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Petitions

Discrimination(s) as emerging from petitions received

STUDY FOR THE PETI COMMITTEE

EN

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

PETITIONS

Discrimination(s) as emerging from petitions received

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions (PETI), focuses on several issues stemming from a sample of forty petitions received. Whilst all petitions are related to anti-discrimination law, they are quite heterogeneous in terms of the respondent entity, the grounds of discrimination and the legal sources invoked. Recommendations are made to assist the PETI Committee and the EP in replying to petitions received in this field.

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To contact the Policy Department or to subscribe to its newsletter please write to:
poldep-citizens@ep.europa.eu

Research Administrator responsible

Name: Jos Heezen
Policy Department C - Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: jos.heezen@ep.europa.eu

AUTHOR(S)

Chiara FAVILLI, University of Florence
Nicole LAZZERINI, University of Florence

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CONTENTS

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
CFR	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EP	European Parliament
FRA	Fundamental Rights Agency
MS	Member States
PETI	Committee on Petitions
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

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EXECUTIVE SUMMARY

The right to equality and non-discrimination is one of the fundamental principles of EU law. It is based on the EU Treaties, the Charter of Fundamental Rights (CFR), the general principles of EU law and EU secondary law. Anti-discrimination directives lay down specific rules for combating discrimination, but their scope is limited to certain fields and grounds of discrimination because the Treaties do not confer on the Union a general, cross-sectoral competence. Still, even the EU Treaties and the Charter may only apply within the scope of the application of EU law. Thus, whilst EU citizens are becoming more and more aware of their rights and are more likely to challenge national and EU acts deemed to be unlawful, they risk 'knocking on the wrong door' and ending up with their plea being rejected on competence grounds.

This study analyses a sample of forty petitions related to anti-discrimination law received by the PETI Committee. These petitions are quite heterogeneous in terms of the respondent entity (the European Union or the Member States), the grounds of discrimination at issue (race and ethnicity, sexual orientation, nationality, age, disability, language, national minority or sex), and the legal sources invoked (the CFR or EU law in general). The fields where instances of discrimination allegedly occurred are also rather different.

Some petitions target the conduct of a national public body or a civil servant or concern the application of a piece of domestic law to an individual case. In other cases petitioners claim there has been a lack of action to combat discrimination by a Member State. When the Member States' responsibility is at stake petitions often call on the European Parliament to promote initiatives at the national level or to monitor the proper implementation of EU law. In petitions which challenge the responsibility of the EU institutions, petitioners often ask for the adoption of new acts. However, often without specifying which measures they consider should be enacted.

This study aims to scrutinise the issues stemming from the petitions received, with a view to providing a number of recommendations to the EP on how to deal with similar cases. The first two chapters pave the way for the analysis – in chapter three - of the petitions in order to ascertain whether they fall within the scope of application of EU law and, if so, which EU legal source is applicable. Also, the respective positions on the petitions taken by the PETI Committee and the European Commission – which in some cases diverge to a significant extent – are examined. Based on the outcomes of the analysis of petitions in the fourth and final chapter the authors provide suggestions on alternative models of reply which may help to strike a balance between the duty to comply with the CJEU's stance on the boundaries of EU competence and the need to satisfy the legitimate expectations of the petitioners.

A complete list of the petitions, classified by grounds of discrimination, is provided in Annex V. For each petition, the issue at stake, the legal source(s) mentioned and the Commission's view are summarised. The recurring themes (national minority and language; obstacles to the free movement of EU citizens and their family members, particularly in the case of LGBT families; child alternative care; age discrimination) are analysed more closely with the aim of providing advice on how the PETI Committee and the Commission might reply to the petitioners. A detailed analysis is provided for cases which are particularly sensitive or give rise to complex legal issues and/or for which the relevance of EU law is not immediately evident.

The petitions received show that the most crucial issues are those related to the exact definition of the boundaries of the EU competence to act. In some cases it is quite difficult to identify the scope of application of EU primary and secondary anti-discrimination law, notably when a national act is challenged. This is also a recurrent topic when petitioners challenge EU law and, in effect, it is addressed abundantly in reports, by academics and in CJEU case law. Nevertheless, it is crucial to the petitions analysed in this study and even the views expressed by the European Parliament and the European Commission on EU competence and the scope of application of anti-discrimination law are sometimes rather, if not radically, different. While the Parliament seems to endorse an overbroad interpretation of the limits of EU competence, the Commission often adopts an excessively narrow approach.

The reasons for these two different approaches lie in the existence of 'grey zones', i.e. in situations or cases in which *in principle* EU law *may* apply. EU competence comes into play when a connection of a specific case to EU law is shown. This situation occurs for instance with national rules on family statutes in cases of free movement of EU citizens and their family members, including third country nationals. In other cases there may not be an EU legal act in force, but there is a *prima facie* relevant reference in the Treaties. This is the case for instance with regard to the protection of national minorities and discrimination on grounds of language, which are expressly mentioned in the Treaties and in Art. 21 CFR. Thus, it is understandable that EU citizens are tempted to invoke EU law and submit petitions to the EP in which they call for action. Unfortunately, their claims and requests are not always clearly defined.

It is obvious that we cannot assume that petitioners are sophisticated lawyers who understand the exact scope and effects of all legal provisions, especially in disputes of competence, which cause different views and approaches even among academics, EU institutions and the judiciary. However, in cases where the EP, and the EU in general, has no competence to intervene, the outcome may be that issues raised in petitions remain unsolved because petitioners are 'knocking on the wrong door'. Other cases are too complex to be dealt with satisfactorily through the petitions process, because they concern individual situations requiring a fact-specific legal assessment and where, for instance in the review of a claim of discrimination, all details of the facts must be considered and all rules on discrimination need to be applied, including definitions, exclusions and remedies.

Nevertheless, an effective compromise solution must be found. On the one hand the CJEU's stance on EU competence and scope of application must be followed, on the other hand the petitioners should be informed and advised about alternative means of redress which may be better suited to the situations and facts described in their petitions. Although these elements are already present in many of the replies to the petitions examined, in some cases alternative replies are available and could be suggested. Finally, it is important that petitioners (as well as other EU citizens) should be made aware that a 'negative' reply to a petition does not mean that EU is *unwilling* to act, but rather that EU is *unable* to act, and that this is often due to the lack of conferral of powers by Member States unwilling to give up their exclusive competence in several areas.

1. EU ANTI-DISCRIMINATION LAW: A MULTI-LAYERED FRAMEWORK

KEY ISSUES

- Overview of all relevant provisions on discrimination: EU Treaties, CFR, and anti-discrimination directives.
- Analysis of the scope of application and the effects of each legal source also in private parties' disputes, taking into account that the current approach of the CJEU to the issue of direct horizontal effect of the Charter may have far-reaching implications in the field of non-discrimination.
- Responsibility of Member States under EU anti-discrimination provisions.

1.1. Non-discrimination under the EU Treaties

1.1.1. Non-discrimination on grounds of nationality and sex

The prohibition of nationality discrimination was contained in the founding Treaties at the birth of the European Community and has since seen an extraordinary development in case law and other legislative provisions. This area of law evolved around the two pillars of discrimination, viz nationality and sex (see also below paragraphs 2.2 and 2.5), both of which have a double aim which is social and economic at the same time.

In a system where the EU legal order must coexist with multiple national legal orders, the prohibition of discrimination on grounds of nationality has assumed a key role, encouraging the creation of the internal market and free movement between the Member States. The CJEU itself has specified this rule to be of fundamental importance and to produce direct effects, both vertical and horizontal.[1]

There are specific prohibitions laid down in Part Three (Union Policies and Internal Actions) of the TFEU, which correspond to the affirmation of the general prohibition of discrimination on grounds of nationality and prohibit all restrictions and discriminations between goods, persons, services and capital dependent on their nationality, establishment, or national origin. The CJEU has always interpreted the concept of nationality as citizenship of a Member State and the two terms, nationality and citizenship, are often used interchangeably.[2]

As far as gender is concerned, according to Art. 157, par. 1, TFEU 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'. The Court of Justice has interpreted this provision broadly and as having direct effect, both vertical and horizontal.[3] Moreover, thanks to secondary law, the principle of equal treatment has been extended to all matters of employment and occupation, such as access to employment and working conditions, statutory and occupational social security schemes, self-employed activities and even in the agricultural field.

[1] Case C-122/96, *Saldanha,* 2 October 1997, ECLI:EU:C:1997:458; Case C-224/98, *D'Hoop,* 11 July 2002, ECLI:EU:C:2002:432.
[2] Case C-192/99, *Kaur*, 20 February 2001, ECLI:EU:C:2001:106; Case C-145/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland*, 12 September 2006, ECLI:EU:C:2006:543.
[3] Case 43/75, *Defrenne*, 8 April 1976, points 7/15, ECLI:EU:C:1976:56.

Table 1. Overview of the scope and effects of Articles 18 and 157 TFEU

Article	Grounds	Nature	Application		Direct effect
			EU level	National level	
18	Nationality	Prohibition of discrimination, and legal basis for action by EU legislature	Applies to all EU acts, regardless of the matter	Applies to national provisions in situations 'governed by EU law'	YES - Vertical and horizontal effects
157	Sex	Prohibition of discrimination, and legal basis for action by EU legislature	Applies to all EU acts, regardless of the matter	Applies to national provisions in situations 'governed by EU law'	YES - Vertical and horizontal effects

1.1.2. The new anti-discrimination provisions

The Treaties of Amsterdam and Lisbon enlarged the social scope of EU anti-discrimination law by adding further rules governing discrimination. The first instance of development of anti-discrimination law was the introduction of Art. 19 TFEU (former 13 TEC) in the Amsterdam Treaty. Art. 19 TFEU endows the Council with the power to combat discrimination; it does not prohibit discrimination itself, but gives the Council the power to act against discrimination based on an exhaustive list of grounds. Although hostility towards discrimination on those grounds can be implicitly inferred from the rule, this is not sufficient to confer direct obligations on Member States and, even less, on their citizens.

Furthermore, Art. 19 TFEU does not assign new competence, but powers, which must be exercised 'within the limits of the powers conferred by them upon the Union' and 'without prejudice to the other provisions of the Treaties'. This last clause means that Art. 19 TFEU cannot be used as a legal basis in the presence of a special rule in the Treaty and that it has a residual application compared to all other rules of the Treaty and not only with respect to those specifically related to discrimination in certain specific sectors.

A second development was introduced by the Lisbon Treaty. The first two titles of the 'new' Treaty on the European Union include numerous references to the prohibition of discrimination and the principle of equality. Moreover, for the first time Art. 2 TEU includes equality as one of the values (previously called principles) on which the Union is based and specifies that non-discrimination and equality between men and women are characteristics which all Member States of the European Union have in common. The subsequent Art. 3, par. 2 TEU replaces Art. 2 TEU and it both modifies and enlarges the aims of the Union. The Treaty now envisages the combating of social exclusion and discrimination, and once again promotes equality between women and men.[3] Thus, equality, the fight against discrimination, and equality between women and men are now considered both fundamental values of the Union and objectives the Union should pursue in all its policies. There are in fact two provisions which specifically refer to the principle of equality: Art. 4, par. 2 TEU and Art. 9 TEU. The first provision establishes the obligation for the Union to respect equality among the Member States before the Treaties and to respect their national identity. On the other hand, Title II

of Art. 9 TEU, which deals with democratic principles, refers to the Union's citizens stating that: 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies […].'

Finally, a completely new provision was inserted, i.e. Art. 10 TFEU, which contains a mainstreaming principle whereby all EU policies are bound not only to uphold non-discrimination on the grounds specified therein - i.e. the same as those contained in Art. 19 TFEU - but also to help to eliminate discrimination. This provision thus requires that all Union policies must not only avoid discrimination for the reasons set out, but must also contribute to the elimination of such discrimination. Therefore, this is neither a prohibition of discrimination (as in Art. 18 TFEU), nor a provision attributing competence (as in Art. 19 TFEU), but rather a provision requiring that discrimination be combated in all areas of the Union's policies and activities. The concept of mainstreaming, which appeared and developed widely in the sector of gender discrimination, is now extended to all forms of discrimination which are expressly mentioned in EU law. However, this provision does not include nationality as citizenship, which continues to be regulated by specific provisions.

Table 2. Overview of the scope and effects of new anti-discrimination provisions

Article	Grounds	Nature	Application		Direct effect
			EU level	National level	
ART. 3(3) TEU	General provision Sex	Aim of the European Union	Applies to all EU institutions	-	No
9 TEU	Nationality	Equal treatment requirement	Applies to all EU institutions	-	YES - Vertical
10 TFEU	Sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation	Mainstreaming principle	Applies to all EU institutions	No	No
19 TFEU	Sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation	Legal basis for action by EU legislature. No prohibition	Applies to all EU institutions	No	No

1.1.3. Non-discrimination under Article 21 of the CFR

The Charter of Fundamental Rights of the EU acquired the same *status* as the Treaties on 1 December 2009 and rapidly became the primary reference source of the three-pronged system of EU fundamental rights delineated by Article 6 TEU. Its Title III (Articles 20 to 26) is devoted to 'Equality' and contains a two-paragraph provision on 'Non-Discrimination' (Article 21). This is preceded by a broadly formulated provision on 'Equality before the law' (Article 20) of which the former is *'a particular expression'*. Moreover, Title III lays down provisions targeting specific dimensions of the principle of equal treatment, notably the respect for cultural, religious and linguistic diversity (Article 22), equality between women and men (Article 23), and the protection of minor children, the elderly and persons with disabilities (Articles 24, 25 and 26 respectively).

Before the entry into force of the Lisbon Treaty there was no written catalogue of EU fundamental rights. Yet, the CJEU had granted protection to some of these rights through a non-written source, the general principles of EU law, which the Court itself can identify and reconstruct taking into account also the ECHR and the constitutional traditions common to the Member States (Art. 6(3) TEU). Article 20 CFR therefore codifies the case law of the CJEU on the principle of equality. Similarly, Article 21(1) CFR, insofar as the prohibition on grounds of sex, age and nationality are concerned, and Article 23(1) CFR, with respect to equal pay between men and women, reassert general principles established by the CJEU. By contrast, the remaining provisions in the 'Equality' Title are largely innovative with respect to the pre-Lisbon legal framework.[4]

At present, Article 6(3) TEU confirms the possibility for the CJEU to draw the protection of fundamental rights (also) from the general principles of EU law. Yet, as anticipated, in recent years the Charter has progressively become the first reference source. At the same time, the Court has relied on its case law on the general principles to interpret the provisions of the Charter drawing on them and to address general questions such as the scope of application of the Charter or the capacity of (some of) its provisions to have direct effect. Accordingly, the case law on general principles in the field of equality and non-discrimination will not be the object of a separate analysis in this study.

1.1.4. Nature and effects of Article 21 CFR

Whilst the second paragraph of Article 21 CFR, which prohibits nationality discrimination, merely replicates Article 18(1) TFEU, the first paragraph lays down a broader list of prohibited grounds of discrimination as compared to Article 19 TFEU. This list encompasses 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, sexual orientation and nationality.

