership in the Netherlands, which was converted into a marriage by law on 11 June 2002. For several years the two complainants lived in Tyrol. Since they were constantly confronted with doubts as to whether their marriage, which was concluded under Dutch law, was valid in Austria, the complainants requested the repetition of their marriage in Austria. With a final decision of the last instance of the court of 13 December 2012, this application was refused by the Landeshauptmann of Tyrol.

The Landeshauptmann of Tyrol stated that, according to Austrian law, heterosexual and homosexual couples enjoyed different legal institutions, as a registered partnership could be justified by homosexual couples and a marriage was only possible for heterosexual couples. Pursuant to Section 16 of the Federal Law of 15 June 1978 on Private International Law, BGBl 34/1978, as amended by the Federal Law, the formal requirements for the conclusion of Austrian law were laid down in Austria. Rejection of the applicants' request for repetition of their marriage in the Netherlands constitutes a grounds of appeal. The Authority refers to the judgment of the European Court of Human Rights of 24 June 2010 *Schalk and Kopf*, as well as the findings of the Constitutional Court VfSlg 19.492 / 2011. In the light of those decisions, it is not apparent that the applicants' rights were infringed.

In their appeal to the Constitutional Court, based on Art. 144 B-VG, the two complainants argue that the contested decision infringes their constitutionally guaranteed rights to equal treatment and non-discrimination on grounds of sex and sexual orientation. In summary, the appellants based their arguments on the fact that, pursuant to Article 13 of the Ordinance on the

Implementation and Completion of the Law for the Unification of the Law of Entitlement and the Arbitration in the Land of Austria and the Kingdom of the Reich (Matrimonial Law) of 27 July 1938 , DRGBl. 1938, 923 (DVOEheG), they have the right to repeat the marriage in accordance with the rules applicable to a marriage (and not merely to a registered partnership) in case of doubts about the validity of its marriage in the Netherlands. By rejecting the application, the complainant discriminated between the sexes and on the grounds of sexual orientation, pointing out that marriage was open only to couples of different sexes in Austria. In particular, this violates the rights of the complainants arising from the relevant prohibitions of discrimination, in particular Art 7 B-VG, Art. 14 in conjunction with Art 8 ECHR, and Art 21. The decision of the authority also limits the complainant in the exercise of his rights as a citizen of the Union and of his right of free movement within the European Union. The complainants therefore also suggest that the question of unjustified discrimination, prohoibited by Article 21 (1), should be submitted to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU.

5. Analysis

The Austrian authorities did not allow for a repetition of the marriage in Tyrol and the couple claimed that their constitutional rights as guaranteed by Articles 8 and 14 of the ECHR and Article 21 of the Charter were violated by this decision. With regard to its previous judgment[137], in which the Constitutional Court ruled that the rights enshrined in the Charter can be brought to the Constitutional Court as constitutionally guaranteed rights and are to be used as suitable scales in the area of competence of the Charter, the Court raised the question of whether Article 21 of the Charter was applicable in the present case. The Court found that the national provisions of marital law do not aim at implementing EU law. Therefore, the Court ruled that the Charter was not applicable.[138]

In the decision - regarding the applicability of the principle of non-discrimination (Article 21) of the Charter - the Constitutional Court concludes with a hypothetical statement. Building on the case law of the ECtHR, the Constitutional Court states that, even if the Charter were applied in the given case, it would not make any difference to its outcome. As the ECtHR has shown in *Schalk and Kopf* (Case 30141/04) – so the Constitutional Court emphasises – the decision on the question of whether or not homosexual couples must have the same access to marriage as heterosexual couples presupposes the assessment of societal developments, which might be different in the different Member States of the EU. Returning to the law of the EU, the Court states: "Regarding the question of access to marriage of same sex couples a competence for the Union is absent, therefore [Article 21 of the Charter] is not opposed to the fact that the requirements stemming from the prohibition of discrimination diverge amongst member states, as long as – which is true for the case in question as the quoted jurisprudence of the ECtHR

[137] Constitutional Court Austria (Verfassungsgerichtshof Österreich), joined cases U 466/11-18 U 1836/11-13, VfSlg 19.632/2012, 14.3.2012 available at: https://www.vfgh.gv.at/cms/vfghsite/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf.

[138] Constitutional Court Austria (Verfassungsgerichtshof Österreich), case B166/2013, 13.3.2014, available at: www.ris.bka.gv.at/Dokument.wxe?Abfrage=Gesamtabfrage&Dokumentnummer=JFT_20140312_13B00166_00&ResultFunctionToken=4d6a6c54-02c0-443e-990d-5bdfadfd80bb&SearchInAsylGH=&SearchInBegut=&SearchInBgblAlt=&SearchInBgblAuth=&SearchInBgblPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblAuth=&SearchInLrBgld=&SearchInLrK=&SearchInLrNo=&SearchInLrOO=&SearchInLrSbg=&SearchInLrStmk=&SearchInLrT=&SearchInLrVbg=&SearchInLrW=&SearchInNormenliste=&SearchInPvak=&SearchInRegV=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=GRC.

shows – the understanding and scope of the prohibition of discrimination corresponds to Art. 14 ECHR [...]."

a. Role of the Charter

The couple's claim, based on the non-discrimination clause (Article 21) of the Charter, was rejected with the argument that the national non-discrimination provision in question does not have to be in compliance with Article 21 of the Charter, as it does not aim at implementing any Union law. Moreover, the national provisions are outside the scope of application of the EU equality directives, so that "there is no provision of Union law which is specific to this area or might influence it". Therefore, the Constitutional Court continued, the Union rules in the present case do not create obligations for Member States and the fundamental rights of the Charter are not applicable to the national rules determining the case.

b. Judicial dialogue

- Horizontal (ECtHR – EU Charter)

The Austrian Constitutional Court, recalling expressly its **duties of consistent interpretation** *vis-à-vis* ECtHR's case-law and EU law, has provided a strict reading of the constitutional provision on non-discrimination looking at the ECtHR's use of the ECHR and Charter provisions.

- Vertical cooperation (Austrian Constitutional Court – ECtHR – potentially CJEU)

Schalk and Kopf v Austria is a particular apt example of spill-over effect: the decision concerned Austria but it was cited by judges of other national jurisdictions.

The ECtHR acknowledges state discretion in cases like *Schalk and Kopf* and how different jurisdictions can make different use of it (contrast the Italian, French, Portuguese and the Spanish judgments on same-sex marriage). Interestingly, the existence of a margin of appreciation might serve as a defense for a measure that seemingly contradicts the ECHR, and therefore the national court must examine this issue to make a determination about its ECHR-compliance.

c. Impact of CJEU's decisions

Note that the CJEU does not typically grant a proper margin of appreciation in a similar fashion to the ECtHR's judgment in *Schalk and Kopf*. Since the CJEU has jurisdiction on EU law, it usually has to rule on the reach and effects of EU legislation and in order to preserve the uniform application of EU law affords **less leeway to Member States**.[139] For instance, it held in *Römer* that a domestic statute entailing a preferential pension treatment for married pensioners over pensioners who had registered their same-sex life partnership constituted 'direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension.'[140] Note however that this conclusion was premised on the existence of the register of life partnerships in Germany, which rendered the situation of life-partners and married couples comparable; the CJEU did not go as far as to compel under EU law all States to *ensure* that comparability. On the contrary, the CJEU considers it a task for domestic court to ascertain whether the situation is comparable (see *Maruko*[141]) and only regulates the legal effect if the answer is positive (ie that no discrimination exists).

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139 Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, judgment of 26 February 2013.

140 Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECR I-3591.

141 Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Btihnen* [2008] ECR I-1757. The CJEU found it discriminatory to treat persons in comparable situations differently (in the specific case, a man sought to obtain survival benefits

In other countries, similar exercises have taken place.

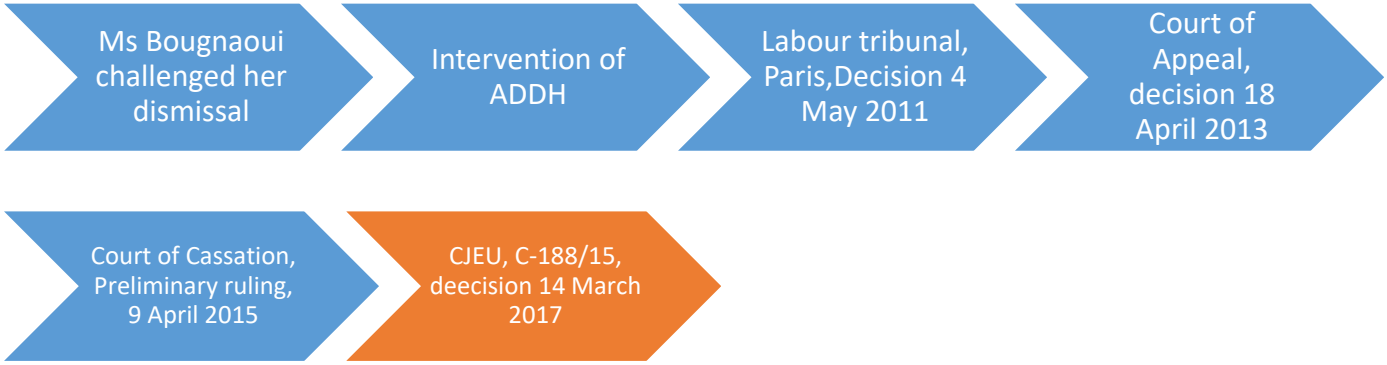
granted under the contributory scheme subscribed to by his male partner, after the death of the latter), but ultimately left it to national courts to decide whether the situation of a survivor in a same-sex couple was comparable to a widower in a married couple.

