

FRICORE CASEBOOK

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



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Scientific Coordinator of the FRICoRe Project:

Paola Iamiceli

Coordinator of the team of legal experts on Non-discrimination:

Aurelia Colombi Ciacchi

Project Manager:

Chiara Patera

Lead authors of this Casebook:

Lottie Lane

Tobias Nowak

Co-authors of this Casebook (in alphabetical order):

Chiara Angiolini

Fabrizio Cafaggi

Tanya Cassam

Aurelia Colombi Ciacchi

Alessandra Faes

Alejandro Fernandez

Andrei Gasca

Paola Iamiceli

Ireneusz C. Kamiński

Fiore Schuthof

Veena Suresh

Oskari Vaaranmaa

Angela Ward

Note on national experts and collaborators:

The FRICoRe team would like to thank all the judges, experts and collaborators who contributed to the project and to the Casebook by suggesting national and European case law in the field of non-discrimination (*in alphabetical order*):

Kosovare Duraku

Martina Flamini

Thibaut Fleury-Graff

Eleni Giannikopoulou

Inès Giauffret

Christopher Hristov

Ireneusz C. Kaminski

Panagiotis Karytsianos

Nikoleta Kiralyova

Judit Kolbe

Hortense Lafond

Annemieke Maatje

Aleksander Milosevic

Deborah Nidel

Francesco Perrone

Rundeer Singh

Imke Smits

Jessica Verlsuis

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Introduction: A brief guide to the Casebook

Cross-project methodology

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

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

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

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

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

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

The main issues addressed in this Casebook

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

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

Another novel aspect of this FRICoRe Casebook is the special focus on non-discrimination in specific contexts, discussed in Part 2. Here, the analysis of CJEU judgments in the contexts of migration and asylum on the one hand, and health and disability on the other, sheds light on how the more general rules on non-discrimination (which are discussed throughout previous sections of the Casebook) apply in these areas. Migration and asylum, as well as health and disability, are cross-cutting dimensions of the FRICoRe project. The

inclusion of specific sections of analysis on these issues in the non-discrimination Casebook is therefore expected to lead to new lines of comparative analysis in the project's forthcoming Casebooks on Migration and Asylum, and on Health.

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

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

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

The structure of the Casebook: some keys for reading

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

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

Chapter 1 discusses the material scope of non-discrimination in EU law and constitutes the most extensive chapter within the Casebook. Focus is placed on the limited grounds of non-discrimination (Section 1.1), the meaning of and differences between direct and indirect discrimination (Section 1.2), and when differences in treatment that would otherwise amount to discrimination can be justified (Section 1.3).

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

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

The justification of differences in treatment that would otherwise amount to discrimination are discussed in some detail in Section 1.3 of the Casebook. Particular attention is first paid to the scope of grounds of discrimination, which are limited to those specified in the relevant directives (*MB*, C-451/16). Second, the ground specific to indirect discrimination (objective justification on the basis of a legitimate aim, the means of achieving which are appropriate and necessary) and how the **principle of proportionality** applies in this context are addressed. Essentially, based on the principle of proportionality, for a measure to be objectively justified, it cannot exceed the limits of what is appropriate and necessary to achieve the aims of the measure (*CHEZ Razpredelenie Bulgaria*; *F.*, C-473/16).

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

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

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

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

The second part of Chapter 3 relates to **effective remedies in non-discrimination cases**. Here, a brief comparative discussion of enforcement of non-discrimination and the different remedies available and claimed at the national level is provided before the case law analysis begins. The jurisprudence on effective remedies centres first on the CJEU’s definition of **‘effective, proportionate and dissuasive’** remedies in non-discrimination cases (*Asociația Accept*, C-81/12 and *Feryn*, C-54/07). Here, the Court emphasises in particular that purely symbolic remedies are not appropriate, and suggests some examples of remedies that are effective, proportionate and dissuasive. Second, the question of whether private acts may be invalidated by national courts on the basis of a violation of Article 21 is considered with reference to *Egenberger*. This case demonstrates that, due in

particular to the need for **effective judicial protection** from discrimination, private acts may indeed be invalidated. Third, the CJEU's case law (*NH*, C-507/18) is analysed to shed light on the use of **compensation** as a remedy in non-discrimination cases and the question of who may bring cases for compensation where there is no identifiable victim. With regard to the former, the Court stressed that European law should be interpreted taking into account the need to provide everyone with **effective protection against discrimination**. Second, in setting the boundaries of the **collective action for compensation**, the Court found that the requirement that sanctions against discrimination are effective, proportionate and dissuasive applies regardless of whether there is any identifiable injured party in a case.

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

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

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

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

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

In the specific context of applications for asylum, much of the Court's case law deals with questions pertaining to the meaning of persecution, particularly alleged persecution on the basis of sexual orientation (*X and Others*, Joined Cases C-199/12 to C-201/12; *A, B and C*, Joined Cases C-148/13 to C-150/13), rather than discrimination *per se*. The CJEU cases do demonstrate that where an individual would be subject to disproportionately discriminate

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

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

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

In the cases concerning migration, the remedies sought are the same as those in some of the non-discrimination cases discussed in Chapters 1-3 of the Casebook (a declaration of discrimination, and a declaration of unconstitutionality of national legislation). The remedy sought in some asylum cases (e.g. *X and Others*) is also the annulment of a decision by a public authority. However, other remedies, including asylum itself, may also be sought. Under EU asylum law, **remedies must be effective**, which depends on the administrative and judicial system of each Member State seen as a whole. Ultimately, however, the rules on effective remedies in asylum cases are different from those in true non-discrimination cases, where, as seen in Chapter 3 of this Casebook, remedies must be 'effective, dissuasive and proportionate'.

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

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

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

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