Moreover, the formulation of Article 21(1) CFR clearly indicates that this list is not exhaustive. This should not imply however that, whatever cause of differentiated treatment could be caught under this provision, any meaningful distinction between Articles 20 and 21 CFR would disappear. The grounds mentioned indeed refer to personal characteristics that also have a social dimension, notably being the cause of prejudice or of stigmatisation. It is ultimately for the Court to establish whether other grounds can be relevant under that provision. This is not only a matter of interpretation of the Charter, it also calls into question societal choices,

[4] As regards the protection of children rights, some reference could be found in pre-Lisbon case law: see, in particular, Case C-540/03, 27 June 2006, *Parliament v. Council*, ECLI:EU:C:2006:429, para. 58 and Case C-244/06, 14 February 2008, *Dynamic Medien*, ECLI:EU:C:2008:85, para. 41.

which must be consistent with the values underlying the EU legal order. So far the CJEU has not expanded the list. By contrast, it considered that under EU law sickness and obesity do not amount to autonomous grounds of non-discrimination: they only become relevant where they imply a condition that can be qualified as disability discrimination.[5]

As is clearly stated by Article 6(1) TEU and Article 51(2) CFR, the Charter does not empower the EU legislature to adopt measures aimed at ensuring the respect of the fundamental rights granted therein, or to promote their application. Rather, the Charter lays down limits for action of the EU legislature, as well as for the Member States 'only when they are implementing EU law' (see Article 51(1) CFR and section 1.2.2 below). Thus, Article 21 CFR prohibits discrimination on certain grounds (not exhaustively listed) which both the EU legislature (when exercising the powers conferred by the Treaties) and the Member States (when they 'implement' EU law) have to respect. However, Article 21 CFR does not provide any legal basis for EU legislation in the field the Charter and can be invoked only within EU competences.[6] In other words, whilst all the grounds mentioned by Article 21(1) CFR set a limit to EU action (insofar as EU acts shall not contain provisions that discriminate on these grounds), the Union may not validly enact legislation aimed at combating discrimination based on grounds mentioned in Article 21(1) CFR, or Article 19 TFEU (namely, colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property, birth)[7]. This means that EU Member States have primary responsibility to tackle these forms of discrimination. Even the duty of 'promotion', laid down in Article 51 CFR, does not constitute a sufficient basis for EU action aimed at promoting the effectiveness of Article 21. In other words, it does not seem plausible to base an action (under Article 265 TFEU) for failure of the EU legislature to enact measures aimed at promoting the Charter on the competences conferred on the Union by the Treaties.

The Charter provides a reference point for EU legislation which shall not contain provisions contrary to Article 21 CFR, read in combination with Article 52(1) CFR (laying down the requirements that limitation to fundamental rights must satisfy). Importantly, Article 21 CFR acts as a basis for overseeing all other measures adopted by the institutions, bodies, offices and agencies of the Union and not only the EU anti-discrimination legislation. However, its role is different under the two alternative scenarios. Where the enactment of EU anti-discrimination legislation is at issue the EU legislature must make provisions that contribute, in a consistent manner, to the achievement of equal treatment in a certain field.[8] By contrast, where equal treatment is not the primary purpose the EU legislature must refrain from introducing provisions that are discriminatory. [9]

[5] See, respectively, Case C-13/05 *Chacón Navas*, cit., and Case C-354/13 *FOA* (*ex parte Kaltoft*), 18 December 2014, ECLI:EU:C:2014:2463, paras. 31-40 and 58-60.

[6] The explanation of Article 21(1) CFR deals with this. It makes clear that the EU legislator may not rely on this provision to adopt legislation that cannot be based on Article 19 TFEU, which expressly empowers the Union to take provisions aimed at combating discrimination (only) on grounds of sex, race or ethnic origin, religion or personal opinions, disability, sexual orientation and age. Reference is made to the Explanation relating to the Charter of Fundamental Rights (2007/C 303/02), which must be taken in due account in the interpretation and application of the Charter (see arts. 6(1) and 52(7) CFR).

[7] One can apply, by analogy, the reasoning developed by the Court of Justice in Case C-354/13 *FOA* (*ex parte Kaltoft*), of 18 December 2014, ECLI:EU:C:2014:2463, para. 36: '*the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof*'.

[8] In Case C-236/09 *ASBL Test-Achats*, 1 March 2011, ECLI:EU:C:2011:100, the CJEU declared the invalidity of Article 5(2) of Directive 2004/113/EC, on equal treatment between men and women in the access to goods and services, which allowed the Member States to introduce proportionate differences in individuals' premiums and benefits where the use of sex was a determining factor in the assessment of risks. The Court found that this provision was likely to impede the achievement of the very objective of the Directive, and it was therefore incompatible with Articles 21 and 23 of the Charter.

[9] In Case C-356/12, *Glatzel*, 12 May 2014, ECLI:EU:C:2013:505, the CJEU upheld the validity of a provision of Directive 2006/126/EC on driving licenses prescribing a requirement of minimum visual acuity for the worse eye for drivers of certain vehicles. The compatibility of this provision with Article 21 CFR was challenged on the ground that it puts in a disadvantageous position persons suffering from a peculiar visual disability whereby binocular acuity

As far as Member States are concerned the Charter is applicable only if there is an EU law rule, other than the Charter provision allegedly violated, which governs the situation in question. This means that, in order to trigger the application of EU fundamental rights, it is not sufficient to claim that a fundamental right granted by the Charter was violated by a Member State. Rather, there must be a rule of EU primary or secondary law, other than the fundamental right allegedly violated, that is directly relevant to the case.[10] If such different EU law rule exists the case falls within the scope of EU fundamental rights and Member State action[11] involved may be reviewed against the Charter. Such rule may be one of the EU anti-discrimination directives, as was the case in *Kücükdeveci*. In this respect it must be noted, however, that the anti-discrimination directives cannot trigger the application of the Charter - in cases falling within their material scopes - in relation to instances of discrimination based on grounds additional to those targeted by the directives themselves. Indeed, the Court made it clear that 'the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof'.[12] The same conclusion should apply to other anti-discrimination directives.

Such a limit to the application of the Charter is a corollary of the principle of conferral, which would be put at risk if EU fundamental rights - being cross-sectoral by their very nature - could be invoked against Member State action by simply claiming their violation.[13] Since the situation shall be 'governed' by EU law, the Treaty provisions that merely confer on the Union the power to adopt anti-discrimination legislation do not, by themselves, trigger the application of the Charter. By contrast, Article 21(1) CFR may be relied on in combination with an EU anti-discrimination directive where a case falls within the latter's scope (see for instance *CHEZ Razpredelenie Bulgaria*).[14] It could also be relied on in a situation which falls outside the scope of EU anti-discrimination legislation, provided that another EU law rule is directly relevant to the case (see for instance *Léger*).[15]

Finally, the Charter may be applied also against private parties. As a rule, violations of the fundamental rights by private parties[16] do not fall, as such, within the scope of the Charter. This can be inferred from its Article 51(1), which only refers to the Union and the Member States (when they 'implement' EU law) as the addressees of the duty to respect the fundamental rights granted in the Charter. This does not mean that EU law, including the

meets the threshold, whereas the weaker eye does not. The Court found that the contested provision did not breach Article 21, read in conjunction with Article 52(1), because *'[the EU legislature] has weighed the requirements of road safety and the right of persons affected by a visual disability to non-discrimination in a manner which cannot be regarded as disproportionate in relation to the objectives pursued'*.

[10] A. Rosas, *When is the EU Charter of Fundamental Rights applicable at the national level?*, *Jurisprudencija–Jurisprudence*, 2012, 19(4), p. 1269–1288. See also para. 10 of the new *Recommendations of the Court of Justice to national courts and tribunals in relation to the initiation of judicial proceedings* (2016/C 439/01).

[11] On the relevance of the Charter with respect to private conducts, see below in this section.

[12] See *FOA (ex parte Kaltoft)*, cit., para. 36. See also, similarly, *Chacón Navas*, cit., para. 56, and Case C-303/06, *Coleman*, 17 July 2008, ECLI:EU:C:2008:415, para. 46.

[13] As is well known, in the Grand Chamber's judgment in Case C-617/10, *Åkeberg Fransson*, 26 February 2013, ECLI:EU:C:2013:280, the CJEU affirmed that Article 51(1) of the Charter codifies its *pre*-Lisbon case law on the scope of fundamental rights as general principles of EU law. Accordingly, there is 'implementation' of EU law *'in all situations governed by European Union law, but not outside such situations'*, or, in other words, when national legislation *'falls within the scope of [EU] law'.*

[14] Case C-83/14, *Chez Razpredelenie Bulgaria*, 16 July 2015, ECLI:EU:C:2015:480.

[15] See Annex II for a concise analysis of each situation where the CFR may be invoked against MS, coupled with examples drawn from the CJEU's case law. For a more comprehensive analysis, see the study by E. Spaventa, The Interpretation of Article 51 of the Charter of Fundamental Rights: the Dilemma of Broader or Stricter Application of the Charter to National Measures, European Parliament, 2016.

[16] It is worth recalling that the Court has endorsed a broad notion of 'State', which encompasses the legislature, the executive power and the judiciary, and any central and local public authorities. It also includes 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals' (see, for instance, Case C-282/10, *Dominguez*, 24 January 2012, ECLI:EU:C:2012:33).

Charter, is irrelevant. Since EU anti-discrimination legislation applies both to public law and private law relationships, the reaction against a private party that discriminates against someone in a field covered by that EU legislation will be based on the national legislation implementing it. However, if the conduct of the private party is in breach of that national legislation, EU law will remain in the background. By contrast, the situation is different when that private party acts in compliance with national legislation that is discriminatory. The CJEU affirmed that the prohibition of discrimination on grounds of age, as enshrined in Article 21(1) CFR, 'is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[17] Thus, in cases involving implementation of EU law, the prohibition of age discrimination in Article 21(1) CFR can be relied on by a private party (e.g. an employee) before a national court in the context of a dispute against another private party (e.g. the employer), in order to obtain the disapplication of conflicting national legislation. In practical terms, a private party (the employer, in our example) is subject to the effect of the Charter as if s/he were formally bound to respect it.

Prior to the recognition of the legally binding status of the Charter the Court had already reached this conclusion in relation to the prohibition of age discrimination as a general principle of EU law.[18] In *Mangold*,[19] *Kücükdeveci*,[20] and *Dansk Industri*[21] the CJEU instructed the referring judges to disapply national legislation in contrast with the general principle prohibiting discrimination on grounds of age, even though the main proceedings involved only private parties (the employee against his employer).

Although the Court referred only to the prohibition of discrimination on the grounds of age, other grounds mentioned in Article 21(1) CFR may similarly entail direct horizontal effect. Clearly, it is ultimately up to the Court to establish this. Indeed, based on its pre-Lisbon case law on the general principle of non-discrimination, it is quite safe to argue that at least the prohibition to discriminate on the grounds of sex and nationality has that effect.

[17] Case C-176/12, *Association de Médiation Sociale,* 15 January 2014, ECLI:EU:C:2014:2. The preliminary ruling in *Association de Médiation Sociale* originated from a case on the right of workers to information and consultation within the undertaking, granted by Article 27 CFR. It is nonetheless relevant to this analysis, because the Court compared Article 27 to Article 21(1) in order to affirm that the former, unlike the latter, cannot entail direct effect.
[18] See below Annex III for an extensive analysis of the case law of the CJEU on the prohibition of age discrimination and on its effects against private parties.
[19] Case C-144/04, 22 November 2005, ECLI:EU:C:2005:709.
[20] Case C-555/07, 19 January 2010, ECLI:EU:C:2010:21.
[21] Case C-441/14, 19 April 2016, ECLI:EU:C:2016:278.

Table 3. Prohibited grounds of discrimination under Articles 19 TFEU and 21 CFR

Grounds	Art. 19 TFEU	Art. 21 CFR
Sex	✓	✓
Race	✓	✓
Colour	X	✓
Ethnic origin	✓	✓
Social origin	X	✓
Genetic features	X	✓
Language	X	✓
Religion or belief	✓	✓
Political or any other opinion	X	✓
Membership of a national minority	X	✓
Property	X	✓
Birth	X	✓
Age	✓	✓
Disability	✓	✓
Sexual orientation	✓	✓
Other grounds	X (closed list)	✓ (open list)

Table 4. Overview of the scope and effects of Article 21 CFR

Grounds	Nature	Application		Direct effect	Key actors for implementation
		EU level	National level		
Non-exhaustive list! 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 nationality sexual orientation	Only prohibition No legal basis for EU action	All EU acts	In situations 'governed by EU law'	YES	Shared competence for grounds covered by both Article 21 and specific Treaty legal bases (e.g. Arts. 18, 19 and 157 TFEU). Primary responsibility of the Member States for grounds mentioned only by Article 21

1.2. Non-discrimination under 'second-generation' directives

Based on Articles 19 and 157 TFEU, special implementation provisions have been enacted, exclusively dedicated to combat discrimination and to implement the principle of equal treatment. A system of concepts, exceptions, remedies and sanctions is included.

The adoption of measures according to Art. 19(1) TFEU requires that a special legislative procedure be followed in which the Council must act unanimously after approval by the European Parliament. The type of procedure justifies why it is important that a specific legal basis envisaged by the Treaty should be used where this exists. This applies to Art. 157 TFEU on the prohibition of discrimination in employment on grounds of sex. There is a potential overlap between this ground of discrimination and its material scope with Art. 19 TFEU, which includes sex as one of the grounds of discrimination. The relationship between the two rules should be resolved with Art. 157 TFEU prevailing, as it requires the ordinary legislative procedure under which the European Parliament is clearly given a decisive role which envisages qualified majority voting in the Council.

Under Article 19(2) TFEU the basic principles of incentive measures can be adopted with the ordinary legislative procedure. This provision does not alter the nature of Art. 19 TFEU, which remains a rule related to powers, but it does allow the adoption of incentive measures pursuant to ordinary legislative procedures, excluding any harmonisation. Among the acts that can be adopted based on this second paragraph are action programmes, i.e. annual or multi-year instruments the Union uses to fund various activities on the basis of certain priorities and guidelines. The 2014-2020 Action Programme, *Rights, Equality and Citizenship Programme,* is currently underway for the period 2014 to 2020.[22] These activities can be carried out by the Commission, by the Member States or by private parties through decisions taken by the Management Committee which establishes an annual programme implemented by the Commission through the publication of notices or contracts. The Council can also adopt different acts, since the only condition laid down by Art. 19(2) is that the reference made is to incentive measures and not harmonisation measures.

With a view to implementing Art. 19 TFEU, a first package of measures was adopted. It comprised Directive 2000/43/EC, which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin[23], and Directive 2000/78/EC which establishes a general framework for equal treatment in employment and working conditions.[24] The directives implementing Art. 19 TFEU are called 'second-generation directives', since compared to those previously adopted concerning discrimination on the grounds of sex, they regulate a comprehensive system of protection against discrimination which was, for the first time, structured, detailed and based on the abundant case law the Court of Justice had developed in the field of discrimination on grounds of nationality and sex. The result was a codification of the concepts of discrimination (direct, indirect and harassment) and of a three-phase system of application of the rule. This allowed comparison between two similar situations, the verification of the existence of a disadvantage and the exclusion of a justification for discriminatory treatment (see Annex I for further details).

The directives, which are identical in many parts, contain comprehensive regulations that identify a system of broad protection, with reference to the notion of discrimination, sanctions

[22] Regulation 1381/2013 of 17 December 2013 *Establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020*, O.J. L 354/62 (2013).
[23] OJ L 180, 19 July 2000, 22-26.
[24] OJ L 303, 2 December 2000, 16-22.

and remedies, including the *locus standi* of collective subjects and the shift of the burden of proof.[25] Directive 2000/43 deals exclusively with discrimination on the grounds of race and ethnicity, while Directive 2000/78 concerns all the other grounds with the exclusion of sex (religion and belief, disability, age, sexual orientation). Moreover, Directive 2000/43 has a wider material scope of application, while the Directive 2000/78 is limited to the work sector.