Casesheet 6.12 - Asma Bougnaoui, Association de defense des droits de L'Homme (ADDH) v Micropole Univers SA, C-188-15, the Court (Grand Chamber), 14 March 2017

1. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	• France	•Article 10(1) •Article 52 para. 3	•purposive interpretation •critical comparative analysis •preliminary reference	•ADDH •National courts •cour de cassation •AG •CJEU

2. Timeline:



3. Case law description

The case follows up on previous litigation at the domestic level (most recently, Cour de cassation, assemblée plénière, 25 June 2014, arrêt No 13-28.845 ('Baby Loup'), as well as before the European Court of Human Rights - particularly S.A.S. v. France, and Ebrahimian v. France.

This is the first preliminary referral that challenges the French approach to religious apparel - particularly those worn by Muslim women - manifest in a general ban. However, different from previous challenges in the employment context, this case relates to the impact of this ban ostensibly based on laicite in the private sector, not the public one, where the state's neutrality carries more weight.

5. Analysis

Ms Asma Bougnaoui was employed as a design engineer by Micropole SA, a company described in the order for reference as specialising in advice, engineering and specialised training for the development and integration of decision-making solutions. Prior to working for that company as an employee, she had completed a period of end-of-studies training there. Her contract of employment with Micropole started on 15 July 2008.

On 15 June 2009, she was called to an interview preliminary to possible dismissal and she was subsequently dismissed by letter of 22 June 2009. That dismissal letter stated that when hired, she had been informed about not being able to wear the veil in all circumstances. 'We asked you to work for the client, Groupama, on 15 May, at their site in Toulouse. Following that work, the client told us that the wearing of a veil, which you in fact wear every day, had embarrassed a number of its employees. It also requested that there should be "no veil next time". Micropole terminated Ms Bouganoui's employment contract and given that failure to work during the notice period was attributable to her, she was not remunerated for the notice period.

In November 2009, Ms Bougnaoui challenged the decision to dismiss her before the Conseil de prud'hommes (Labour Tribunal), Paris, claiming that it was a discriminatory act based on her religious beliefs. The Association de défense des droits de l'homme (Association for the protection of human rights; 'the ADDH') intervened voluntarily in those proceedings. By judgment of 4 May 2011, that tribunal held the dismissal to be well founded on the basis of a genuine and serious reason, ordered Micropole to pay Ms Bougnaoui the sum of EUR 8 378.78 by way of compensation in respect of her period of notice and rejected her other claims on the merits.

On appeal by Ms Bougnaoui and cross-appeal by Micropole, the Cour d'appel de Paris (Court of Appeal, Paris) upheld the judgment of the Labour Tribunal by judgment of 18 April 2013.

Ms Bougnaoui has brought an appeal against that judgment before the referring court, which referred the following question to the Court of Justice under Article 267 TFEU: '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?'

The Opinion relies on the ECHR, the TEU, the Charter and the Employment Equality Directive - in this order. It discusses comparative jurisprudence and Strasbourg case law in great detail.
The Charter is invoked in order to permit analogy with Convention case law. Article 52(3) is referred in order to justify 'levelling up' from protection available under the Convention. This clever reliance on the Charter and the emphasis on employment in the private sector allows the opinion to counter arguments based on the right to maintain national constitutional identities, as enshrined in Article 4(2) TEU.
As discussed by Advocate General Maduro in Coleman, the general/fundamental principle of non-discrimination is based on individual dignity and autonomy, pursuant to which individuals possess equal dignity and have the right to make individual choices unfettered by personal characteristics, including religion.
There are non-negotiable parts of religion, which is an immutable characteristic, similar to sex, racial or ethnic origin, etc. The case does not concern proselytization, which is not protected under Convention case law, nor does it concern protection from sex discrimination, as the impugned practice of wearing the Islamic veil results from free choice (analogy with SAS v France). Rather, it concerns manifestation of religion, which must, as far as possible, be accommodated through consensus between employer and employee - of which the opinion provides examples.
The ban in practice constitutes direct religion based discrimination, against which few justifications are available under EU law (as opposed to ECtHR case law, which is why it is important that the latter is not based on non-discrimination as a fundamental principle). Under

Article 4(1) the specific circumstances do not reveal an essential occupational requirement not to wear the veil. Other justifications are not applicable.
The freedom to conduct a business, narrowly interpreted could provide justification if a neutral dress code applied at the work place to all employees in a proportionate manner.
CJEU: a requirement that is not objectively dictated, rather, stems from an employer`s subjective expectations vis-à-vis an employee concerning her attire when in contact with a customer does not qualify as genuine and determining occupational requirement. Such clothing includes the Islamic headscarf (paras 41-41.).

a. Role of the Charter

AG opinion: Article 10 (freedom of religion), 16, (freedom to conduct a business) and 21 (non-discrimination) are discussed. Article 16 is not an absolute principle and Article 10 allows derogations/exceptions. Article 16 cannot serve as a means to widen the scope of GDOR (Article 4(1) EED), given the non-discrimination principle in Article 21.
CJEU: the concept of religion, although not defined in Article 1 EED, should be interpreted as covering both forum internum and externum, i.e. the right to have a belief and manifest religious faith.
AG Opinion: The function of non-discrimination differs under the two legal regimes and therefore the Convention and the Charter. Based on Coleman, Advocate General Sharpton explains that non-discrimination is a general principle of EU law, while Article 14 only plays an ancillary role under the Convention.
CJEU: the right to religion is recognized in both the Charter and the ECHR, their meaning and scope is the same, being broad.
AG: purposive, comparative and doctrinal interpretation of national jurisprudence relating to the Islamic veil, critical interpretation of ECtHR jurisprudence with a view to providing protection under EU law in compliance with Article 52(3) of the Charter.
CJEU: by invoking Achbita, the Court refers to ECtHR jurisprudence in a restrictive manner

b. Judicial dialogue

- <u>Horizontal (ECtHR – EU Charter)</u>

Advocate General Sharpton proposes a comparative analysis of interpretive frames regarding the Islamic veil and identifies restriction (on the freedom of religion) and non-discrimination based approaches. She also notes a shift in the ECtHR's case law: 1. distinction between employees in public v private sector, 2. proselytizing not supported, 3. the freedom to change jobs should not lead to no finding of a violation. She notes the uneven application of Article 14. An important part of her analysis focuses on Member States other than France and Belgium, where no general ban is imposed, but laicite is not a founding principle and state neutrality takes on diverse interpretation.

Advocate General Sharpston references Article 4(2) TEU, Article 10, 16 and 21 of the CFREU and a wide array of case law from all grounds, perhaps most importantly Coleman. The CJEU references Achbita, C-157/15. On genuine and determining occupational requirements: Wolf, C-229/08, Prigge, C-447/09, Vital Perez, C-416/13 and Salaberria Sorondo, C-258/15

- <u>Vertical cooperation (cour de cassation – ECtHR – potentially CJEU)</u>

Following judgment in the highly controversial Baby Loup case (Cour de cassation, assemblée plénière, 25 June 2014, arrêt No 13-28.845) by the plenary session of the court de cassation, as

well as the SAS v France judgment by the ECtHR, the former seeks to differentiate protection from blanket bans in the context of employment in the private sector. The cour de cassation invokes Feryn, C-54/07.

c. Impact of CJEU's decisions

By balancing out the more restrictive approach in Achbita, the judgment leaves open the door for the accommodation of minority religious needs at the workplace in the private sphere.

Casesheet 6.13 – Achbita v G4S Secure Solutions, Case C-157/15: Request for a preliminary ruling from the Hof van Cassatie (Belgium) lodged on 3 April 2015.

1. Core issues

Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

2. At a glance

Area	Country	Relation to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination	•Belgium	• Article 10 and Article 16 CFREU •Article 52(3) CFREU •Directive 2000/78/EC	•Preliminary reference	•National courts •CJEU •Advocate-General •UNIA, the Belgian Equality body as intervener

1. Timeline representation

2. Case law description[142]

On 12 June 2006, Ms Achbita, a receptionist, was dismissed by G4S Secure Solutions, her employer, because of the wearing of the Islamic headscarf. This behaviour was regarded by her employer as incompatible with the company's principle of neutrality and, in particular, with the company rule according to which "employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them". Interestingly, the internal rule on religious and philosophical neutrality was amended shortly prior to her dismissal.
Ms Achbita, joined by the Belgian Centre for Equal Opportunities and Combating Racism, unsucessfully challenged her dismissal before the Labour Court (Antwerpen) and the Higher Labour Court (in appeal). The Belgian Court of cassation referred a preliminary ruling to the Court of Justice.[143]

[142] Case C-157/15: Request for a preliminary ruling from the Hof van Cassatie (Belgium) lodged on 3 April 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CN0157

[143] In *Arbeidsrechtbank Tongeren, Joyce V. O. D. B v. R. B. NV,* No. 11/2142/A, 2 January 2013, a Labour Court in Belgium ruled that a general requirement made by an employer for employees not to wear religious symbols does not constitute a genuine occupational requirement as defined by the Anti-Discrimination Act.

AG Kokott opined that the case may amount to indirect discrimination based on religion, as opposed to direct discrimination. In the present case – taking into account the company rule on neutrality and the freedom to conduct a business – it is justified.

3. Analysis
a. Role of the Charter

In her Opinion, delivered on 31 May 2016, AG Kokott considered that :

"1) The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive.
2) Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard.
In that connection, the following factors in particular must be taken into account:

– the size and conspicuousness of the religious symbol,

– the nature of the employee's activity,

– the context in which she has to perform that activity, and

– the national identity of the Member State concerned."

She also referred to Articles 10 (freedom of religion) and 16 (freedom to conduct a business) of the Charter in order to interpret some concepts laid down by the Directive (more particularly, the concept of direct and indirect discrimination, on the one hand, and the possible grounds of justification of an indirect discrimination, on the other hand.

The CJEU agreed with the qualification of discrimination as indirect. It found that the internal rule may be indirectly discriminatory on the basis of ` a particular religion`, unless objectively justified, which it is for the referring court to ascertain. The concept of religion, although not defined in Article 1 EED, should be interpreted as covering both forum internum and externum, i.e. the right to have a belief and manifest religious faith.
The CJEU found that the right to conduct a business under Article 16 of the Charter includes an employer`s wish to project an image of neutrality towards customers. Relying on Eweida and Others v UK (para. 94. CE:ECHR:2013:0115JUD004842010,) it holds that the freedom of religion can be restricted in pursuit of this wish/aim, if neutrality is pursued in a consistent and systemic manner (Hartlauer, C-169/07 and Petersen, C-341/08).

Role of ECHR

The CJEU noted that the right to religion is recognized in both the Charter and the ECHR, their meaning and scope is identically broad.

b. Judicial dialogue

Vertical cooperation (national courts – CJEU): preliminary reference

Horizontal: CJEU references ECtHR case law, but erroneously, i.e. deciding to the contrary, without adopting the ECtHR test that balances the right to religion and neutrality required by a private enterprise. As commentators point out, in Eweida the ECtHR did not find the private company`s neutrality policy proportionate (strasbourgobservers, Chaib, S. O. and David, V.). Moreover, the CJEU did not balance the freedom to conduct business with Achbita`s right to religion, which is the test the ECtHR uses (Jolly, S.). Last, they underline that the CJEU failed to consider that the company board of directors amended the work regulations in order to forbid the wearing of conspicuous religious, etc. symbols following Achbita`s persistence at wearing the headscarf during working hours (Lahuerta, S. B.).

c. Follow-up

The CJEU is very deferential to the referring national court as to the ascertaining of facts, ready to handle a domestic judgment which is more beneficial to Achbita. Chaib and David point out that an internal rule based on religious and philosophical convictions cannot be regarded as apparently neutral vis-à-vis religion. This may create difficulties for the referring domestic court to implement the CJEU judgment.

Casesheet 6.14 – (Hungary) Supreme Court, Kfv.III.37.848/2014/6, 29 October 2014

1. Core issues

After a teenage girl was murdered in Kiskunlacháza, the local mayor whipped up anti-Romani sentiments through various speech acts. The Hungarian Helsinki Committee as act poplars claimant launched a complaint against him with the Equal Treatment Authority (hereafter "ETA"). Following a long legal battle, the Supreme Court upheld the ETA''s decision in which it found the mayor liable for harassment against a member of the Roma national minority, and ordered the publication of its decision.

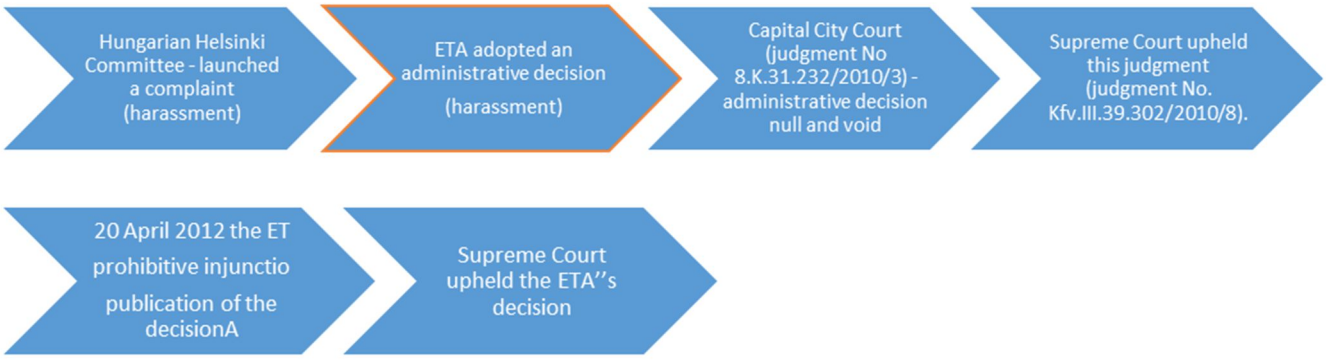
The publication of the decision is in this case part of the set of remedies strengthening the idea that sanctioning hate speech implies sending a strong message to the community, of not condoning the discriminatory behaviour and preventing escalation.

Definition of harassment, personal and material scope of the Equal Treatment Act, limitations of free speech, publication of decision as a remedy.

2. At a glance

Area	Country	Reference to EU law	Judicial dialogue technique	Legal and/or judicial Actors
• Non-discrimination/Hate speech	• Hungary		•consistent interpretation	• Hungarian Helsinki Committee •Equal Treatment Authority •Capital City Court •Supreme Court •CJEU

3. Timeline representation



4. Case law description

On 28 November 2008, following the murder of a teenage girl, the local government convened a meeting at which the mayor proclaimed that it was 'enough of the Roma violence … we are still the majority.'

In the March 2009 edition of the local newspaper, he published an article in which he alluded to the fact that the government was responsible for continuing to discuss racism in the face of

growing and brutal criminal acts evidently committed by the Roma. 'Unfortunately, we must state that in Kiskunlacháza overt, institutional racism is being inflicted on the Hungarians. We cannot condone the fact that certain individuals, under the pretense of minority existence, can access more rights than the majority society.'

In the October edition, the mayor published an open letter addressed to the Prime Minister, calling on him to ban Gypsy paramilitary groups in the same manner his government banned the Hungarian Guards - an extremist and openly racist paramilitary organization founded by the extreme right wing party leader.

On 19 October 2009, the Hungarian Helsinki Committee - intervening on the side of the ETA before the courts - launched a complaint with the latter, alleging that the mayor had committed harassment.
On 19 January 2010 the ETA adopted an administrative decision in which it established that the mayor's conduct amounted to harassment against individuals belonging to the Roma minority.