The European Commission in 2008 put forward a proposal aiming to extend the scope of Directive 2000/78/EC to the same fields already covered by Directive 2000/43/EC. However, several Member States expressed their opposition to the proposal and the Council has not yet been able to reach the majority needed to approve it.[26]. Despite slight differences among MSs' positions, their opposition is mainly grounded on the following reasons: failure to respect the principles of subsidiarity and proportionality; lack of legal clarity; existing case law (including infringement proceedings stemming from the other EU anti-discrimination directives); the need for an impact assessment (a cost-benefit analysis and an assessment of the burden the proposal would impose on private businesses); and the scope of the directive (certain delegations being opposed to the inclusion of social protection and education).[27] While during the Italian Presidency in the second half of 2014 a consensus was close to being reached, recently the opposition side appears to have become larger. It is worth mentioning that Germany has been against the proposal since its publication, influencing the whole negotiation process. Complete refusal of the proposal was even part of the government coalition agreement in the Merkel I government. While the Merkel II coalition agreement does not contain this point, the government's position at EU level has not changed.[28] However, the Commission has confirmed its original proposal and a scrutiny reservation on any changes thereto. Negotiations within the Council are still going on, but with still different views among Member States as shown in the progress reports published by the Council.[29]

The package of measures to implement Art. 19 TFEU was largely inspired by the legislation and action programmes adopted to implement Art. 157 TFEU. In turn, the Directives of 2000 created the need to amend the law on discrimination on the grounds of sex. Directive 2002/73/EC of 23 September 2002 was thus adopted.[30] Although the need for this change is to be found in Art. 19 TFEU, Directive 2002/73/EC has its legal basis in Art. 157 TFEU as a special rule according to Art. 19 TFEU. Later, in 2006, Directive 76/207/EEC was the subject of another legislative regulatory intervention.[31] The origins of this intervention are entirely different from the previous ones. It came about in the wake of the European institutions' activities aimed at improving and simplifying the state of EU law.[32] The legislative activism on the subject ended with the adoption of Directive 2004/113/EC which implemented the principle of equal treatment between men and women as regards access to and supply of

[25] Case C-415/10, *Meister*, 19 April 2012, ECLI:C:2012:217; Case C-246/09, *Bulicke,* 8 July 2010, ECLI:EU:C:2010:418; Case C-429/12, *Pohl,* 16 January 2014, ECLI:EU:C:2014:12.
[26] *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008)426 of 2 July 2008.
[27] The progress on negotiations are reported in regular progress report: see the most recent Council docs. No. 14284/16, 10916/16, 14282/16 and 5428/17 of 14 February 2017.
[28] M. Privot, A. Pall, Three ways to unlock the EU anti-discrimination bill, 23 December 2014, www.euobserver.com.
[29] Progress Report, Doc. Cons. No. 14284/16 of 22 November 2016, p. 3
[30] Directive 2002/73/EC *amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, OJ L 269/15 (2002).
[31] Directive 2006/54/EC of 5 July 2006, *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, envisaged the recasting of the normative content of Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC, which were at the same time repealed with effect from 15 August 2009, OJ L 204/23 (2006).
[32] Unlike consolidation and codification, recasting makes it possible both to bring together regulatory acts relating to the same matter in a single text and to make any changes required to the regulations based, for example, on the fundamental judgments of the Court of Justice.

goods and services.[33] Directive 2004/113/EC has its legal basis in Art. 19 TFEU and aims to extend the scope of the prohibition of discrimination on the grounds of sex to sectors other than work. The different legal bases, therefore, tend to generate different regulations while having the same object, which undermines any attempt at simplification the institutions wished to pursue. For example, the notions of discrimination are reiterated in both directives, repeating the definitions provided by the directives of 2000 as well as the provisions on the judgment of discrimination.

It is worth mentioning that as far as 'nationality' is concerned there is no secondary rule that expressly lays down rules on the application of the prohibition of discrimination on grounds of nationality.[34] At the same time, Directive 2000/43/EC, which implements equal treatment irrespective of racial or ethnic origin, expressly excludes its application to differences of treatment based on nationality (Article 3) unless this leads to indirect discrimination on grounds of racial or ethnic origin (annual report of the European Commission on the implementation of Directive 2000/43/EC). This means that as far as the legal instruments required by the latest generation of directives is concerned, these are not applicable *per se* to the prohibition of discrimination on grounds of nationality. National legislators can envisage it, but it is not required by the obligations of the European Union.[35]

For EU citizens as well as for those categories of third country nationals to whom the prohibition of discrimination on grounds of nationality applies, the issue becomes that of which procedural rules are applicable. In this case too, in fact, as for the discrimination on grounds of nationality of EU citizens, there is no specific anti-discrimination provision obliging Member States to adopt a real system of protection and remedies to respond to the discrimination suffered.[36] Hence, according to Articles 19 TEU and 47 CFR the remedies applicable will be the national ones already in place to protect similar rights recognised by domestic law, assessed in the light of the principles of equivalence and effectiveness. It follows, therefore, that in the absence of any regulatory requirement for procedural instruments to enforce the prohibition of discrimination on grounds of nationality, national procedural rules will apply.

As already stated, when EU anti-discrimination legislation is applicable Article 21 CFR also is. When EU anti-discrimination legislation is not applicable Article 21 CFR applies only if the case involves an alleged discrimination stemming from an EU act (regardless of the matter) or, at the national level, a situation 'governed by EU law'. If the case involves alleged discrimination in a field where there are no directly relevant EU law rules (other than the Charter), Article 21 CFR is not applicable. Treaty provisions merely conferring on the Union the power to enact legislation on the matter concerned cannot trigger the application of the Charter.[37]

[33] 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 373/37 (2004).
[34] The jurisdiction provided for in par. 2 of art. 18 was in fact never exercised for this purpose.
[35]Case C-312/93, *Peterbroeck*, 14 December 1995, ECLI:EU:C:1995:437, para. 12. For a confirmation of the principle on non-discrimination, see Case C-246/09, *Bulicke v Deutsche Büro Service gmbh*, 8 July 2010, ECLI:EU:C:2010:418.
[36] Case C-291/09, *Franscesco Guarnieri & Cie*, 7 April 2011, ECLI:EU:C:2011:217, para. 20; Case C-571/10, *Kamberaj*, 24 April 2012, ECLI:EU:C:2012:233.
[37] See below in Annex IV on the interplay between EU sources on antidiscrimination the Charter.

2. RELEVANT GROUNDS OF PROHIBITED DISCRIMINATION

KEY ISSUES

- Analysis of the specific grounds of prohibited discrimination, taking into account the plurality of EU law anti-discrimination sources (highlighted in Chapter I), with a view to clarifying the different degrees of protection that those grounds enjoy or could enjoy.
- Analysis of the main judgments through which the CJEU contributed to shaping the scope of EU law anti-discrimination provisions, often embracing an extensive interpretation.

2.1. Interpreting the different grounds in different legal sources

Neither the Treaties nor the Charter or the EU anti-discrimination legislation provide a definition of the grounds of prohibited discrimination they mention. It is reasonable, however, that their meaning does not vary depending on the source referred. EU anti-discrimination directives are based on the Treaty provisions on non-discrimination and the explanation of Article 21 CFR points out that paragraph 1 of this provision *'draws on [inter alia] Article 19 [TFEU]'*, whereas paragraph 2 *'corresponds'* to Article 18(1) TFEU.

An important parameter of interpretation is provided by the case law of the ECtHR on Article 14 ECHR. The explanation of Article 21 CFR indeed points out that *'[i]n so far as [this provision] corresponds to Article 14 of the ECHR, it applies in compliance with it'*. This is in line with Article 52(3) CFR, according to which the scope and meaning of Charter rights which correspond to rights granted by the ECHR ('corresponding rights') shall be the same as those laid down by this Convention, although Union law may provide a more extensive protection. In other words, the ECHR sets a minimum floor with respect to the protection to be granted to corresponding rights.

Based on the formulation of Article 21(1) CFR and Article 14 ECHR[38] the overlap concerns discrimination based on sex, race, colour, language, religion, political or other opinion, social origin, property, birth and, arguably, membership of a national minority (although the expression used in the ECHR is 'association to a national minority'). Interestingly, the explanation of Article 52(3) CFR points out that *'[t]he meaning and the scope of the [corresponding] rights are determined not only by the text of [the Convention and of its Protocols], but also by the case law of the European Court of Human Rights'*. Based on that case law discrimination on grounds of genetic features must be added to the list[39] and, more generally, the overlap between the two provisions may further evolve through the case law of the two courts.

[38] Article 14 ('Prohibition of discrimination') states as follows: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[39] In *G.N. and Others v. Italy*, the European Court of Human Rights, relying *inter alia* on Article 21(1), considered that instances of discrimination based on genetic features may be caught by Article 14 ECHR: whilst that ground is not explicitly mentioned, also Article 14 ECHR does not contain an exhaustive list of prohibited grounds. No. 4134/05, 01/12/2009, ECLI:CE:ECHR:2009:1201JUD004313405.

It is worth pointing out that the prohibition of non-discrimination laid down by Article 21 CFR is not an absolute. Based on a combined reading with Article 52(1) CFR,[40] a discriminatory treatment is compatible with Article 21(1) CFR when it: has a legal basis, respects the essence of the prohibition, genuinely meets objectives of general interest recognised by the Union or the need to protect the rights or freedoms of others, and entails restrictions that do not exceed the limits of what is necessary and appropriate to attain its stated purpose. If the specific ground concerned is protected also under Article 14 ECHR, attention must be paid also to the case law of the ECtHR because the explanation of Article 52(3) CFR points out that the duty of parallel interpretation extends to limitations.

Concerning limitations, it must be stressed, however, that EU anti-discrimination legislation contains specific provisions on this. The test laid down by Article 52(1) CFR is therefore the primary reference with respect to allegedly discriminatory conducts that fall within the scope of the Charter,[41] though not within the scope of a specific EU anti-discrimination directive.[42]

2.2. Nationality

As regards the prohibition of nationality discrimination, now laid down by Article 18(1) TFEU, the CJEU has consistently interpreted the concept of 'nationality' as 'citizenship of an EU Member State'.[43] Likewise, the concept of 'worker of the Member State'" under Art. 45 TFEU has been interpreted as referring only to a worker who is also a 'national' of a Member State.

It is important to stress that the purpose of the prohibition in Art. 18 TFEU is not to ensure the equality of citizens of the Union but to ensure equal treatment of EU citizens who move to another Member State, thus exercising their right to free movement as guaranteed by EU law. According to the Court, this principle precludes a Member State from granting a right to an EU citizen on condition that s/he is resident on the territory when such a condition is not required for that state's own citizens. By contrast, the prohibition does not imply that all EU citizens should be treated equally in every situation, rather it requires that nationality should not be a barrier to their movement, to achieve a genuine internal market and a true area of freedom, security and justice. Thus, for instance, Art. 18 TFEU cannot be invoked to challenge discrimination arising only from the existence of differences in the legislation of the Member States that do not limit the enjoyment of rights under EU law.[44] Nor may it validly be relied on against discrimination, i.e. the inevitable different effects produced by harmonisations, that are a consequence of differences in the previous state of national regulations.[45]

[40] This is the general provision of the Charter that lays down the conditions that limitations to the exercise of the fundamental rights granted by the Charter shall satisfy: *'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.*
[41] On the scope of application of Article 2 1(1) of the Charter, and of the Charter itself, see point 1.2.3 below.
[42] In *Léger*, the Court checked a national measure transposing Directive 2004/33/EC on technical requirements for blood donation against Article 52(1). The national measure provided for a permanent deferral to blood donation for men who have had a sexual relations with other men. The court found that the said measure *'may discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1)'*. Besides, Article 52(1) sets the benchmark against which a discriminatory provision contained in an EU act must be tested, as the Court did, for instance, in the already mentioned *Glatzel* case. See Case C-528/13, *Léger*, 29 April 2015, ECLI:EU:C:2015:288, paras. 50-58.
[43] Indeed, the two terms - nationality and citizenship - are often used interchangeably in the CJEU's case law: see, for instance, *Kaur, cit*.
[44] Case C-177/94, *Perfili*, 1 February 1996, ECLI:EU:C:1996:24.
[45] Case 331/88, *Fedesa,* 13 November 1990, ECLI:EU:C:1990:391.

Originally, the prohibition of nationality discrimination was essentially conceived of by the Treaties as the driving engine for the creation of the internal market, which is characterised by the abolition of obstacles to the free movement of goods, persons, services and capital between Member States. When these obstacles are based on discriminatory measures they fall under the general prohibition in Art. 18 TFEU or in the specific prohibitions laid down by the other Treaty provisions on freedom of movement, which prohibit any form of restriction on the movement of economic actors.

The CJEU's generous approach to the scope of the Treaty provisions on free movement[46] implies that also the scope of the prohibition of nationality discrimination within the internal market has been interpreted broadly. For instance, the Court included amongst its beneficiaries EU citizens who move to another Member State for reasons of tourism or to receive medical treatment.[47] The prohibition was also applied by the Court to a citizen residing in his state of nationality where he pursued an activity falling within the provision of services as regulated by Art. 56 TFEU. This offers protection both against the state of destination and the country of origin when the entrepreneur operates as a provider of services with a 'Community dimension'.[48] The CJEU also specified that rules of criminal law or criminal procedure may fall within the scope of the prohibition, even though the Member States have exclusive competence on these matters.[49] Indeed, EU law sets limits to such competences which must neither create discrimination against persons to whom EU law gives the right to equal treatment, nor restrict the fundamental freedoms guaranteed by EU law.[50]

Art. 24 of Directive 2004/38/EC[51] now lays down a general provision on equal treatment of EU citizens and their family members subject to the limits and conditions set forth in the Treaties and secondary law. Member States may apply derogations to the principle of equality of treatment in cases of social assistance during the first three months of residence and maintenance aid for studies, including vocational training prior to acquisition of the right of permanent residence granted to persons other than workers and self-employed persons.

The CJEU has expressly excluded the application of the prohibition of discrimination on the ground of nationality to third country nationals (TCNs). In *Vatsouras*, the CJEU reiterated its restrictive interpretation of Article 18(1) TFEU, holding that '[this] provision concerns situations coming within the scope of [Union] law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely based on his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries'. [52]

Both the European Union and the Member States are essentially free to regulate the treatment of foreigners in their territory through internal rules or by means of international agreements subject to the limitations arising from other international obligations or

[46] Cases C-286/82 and C-26/83, *Luisi and Carbone*, 31 January 1984, ECLI:EU:C:1984:35; Case C-60/00, *Carpenter*, 11 July 2002, ECLI:EU:C:2002:434.
[47] Case C-186/87, *Cowan,* 2 February 1989, ECLI:EU:C:1989:47.
[48] Case C-368/95, *Familiapress*, 26 June 1997, ECLI:EU:C:1997:325.
[49] See *Saldanha*, cit.; C-323/95, *Hayes*, 20 March 1997, ECLI:EU:C:1997:169; Case C-224/00, *Commission c. Italian Republic*, 19 March 2002, ECLI:EU:C:2002:185; Case C-29/95, *Pastoors*, 23 January 1997, ECLI:EU:C:1997:28.
[50] Case C-274/96, *Bickel and Franz*, 24 November 1998, ECLI:EU:C:1998:563.
[51] Directive 2004/38/EC *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, O.J. L 158 2004, 77.
[52] Case C-22/08, *Vatsouras*, 4 June 2009, ECLI:EU:C:2009:344. The situation at issue in the case was peculiar, because two EU citizens claimed to be the victims of nationality discrimination in relation to a social assistance benefit access to which was limited to third country nationals. The CJEU held that 'Art. 12 EC [now, 18 TFEU] does not preclude national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries. See also Case C-291/09 *Guarnieri,* 7 April 2011, ECLI:EU:C:2011:217; *Kamberaj,* cit.

constitutional law. In addition to international rules that specifically relate to the treatment of foreigners, the rules on human rights have an important role and, as such, do not admit distinctions based on citizenship.[53]

The CFR confirms the same rule. Despite the fact that Art. 21(2) CFR also uses the neutral expression 'nationality', which, in and of itself, could encompass also third country nationals, Art. 52(2) CFR provides that '*[r]ights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'*. Moreover, the mention of nationality discrimination in a separate paragraph of Art. 21 CFR is likely meant to foreclose arguments in favour of broadening the consolidated approach of the CJEU.[54]

The development of the European policy on immigration led to the adoption of several directives governing the entry and treatment of specific categories of third country nationals, many of which contain an express obligation for the Member States to recognise the right to equal treatment. The most important are: Directive 2003/109/EC on so-called long-term residents (Art. 21); Directive 2011/98/EU on the so-called single permit (Article 11); Directive 2009/50/EC on the blue card of highly skilled workers (Article 14); and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for the admission of third country nationals for purposes of scientific research (Article 12).