The Capital City Court (Fővárosi Bíróság), in its judgment No 8.K.31.232/2010/3. found the administrative decision null and void, ordering the ETA to repeat its proceedings. The Supreme Court in essence upheld this judgment in its judgment No. Kfv.III.39.302/2010/8. While agreeing that the Equal Treatment Act's personal scope covered the mayor in the particular case, the Supreme Court instructed the ETA to investigate whether his actions constituted a legal relationship falling under the Act's material scope. It noted the necessity of examining whether the definition of harassment prohibited under Article 10 paragraph 1 covered instances in which not only an individual, but a group of individuals suffered such treatment - bearing in mind that the Act specifically mentioned groups in certain provisions but not in relation to harassment.
On 20 April 2012 the ETA once again established the mayor's liability for harassment against persons belonging to the Roma minority. It imposed a prohibitive injunction and ordered the publication of the decision on its website for a period of 60 days.
The Capital City Court found the decision null and void in its judgment No. 12.K.31.431/2012/9. The Supreme Court, however, quashed this verdict in its judgment No. Kfv.III.37.773/2012/6. and ordered the retrial of the case due to the fact that the Capital City Court had not provided reasons for its finding purporting to establish that the prohibition of harassment did not extend to groups.
Following retrial, the Capital City Administrative and Employment Court (Fővárosi Közigazgatási és Munkaügyi Bíróság) rejected the mayor's claim and upheld the administrative decision with reference to, inter alia, the CJEU's judgment in the case *Firma Feryn* and the European Court of Human Rights' judgment in *Feret v Belgium*.
The Commentary attached to the Act also supports findings of harassment where the victim is a group rather than an individual. This purposive interpretation is supported by the CJEU's judgment in *Feryn*.
The mayor sought judicial review of this judgment before the Supreme Court, claiming that the mayor's statements do not constitute a legal relationship under the Act, that harassment can only be directed to an individual and the Commentary cannot serve as a legal basis on a par with a legal act and that the *Feryn* judgment cannot be invoked.
According to judgment No. Kfv.V.35.460/2011/5, the general judicial practice is that once a lower court is instructed to retry a case, it must also follow the guidelines provided for such retrial. This had been followed in the present case. It rightly concluded that the defendant mayor's claim is unfounded. Earlier, the Supreme Court had established that the mayor fell

under the personal scope of the Act. The Supreme Court agrees with the ETA in that his conduct in the present case also falls under the material scope of the Act.
The definition of harassment under the Act cannot flow from the interpretation or analogy with definitions in criminal and civil law, because of the diverse personal and material scopes.
Other than the strict linguistic interpretation favored by the plaintiff, the Act must also be examined by way of purposive and doctrinal interpretation. No Act can be attributed a meaning that is contrary to its purpose. It is relevant in this respect that the Equal Treatment Act under Article 1 sets out to prohibit discrimination against individuals as well as against groups of individuals. Moreover, Article IX paragraph 5 of the Fundamental Law curtails freedom of expression if it aims at violating a national, ethnic or racial community. Limiting protection under the Act to an individual in case of harassment would run counter to the fundamental principles expressed in the Act. Thus, on 29 October 2014 the Supreme Court upheld the final judgment
Following a long legal battle, the Supreme Court upheld the ETA's decision in which it found the mayor liable for harassment against a member of the Roma national minority, and ordered the publication of its decision.

5. Analysis

a. Role of the Charter

Although the Supreme Court did not cite the Charter, it did rely on the Equal Treatment Act which transposes not only the anti-discrimination directives, but also gender directives into Hungarian law. Moreover, it relied on Article IX of the Fundamental Law which - similar to the Charter - protects free speech.[144]

b. Judicial dialogue

Vertical cooperation (national courts – CJEU)

Both lower courts made strategic use of **consistent interpretation**. The Supreme Court agreed with the lower court in relying on Feryn[145], mainly in order to provide judicial protection for a collective claim pertaining to a speech act.
Moreover, it relied on *Feret v Belgium*[146] to provide an interpretation of the constitutional provision on free speech in a manner that limits it in relation hate speech on the grounds of racial or ethnic origin.

c. Remedies

It is particularly interesting that the publication of the decision is part of the set of remedies strengthening the idea that sanctioning hate speech implies sending a strong message to the community, of not condoning the discriminatory behaviour and preventing escalation.

[144] Act No CXXV of 2003 on equal treatment and the promotion of equal opportunities, particularly Article 1, 4, 7, 8, 10 paragraph 1 and Article IX paragraph 5 of the Fundamental Law
[145] C-54/07 Firma Feryn
Judgment by the European Court of Human Rights (Second Section)
[146] Féret v. Belgium, Application no. 15615/07 of 16 July 2009

Casesheet 6.15 - Case C81/12 *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*[147]

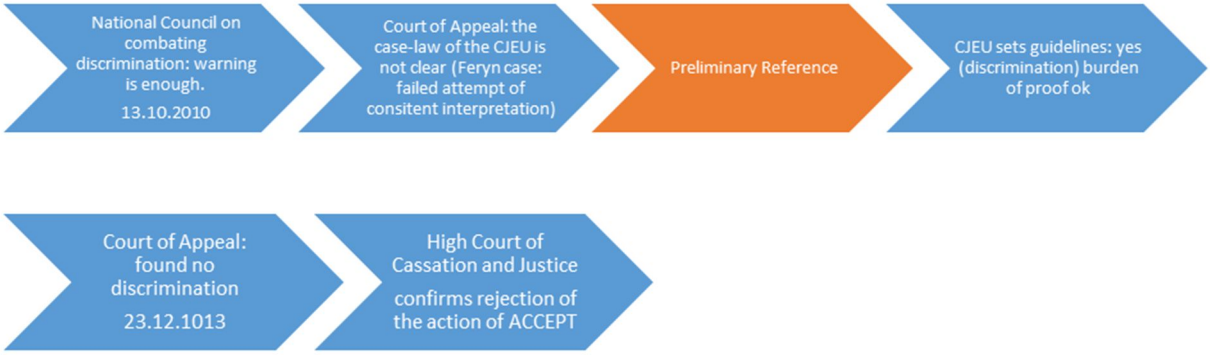
1. Core issues

Can a statement by a different person than the employer constitute discrimination under Directive 2000/78? If so is the reversal of the burden of proof fair?

2. At a glance

area	Country	Judicial dialogue techniques	Legal and/or judicial Actors	Remedy
•Non discrimination •Hate speech	•Romania	•preliminary ruling	•CJEU •Court of Appeal •National council on combating discrimination	•dissuasive remedies •warning

3. *Timeline representation*



4. Case law description

The dispute arose from homophobic public statements issued by Mr Becali, a former shareholder of the football club FC Steaua Bucureşti, regarding the sexual orientation of a Bulgarian football player whom the team was considering signing. Mr. Becali declared that, as there were rumors that the player was homosexual, he would not have him in his future team, as he would prefer that the team be shut down or made up of junior players rather than including homosexual footballers. The Club has never distanced itself from Mr Becali's statements; on the contrary the representative lawyer publicly admitted that the Club shares Mr Becali's view.

[147] Based on the case note available in the Handbook on the principle of non-discrimination on the grounds of age, race, gender, disability and sexual orientation, pp 51-53, by the Centre for Judicial Cooperation, http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx

In December 2010, Asociaţia ACCEPT, a Romanian NGO defending and promoting the rights of LGBT persons, instituted proceedings in front of the Bucharest Court of Appeal in order to partly repeal Decision no. 276 of 13 October 2010 of the Romanian National Council for Combating Discrimination (NCCD) which sanctioned the discriminatory statements of Mr Becali with a simple warning. Mr Becali, in spite of transferring his shares in the Football Club five days prior to the statements, still possessed a considerable power and influence over the decisions taken in the Club.

The NGO ACCEPT claimed in front of the NCCD that this declaration (i) directly discriminated on the basis of sexual orientation, (ii) violated the principle of equality regarding the hiring policy and constituted an offense to the dignity of persons with a homosexual orientation. NCCD decided that Becali's statements (i) fell outside the scope of work relations, as referred to by Art. 5 and 7 of Government Ordinance 137/2000 regarding the prevention and sanctioning of all forms of discrimination (GO 137/2000), but that they (ii) fell under the scope of Art. 15 of the same act, as they represented a behavior whose purpose was to undermine the human dignity of a certain group of persons or to create a degrading or humiliating environment for them, based on their sexual orientation. NCCD sanctioned Mr Becali with a warning, and not a fine as requested by the parties due to the expiry of the period of the 6 months period for liability punished by fine.

The Court of Appeal, seized of the challenge of this decision, raised a preliminary ruling to the CJEU.[148] It was aware of the existence of the *Firma Feryn* precedent,[149] in which a similar statement by an employer, which was distinctly discriminatory on grounds of race, had been found to constitute direct discrimination under Art. 2(2) of the Racial Equality Directive 2000/43. However, due to the slight factual differences in the instant case (Mr Becali was not formally an employer, and the discriminatory conduct was based on sexual orientation rather than race), the Court of Appeal was not sure whether it would be distinguishable from the situation in *Firma Feryn*. It therefore asked whether Becali's statement could constitute direct discrimination under Art. 2(2) of Directive 2000/78 or, at least, a fact establishing a presumption of discrimination that was for the defendant to rebut.

The Court also asked whether shifting the burden of proof demonstrating the absence of discriminatory policies onto the football club would yield unfair results, and whether the statutory limitation setting a 6-month period of limitation, after which no fine can be imposed for breach of the national provisions transposing the Directive, frustrates the correct enforcement of the rights protected therein.

On 25 April 2013, the CJEU delivered the preliminary ruling in the *ACCEPT* case.[150] It confirmed at the outset that the finding on the alleged discrimination is for the national court to make, without prejudice to the CJEU's power to provide national courts with helpful guidelines on how to reach such finding.[151] It found that the *Firma Feryn* judgment does not establish a legal condition that discriminatory statements must come from persons who have a legal power to implement recruitment policies.[152] The defendant is not relieved of the burden of rebutting the presumption of having acted discriminatorily merely because the *prima facie* evidence (the statement) does not come from someone who can act on its behalf, also in light of the fact that the nature of the statement must be assessed bearing in mind its impact on society at large.[153]

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[148] Court of Appeal of Bucharest, judgment of 12 October 2011 between the NGO ACCEPT (claimant) and the National Council for Combating Discrimination (respondent), available at http://www.csm1909.ro/csm/linkuri/05_04_2012__48432_ro.pdf.

[149] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187.

[150] Case C-81/12 *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*, nyr.

[151] Case C-163/10 *Patriciello* [2011] ECR I-7565, par. 21

[152] See par. 47 and 49.

[153] The judgment refers to the precedent in case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraphs 55 to 58.

The acceptance of *prima facie* evidence, pursuant to the modified evidentiary regime set by Directive 2000/78, moreover, does not have a disproportionate effect on the defendant, who can refute it through reasonably available evidence, for instance by proving that the employer had distanced itself from the homophobic statement.

5. Analysis

a. Judicial dialogue

Ordinary judges are confronted with CJEU's precedents and expected to adhere to them; dubious instances of distinguishing can be solved through the preliminary reference procedure. Through the use of preliminary questions the national court is able to understand the exact scope of previous CJEU's judgments (with respect to equivalent but not identical facts and EU norms), as well as to challenge certain aspects thereof, inviting the CJEU to narrow down their application.

In *Firma Feryn NV* the CJEU concluded that public declarations accounting for the discriminatory hiring policies of an employer constitute direct discrimination on grounds of race within the meaning of Art. 2(2)(a) of Directive 2000/43, even if a victim is not identifiable. The Romanian Court of Appeal was convinced that the same would hold true with Art. 2(2) of Directive 2000/78, and included in its preliminary question the full transcription of Becali's statement, to allow for the CJEU's exact review of its discriminatory elements. The Romanian judges were convinced that the correct interpretation of the Government Ordinance needed to adhere to the judgments of *Bosman* (C-415/93) and *Firma Feryn*, but raised a **preliminary question** to obtain from the CJEU reassurance that the principles laid down therein would hold even in the circumstances of the instant case, which were distinguishable to an extent (Mr Becali was formally unable to carry out the hiring strategies of the club[154]). The CJEU was very cautious in its ruling: it confirmed that discriminatory statements can be attributed to an employer even in a situation akin to the one in the main proceedings, but **deferred the necessary findings to the national court** (on the merits – whether the relevant evidentiary burdens are discharged by the parties, and on the appropriateness of the remedies offered by national law).

On another matter, the Court of Appeal raised a genuine doubt as to whether the interpretation of a provision of the Racial Equality Directive (as provided in *Firma Feryn*) could extend to the equivalent provision of Directive 2000/78. Namely, Art. 8 of Directive 2000/43, like Art. 10 of Directive 2000/78, requires the defendants to bear the burden of proof of demonstrating that no violation was committed, if the claimant has submitted evidence leading to a presumption that a breach of the principle of equality has occurred. Whereas in *Firma Feryn* the CJEU had concluded that public statements by the employer confirming its unwillingness to hire employees from a specific group would qualify as facts giving rise to such presumption, the Court of Appeal reasoned that this approach would impose on the defendant of the main proceedings a burden that is impossible to discharge (*probatio diabolica*). The only possible way to rebut such presumption, in fact, would be to show that a homosexual player was hired. This, besides being unreasonable, is in itself problematic as it implies that the employer is aware of, and inquiring into their players' private life. Interestingly, the Court of Appeal has not made any reference to the principle of freedom of expression, which was instead used by the Croatian Court in the analogous dispute of *Mamić v Croatia* (see the following case study). The CJEU

[154] 'The invoked jurisprudence is not enough for the national court to clarify the exact scope of the notion of direct discrimination in labour given that discriminatory statements coming from a person who, by law, cannot bind the company that is recruiting staff but, due to the close relationships it has with the company, could decisively influence its decision or, at least, could be perceived as a person who can decisively influence the decision.'

finally clarified how to circumvent this dilemma: the proof that the defendant is asked to offer to refute a prima facie proof of discrimination must not necessarily consist in the demonstration that a gay player was signed or considered for hiring. A much easier proof would have been available if the team had immediately distanced itself from Becali's statement, which it had not done in the specific circumstances. Significantly, the CJEU suggested to the ordinary court (without entering into the merits of the specific question) that the right way to decide the case might involve a consistent interpretation of the relevant domestic legislation, which would render the time-limit for the imposition of a fine inapplicable.

b. Remedies

The CJEU recognized the member States' autonomy in setting the sanctions connected to discriminatory acts, but pointed out that merely symbolic sanctions cannot be deemed to satisfy the requirement of effectiveness, proportionality and dissuasiveness.[155] In addition, the duty for national courts to interpret domestic legislation in conformity with directives[156] might lead to the conclusion that the time-limit imposed for the imposition of the fine frustrates the purpose of the Directive and, therefore, must be interpreted out (set aside) in the main proceedings.

c. Impact of CJEU decision

The CJEU issued its clarifications in C-81/12 in its first case on discrimination in recruitment on grounds of sexual orientation.

Interestingly, the Court of Appeal, resuming the main proceedings in light of the preliminary ruling, found no discrimination.[157] The Romanian court performed a comprehensive analysis of the facts (as per the CJEU's encouragement) but partially disregarded the CJEU's instructions on the law. It ignored the CJEU's confirmation of *Firma Feryn* (which establish liability of the employer for acts committed by a person without hiring power) and stretched the "effective remedy" instruction to find that the warning was sufficient and proportionate.

ACCEPT brought the case before the High Court of Cassation and Justice as the last available remedy. In its decision 2224, the High Court of Cassation and Justice rejected the appeal filed by ACCEPT against the decision of the Bucharest Court of Appeal. In the reasoning, the High Court only mentions C-81/12 to underline that even the CJEU in its preliminary ruling recognized that the competence for assessing the facts in the case belongs exclusively to the national court. There is no analysis or incorporation of the substantive guidance provided by the CJEU in the case. In regards to the warning applied to Mr. Becali as sanction in first instance, which was challenged by the complainant as not being dissuasive, proportionate and adequate for a case of discrimination, the High Court stated: "contrary to the statements of the complainant, a warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered de plano as a purely symbolic sanction.
The decision also states that "the High Court also concludes that the complainant association cannot justify the infringement of a legitimate public interest, under the meaning of Art. 2 (1) letter r of Law 554/2004 (Legea Contenciosului Administrativ), given the fact that the NCCD issued a warning for George Becali and not an administrative fine.

The follow-up to the preliminary ruling of the CJEU is instructive: because the CJEU is unable to invalidate State measures and national practices, the national court has the last word. Also, because the **proportionality test** indicated by the CJEU is handed over to the national judge,

155 Par. 64.

156 Par. 71.

157 See Court of Appeal of Bucharest, judgment of 23 December 2013, see http://www.non-discrimination.net/content/media/RO-116-CAp%20Buch%20Accept%20v%20Becali%20reasoning.pdf.

even in a straightforward case can the CJEU's guidelines be stretched so as to confirm the legality of the national practice preceding the preliminary question. Only through further litigation and clarification by the CJEU can a (unintended or deliberate) misunderstanding like the one upheld by the Romanian Court of Appeal and confirmed by the High Court of Cassation and Justice be eliminated in the future.[158]

i. External

Firma Feryn and Accept have been cited in national courts of other EU member states through consistent interpretation. In Croatia in 2010, four human rights organisations filed a joint action against Z.M., the executive manager of the most popular football club and vice president of the Croatian Football Association, because of his public statement that gay people could not play in his national football team. Following a long string of national decisions the Supreme Court based its decision on the "Feryn case", finding the facts in the two cases to be the similar. 2 The Court found that Z.M. had such a reputation and public authority that his statement could encourage others to treat gay persons with prejudice. The Court concluded that his statement was an act that could place a person (a gay man) in a less favourable position than other persons (a heterosexual man) in a comparable situation and was therefore direct discrimination. The Court further stated that statements can be acts of discrimination in spite of the constitutional freedom of expression.[159] In Italy in 2014 a renowned lawyer in an interview broadcasted in a radio show, declared that he would never hire a gay lawyer in his legal firm. The court considered that even if the legal firm had not issued any announcement of selection, the statement is discriminating on the ground of sexual orientation because discourages homosexuals from applying for those positions. In doing so, the Court cited Article 9 of Directive 2000/78/CE, case Associatia Accept C-81/12; case Feryn NV C-54/07.[160]

[158] For details see http://www.equalitylaw.eu/downloads/3632-romania-high-court-confirms-rejection-of-the-action-of-accept-in-the-case-based-on-cjeu-c-81-12-pdf-97-kb

[159] For more details see Supreme Court of the Republic of Croatia, Rec-300/13, judgment of 17 June 2015 information available at http://www.equalitylaw.eu/downloads/3693-croatia-new-case-law-on-discriminatory-public-statements-pdf-76-kb

[160] Italy, Court of Appeal of Brescia, decision 11.11.2014, appellate instance. For more information on this case see our database.