Thus, even though Art. 18 TFEU and the specific Treaty provisions prohibiting nationality discrimination in the context of free movement do not apply to third country nationals, many obligations now exist which require that states ensure equal treatment of such persons, as in the directives on immigration and asylum. Individual prohibitions contained in the directives make it possible to assess the discriminatory nature of measures taken against TCNs on grounds of their nationality[55].

Finally, it is worth noting that some categories of TCNs enjoy a special *status* within EU law. The Union, but also individual Member States, have over the years adopted international agreements aimed at regulating the movement and treatment of the nationals of the contracting states. An even more protected category of third country nationals is that of family members of EU citizens who enjoy a right of movement and residence. A special *status* is granted to the family members, dependent on that of the EU citizen, but basically assimilated to it thanks to Article 24.1 of Directive 2004/38/EC.

2.3. Sex

The CJEU interpreted Art. 157 TFEU - including the notion of 'sex' therein - in an extensive way. For instance, whilst the provision was originally meant to protect women, the Court referred to 'sex' as a neutral notion, so that Article 157 TFEU may be relied on also in cases were men are discriminated. At the same time, the Court pointed out that discrimination for

[53] ECtHR 12313/86, *Moustaquim* v*. Belgium*, 18.02.1991, ECLI:CE:ECHR:1991:0218JUD001231386; 21794/93, *C. v Belgium*, 7.08.1996, ECLI:CE:ECHR:1996:0807JUD002179493, paras. 37-38.
[54] Remarkably, although Article 14 ECHR refers to 'national origin', the explanation of Article 21(2) does not qualify the two provisions as corresponding rights for the purpose of Article 52(3), nor the ECHR is somehow mentioned as a source of inspiration.
[55] The applicability of the former or latter will depend on the appreciation of the Courts, primarily the Court of Justice that, in fact, has always applied the various sources in which a prohibition of discrimination is laid down at the same time; for instance, on discrimination on grounds of sex, the Court applied the general principle instead of the express prohibition in Art. 157 TFEU to allow a wider application of the rule under the Treaty. Case C-149/77, *Defrenne II*, 15 June 1978, ECLI:EU:C:1978:130; Cases C-75/82 and C-117/82, *Razzouk and Beydoun*, 20 March 1984, ECLI:EU:C:1984:116; *Mangold*, cit.

pregnancy reasons constitutes sex discrimination because pregnancy is a status peculiar to women. Even more interesting is the Court's interpretation whereby, under EU law, discrimination based on sex also covers situations where a person is discriminated because he or she intends to undergo, or has undergone, gender reassignment.

In *P. v. S.*[56] the CJEU was requested to clarify whether the dismissal of a transsexual for a reason related to a gender reassignment was in contrast with Art. 5(1) of Directive 76/207/EEC[57] which prohibits direct and indirect sex-discrimination between workers. The applicant in the main proceedings was a manager in an educational establishment, who, a year after having been taken on, informed the Chief Director of the establishment of his intention to undergo gender reassignment. After he underwent some minor surgical operations he received a notice of dismissal which took effect after surgical gender reassignment. After recalling that 'the right not to be discriminated against on grounds of sex is [a] fundamental human rights whose observance the Court has a duty to ensure', the CJEU affirmed that discrimination for reason of gender reassignment constitutes discrimination 'based, essentially if not exclusively, on the sex of the person concerned'.[58] It also added that 'To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.[59] Accordingly, the Court concluded that 'Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment'.[60]

Later, the Court confirmed this approach in *K.B.,*[61] a case concerning the refusal to award a widower's pension to a worker's partner, on the grounds that only married couples were entitled to that pension. There was, therefore, a discrimination between married and non-married couples regardless of whether the partners were persons of the opposite sex by birth or following gender reassignment. Yet, in the Member State concerned (UK), whilst transsexuals could undergo gender reassignment surgery through the National Health Service, they were precluded from getting married, because only heterosexual marriage was admitted and post-operative transsexuals could not obtain the amendment of the data concerning their sex in the civil register. Relying also on its judgment in *Goodwin v. UK*,[62] the CJEU held that national legislation such as that at issue (namely, legislation that does not allow to amend the data concerning sex of post-operative transsexuals in the civil registers) was discriminatory.

2.4. Race and ethnicity

Both Article 19 TFEU and Directive 2000/43/EC list ethnic origin along with race, thereby connecting the word that best evokes physical characteristics (race) with a reference to the cultural dimension of the group (ethnicity). 'Race and ethnicity' should in effect constitute a

[56] Case C-13/94 *P. v. S.*, 30 April 1996, ECLI:EU:C:1996:170.
[57] Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39, p. 40.
[58] *P. v. S.*, cit., paras. 19 and 21.
[59] Ibid., para. 22.
[60] Ibid., para. 24.
[61] Case C-117/01 *K.B.*, 7 January 2004, ECLI:EU:C:2004:7. See also, similarly, Case C-423/04 *Sarah Margaret Richards*, 27 April 2006, ECLI:EU:C:2006:256.
[62] ECtHR, No. 28957/95 *Christine Goodwin v. United Kingdom*, 11 July 200, ECLI:CE:ECHR:2002:0711JUD002895795. See also ECtHR, No. 25680/94, *I. v. United Kingdom*, 11 July 2002, ECLI:CE:ECHR:2002:0711JUD002568094 and No. 35968/97 *Van Kuck c. Germania*, 12 September 2003, ECLI:CE:ECHR:2003:0612JUD003596897.

single concept, to avoid situations in which protection is not afforded purely for terminological reasons.[63] In addition, Art. 21 CFR and Art. 14 ECHR mention colour and membership to a national minority,[64] which should also be considered when examining instances of alleged discrimination on grounds of race and ethnic origin.

In *CHEZ Razpredelenie Bulgaria*[65] the applicant complained about not being able to monitor her electricity consumption because in her town district the electricity meters had been installed much higher than elsewhere. She claimed that such installation was due to the circumstance that the district was densely populated by Roma. Since the applicant was not Roma herself the national judge doubted whether she could be regarded as a victim of discrimination on grounds of ethnic origin under Directive 2000/43/EC and Article 21 CFR. The CJEU held that that '*the principle of equality (...), as recognised by Article 21 [CFR], (...) applies not to a particular category of persons but by reference to the grounds mentioned in Article 1 of the Directive, so that [it] is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds*'.[66]

Although in practice it may sometimes be difficult to draw a clear dividing line, racial discrimination and religious discrimination are considered separately under EU law. Directive 2000/43/EC deals with racial discrimination and Directive 2000/78/EC with religious discrimination. Even more significantly, Art. 3 of Directive 2000/43/EC expressly points out that this directive does not address 'difference of treatment based on nationality and [that it] is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third country nationals and stateless persons concerned'. Recital 13 reinforces this by clarifying that the directive and the implementing national legislation applies to nationals of third countries, but they can be invoked against migration laws or for discrimination based on nationality.[67]

It is not always easy to understand whether discrimination is based on nationality or on race or ethnic origin, especially in countries which experienced (or are experiencing) a significant influx of migrants in more recent times and whose policies do not facilitate the acquisition of citizenship.[68] Importantly, the directive is applicable when discrimination based on nationality also determines indirect discrimination on grounds of race. In *Feryn* the CJEU qualified as discrimination on grounds of racial or ethnic origin the public statement by an employer that he would have not recruited 'migrant workers'.[69] This is, apparently, an endorsement of the

[63] A similar approach is adopted in the United Nations Convention on the Elimination of Racial Discrimination (CERD), whose Article 1 defines the concept of racial discrimination by associating the terms race, colour, descent and national or ethnic origin. Note also that Recital 6 of Directive 2000/43/EC clarifies that "the European Union rejects theories that attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories". One of the reasons for the inclusion of this recital was to overcome the resistance raised by France that was against the use of the term race to avoid supporting, even formally, the **theory of the division of humanity into different races**. However, the maintenance of the term race was regarded as necessary to provide a comprehensive protection.
[64] This ground is addressed separately under 2.6 below.
[65] Case *CHEZ Razpredelenie Bulgaria,* cit.
[66] Ibid., paras. 43 and 56.
[67] Recital 13 provides that "[the] prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third country nationals and their access to employment and to occupation".
[68] By contrast, it is easier to distinguish between the two grounds those Countries where the people of a different race or ethnic origin than that of the majority of the population are also citizens of those Countries.
[69] Case C-54/07, *Feryn*, 10 July 2008, ECLI:EU:C:2008:397.

orientation that considers discrimination on grounds of nationality, or xenophobia, as one of the many variants of racial discrimination and racism.[70]

From a more technical perspective the exclusion of the application of Directive 2000/43/EC to discrimination on grounds of nationality is also justified based on respect for the principle of conferral of powers, since Art. 19 TFEU contains an exhaustive list of grounds but does not include nationality, which is dealt with separately by Art. 18 TFEU. The prohibition laid down by the latter provision has always been understood by the CJEU as referring to discrimination on grounds of 'citizenship', which in turn has been interpreted restrictively as 'citizenship of one of the EU Member States'. Since Art. 19 TFEU is without prejudice to the other provisions of the Treaty, the prohibition of discrimination on grounds of nationality continues to be exclusively governed by Art. 18 TFEU, with the result that any legal act relating to discrimination on grounds of nationality must be based on this Article.

2.5. Language

Language is a prohibited ground of discrimination under Art. 21(1) CFR and, since Art. 14 ECHR also mentions it, Art. 52(3) CFR applies. Moreover, Art. 22 CFR on 'Cultural, religious and linguistic diversity' requires the Union to 'respect cultural, religious and linguistic diversity'. By contrast, language is not included amongst the grounds targeted by Article 19 TFEU. Thus, given that the Charter does not empower the EU to adopt legislation, there are no (and there cannot be any) EU measures aimed at combating discrimination on grounds of language.

However, Directive 2000/43/EC (the Racial Equality Directive) may be applicable to cases where an unfavourable treatment based on language turns out to be also an indirect discrimination on grounds of race or ethnic origin.[71] Moreover, provisions aimed at overcoming linguistic hurdles may be contained in EU measures other than anti-discrimination legislation. For instance, in 2010 the EU adopted a directive requiring Member States to ensure that defendants in criminal proceedings are entitled to interpretation and translation services in a language they understand.[72] It is worth mentioning that regarding criminal procedural law the CJEU had already stated that when a MS confers to citizens who are resident in a defined area (South Tyrol in the case at stake) the right to require that criminal proceedings be conducted in a language other than the principal language of that State (German), the same option shall be granted also to 'nationals of other Member States travelling or staying in that area, whose language is the same'.[73] According to the Court, while the protection of ethno-cultural minority may constitute a legitimate aim to be pursued by the state, that aim would not be undermined if the rules at issue were extended to cover

[70] Indeed, according to the Durban Declaration of 2001, adopted during the *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, xenophobia and discrimination against migrants are two of the most serious forms of racism in the contemporary age, http://www.un.org/en/durbanreview2009/pdf/DDPA_full_text.pdf. The declaration was reviewed during the Geneva Conference held on 20-24 April 2009.

[71] 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 ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'); COM (2014)2, 17 January 2014, p. 11.

[72] Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L280 2010, 1-7.

[73] Case C-274/96, *Bickel and Franz*, of 24 November 1998, ECLI:EU:C:1998:563. para. 31.

German-speaking nationals of other Member States exercising their right to freedom of movement.[74]

In other cases the CJEU has been required to establish the discriminatory nature of language requirements in questions concerning the free movement of EU citizens who were workers in or enjoyed the right to freely move or reside in another EU country. The leading case in this regard is *Groener*. This case concerned the obligation imposed on lecturers in public vocational schools in Ireland to have a certain knowledge of the Irish language.[75] In particular, the Court had to assess the interpretation of Article 3(1) of Regulation 1612/1968 (now repealed by Regulation no. 492/2011 with an identical Article 3(1)) allowing Member States to apply linguistic requirements not applicable to their own nationals. According to the Court a policy adopted to protected a national language which is also the first language of that state, 'must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States'. The Court recognises the importance of education for the implementation of such a policy and the key role that teachers have to play, 'not only through the teaching which they provide but also by their participation in the daily life of the school and the privileged relationship which they have with their pupils'.[76]

Where linguistic requirements apply the MSs shall apply them according to the principle of non-discrimination. This means, for instance, that MSs may not impose that the linguistic knowledge must have been acquired within the national territory.[77] Also worth mentioning here is the CJEU's case law on the recognition in a Member State of the surname registered in another Member State in accordance with different rules than those followed in the former state.[78] The CJEU affirmed that it is up to the Member States to adopt legislative or administrative measures laying down the detailed rules for transcriptions of EU citizens' surnames. However, those rules may be relevant under EU law if they interfere with the exercise of the free movement rights conferred on EU citizens by the EU Treaties.[79] Yet, based on that same case law, such an obstacle would not be - as such - incompatible with EU law, on condition that it does not give rise to serious inconvenience at administrative, professional and private levels and if it is necessary for the protection of the interests which the national rules are designed to secure and is proportionate to the legitimate aim pursued.[80]

Another important strand of the CJEU's case law concerns the right of EU citizens to address the EU institutions in any one of the 24 official languages, and to receive answers from the institutions in that same language (Article 24(4) TFEU). This led the Court to annul the notice of some EPSO competitions, which limited the choice of the second language, as well as candidates' language of communication with EPSO, to English, French and German.[81]

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[74] Ibid., para. 29.
[75] Case C-379/87, *Groener*, 28 November 1989, ECLI:EU:C:1989:599.
[76] Ibid., para. 20.
[77] Case C-281/98, *Angonese,* 6 June 1998, ECLI:EU:C:2000:296.
[78] Case C-168/91, *Konstantinidis v Stadt Altensteig and Landratsamt Calw*, 30 March 1993, ECLI:EU:C:1993:115 ECLI:EU:C:1993:115; Case C-391/09, *Runevič-Vardyn e Wardyn*, 12 May 2011, ECLI:EU:C:2011:291; Case C-148/02, *Garcia Avello,* 2 October 2003, ECLI:EU:C:2003:539, Case C-353/06, *Grunkin and Paul*, 14 October 2008, ECLI:EU:C:2008:559, and Case C-208/09 *Sayn-Wittgenstein,* 22 December 2010, ECLI:EU:C:2010:806. See below par. 3.4.1 for an analysis of these cases related to free movement of EU citizens and recognition of statutes.
[79] Case C-391/09, *Runevič-Vardyn e Wardyn*, cit., para. 63.
[80] Ibid., paras. 78 and 82.
[81] See EU Trib., Case T-124/13 *Italian Republic and Kingdom of Spain v. European Commission*, 24 September 2015, ECLI:EU:T:2015:690.

2.6. National minorities

National minority is a prohibited ground of discrimination according to Art. 21 CFR, but it is not mentioned in Art. 19 TFEU. Under EU law this ground therefore enjoys merely a negative protection, insofar as the EU and the Member States ('only when they implement EU law' within the meaning of Art. 51(1) CFR) shall not lay down provisions discriminating against individuals on grounds of their belonging to a national minority. However, protection from discrimination of persons belonging to national minorities may be granted under Directive 2000/43/EC on grounds of race and ethnic origin and under Directive 2000/78/EC on the grounds of religion or belief.

EU institutions may stimulate the Member States to adopt measures aimed at fostering equality and combating discrimination on this ground. Yet, they cannot validly impose such measures. Moreover, only when a national act or measure having the purpose or the effect of discrimination on grounds of belonging to a national minority falls under the scope of EU law, can the EU institutions act against the Member State concerned.[82]

While the Charter binds the EU and the Member States to respect cultural, religious and linguistic diversity and to not discriminate on grounds of belonging to a national minority, it is hard to find a legal basis in the Treaties for the adoption of acts specifically addressed at national minorities or a duty to adopt such acts. This also applies to minority language rights, which are of key importance for the effective protection of all other rights of persons belonging to a minority.