Hypotheticals

Case 1 (Age – Level I)

Bjorn and Hans asked the Labour Court to declare their dismissals - based on proximity to pensionable age, as discriminatory and therefore unlawful.

In both cases the claimants had been selected for dismissal in accordance with the guidelines set in the collective agreement concluded by the trade union representatives and employers' association of which the employer was a member. The guidelines identified reaching the minimum pensionable age as a priority criterion for dismissal in the event of collective dismissal procedures.

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you (undisputed by the parties) have Bjorn and Hans been discriminated?
- What is the relevance of the EU non-discrimination framework for this case?
- What specific case law could be used to support your decision in this case?
- Discuss the concept of reasonable justification in light of recent CJEU case law
- Discuss the horizontal application of the general principle of non-discrimination on grounds of age

Guidelines for discussion/solving the case:

- Discuss the reasoning of the CJEU in *Mangold*: when is the discriminatory effect unlawful and when is it not?
- Discuss what is today's role of article 21 of the Charter for the general principal of non-discrimination on the grounds of age as it was initially developed by the CJEU.
- **Case sheet 1 and 2** of the handbook **-** (Italy) Trib. Milano, 7 January and 22 July 2005; Court of Appeal Firenze, 27 March 2006/ (Italy) Corte d'Appello di Milano – sezione Lavoro e Previdenza RG 1044/13 (Abercrombie case) - served as a basis to draft Hypothetical Case 1. Draw parallels.

Case 2 (People with Disabilities – reasonable accommodation - Level I)

Pedro is a party in administrative court proceedings and asked for a copy of the court file in Braille script. The court rejected Pedro's request. The court stated that there is no basis to demand that the court should provide a person living with severe visual impairment the copies of the pleadings in Braille alphabet.

Pedro filed a suit in the Administrative court of appeal, claiming that people living with severe visual impairment or blindness who litigate before the courts are being indirectly discriminated against.

Pedro has claimed compensation on the grounds of having been placed in a position of disadvantage vis-à-vis the other party in the dispute.

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you (undisputed by the parties) has Pedro been discriminated against?
- What is the relevance of the EU non-discrimination framework for this case?
- What specific case law could be used to support your decision in this case?
- Discuss the concept of "reasonable accommodation" in the context of the relevant EU non-discrimination framework and the United Nations Convention on the Rights of People with Disabilities.

Guidelines for discussion/solving the case:

- Refer to Article 2 of UNCRPD (definition of discrimination on the basis of disability and concept of reasonable accommodation);
- Refer to Article 13(1) of the UNCRPD which requires States Parties to ensure effective access to justice for persons with disabilities;
- Discuss the role of Article 21 and 26 of the Charter, if any;
- **Case sheet 9** of the handbook – (Slovenia) Constitutional Court (Ustavno sodišče RS), U-I-146/07, 13.11.2008 - served as a basis to draft Hypothetical Case 2. Draw parallels.

Case 3 (racist/xenophobic hate crime - Level I)

Simone is a French national and was visiting Mania's capital. Simone is black and has a white Mainian boyfriend, Albert, whom she was visiting. The two were waiting for the bus. Before the approaching bus stopped at the bus stop, a man on the bus began staring at Simone and Albert from the window and making noises imitating monkey. When the bus doors opened, he got off with two other men.

They continued making the monkey grunts in Simone's direction. One of the men spat on Simone's clothes and said "Where is the big nigger to protect you now?" Albert told them to stop and the three men attacked him with punches and kicks, pushing Simone aside. Witnesses described that they shouted racial abuse during the attack, using the word "nigger" and "nigger-lover" and also slogan "Mania for Manians!"

Simone tried to call the police but to no avail. About one minute into the attack, Albert stopped moving. The three attackers took a wallet and a cell-phone from his pocket and took also Simone's phone and left. Albert was left motionless on the pavement. Three days later, Albert succumbed to internal injuries suffered as a result of the beating and died.

Pursuant to extensive coverage of the attack in the media a witness contacted police and testified that the three suspects may have assaulted a Roma teenager on the bus just minutes before getting off to attack Albert. This victim was never identified, although more testimonies from the witnesses confirmed this bus attack. One of the witnesses described it as an "unprovoked and extremely brutal attack on a child".

Another person reported to the police a post by an acquaintance on Facebook profile one day after the attack, which read: “last night, kicked a gypsy and a nigger in the head”. This post led to identification of A.

In his statement to the police, A. said he was alone on the day and did not know the other two people who were allegedly with him. A. admitted involvement in the two incidents, and claimed that he was just teasing the kid on the bus and no harm was done. About the incident at the bus stop, A. did not deny that he punched and kicked Albert, but explained that this was because Albert was making fun of him.

Later into the investigation, the police confronted A. with the comments he was heard making during the fights, and with his Facebook posting. A. did not deny either, but said that he is not a racist – he even went to school with some Roma even. The posting is just a meaningless word play – he didn't really fight with the black woman but with a white man.

You are the judge on the local court. Please answer the following questions:

- Has there been a hate crime? Explain what are the bias indicators?
- Is there sufficient evidence to prove the bias motivation?
- What case law (ECJ, ECHR) could be used to support your decision in this case?

Guidelines for discussion/solving the case:

- Refer to Article 4 of **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Discuss how it has been reflected into criminal codes.**
- Discuss whether citing Article 21 of the Charter can play a role in increasing the protection of hate crime victims irrespectively of the scope of application of the Charter.
- Use Balazs v. Hungary (ECtHR, 2015) to discuss the following issues:
    - mixed motives (lucrative – robbery - and bias);
    - mandatory use of bias indicators to unmask bias motivation;
- Use Skorjanec v. Croatia (ECtHR, 2017) to discuss the following issues:
    - victims by association (who themselves do not possess the protected characteristics of the targeted group) are also protected under the hate crime provisions;

On whether there was a hate crime:

- On bias indicators (murder):
    - Differences btw. attacker and the victim: Simone is black and a foreigner, attacker presumably not;
    - Speech, gestures before, during and after the attack: monkey grunts – commonly used by racists to express perceived animal-like qualities of people of African descent; explicit racial abuse (*nigger*, *nigger-lover*); *Mania for Manians* – while not explicitly racist statement, it expresses exclusion of others, not perceived as Manians, and thus expresses perceived superiority of the speaker; posting on Facebook: in addition to use of derogatory language, expresses pride over the act and willingness to use it to mobilize followers;
    - Type of violence employed: spitting is a an action intended to diminish the target's dignity, expresses perceived superiority
- Bias indicators (assault):
    - Type of violence – brutal and unprovoked;
    - Random selection of the victim – as a representative of the whole group of Roma;
    - Statements – Facebook message;
    - Pattern in actions of perpetrators – same group on the same day attacking targets from different groups – racist motivation connects the two attacks;
- Is there sufficient evidence to prove the bias motivation?
    - Discuss the importance of indirect evidence for proving bias motivation. Obtaining direct admission of bias motivation can be impossible, even when perpetrator admits commission of the base offence; need to assemble, present and assess the totality of available evidence. Circumstantial and other indirect evidence will be crucial.

Case 4 (Sexual orientation – Level II)

Joaquin and Jacek are both male EU citizens. They have married in an EU Member State 5 years ago. They now live in another EU Member State. The national legislation of the latter only foresees the possibility of marriage between people of different sex. Joaquin was diagnosed with cancer three months ago and has been undergoing chemotherapy in the Public Hospital of Sacred Heart. Due to his illness he sometimes has to go to the emergency services. Recently, he has been hospitalized for four days in an emergency observation room.

Jacek hasn't been allowed to visit, he was told Joaquin needed to rest and that he was next to a patient in critical condition. An hour later, while Jacek was still waiting for medical updates, Joaquin's mother was allowed to visit.

Not content with the situation, Jacek talked to the Chief of service, Dr. Jakub, and explained that they are married, and therefore relatives, and that he would like to see Joaquin. Dr. Jakub responded that the amount of visitation allowed in an emergency room should be decided by the surgeons and nurses treating the patients and that in any case emergency ward visits' are limited to family. Jacek stated he would wait until he would be given permission to enter to what Dr. Jakub acquiesced and walked away. At the same time a nurse went by and whispered to Jacek "go home, faggot".