The issue is particularly timely in light of the fresh judgment of the EU Tribunal[83] annulling the decision of the European Commission to refuse registration of a European Citizens' Initiative entitled '*Minority Safepack – one million signatures for diversity in Europe'* by alleging lack of competence.[84] The promoters asked the EU to adopt a set of legal acts aimed at improving the protection of persons belonging to national and linguistic minorities and at strengthening cultural and linguistic diversity in the Union. In the decision refusing registration the European Commission observed that 'while the respect for rights of persons belonging to minorities is one of the values of the Union referred to in Art. 2 TEU, neither the [TEU], nor the [TFEU] provide for a legal base as regards the adoption of legal acts aiming at promoting the rights of persons belonging to minorities. Likewise, irrespective of their field of action, the Union institutions are bound to respect 'cultural and linguistic diversity' (Art. 3(3) TEU) and to refrain from discrimination based on 'membership of a national minority' (Art. 21(1) CFR). However, none of these provisions constitutes a legal basis for whatever action by the institutions'. The Commission then admitted that some of the acts requested through the ECI may fall within the competences of the EU, but it did not specify which ones, thus preventing the proponents from promoting a new admissible initiative. The EU Tribunal regarded as unlawful the Commission's failure to state the reasons supporting its conclusion and therefore annulled the Commission's decision to refuse registration. The following step will be a renewed decision by the Commission, which shall specify whether the specific acts requested through the initiative fall within or outside EU competences. Thus, the proponents will be able to reformulate a new initiative or to challenge on the merit the decision of the Commission.

[82] See the study on *Minority language and education: best practices and pittfalls*, European Parliament, 2017.
[83] Case T-646/13, *Minority SafePack - one million signatures for diversity in Europe v Commission,* 3 February 2017, ECLI:EU:T:2017:59.
[84] Commission Decision (2013)5969 of 13 September 2013.

The *'Minority SafePack'* case shows that the EU so far has not adopted any legal act specifically aimed to protect national minority, including minority languages. It is questionable whether the EU has any competence to adopt legal acts in this field. The follow up of the *'Minority SafePack'* case will provide very useful guidelines.

2.7. Sexual orientation

Sexual orientation is defined as a personal characteristic which is relevant in the choice of a person's partner. This orientation may be either heterosexual (when the choice falls on a partner of the opposite sex) or, conversely, homosexual (when the partner chosen is of the same sex). It is bisexual when partners of both sexes are chosen. The prohibition of discrimination on grounds of sexual orientation requires that no difference in treatment is practiced because of that choice and aims at protecting homosexuals, who are often victims of discrimination.

The specific mention of sexual orientation in Art. 19 TFEU is a fundamental step towards the recognition of the rights of such persons. The CJEU had indeed previously ruled that the reference to sex in Art. 157 TFEU did not include sexual orientation.[85] However, as sexual orientation is dealt with only by Directive 2000/78/EC, the scope of application of the prohibition of discrimination in the EU legal order is 'only' employment. In *Maruko*,[86] the CJEU held incompatible with the prohibition of discrimination based on sexual orientation German legislation whereby partners of a 'life partnership' could not benefit from the same pension as widows or widowers because same-sex partners cannot marry and, therefore, cannot acquire the status of a widow/widower. The CJEU found that the case entailed direct discrimination, because the German law life partnership places same-sex couples in a similar situation as spouses as regards the enjoyment of social security benefits such as those at issue in *Maruko*.[87]

Sexual orientation may be particularly relevant with respect to EU acts dealing with family status and with freedom of movement of EU citizens. Directive 2004/38/EC does not distinguish between same-sex and different-sex spouses and its Art. 3(2) imposes on EU Member States a duty to facilitate entry and residence of any family members of an EU citizen. This is particularly relevant when family members are TCNs, as they do not enjoy an independent right of free movement. Different treatments may also stem from the directive's provision according to which Member States shall facilitate the entry and residence of *de facto* partners of EU citizens only if the partners shared the same household in the country from which they have come, or where there exists a 'durable relationship' between them, which must be 'duly attested'. By contrast, the obligation is not conditional on the existence in the host Member State of a form of registered partnership considered equivalent to marriage. If the conditions are satisfied, the host Member State is obliged to 'facilitate entry and residence' of the partner, taking carefully into account the personal circumstances of the person concerned and justifying any denial.

Yet, in Member States which still do not recognise same-sex marriages or registered same-sex partnerships EU citizens may face obstacles to exercising their freedom of movement and staying in another EU country. A specific concern arises regarding children of same-sex

[85] See Case C-249/96 *Grant*, 17 February 1998, ECLI:EU:C:1998:63, and Case C-13/94 *P. v. S.*, 30 April 1996, ECLI:EU:C:1996:170.
[86] Case C-267/06 *Tadao Maruko*, 1 April 2008, ECLI:EU:C:2008:179.
[87] The same stance has been followed by CJEU in Case C-147/08, *Römer*, 1 April 2008, ECLI:EU:C:2011:286.

couples, notably when one of the parents is a non-EU citizen and the hosting Member State's laws do not provide for legal recognition of same-sex partners or specific protection for children of same-sex couples.

The ECHR and the ECtHR's case law may still play an important and proactive role in the protection against discrimination on grounds of sexual orientation outside the scope of application of EU anti-discrimination law and the free movement directive. Despite not being expressly mentioned in Art. 14 ECHR, the ECtHR included sexual orientation amongst the 'other grounds' mentioned in that Article.[88] Moreover, sexual orientation may find autonomous protection also under the concept of 'family life' in Article 8 ECHR.[89]

The European Parliament has already invited the Commission to issue guidelines on the proper implementation of Directive 2004/38/EC on the free movement of citizens and their family members as well as on Directive 2003/86/EC on the right to family reunification of TCNs, in order to 'ensure respect for all forms of families legally recognised under Member States' national laws'. [90] The European Parliament also invited the Commission to 'make proposals for the mutual recognition of the effects of all civil status documents across the EU, in order to reduce discriminatory legal and administrative barriers for citizens and their families who exercise their right to free movement'. Similarly, the European Agency for Fundamental Rights (FRA) addressed these issues in the context of a comprehensive comparative legal analysis on 'Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU'.[91]

2.8. Religion or belief

Art. 19 TFEU, Art. 21(1) CFR and Directive 2000/78/EC mention religion amongst the prohibited grounds of discrimination. The word religion is associated with the term belief. The prohibited ground of discrimination must therefore be interpreted by considering both concepts which equally appear in international conventions aimed to recognise freedom of religion (notably Art. 9 ECHR and Art. 18 ICCPR). Based on the case law of the ECtHR, which must be considered under Article 52(3) CFR, the terms should be interpreted broadly, notably as encompassing also the discrimination of churches or, in general, groups around which a religious activity is organised.[92] These terms must be understood as providing protection in relation to any belief, not only those connected in any way to a deity, but also non-religious belief systems, i.e. sets of ideas and opinions on life and lifestyle. The concept of non-violence and pacifism offers an example because it goes beyond the conceptualisation of peaceful

[88] ECtHR, *Labassee v. France*, No. 65941/11, 26 June 2014, and *Mennesson v. France*, No. 65192/11, 26 June 2014.
[89] ECtHR, No. 76240/01, *Wagner and J.M.W.L v. Luxembourg*.
[90] Resolution on the fight against homophobia in Europe, P7_TA(2012) 0222, Brussels, 24 May 2012; Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, P7_TA(2014)0062, Brussels, 4 February, 2014.
[91] Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis – Update 2015, December 2015, available here available here http://fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015.
[92] ECtHR, No. 7511/76, *Campbell and Cosans v. UK,* 25 February 1982, ECLI:CE:ECHR:1982:0225JUD000751176; No. 14307/88 *Kokkinakis v. Greece,* 25 May 1993, ECLI:CE:ECHR:1993:0525JUD001430788; No. 23372/94, *Larissis and others v. Greece,* 24 February 1998, ECLI:CE:ECHR:1998:0224JUD002337294; No. 24645/94, *Buscarini and others v. San Marino,* 18 February 1999, ECLI:CE:ECHR:1999:0218JUD002464594; No. 30814/06, *Lautsi v. Italy,* 18 March 2011, ECLI:CE:ECHR:2011:0318JUD003081406; No. 48420/10, *Eweida and others v. the United Kingdom,* 15 January 2013, ECLI:CE:ECHR:2013:0115JUD004842010.

relations between states and rather involves various aspects of human relations.[93] By contrast, mere opinions do not fall within the protected scope of the ground concerned.

It is doubtful whether sects may also be granted protection under the rules on freedom of religion as well as under the rules concerning discrimination on grounds of religion. Generally speaking, the term 'sect' refers to a group which, under the mantle of religion, carries out activities which are illegal or even harmful to its followers, sometimes violating their dignity. In its 1996 resolution on cults in Europe the European Parliament affirmed that freedom of religion can be limited when an organisation commits acts of torture, inhuman and degrading treatment or involves serious forms of psychological subjugation, thus urging countries to be cautious in granting the status of religious confession to sects whose methods are seriously questionable.[94]

Interesting developments occurred relating to the dialogue with churches, religious associations or communities and philosophical and non-confessional organisations required under Article 17(3) TFEU.[95] Where the EU institutions have a duty to promote and maintain the religious dialogue with churches and religious organisations, Article 17(1-2) TFEU refers to national law of the Member States for any issues related to the status of churches and non-confessional organisations under their jurisdiction. Member States therefore retain exclusive competence in the management of religious and philosophical diversity in the internal legal order. The EU only has a duty to promote a dialogue and not to prejudice the status of churches and religious associations and communities.[96]

Before the introduction of Art. 19 TFEU the CJEU had the opportunity to consider the religious factor as a justification for derogations to the freedom of movement of citizens.[97] In an old EU staff case the CJEU held that, when organising competitions, the EU institutions shall consider religious requirements where duly communicated (for instance in relation to holy days), in order to allow all participants to take the tests.[98]

More interesting are the two cases, decided in 2017 by the CJEU, which dealt with wearing religious clothing, notably the headscarf.[99] Two employers, one in Belgium and the other one in France, had dismissed two Muslim women because they wore a headscarf at work despite having been asked to refrain from doing so. When they refused to comply with this request, their employment was terminated. The judgments were much awaited, because different Advocates General had endorsed different approaches, notably concerning the meaning of 'direct' and 'indirect' discrimination and the concept of 'genuine and determining occupational requirements' provided by Directive 2000/78/EC at Article 4(1).

In *Bougnaoui*, the CJEU qualified the meaning of 'religion' according to Article 10 CFR which corresponds to Article 9 ECHR. The Court then qualified both dismissals as different

[93] ECtHR, No. 7511/76 *Campbell and Cosans v. UK,* cit.; No. 25088/94, *Chassagnou and others v. France*, 29 April 1999, ECLI:CE:ECHR:1999:0429JUD002508894; No. 7710/02, *Grzelak v Poland*, 15 June 2010, ECLI:CE:ECHR:2010:0615JUD000771002.
94 OJ C 78/31 1996.
[95] See the European Ombudsman Decision in his inquiry into complaint 2097/2011/RA against the European Commission, interpreting Art. 17 TFEU, available at:
https://www.ombudsman.europa.eu/en/cases/decision.faces/en/49026/html.bookmark
[96] Concerning this, several documents were published under the Seventh Framework Programme of the http://www.religareproject.eu/
[97] Case C-41/74, *Van Duyn*, 4 December 1974, ECLI:EU:C:1974:133.
[98] Case C-130/75 *Prais*, 27 October 1976, ECLI:EU:C:1976:142.
[99] Case C-188/15, *Bougnaoui*, 14 December 2017, ECLI:EU:C:2017:204; Case C-157/15, *G4S Secure Solutions*, 14 March 2017, ECLI:EU:C:2017:203. While the judgments were issued the same days, the Advocates General's opinions were published in different times: Case C-157/15, *Achbita,* 31 May 2016*,* ECLI:EU:C:2016:382; Case C-188/15, *Bougnaoui and ADDH*, 13 July 2010, ECLI:EU:C:2016:553.

treatments indirectly based on religion or belief according to Article 2(2)(b) of Directive 2000/78/EC. This led the Court to explore whether such different treatments were objectively justified by a legitimate aim by the employer 'of a policy of neutrality vis-a-vis its customers, and if the means of achieving that aim are appropriate and necessary'. As far as the exception provided for in Art. 4(1), when a 'genuine and determining occupational requirement' occurs, the CJEU clearly states that 'it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement […]'. It follows from the information set out above that the concept of a 'genuine and determining occupational requirement' within the meaning of that provision refers to a requirement which is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer. Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

In *G4S Secure Solutions* the CJEU proposed the same reasoning as regards *Bougnaoui*, as far as the qualification of the difference of treatment as a case of discrimination indirectly based on religion is concerned. According to the Court, under Article 2(2)(b)(i) of Directive 2000/78 such a difference of treatment does not, however, amount to indirect discrimination within the meaning of Article 2(2)(b) of the directive if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. The Court then states 'that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate and stemming from the freedom to conduct a business that is recognised in Article 16 CFR'. The Court then clarifies that such a policy of neutrality 'is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to have contacts with the employer's customers'.[100]

This interpretation is in line with the ECtHR case law on freedom of religion (Art. 9 ECHR), where the Court has stated that a limited restriction on the freedom of religion is admissible within the framework of the Convention.[101] In the reasoning of the CJEU a key role is played by a policy of neutrality already existing in the company before the dismissal and by its practical implementation. In order to be admissible the prohibition of wearing visible religious clothing must be 'strictly necessary for the purpose of achieving the aim pursued'. Therefore, national judges have to assess if 'taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her'. [102] In summary, the Court leaves it to national judges to strike a balance between, on one hand the legitimate aim pursued by an employer through a policy of neutrality and, on the other the restrictions on the freedom of religion which may be limited to what is strictly necessary.

[100] Case C-157/15, *G4S Secure Solutions*, cit., para. 38.
[101] ECtHR, of 15 January 2013, *Eweida and Others v. United Kingdom*, CE:ECHR:2013:0115JUD004842010, paragraph 94.
[102] Case C-157/15, *G4S Secure Solutions*, cit., para. 43.

2.9. Age

The specific consideration of age in Art. 13 EC (now Art. 19 TFEU) innovated the legal framework at both EU and international level. At the time, only a few Member States had legislation against discrimination on grounds of age. While surveys on European population demonstrate that the protection of older people is one of the priority issues of social policies, only some collective agreements take into account the rights of aged people.

At present, age is one of the grounds of prohibited discrimination targeted by Directive 2000/78/EC. Moreover, also Art. 21 CFR mentions age. In addition, Arts. 24 and 25 CFR contain specific provisions on the protection of the rights of children and the elderly. Similarly, Art. 19 TFEU must be interpreted as relating to both the age of the elderly and minors, although the discrimination suffered by the elderly population has so far attracted greater interest from both the legislator and public opinion. Reference must be made exclusively to a chronological criterion and not to a state of mind, as the latter may be related to youth or old age regardless of the actual birth date registered.