Jacek considers that by not being allowed to visit he has been discriminated on the basis of his sexual orientation. Jacek approached your court and filed a discrimination suit against the Hospital, claiming compensation.

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you has Jacek been discriminated on the grounds of sexual orientation?
- What is the relevance of the claim by the hospital that emergency ward visits' are limited to family?
- What specific case law could be used to support your decision in this case?
- What is the relevance of the EU anti-discrimination framework for this case?

Guidelines for discussion/solving the case:

- Discuss the recognition of marital or family status in light of CJEU's *Maruko* and *Romer*.
- Sexual orientation is now recognized in EU law as a ground of discrimination. Refer to Article 19 TFEU, Race Equality Directive, Employment Directive. Discuss the scope of these provisions to assess whether it is a discriminatory practice to refuse Jacek's entry.
- Discuss whether Article 21 can play a role in expanding the scope of these provisions.

On possible hate speech by the nurse *refer to* Vejdeland and Others v. Sweden: *inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner . . . In this regard, the Court*

stresses that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour" *(see, inter alia*, *Smith and Grady v. the United Kingdom"* (para 55).

Case 5 (anti-Semitic hate crime - Level II)

Daniel runs a Center for Revival of Jewish Heritage in city V. The Center organizes cultural events, has a theatre, museum and co-operates with Jewish communities, both nationally and abroad. Daniel himself is not Jewish but he is a locally well-known person because of the Center. Since 2012, Daniel and the Center have been a target of occasional vandalism (for example, in 2013, windows of the Center were broken – by stones thrown from the street, with a swastika drawn on them with a marker).

On 13 July 2014, someone threw a Molotov cocktail into Daniel's car, parked outside his home. The car caught on fire and was completely destroyed. Minutes after the attack, Daniel received an SMS from an unknown number, which read "88". No suspect could be immediately apprehended, although witnesses saw two persons running away from the burning car, yelling or singing something. Daniel told police officers that this was surely a continuation of anti-Semitic attacks against him.

In August 2014, a rally opposing Israeli action in Gaza was organized by a pro-Palestinian group in V. A. was among the speakers and was quoted the next day by local press as saying into the loud-speaker: “as long as they [Israel] burn Gaza, we will continue doing the same to them. And some of them live among us.” A. is 20 years old, an informal leader of one of the hooligan crews supporting a local football club. A. had been arrested on several occasions in connection with violence during football games, but never charged with any offence.

Investigation: The police brought A. in for questioning and inquired about the attack on Daniel's car. A. denied any connection with the bombing. A.’s apartment was searched and chemicals used in the fire-bombing were found. A's fingerprints were taken and later found to match those taken from the incendiary device thrown into the car. The search also revealed a mobile with a pre-paid card, from which the SMS was sent to Daniel on 13 July. A.’s apartment also housed a large number of books about the Second World War, Holocaust, and Nazi German militaria. A photograph of A. wearing Wehrmacht military uniform and with a right arm raised in a Hitler salute, in front of an improvised flag with a swastika was also found.

In a statement to police, A. explained that he is only concerned about the political issues involved in the current Palestinian-Israeli fighting and Israeli aggression in Palestine. He stated that he does not consider himself an anti-Semite and added: "it's all the same to me - Israel, Jews here, Jews on Wall Street, Jews in Hollywood, it's all the same bunch, all with blood on their hands." When asked about the photograph with the Hitler salute and a swastika, he answered that he didn’t think this was criminal as swastika is a symbol of the sun in some oriental religious systems. His hobby is military history, in particular the Second World War period. He was also not performing Hitler salute in the picture, but showing something to his friends.

Confronted with the matching fingerprints and the mobile phone, A. later confessed to making the incendiary device and throwing it to Daniel's car. He refused to answer why he chose this particular car.

Trial: During the trial, The prosecution claimed that this was an anti-Semitic attack. The Defense argued that Daniel could not have been targeted in an anti-Semitic crime, because he is not Jewish.

You are the judge on the local court. Please answer the following questions:

- Has there been a hate crime – crime motivated by anti-Semitic bias? Which incidents can be considered as hate crimes? Explain what are the bias indicators in each of them?

- Assess and discuss the arguments put forward by the accused and the defense that this was not an anti-Semitic attack.
- Is there sufficient evidence to prove the bias motivation?
- What case law (ECJ, ECHR) could be used to support your decision in this case?

Guidelines for discussion/solving the case:

- Refer to Article 4 of **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Discuss how it has been reflected into criminal codes.**

- Discuss whether citing Article 21 of the Charter can play a role in increasing the protection of hate crime victims irrespectively of the scope of application of the Charter.
- Bias indicators:
    - Type of target: Jewish Cultural Center, its publicly known representative and his property – clear association with Jews (despite Daniel not being Jewish);
    - Speech, gestures, graffiti:
        - Swastika on the stones;
        - "88" is a numerical expression of the eighth letters in alphabet – "H"; the message thus means "HH" for "Heil Hitler";
        - A's speech (at the demo and in the statement to police) implying responsibility of all Jews for actions of Israel;
    - Victim perception: Daniel perceives the arson attack as anti-semitic;
    - Pattern of attacks: several anti-Semitic attacks preceding the arson, in the same city, targeting the same person/organization;
    - Timing of the arson attack: during the time of July-August 2014 war between Israel and Hamas in the Gaza Strip;
    - Background of the suspect:
        - connection with a group (football hooligans) potentially involved in bias violence;
        - affinity with racist, supremacist ideology, documented by findings in A's home;
        - picture of A giving a Hitler salute;
- Explore the criminality of hate speech used during the demonstration – incitement?;
- Discuss the defence of the suspect: Middle-Eastern politics has nothing to do with ethno-religious prejudice (discuss the concept of the "new anti-Semitism" in this context); fan of military history; swastika as a symbol with meanings other than Nazi; pointing towards something instead of Hitler salute;
- Victims by association:
    - Explore the ECtHR judgment in Skorjanec v. Croatia (2017)
    - Discuss (im)practicality or even (im)possibility of proving in court someone's "Jewishness", if this were deemed as required by the law (what criteria should be used for that?)
- Discuss the importance of indirect evidence for proving bias motivation. Obtaining direct admission of bias motivation can be impossible, even when perpetrator admits commission of the base offence; need to assemble, present and assess the totality of available evidence. Circumstantial and other indirect evidence will be crucial.

Case 6 (People with disabilities – Definition – Level II)

Soren has been working as a cook in a local public school for twenty years. Soren has been described as severely obese. On one occasion, when undergoing a regular medical check-up obligatory for those working in public catering, his obesity was classified as falling within the meaning of the definition of the World Health Organization (obesity being registered under code E66 of the 'International Statistical Classification of Diseases and Related Health Problems'). Soren's condition has continued to worsen over time, although there were also periods when he exercised intermittently in the local gym and lost some weight.

In 2010, Soren requested in writing that his employer, the School, rearrange the set-up of his working place in the kitchen, in order to make it possible for him to continue working in that relatively confined space. The School administration at first refused, arguing that the School's kitchen is arranged to comply with demanding national hygienic standards and the set-up would be too difficult to change. Later, the School administration reconsidered and made the changes requested by Soren, which cost 2,000 EUR.

In 2012, Soren submitted a similar request with further proposals on how his working place should be rearranged. This time the School has refused to comply.

In 2013, following a drop in the number of children attending the School, and as part of a broader reduction scheme, Soren was dismissed from his job as a cook. When this decision was communicated to him by his superiors, Soren claims that his constant "special requests" that no one else was making were mentioned as one of the reasons why he is the only staff working in the kitchen to be let go. His boss also mentioned that now, Soren will at least now have time to take care of his health.

Soren filed a suit in local court, complaining of a discriminatory dismissal. In his complaint, he argued that he was discriminated because he is obese, and claimed compensation.

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you (undisputed by the parties), has Soren been discriminated on the grounds of his obesity?
- What specific case law could be used to support your decision in this case?
- What is the relevance of the EU anti-discrimination framework for this case?
- What is the relevance of the claim by the defendant (the School) that Soren caused his condition himself, therefore it cannot constitute disability?
- The School claims that they accommodated Soren's special needs, although it was very costly and they were under no obligation to do that. Discuss.

The Directives against discrimination in employment and occupation have been fully transposed into the national law. National law thus bans the discrimination on the basis of disability, but never mentions obesity in the discrimination context.

Guidelines for discussion/solving the case:

- Discuss whether Article 6 TEU and/or Directive 2000/78/EC could serve as sources for obesity to be found as a disability and a discriminatory ground;
- Discuss CJEU's reasoning in *Chacón Navas* when it declined to extend the list of protected grounds to 'sickness';
- Refer to CJEU's definition of disability in *HK Danmark* - as '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';
- Discuss CJEU's *Åkerberg Fransson:* can obesity discrimination fall within the scope of EU law?
- Discuss whether the Charter is applicable. See AG Jääskinen's Opinion:
    - The general non-discrimination clause of Article 10 TFEU and the legal basis of Article 19 TFEU do not refer to obesity;
    - The Equality Directives do not refer to obesity either, and the fact that this case concerns an area falling within the Union's competence (i.e. employment policy) 'is an insufficient foundation for concluding that a Member State (…) is "implementing" EU law.'