The vast majority of the CJEU's judgments concerning age discrimination were based on advanced age. There are numerous cases in which pension schemes and/or mandatory retirement ages were assessed in light of the prohibition of age discrimination, notably as given expression in Directive 2000/78/EC. The Court thus had the opportunity to point out that Member States may introduce or maintain differences in treatment based on age in order to achieve legitimate objectives of social policy, such as those related to employment policy, the labour market or vocational training.[103] Among such objectives are the need to establish 'an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, [which] can constitute a legitimate aim of employment and labour market policy'.[104] However, in order not to entail age discrimination the legitimate aim pursued must be appropriate and necessary. National provisions do not go beyond what is necessary to achieve the purpose and do not cause excessive injury to the interests of the people to whom those provisions refer, taking into account both the damage they can cause to the people involved and the benefits that derive to society as a whole and the individuals who make up this society.[105]

The CJEU also had the chance to state that the maximum age limit for access to or the termination of a profession does not amount to discrimination when it constitutes an essential and genuine requirement of the work. The reasonableness of the limit provided for shall be decided case by case.[106]
Outside the scope of application of Directive 2000/78/EC, EU and national provisions (within the meaning of Art. 51(1) CFR) entailing discrimination on the grounds of age may be challenged through Art. 21(1) CFR. So far, all CJEU cases on age discrimination concerned

[103] Case C-388/07, *Age Concern England*, 5 March 2009, ECLI:EU:C:2009:128, para. 46; Case C-447/09, *Prigge*, 12 September 2011, ECLI:EU:C:2011:573, para. 81; Case C-530/13, *Schmitzer*, 11 November 2014, ECLI:EU:C:2014:2359.
[104] Case C-159/10, *Fuchs e Köhler*, 21 July 2011, ECLI:EU:C:2011:508, para. 50.
[105] Case C-45/09, *Rosenbladt*, 12 October 2010, ECLI:EU:C:2010:601, para. 73; Case C-286/12, *Commission v. Hungary*, 6 November 2012, ECLI:EU:C:2012:687; Case C-297/10, *Hennings* 8 September 2011, ECLI:EU:C:2011:560; Case C-530/13, *Schmitzer*, 11 November 2014, ECLI:EU:C:2014:2359; Case C-417/13, *Starjakob*, 28 January 2015, ECLI:EU:C:2015:38; Case C-515/13, *Ingeniørforeningen i Danmark*, 26 February 2015, ECLI:EU:C:2015:115.
[106] Case C-229/08, *Wolf*, 12 January 2010, ECLI:EU:C:2010:3; Case C-416/13, *Vital Pérez*, 13 November 2014, ECLI:EU:C:2014:2371; Case *Prigge*, cit., paras. 65-76; Case C-341/08, *Petersen*, 12 January 2010, ECLI:EU:C:2010:4, paras. 44-64.

subject-matter covered by Directive 2000/78/EC. However, the Charter played an important role in some of them, because the Court affirmed that the prohibition of age discrimination in Art. 21(1) CFR has direct horizontal effect (which the directives' provisions do not have).[107]

2.10. Disability

The term 'handicap' appeared in the original version of Art. 13 TCE, but was later replaced with the more politically correct term 'disability', which is currently employed in Art. 19. The UN Convention on the Rights of Persons with Disabilities (UNCRPD), adopted on 13 December 2006, to which the Union is a party, is a relevant legal source in this context.[108] As an international treaty binding upon the EU it has acquired a legal status subordinate to the EU Treaties, but overarching secondary laws. This means that EU legal acts, particularly the anti-discrimination directives, shall respect the UNCRPD and shall be interpreted in line with that Convention.

Lacking an explicit definition in EU law, the interpretation of the notion of disability was given by the CJEU in preliminary rulings mainly referred to it by Danish courts. Thus, according to the CJEU the concept of disability excludes in principle mere disease, unless it constitutes, during a certain period of time, an obstacle to participation in professional life.[109] In *HK Denmark Ring and Werge* the Court also stated that the state of obesity of an employee, resulting in particular from physical, mental or psychological impairments, may in interaction with various barriers hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. If this limitation is of long duration such a disease may fall within the definition of 'disability' within the meaning of Directive 2000/78/EC.[110]

The CJEU has therefore adhered to a social model of disability, as opposed to the outdated medical model. The political institutions then started to employ the interpretation given by the CJEU.[111] Later the Court stressed that 'the EU concept of disability was explicitly aligned with that of the UN Convention'.[112]

Clearly, the Court held that the concept of disability must be understood as 'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[113] Discrimination may also occur when a person is not himself/herself disabled but suffers discriminatory behaviour due to their child's disability.[114]
Finally, in the preliminary reference in *Glatzel*,[115] which challenged the compatibility of certain EU provisions on driving licenses with the prohibition of discrimination on grounds of disability, the Court applied Article 21 CFR relying on the same notion of 'disability' it has embraced in the context of Directive 2000/78/EC.

[107] On this issue and the relevant CJEU's case law see point 1.2.2. above and Annex II.
[108] The Convention (see text here: http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf entered into force on 3 May 2008. The European Union is part since 23 December 2010.
[109] Case *Chacón Navas*, cit..
[110] Case *Fag og Arbejde* (*FOA*), cit.
[111] A definition of disability may however be found in the *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM(2010)636 final; S. Favalli, D. Ferri, *Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints*, *European Public Law*, 2016, 22(3), 3.
[112] Case C-363/12, *Z.*, 18 March 2014, ECLI:EU:C:2014:159; S. Favalli, D. Ferri, cit., p. 15.
[113] Case C-335/11, *HK Denmanrk Ring and Werge*, 11 April 2013, ECLI:EU:C:2013:222.
[114] Case *Coleman*, cit.
[115] Case *Glatzel*, cit., paras. 44-46.

3. ISSUES ARISING FROM THE ANALYSIS OF PETITIONS

KEY ISSUES

- The following topics have emerged as more problematic: competence/scope of application; national minorities and language; free movement of EU citizens and recognition of LGBT families; child alternative care; age.
- Assessment of a claim of discrimination in individual cases requires a detailed analysis on merits and laws.

3.1. Competence – scope of application

One horizontal issue stemming from the petitions analysed is that of the scope of application of EU anti-discrimination law, including the Charter. This leads to a more general question regarding the extension of the EU's competence and hence the limits of the EU institutions' activity, notably when an act of a Member State is challenged. As explained in the first part of this analysis, a connection with an EU competence is necessary to trigger the application of the Charter, including the rights to equality and non-discrimination. This is a recurrent issue when citizens challenge EU law and it is addressed abundantly by reports, academics and CJEU case law, but it is still crucial even in the petitions analysed in this study.

The findings of the European Parliament and the European Commission concerning EU competence and the scope of application of EU law often diverge. While the Parliament appears to have given an overbroad interpretation of the limits of EU competence, the Commission seems to have followed an excessively narrow approach. The reasons for these two different approaches lie in the existence of 'grey zones', where *in principle* EU law *may* apply if a connection with EU law is shown, e.g. family statutes in cases of free movement of EU citizens and their family members, including third country nationals. In other cases, there is no EU legal act in force but there is *prima facie* a relevant reference in the Treaties, e.g. the values of the European Union or certain grounds of discrimination mentioned in Art. 21 CFR, and EU citizens are understandably tempted to invoke EU law, primary law and the Charter. We cannot assume that EU citizens are sophisticated lawyers who understand the exact scope and effects of those provisions, especially in disputes of competence which cause different views and approaches even among academics, EU institutions and the judiciary.

The EP thus often faces a choice between the devil and the deep blue sea: giving a precise although apparently strict interpretation of the scope of EU law and declaring the petition inadmissible, thereby frustrating the petitioner's request, or giving a wider interpretation, with the real risk of confronting its position to the different and often opposite position assumed by the European Commission. A compromise should be followed: on the one hand adhering to a stricter interpretation of the scope of EU law, in line with the stance of the CJEU, and on the other hand showing petitioners alternative means of redress, more suitable to the described facts. This is already present in many of the replies to the petitions examined, but in some cases an alternative answer could be suggested. Indeed, EU citizens should be made well aware that a 'negative' reply to their petitions does not mean that the EU is *unwilling* to act. In fact, it is often the case that the EU is *unable* to act because the Member States decided to retain exclusive competence in several areas.

3.2. National minorities and language

Several petitions deal with discrimination of national minorities on the grounds of language. Despite the differences in the countries concerned and the specific facts of the cases, **petitions 0609/2013, 0111/2016, 0141/2016** and **0217/2014** raise similar issues (for the details see Annex V). If, on the one hand, both the European Union and the Member States have the duty to respect national minorities, only the Member States are also required to promote their effective equality of treatment in accordance with international instruments, such as the Framework Convention for the Protection of National Minorities.[116]

However, as explained in the 'National minorities' section, while the EU competence to adopt a legal act on such a matter is questionable – and the *'Minority SafePack'* case is very useful to shed light on this issue – the European Union has not adopted any relevant legal act on this matter so far. Thus, while minority language teaching or the use of names in minority languages in public signs are two key issues when dealing with minority rights, they fall, in principle, outside EU law competence.[117] This means that neither anti-discrimination directives nor the Charter are applicable *per se* here, unless a case of discrimination on the grounds of race/ethnic origin or religion/belief occurs within the scope of application of the two '2000 directives.

This is a paradigmatic example of a right stated in the Charter but not covered by an EU competence or at least an EU legal measure. This means that, despite the references to respecting the rights of minorities (Art. 2 TEU - Art. 21 CFR) and linguistic diversity (Art. 3(3) TEU, 165 and 198 TFEU and 22 CFR), the Member States did not entrust the Union with a general competence to enact legislation aimed at protecting and promoting linguistic or other minorities. The Union, rather, has a negative duty 'to respect' and not 'to adopt measures' containing provisions that would violate the overarching provisions.

Petition 1123/2013 is only partially different. It concerns the use of a sign language in Austria by persons who are deaf. Although Austrian sign language is constitutionally recognised as an official language, deaf Austrian citizens cannot use it as a first language and are obliged to learn spoken German at school. The language grounds could be invoked in relation to the rights of linguistic minorities. However, from a strictly legal point of view, people who are deaf are not recognised as a 'national minority', at least not yet. In any case, there is no explicit protection in EU law, unless an unfavourable treatment amounts to discrimination on one of the protected grounds under Article 19 TFEU and the '2000 directives. Indeed, the petitioner invokes an obligation stemming from the Austrian constitution and not from EU law. A different conclusion can be drawn from the accession of the Union to the United Nations Convention on the Rights of Persons with Disabilities. As already explained, the UNCRPD applies within EU competences and may not enable the EU institutions to adopt new legal measures not allowed by the EU Treaties. However, EU secondary laws must respect and be interpreted in line with the UN Convention (see above at paragraph 2.10).

[116] Advisory Committee on the Framework Convention for the Protection of National Minorities, Thematic commentary No. 3, *The language rights of persons belonging to national minorities under the Framework Convention*, 24 May 2012.
[117] See the study on *Minority language and education: best practices and pittfalls*, cit.

3.3. Free movement of EU citizens

3.3.1. Obstacles to the free movement of LGBT families

Petition 0320/2016 and **petition 0513/2016**, which is still pending at the time of writing this analysis, concern the problems for LGBT families stemming from the lack of EU-wide recognition of civil statuses regularly constituted in a Member State.

In **petition 0320/2016**, a French national complained of different instances of discrimination by the French consulates in London and Cape Town he allegedly experienced because of his registered partnership with a same-sex South African citizen. At the time when the petition was filed the couple was living in La Reunion on a multi-entry 3-year Schengen visa. They had previously lived in the UK, but – according to the petitioner – they had to leave because he had no permanent job and, therefore, his partner could not obtain a residence card. Discrimination allegedly took place during the official registering of their partnership when the South African partner applied for a Schengen visa and when they asked information regarding French citizenship. The petitioner also asked the European Parliament to help his partner obtain French citizenship prior to the mandatory 5 years of marriage for couples outside of France. The PETI Committee decided not to ask the Commission's view and advised the petitioner to raise the matter with the French Ombudsman or, alternatively, to seek redress before the ECtHR, after exhaustion of available remedies at national level.

In our opinion some instances of discrimination described in the petition are (potentially) connected to EU law, although additional information is needed to provide a more precise answer. Firstly, there is a clear link to EU law with respect to the difficulties encountered by the South African partner when applying for the Schengen visa. When applying the Visa Code[118] Member States implement EU law within the meaning of Art. 51(1) CFR. Therefore, they must respect Art. 21(1) CFR which prohibits discrimination on grounds of sexual orientation (Art. 21(1) CFR). The petition does contain enough information to establish whether this prohibition was infringed by the French authorities, but in case it was, redress could be sought (before a national judge) based on the Charter.[119]

Secondly, to the understanding of the petitioner, in order to live and work together in Europe his partner needs to acquire French citizenship. Yet, based on EU law (notably Directive 2004/38/EC) family members of an EU citizen, including those who are not EU citizens themselves, may enjoy a derivative right to accompany or join the EU citizen in a host Member State, as well as a derivative right to reside there for a longer period than three months, provided – in the latter case – that the two have 'sufficient resources' so as not to become a burden for the host state and a comprehensive sickness insurance.[120] When these requirements are satisfied, the host Member State is under a duty to allow entry and residence of the partner who is in a registered partnership with the EU citizen, provided that the host Member State recognises registered partnerships as equivalent to marriage.[121] In

[118] Regulation (EC) No. 810/2009 of the European Parliament and the Council of 13 July 2009, establishing a Community Code on Visas, OJ L 243, 15.9.2009, p. 1–58.
[119] See, by analogy, Case C-23/12, *Zakari*a, 17 January 2013, ECLI:EU:C:2013:24.
[120] See Art. 7(1) and (2) of Directive 2004/38/EC. In fact, according to the case law of the CJEU, it is not necessary that the EU citizen provides the sufficient resources, they may also come from the TCN: see Case C-200/02, *Chen,* 19 October 2004, ECLI:EU:C:2004:639, para. 47.
[121] See. Artt. 2(2) and 3(2) of Directive 2004/38/EC, which apply equally to EU citizens and family members who are TCNs. Indeed, these two provisions, interpreted in light of the CJEU's case law (*Reed*, cit.), apply also to same-sex couples. A broader discussion is provided above (Part II, section on "Sexual orientation" ground), as well as below (analysis of petition 0513/2016).

addition, if the non-EU family member needs to hold an entry visa[122] Art. 5(2) of the directive provides that 'Member States shall grant such persons every facility to obtain the necessary visas [; s]uch visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure'.

By contrast, Directive 2004/38 cannot establish a derived right of residence for third country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.[123] However, depending on the circumstances of the case a similar outcome may sometimes be reached through the CJEU's case law on the so-called 'returners', i.e. EU citizens or workers who return to their Member State of origin after having exercised the EU right to free movement or to work in another Member State. According to the CJEU *'Article 21(1) TFEU must be interpreted as meaning that, where a Union citizen has created or strengthened a family life with a third country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38/EC in a Member State other than that of which s/he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national'*.[124]

Based on the information provided it is difficult to establish whether the petitioner and his partner could take advantage of this case law. Before leaving the EU the couple spent some time in the UK, but there are not enough elements to establish whether their stay could be qualified as 'genuine residence'. Apparently, the partner of the petitioner did not enjoy, in the UK, a (derived) right to reside based on Directive 2004/38/EC. However, the petitioner's statement that, since he had no permanent job, his partner could not obtain a residence card and therefore they had to leave, may raise some doubts concerning the correct application of that directive by the UK authorities. The requirement of having 'sufficient resources' for the family member, prescribed by Art. 7(1) and (2) of the directive, should not necessarily imply that the EU citizen has a permanent job.

Clarification on the relevance of EU law in cases such as this one may be provided by the CJEU's decision on pending case C-673/16 *Coman*. The Romanian Constitutional Court asked for an interpretation of Directive 2004/38/EC in relation to the case of two men (one of Romanian nationality and the other of US nationality) who, after having married in Belgium in 2010, moved to the US and after that filed a directive-based request to obtain a residence permit in Romania.