- **Case sheet 8** of the handbook - C-354/13 Kaltoft V Municipality of Billund, 16 December, 2014 - served as a basis to draft Hypothetical Case 6. Draw parallels.

Case 7 (Hate crime – People with Disabilities - Level III)

Z. – a young man with autism placed in an institution – sustained second degree burns over 30 % of his body. The injuries occurred after a carer showered him with scorching water for 30 minutes. The case was reported to the police by the young man's mother and criminal charges were filed against the carer.

While wiping Z. after showering another staff member noticed redness and peeling of the skin and took Z. to hospital. An urgent meeting of the professional board of the institution was called and the parents were informed later in the day. The carer was temporarily removed from job due to the shock he experienced and until circumstances of the incident were established.

The head of the institution testified that according to Z.'s medical record, he had multiple psychomotoric impairments and specific health condition which required that he be showered a few times per day. He had also been using pharmacological treatment. This, together with frequent showering over years, led to hypersensitivity of skin to any external stimuli. She also added (and supported with health records) that the 26 year old young man with autism had a history of aggression and auto-aggression.

The carer denied that he burnt Z. deliberately and insisted it was an accident, when he didn't realize how hot the water was. He added that the young man might have turned on the hot water himself by accident. He also said that the reason for the shower was that Z. previously smeared the whole of his body with feces. The carer added that during the showering the young man showed no indication he was in pain which they explained by the higher tolerance to pain that persons with autism have.

Police were unable to interview other inmates in the institution, who appeared to be frightened and refused to speak about the incident. A staff member who was present at the showering incident testified that the carer approached him, laughing after he finished showering Z., and said to him *it's so funny, they really feel nothing man, like some freak dinosaurs. I'll think of something better to teach him not to eat shit.*

At the time of police investigation, a staff member who was recently fired from the institution gave an interview to the local paper in which she described that the rights of inmates in the institution were utterly disrespected and the conditions there amounted to torture. In the interview, the ex-employee claimed that many staff members are sadists who despise people with autism.

You are the judge on the local court. Please answer the following questions:

- Has there been a hate crime – crime motivated by bias against disabled people? Explain what are the bias indicators?
- The prosecutor invoked the provision which aggravates any crime in which the victims are "vulnerable" due to disability – as opposed to a hate crime provision (which also includes disability); Do you agree with this approach? Respond to this qualification.
- Is there sufficient evidence to prove the bias motivation? If not, what pieces of information are missing and what other investigative steps should have been ordered?
- What case law could be used to support your decision in this case?
- The case attracted lots of media attention and you were asked to prepare a public statement on behalf of your court – what would be the main messages you would like to communicate to public?

Guidelines for discussion:

- Refer to Article 4 of **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Discuss how it has been reflected into criminal codes.**
- Discuss whether citing Article 21 of the Charter can play a role in increasing the protection of hate crime victims irrespectively of the scope of application of the Charter.
- Bias indicators:
    - Institutional setting: which is a characteristic feature of disability hate crime; possible pattern of ill-treatment – indicated by fear of others to speak out and by the interview of an ex-employee;
    - Differences btw. suspect and the victim;
    - Speech, gestures, graffiti: Admission of the suspect after the act – use of derogatory language dehumanizing people with autism;
    - Nature of attack: Use of brutal violence with disrespect for the victim's suffering (dehumanization of the victim);
- Discuss the "discriminatory selection model" (as opposed to "hostility model") of construing the bias motivation, whereby mere selection of the target **due to** disability is sufficient manifestation of bias (no proof of hatred or enmity towards the targeted group is needed);
- Discuss the notion of "vulnerability" of people with disabilities:
    - isn't such notion in itself an expression of prejudice (compare the UK CPS Guidance on prosecuting Disability Hate Crime);
    - discuss the "social model" (as opposed to "medical model") of disability, enshrined in the CRPD and its practical consequences (disability is the barriers faced by people with impairment, not the impairment itself);
    - preference for the solution which considers all people with disabilities as vulnerable fails to take account of specific motivation of the perpetrator;
- Discuss the extent to which the notion of "disability hate crime" is prevalent and understood in participants' jurisdiction's discourse; is there a need to raise awareness of this issue – e.g. through giving visibility to a judgment in a disability hate crime case?
- Discuss the implications of the Đorđević v. Croatia (ECtHR, 2012) case.

Case 8 (Gender – level III)

Marie was employed for the last 10 years as a receptionist in the defendant's boutique hotel. Between 2002 and 2011 she was frequently awarded the title of "employee of the month". She was promoted to chief receptionist in the end of 2012.

When in mid-2013 she communicated to her manager, John, that she was pregnant, he asked her to assume secretarial functions in the back of the office. She acquiesced as she was told this was temporary and to supress a temporary lack of staff. However, when filing for the extra 150 euro monthly fee automatically awarded to pregnant workers – according to the company's rules - the human resources director told her she had lost the right to the fee because she had been demoted. Her work evaluation of the previous month had been classified as "poor". Marie filed a complaint to the Labour Inspection Office for discrimination on the basis of her being a woman and pregnant. She demanded to return to her chief receptionist job and to be awarded the pregnancy fee. The result of the administrative proceedings was that Marie was entitled to the fee and that she should return to her post. The proceedings did not make any reference to the discrimination claims.

At 15 weeks of pregnancy Marie was diagnosed with hypothyroidism. Her doctor advised her to stay in bed rest. Marie was on bed rest until she delivered.

John sent the request for sick leave to the prosecutor office on the basis of the suspicion that Marie wanted to obtain undue gain under false pretences. On 30 April 2016 the Public Prosecutor dismissed the claims against Marie because he did not find any false or unfair conduct in the doctor prescription that Marie should not work. In parallel, John informed the Social Security Office about his suspicion. Social Security did not find any false or unfair conduct in the doctor's medical prescription. On 15 May 2016, John unilaterally terminated the labour contract. The employer stated that Marie was disloyal because she used the sick leave to obtain social benefits unfairly.

Marie filed a suit in local court, complaining of a discriminatory dismissal. In her complaint, she argued she was discriminated because she is a woman and asked to be reinstated. She also claimed compensation.

You are the judge on the local court. Please answer the following questions:

- Based on the facts before you has Marie been discriminated on the grounds of her gender?
- What specific EU level case law could be used to support your decision in this case?
- What is the relevance of the EU anti-discrimination framework for this case?
- In case you decided there had been discrimination could you order the employer to attend a course on "Non-discrimination in the workplace"?

Guidelines for discussion:

- Discuss whether Article 21 of the Charter adds to the protection under the Equality Directives.
- Discuss *Dekker* vs *Stichting Vormingscentrum voor Jong Volwassenen*

- **Case law on case sheet 3** of the handbook - (Poland) District Court in Wrocław, Śródmieście, X P 20/16, 3rd August 2016 - served as a basis to draft Hypothetical Case 8. Draw parallels.

Case 9 (Hate speech)

Olga, a candidate of the party *Right-Wing-National* was found guilty of an intentional racially motivated offence designed to incite hatred or discrimination against all black people. The court, hearing a complaint by the Equality body, sentenced Olga to 9 months in prison and 5 years of ineligibility.

The candidate had posted on her Facebook page two pictures side-by-side: one of a monkey another of the Minister of Environment. Olga did not deny the claim, she stated: "It was a joke".

The Court found that the *Right-Wing-National* was to be considered a co-offender given that "the moral element of the offence consisted in the expressed willingness of the party to lash out at foreigners and more generally at people of different race or origin"

The court went beyond the request for compensation and attributed a fine of 50,000 euros. It also ordered the *Right-Wing-National* to pay a 30,000 euro fine.

Olga appealed on the basis that the equality body did not have locus standi. The court of appeal ruled the complaint by the equality body "inadmissible" and annulled the decision by the first instance court.

In parallel to these proceedings the prosecutor's office has opened an investigation on Olga due to the fact that during her last political campaign she allegedly appealed to voters to "Take monkeys from governmental offices with your own hands".

You are the judge on the local court. Please answer the following questions:

- Based on the facts has there been an intentional racially motivated offence designed to incite hatred or discrimination against all black people?
- What is the relevance of the EU anti-discrimination framework for this case?
- What specific EU level case law could be used to support your decision in this case?

Guidelines for discussion/solving the case:

- *Discuss freedom of expression and hate speech in the context of this case.*
- *Do Equality bodies in your MS have locus standi ?*
- *In case the decision had not been overturned was the fine effective, proportionate and dissuasive ?*