This request was rejected because Art. 277§2 of the Romanian Civil Code bans the recognition in Romania of same-sex marriages performed abroad. Based on unofficial information,[125] the Romanian Constitutional Court 'essentially asked whether a same-sex

[122] Notably, in the case of nationals of a Member State for which an entry visa is required by Regulation (EC) No 539/2001 (for instance, South Africa).
[123] Case C-456/12, *O.,* 12 March 2014, ECLI:EU:C:2014:135.
[124] Ibid., operative part.
[125] At the time of writing, the information on the case is not yet available in the Curia website.

non-EU citizen spouse of an EU citizen qualifies as a 'spouse' in the sense of Directive 2004/38/EC or, in the subsidiary, as 'any other family member' or as a 'partner' in a 'durable relationship' under the same directive, for the purposes of the right to reside in the latter's home EU Member State'.[126] Considering the above, the petitioner should have been advised to seek legal assistance aimed at disentangling the EU law aspects of his case, possibly in order to raise some of the alleged instances of violation before a national court.

In **petition 0513/2016** the petitioner is a Greek woman, married in the UK to a British woman, who gave birth to a daughter in Spain. Whilst both women are registered as parents in the Spanish birth certificate, only the (Greek) biological mother is recognised in the UK. According to the petitioner's statements her British spouse should adopt the child in order to get recognition of parenthood in the UK. By contrast, there would be no provision for similar families under Greek law. The petitioner complains that her daughter has no passport and, therefore, the family is unable to travel.

It is our opinion that the case presents (at least potentially) several connections with the scope of application with EU law. Preliminarily, however, we think that the petitioner's statement that the child cannot get a passport must be qualified. Apparently, the child should be entitled to a Greek passport, because the biological mother is Greek and, to our knowledge, *ius sanguinis* applies in such a situation. If the couple is experiencing problems in obtaining the Greek passport, a violation (by Greek authorities) of Article 4(3) of Directive 2004/38/EC may be at issue. According to this provision 'Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality'. As regards the impossibility to get a British passport (lacking adoption of the child by the petitioner's spouse), it must be recalled that the rules on civil status fall – in principle –[127] within the competences of the Member States. However, once the child obtains the Greek passport the family may rely on Art. 21 TFEU and on Directive 2004/38/EC, which specifies the rights stemming directly from the Treaty, taking into account, to some extent, the situation of same-sex couples or partners.

If one of the two women does not meet the conditions to reside in another Member State for more than 3 months she may enjoy a derivative right of residence as a family member of a EU citizen, provided that the spouse is able to satisfy the residence conditions[128] for them both (and for the daughter). As for the daughter, it does not matter whether the 'sufficient resources' required by the Directive are provided for her by the biological mother or her spouse. According to the CJEU's case law, EU law does not make provision on the source of those resources.[129]

It is true that in case of LGBT families Directive 2004/38/EC does not always ensure the possibility of preserving family unity throughout the EU (even when there is no problem from the point of view of the 'sufficient resources' requirement. This is a corollary of the notion of 'family member' embraced by Article 2(2) of the Directive, which grants – in principle – a

[126] C. Cojocariu, "Same-sex marriage before the courts and before the people: the story of a tumultuous year for LGBT rights in Romania", 25 January 2017, available here http://verfassungsblog.de/same-sex-marriage-before-the-courts-and-before-the-people-the-story-of-a-tumultuous-year-for-lgbt-rights-in-romania/.
[127] Under Art. 81 TFEU, the EU may adopt measures on family law which have cross-border implications (such as the recognition of civil status established in other Member States), but so far the Member States have not reached an agreement on this. However, as explained below, cross-border cases on civil status may fall within the scope of EU law.
[128] See art. 7 of Directive 2004/38/EC, which is inspired to the idea that EU citizens and their family members shall not become a(n economic) burden for the host Member State.
[129] See *Chen*, cit., para. 30

proper derivative right of entry and residence to the following family members of the EU citizen exercising the primary right of movement: '(a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)'. When none of these categories is relevant, then Article 3(2), entitled 'Beneficiaries', may be. However, it only makes provision for a duty of the host Member State to facilitate entry and residence of the persons concerned, not for an obligation thereof.[130] Notably, facilitation concerns the partner with whom the Union citizen has a durable relationship, duly attested.[131]

It can also be noted that in cases of LGBT couples who are married the interpretation of the 'family members' notion raises some doubts, concerning notably whether their situation falls under Art. 2(2) (a), Art. 2(b), or under Art. 3(2)(b) of the directive. The CJEU has not yet clarified this point. If the situation fell under Art. 2(2) (a), the implicit assumption would be that a Member State shall recognise – though only for the purposes of Directive 2004/38/EC – a civil status established in another Member State, even though the host state does not make provision for it. The diametrically opposite interpretation is that the weaker situation applies (i.e. that of Art. 3(2)), because Art. 2(2)(b) refers only to registered partnerships, not to marriage. Yet, this would result into a worse condition for same-sex married couples than for same-sex registered partners (which appears to be in contrast with the rationale of the provisions concerned). At least the same status as registered partners should be granted to spouses. As stated clarification should come from case C-673/16 *Coman*.[132]

Clearly, in a case such as that in the petition, the non-biological parent may encounter obstacles in exercising her free movement rights together with the daughter, but independently from her spouse. However, the fact that the rules on civil status are within the Member States' competence does not mean that situations concerning the (lack of EU-wide) recognition of civil status necessarily fall outside the scope of EU law. Indeed, similar situations may fall within the scope of EU law.

The CJEU has not yet ruled on a case about obstacles to free movement stemming from heterogeneous national provisions on civil statuses. Its reasoning in the case law on the recognition in a Member State of a surname registered in another Member State, where different rules apply (*Garcia Avello*, *Grunkin and Paul* and *Sayn-Wittgenstein* cases)[133], is therefore worthy of some attention.

According to the CJEU the rules on surname fall within the Member States' competence but they are nonetheless relevant under EU law when they are likely to hamper the exercise of the free movement rights conferred on EU citizens by Article 21 TFEU. The national legislation

[130] The duty of facilitation implies that '[the] host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people' (see Art. 3(2) of the Directive, last sentence).
[131] Apparently, Directive 2004/38/EC realised an imperfect codification of the CJEU's case law: based on the Court's judgment in Case C-59/85, *Reed,* 17 April 1986, ECLI:EU:C:1986:157, paras. 28-29, there should be a duty to allow entry and residence of the partner – rather than a mere duty to facilitate entry and residence – if the host Member State grants the right to entry and reside to the unmarried partners of its nationals.
[132] See the analysis of the previous petition.
[133] See, respectively, Case C-148/02, *Garcia Avello,* 2 October 2003, ECLI:EU:C:2003:539, Case C-353/06, *Grunkin and Paul*, 14 October 2008, ECLI:EU:C:2008:559, and Case C-208/09 *Sayn-Wittgenstein,* 22 December 2010, ECLI:EU:C:2010:806.

responsible for the obstacle to free movement could be justified, notably on public policy grounds, but – as is well-known – this limit is interpreted strictly by the CJEU.

Justifications based on public policy seem particularly pertinent in civil status cases. Interestingly, however, in its surname case law, the Court put special emphasis on the fact that the surname is a constituent component of a person's identity. A similar reasoning may be extended to cases where obstacles to free movement stem from diverging national provisions on parenthood, notably in the light of the recent case law at the ECtHR, whereby, in order to pursue the best interests of the child, his or her identity must be protected, and affiliation is a fundamental aspect thereof.[134]

In conclusion, we think that in light of the complex legal background and the many potential connections to EU law, it is important to ensure that petitioners who present cases similar to the two examined in this section receive as much complete and facts-specific information as possible.

Whilst the Your Europe Portal (http://europa.eu/youreurope/citizens/index_en.htm) may be a starting point, qualified legal assistance will be often essential.

3.3.2. National citizenship law potentially entailing loss of EU citizenship

In **petition 1315/2015** the former President of the Hungarian Supreme Court complained about the amendment to the Slovak citizenship law enacted in 2010, which provides for the automatic loss of Slovak citizenship when one acquires another citizenship. According to the petitioner, the law is in contrast with both the Slovak Constitution and with the 'fundamental principles of European integration'.

Whilst constitutionality control is outside the EU mandate, the CJEU's *Rottmann* judgment[135] suggests that national legislation providing for the automatic loss of citizenship becomes relevant under EU law (though not necessary incompatible with it) when it entails the loss of (also) EU citizenship. This occurs in a case such as that at issue when a Slovak citizen acquires the nationality of a non-EU Member State. By contrast, there is no link with EU law when the citizen acquires the nationality of another EU Member State, as s/he will keep EU citizenship, despite the loss of Slovak nationality.[136]

The CJEU has repeatedly stated that *'it is for each Member State, having due regard to [Union] law, to lay down the conditions for the acquisition and loss of nationality'*.[137] In *Rottmann*, as the Commission recalled in its view on the petition, the CJEU clarified that *'the*

[134] ECtHR, *Labassee v. France*, No. 65941/11, 26 June 2014, and *Mennesson v. France*, No. 65192/11, 26 June 2014. See also ECtHR, No. 76240/01, *Wagner and J.M.W.L v. Luxembourg*.

[135] Case C-34/09, *Rottmann,* 2 March 2010, ECLI:EU:C:2010:104. The case concerned an individual case of withdrawal, because of deception, of the German nationality acquired through naturalisation by an Austrian citizen. Since Austrian law on citizenship does not allow double nationality, the man had lost his Austrian nationality. Thus, withdrawal of the German nationality would have render him stateless, thus losing EU citizenship as well.

[136] Indeed, the historical background of the petition suggests that this is the main scenario caused by the Slovak Law on Citizenship of 2010, which was adopted following to an amendment to the Hungarian Citizenship Act that has broadened the conditions to apply for naturalisation. The Slovak amendment therefore concerns, primarily, Slovak citizen who decide(d) to acquire Hungarian citizenship. For some insights, see M. Ganczer, "Hungary – the twisted story of dual citizenship in Central and Eastern Europe", 8 October 2014, available here http://verfassungsblog.de/hungarians-outside-hungary-twisted-story-dual-citizenship-central-eastern-europe/.

[137] Case C-369/90, *Micheletti and Others,* 7 July 1992, ECLI:EU:C:1992:295, para. 10; Case C-179/98, *Mesbah,* 11 November 1999, ECLI:EU:C:1999:549, para. 29; Case C-200/02, *Zhu and Chen,* 19 October 2004, ECLI ECLI:EU:C:2004:639, para. 37.

proviso that due regard must be had to Union law (...) enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation (…), is amenable to judicial review carried out in the light of European Union law.'[138]

Thus, whilst the CJEU has not ruled out the possibility of losing EU citizenship, it has rejected the possibility that the loss of EU citizenship be the automatic consequence of the loss of nationality of a Member State. Indeed, it requires that the proportionality of the decision of withdrawal of national citizenship is examined by taking into account *'the consequences [it] entails for the situation of the person concerned in the light of EU law'*.[139] In particular, regard must be had *'to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect, it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality'.*[140]

The principles affirmed by the CJEU in *Rottmann* (notably the preclusion of any automatism) should apply also in individual cases where the loss of EU citizenship is the consequence of the application of a citizenship law such as the one adopted in Slovakia in 2010. The CJEU's judgment in *Kaur*,[141] concerning the nationality of British overseas citizens, seems to support this conclusion. The CJEU affirmed that the 1972 Declaration through which the UK defined the category of citizens to be considered as its nationals for the purposes of the application of (then) Community law was not in contrast with that law *'[because] it did not have the effect of depriving any person who did not satisfy [that] definition (...) of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person'.*[142] Reasoning *a contrario*, national legislation on citizenship which may entail deprivation of EU citizenship, may not be totally compatible with EU law. In such a situation the person concerned could seek redress before a national court which, in case of doubts, may refer a question for preliminary ruling to the CJEU.

3.3.3 Free movement rights of non-EU family members of EU citizens

In **petition 1164/2013** an Estonian national living in the UK stated that her mother was not able to visit her because the UK decided to no longer recognise the Aliens Passport, i.e. the passport granted to people – such as her mother – belonging to the Russian speaking minority in Estonia, who are not considered Estonian citizens. In its reply the Commission pointed out that the Union has no general competence as regards the protection of minorities and that, since they do not hold a Member State's nationality, Estonian non-citizens cannot rely on EU citizenship rights. The Commission also affirmed that there were insufficient elements to establish whether the UK authorities' refusal to deal with the visa application of the petitioner's mother complied with EU law.

[138] *Rottmann*, cit., para. 48.
[139] Ibid., para. 55.
[140] Ibid., para. 56.
[141] *Kaur,* cit.
[142] Ibid., para. 25.

We agree with the first part of the Commission's answer. Indeed, concerning the citizenship issue, the CJEU's judgment in *Kaur*, which we mentioned in the analysis of **petition 1315/2015**, seems relevant. As for the second part of the Commission's answer, the privileged status of the family members of an EU citizen maybe deserved some additional attention. Apparently, the petitioner's daughter falls within the scope of Directive 2004/38/EC, as she is living in a host Member State. Indeed, the directive grants to the 'dependent direct relatives in the ascending line' [143] of a EU citizen the right to accompany or join him/her in a host Member State, subject to the conditions and limits prescribed by the directive itself. A family member who is a not an EU citizen shall hold 'an entry visa obtained in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law'. The directive expressly points out that 'Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure'.

It is also worth noting that, as concerns stateless persons, recital 7 of Regulation 539/2001 points out that 'the decision as to the visa requirement or exemption should be based on the third country in which these persons reside and which issued their travel documents'. 'However, given the differences in the national legislation applicable to stateless persons (...), Member States may decide whether these categories of persons shall be subject to the visa requirement, where the third country in which these persons reside and which issued their travel documents is a third country whose nationals are exempt from the visa requirement.' If a person in a situation such as that of the petitioner's mother is to be regarded as stateless, then it could be argued that, since she resides in a Member State, she could be exempted from the visa requirement. By contrast, if she is regarded as a TCN, then, according to Art. 10 of Directive 2004/38/EC 'possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.'

In sum, in cases such as that in the petition EU law provisions on (derived) free movement rights of the family members of EU citizens, notably those of Directive 2004/38/EC, may be relevant. It would therefore be worthwhile recommending the petitioner to ask legal assistance to disentangle the EU law aspects of his/her case. Moreover, the petitioner could also be referred to Your Europe Portal for general information.

3.4. Alternative care for children

In **petitions 1852/2013, 1655/2013, 1847/2013, 2498/2013, 2543/2013 and 2546/2013** the petitioners complain about violations by the UK social services in the context of children's removal from parental custody. In all petitions but one (2543/2013) the petitioners are EU citizens, but they are not UK nationals. In four petitions, instances of discrimination on grounds of language and/or religion and/or ethnicity are alleged. In two petitions (2498/2013 and 2543/2013) no instance of discrimination is alleged and based on the information received it is difficult to identify any. However, in petition 2543/2013 the petitioner complains about a travel ban. All petitions were declared admissible by the PETI Committee. By contrast, the Commission found them to be outside the scope of EU law and expressed the concern that a hearing could raise false expectations.

[143] Cf. Art. 2(2)(d) of Directive 2004/38/EC.

We decided to devote some special attention to this set of petitions because, as remarked by the Commission, their number is increasing. Petitions on children's rights in general can be expected to increase because the Lisbon Treaty introduced many new references to the objective of protecting this vulnerable group. Yet, in many (probably most) respects the Member States retain their competence, as is the case with the substantive rules on removal of a child from parental care. The relevance of EU law then depends on the specific circumstances of each case. For instance, in cross-border cases on alternative care Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility may come into play. The CJEU has indeed interpreted its scope as covering *'a decision ordering that a child be immediately taken into care and placed outside his original home (...), where that decision was adopted in the context of public law rules relating to child protection'*.

In principle, the right of EU citizens to freely move within the EU may also apply to similar cases within the scope of EU law, because a decision to place a minor EU-citizen into alternative care constitutes a limitation of his/her right to free movement (and possibly of the same rights of his/her parents). However, that decision is likely to be justified on public policy grounds, being inspired - as a rule - by the best interests of the child. Similar considerations apply to the travel ban complained about in petition 2543/2013.

Since four out of six petitioners alleged instances of discrimination, attention shall be paid to anti-discrimination legislation. Yet, national rules on child removal fall outside the scope of Directive 2000/78/EC, which concerns only employment and occupation. As for Directive 2000/43/EC (the Racial Equality Directive), which has a broader scope, the question is whether the activity of national social services relating to the care of children removed from their families constitutes a measure of 'social protection' for the purpose of Art. 3(1)(e) of Directive 2004/43. The Commission answered the question negatively, arguing that this notion *'should not be understood as covering the functioning of child welfare services, but rather as covering measures in the field of social security and healthcare'*.

It is respectfully submitted that this interpretation appears to be too restrictive. The expression used in Art. 3(1)(e) of the Directive ('*including* social security and healthcare') rather suggests that 'social protection' has a broader coverage than the two fields expressly mentioned. We would therefore encourage a discussion on this notion's coverage, which, incidentally, shall be the same throughout the EU. Unlike other EU law instruments where the same notion appears Art. 3(1)(e) does not refer to the national law of the Member States. The notion of 'social protection' should therefore receive an autonomous EU law interpretation, which the CJEU is ultimately competent to provide.

Directive 2004/38 may also provide a connection with EU law. Its Art. 24 states that 'all Union citizens residing based on this directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty'. If children who are nationals of the Member State concerned are allowed to learn their language (when different from that of the State of nationality) or to practice their religion, children of other Member States should receive the same treatment (provided that they enjoy a right to reside in the host Member State under Directive 2004/38).

In sum, although it is not possible to affirm that EU law was undoubtedly applicable in some of the cases at issue, and even less that it was violated, this group of petitions well illustrates how complex, relative and dynamic the scope of EU law is. To avoid that petitioners are faced with a negative answer regarding the many references to children protection in the Treaties as nothing really serious, an effort should be made to explain what the EU did, can do and

cannot do in the field. It is also important to convey the message that another source of law (national law or the ECHR) will be applicable when EU law is not.

3.5. Age

Petition 0309/2015 deals with a case of discrimination on the grounds of age. The petitioners complain of the dismissal of some senior officers in the Slovakian Ministry of Foreign Affairs, determined only by their age. They refer to an ongoing practice of purging senior officials. In fact, the Slovak government had terminated the contracts of 13 employees of the Foreign Office aged over 50. The case falls within the scope of Directive 2000/78/EC, since Article 3 expressly quotes conditions of dismissal amongst the matters covered. Above in section 2.9 and below in Annex III an extensive analysis of the principles stated by the CJEU regarding the application of the principle of non-discrimination on grounds of age is given. Even the Commission does not question the applicability of EU law but, since Directive 2000/78/EC was transposed correctly by Slovakia, the Slovakian national authorities have the primary responsibility to ensure its correct application. Thus, the Commission suggested that the case be brought before the national courts (or before the national equality body). The opinion expressed by the Commission is not fully convincing. While it is true that when there is a breach of an individual right people should complain before a national court (or also before an equality body in cases of discrimination), the role of the Commission as 'guardian of the Treaties' is different and aims to ensure that MSs fulfil their obligations under EU law. It is not clear in this case why the Commission has not found any need to investigate further, eventually opening a Pilot procedure, such as in the case *Commission v. Hungary*.[144] On the other hand the Commission has discretional power to decide on which cases it will start investigations. One possible reason not to open such a procedure in this case could be that the challenged national measure taken by the Slovakian government addressed 'only' 13 people.

Two other **petitions** - **0962/2014, bearing 28 signatories, and 1103/2014** - concern discrimination on the grounds of age but the challenged national law was later modified. Petitioners complained about the maximum age limit (30 years) for access to the Guardia Civil. Subsequently, and thanks to a judgment of the CJEU in a preliminary ruling, Spain has modified its legislation and increased the maximum age limit to 40 years.

3.6. Conclusions

The analysis presented in this section draws on petitions which raise more problematic questions and where the opinion of the EU Commission is not thoroughly conclusive. A full list of the petitions received, classified by grounds of discrimination, is provided in Annex V. Where the cases are particularly complex and different legal issues arise, a detailed scrutiny is given.[145]

Although they are all related to anti-discrimination law, the petitions received are quite different in terms of the respondent entity (the EU or Member States), the grounds of discrimination at stake (race or ethnicity, sexual orientation, nationality, age, disability,

[144] Case C-286/12, *Commission v. Hungary*, 6 November 2012, ECLI:EU:C:2012:687.
[145] We thank Prof. Adelina Adinolfi and Prof. Olivia Lopes Pegna of the University of Florence, for their constructive comments regarding the most controversial legal issues emerging from the petitions analysed.

language, national minority, and sex), and the legal sources invoked (the CFR or EU law in general).

Some petitions concern only Member States and challenge a conduct of a public body or a civil servant or the application in an individual case of a piece of law. In other cases, petitions claim lack of action to combat discrimination at national level. When the responsibility of a Member State is at stake some petitions call upon the Parliament to promote initiatives at the national level or to monitor proper implementation of EU law. Petitions in which the responsibility of the EU institutions is challenged generally ask for the adoption of new acts, mostly however without specifying exact measures.

Most of the petitions concern specific individual cases, while only a few petitions complain about discrimination against a 'group' or an issue of general interest. In many cases the poor description of the facts provided by the petitioners makes it difficult to understand exactly which legal issues are relevant to the case and to assess it properly.

One of the most troublesome issues is that of EU competence. The material regarding the petitions received often contains a relevant statement: 'explain to the petitioner that the Committee on Petitions does not have competence to intervene in individual cases' (**petition 0320/2016**). The European Commission in at least two of its opinions on this lot of petitions has stated the same (**petitions 1847/2013, 2498/2013, 2543/2013** and **2546/2013**). This appears to be a key issue emerging from the majority of petitions received and a major problem when trying to find an appropriate and satisfying reply to the petitioners.

EU citizens should be aware that the right to petition is an instrument to communicate directly with the EU institution that represents their interests in general and not individually. This does not mean that EU citizens should not send petitions on their individual cases and allege the breach of one of their rights. On the contrary, individual cases may be useful to raise concerns that are more general and thus relevant from a political perspective. Against this background the PETI Committee should analyse the individual cases in order to assess the effectiveness of individual rights recognised by EU law, and to identify general issues the EP, in cooperation with the other EU institutions and, if possible, with the Member States, should explore more in depth. Petitioners should be informed that their claims will be dealt with with a view to finding general political solutions to issues of general interest highlighted in their petitions, rather than with a view to finding a legal solution to their specific case.

The European Parliament does not have the powers to solve individual cases but it has the competence - and the duty - to act to find the most suitable solution to prevent similar cases from being raised again. For instance, several petitions on 'alternative child custody' concerned individual and very sensitive cases where minors are involved. When citizens submit such petitions they should be aware that the Parliament is not the institution charged with powers to solve their personal situations directly. They should however be informed that the EP welcomes their petitions and that it will treat them as an alert on policies where the EU and the Member States should act differently and do better.

It seems also worth mentioning that the petitions analysed in this study show that, when verifying whether an individual case entails discrimination, a complex and articulated assessment is required. Definitions, exceptions, evidences, scope of application and remedies have to be duly applied in the individual cases in order to establish the existence or not of a prohibited discrimination. To establish beyond doubt that a case falls within the scope of EU competences and that a discrimination has occurred, a thorough legal analysis is required. This in turn requires a detailed description of the facts and this is often lacking in the sample

of petitions analysed in this report. In all these cases the petitioners would need qualified legal advice and assistance in order to defend their rights at national level. The EU is already promoting instruments to properly inform EU citizens in this regard. The Petitions Portal of the PETI Committee could provide a direct link to these instruments, to enhance their visibility and popularity and to raise the EU citizens' awareness that petitions are not the most appropriate instrument to solve legal cases with direct effects in the individual personal sphere.

Lastly, two EU citizens submitted petitions claiming a discrimination suffered by their family members who are third country nationals. In these cases the petitioners seem to be unaware of the fact that the right to petition is not an exclusive right of EU citizens, but may be enjoyed also by third country nationals who are residing in one of the Member States.

4. RECOMMENDATIONS

The assessment of a case of discrimination needs a thorough analysis and specific legal expertise is necessary. The activities of collective actors, NGOs and institutional bodies should be encouraged to assist victims of discrimination. The European Parliament should support the activities of national equality bodies and enquire into the cooperation with other institutions and their effective roles.

The issue of competence is a crucial one, as already mentioned here and in numerous other studies and case law. When a citizen reads in the Charter of Fundamental Rights that there is a principle of non-discrimination on the grounds of language and belonging to a national minority, it is understandable that petitions on these matters are submitted. The case of minorities is particularly interesting, since it is one where the value of the European Union and its fundamental rights exists, but the Union has little, if any, competence. In cases like these, the EP should:

- take due account of the petitions received, start inquiries to better comprehend the causes at the origin of the petitions, and promote meetings, seminars and resolutions to stimulate national governments to find durable solutions. While referring to the non-EU binding legal instruments in force, notably those of the Council of Europe (such as the ECHR and the European Convention on National Minorities), the EP should reassure the petitioners that it will keep on monitoring the situation, taking into account other similar petitions;

- develop guidelines for petitioners, e.g. a checklist, to ensure that, on the one hand EU citizens do not hold false expectations about the effects of their requests and, on the other hand they are made aware of the system of existing remedies. As is well-known, EU law provides for a system of judicial protection with remedies available both at national and at European level. Moreover, there are information platforms funded by the EU to provide advice to EU citizens, when they exercise their right to freedom of movement and stay. During the petition submission stage the 'submission portal' should provide the necessary information about the system of existing remedies, and petitioners should receive information about any legal action already taken. In particular, potential synergies with instruments such as the Your Europe Portal (www.europa.eu/youreurope/citizens/index_en.htm), Clarity (www.fra.europa.eu/clarity/en) and Charterclick (http://52.58.51.113:3000/) might be explored.

Both guidelines and checklist should aim at strengthening the petitioners' knowledge about:

- the rights invoked;
- the competent entity (e.g. the EU or the Member States);
- the relevant legal sources and their scope of application (e.g. the Charter/value only or in conjunction with an EU competence and secondary law);
- the EP's limited powers in individual cases;
- the powers and competences of national equality bodies;
- the EP's powers on general issues even outside EU competences, but according to the EU's fundamental rights and values (e.g. minorities, language, religion, homophobia, gender issues);
- the system of judicial protection both at national and EU level;
- the role of the EU Commission as Guardian of the Treaties.

Replies to petitions should be formulated in such a way as to ensure consistency with the CJEU's case law on the boundaries of the EU competence and the scope of application of EU law. Special attention should be paid to providing satisfying answers in cases falling outside that scope.

When a petition concerns a matter within the Member States' exclusive competence, but there is a reference to the rights invoked among the values of the EU and in the CFR, the EP should in any case take due account of the claims and make the petitioners aware of the paramount actions already taken and to be taken in the future (e.g. actions already taken by the EP regarding homophobia, minorities, religions). The responsibility of the MSs should be stressed, including in terms of their choice not to confer (enough) powers to the EU in certain fields, or not to allow the EU to legislate on an issue that falls within its competences.

ANNEX I – APPLYING THE NON-DISCRIMINATION PROHIBITIONS

1. The judgment on discrimination

The assessment of a claim of discrimination entails the application of an articulated judgment, first developed by the CJEU – directly applying the prohibitions entrenched in the Treaties – then laid down in anti-discrimination directives. Specific definitions, exceptions and a system of remedies apply. Different rules may apply for different grounds of discrimination, in particular regarding the scope of application and justifications.

2. The definition of discrimination

According to EU law the definition of discrimination entails three different concepts: direct discrimination, indirect discrimination and harassment. Direct discrimination means a difference of treatment based on a suspected ground or on the general principle of non-discrimination. Indirect discrimination means a disadvantage produced by normative acts or practices which, although apparently neutral, in fact produce discrimination on one of the suspected grounds or on the general principle of non-discrimination.[146] Protection against indirect discrimination is an aspect which strongly characterises the Union's legal order. Discrimination on the grounds of nationality is an example. As the national legal orders no longer contain direct discrimination[147] which blatantly discriminates European citizens and is therefore more easily identifiable, the CJEU has predominantly considered cases of indirect discrimination, with a vast majority of cases dealing with national provisions based on residence.[148] In two cases dealing with prohibition of wearing religious clothing, applied to workers of private companies, the Court has qualified the dismissal of two Muslim girls for wearing a headscarf as a case of indirect discrimination.[149] The Court pointed out that the prohibition was applicable to any religious clothing and not only to clothes of a particular religion. It is worth noting that two Advocates General had endorsed different approaches, notably concerning the meaning of 'direct' and 'indirect' discrimination and the concept of 'genuine and determining occupational requirements' provided by Directive 2000/78/EC at Article 4(1).

According to the '2000 anti-discrimination directives the concept of discrimination includes also harassment, which means unwanted conduct related to any relevant grounds and having the purpose or the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment.

3. Comparison, disadvantage, objective justifications and explicit exceptions

According to EU anti-discrimination directives and CJEU case law the concrete application of the prohibition to relevant cases involves a three-layer assessment of the facts: comparison between similar situations, existence of a disadvantage, and exclusion of an exception or of an objective justification.

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[146] Case C-419/92, *Scholz,* 23 February 1994, ECLI:EU:C:1994:62, para. 7; Case C-152/73, *Sotgiu,* 12 February 1974, ECLI:EU:C:1974:13.

[147] Case C-55/00, *Gottardo,* 15 January 2002, ECLI:EU:C:2002:16.

[148] Case C-350/96, *Clean Car,* 7 May 1998, ECLI:EU:C:1998:205; Case C-57/96, *H. Meints,* 27 November 1997, ECLI:EU:C:1997:564; Case *Sotgiu,* cit.; Case C-107/94, *Asscher,* 27 June 1996, ECLI:EU:C:1996:251; Case C-279/93, *Schumacker,* 14 February 1995, ECLI:EU:C:1995:31; Case C-33/88, *Allué e Coonan,* 30 May 1989, ECLI:EU:C:1989:222; Case C-237/94, *O'Flynn,* 23 May 1996, ECLI:EU:C:1996:206; Case C-27/91, *Le Manoir Sarl,* 21 November 1991, ECLI:EU:C:1991:441; Case C-367/11, *Prete,* 25 October 2012, ECLI:EU:C:2012:668; Case C-20/12, *Giersch,* 20 June 2013, ECLI:EU:C:2013:411.

[149] Case C-188/15, *Bougnaoui*, cit.; Case C-157/15, *G4S Secure Solutions*, cit. See also above par. 2.8.

In application of the classical Aristotelian maxim according to which equality entails equals being treated equally and unequals unequally, the CJEU only considers cases where unequal treatment is applied to equal situations as being discriminatory. The difference in treatment of different situations which are not comparable does not constitute discrimination and is therefore legitimate. Technically, one can speak about discrimination only when the difference in treatment results from an act relating to comparable situations judged to be alike, or when the same treatment is applied to objectively different situations.[150] Therefore, comparison is the first stage in the application of the prohibition of discrimination.
Once the comparability of the cases has been established it is necessary to ascertain that there is a less favourable treatment of a person and that such treatment is the result of a rule or practice based on one of the relevant grounds, or is seemingly neutral but causing the same discriminatory outcome.[151] The proof can be obtained simply from the interpretation of the rule, without having to prove that there has been an adverse effect on a greater number of persons, as it is sufficient that the legislation may have even potentially contained prejudice.[152]

Finally, it is necessary to exclude the existence of an allowed exception or, concerning indirect discrimination, an objective justification, which makes the contested provision legitimate and compatible with EU law provisions. First of all, it should be clarified that an objective justification is different from an objective difference in the situations at stake and where a different treatment is allowed. To treat different situations in different ways is perfectly lawful and at times required by the application of the non-discrimination principle.[153] Rules applying to objective justifications may differ depending on whether direct or indirect discrimination occurs. In the case of direct discrimination only those justifications which are expressly provided for in the Treaty or in secondary law are allowed. We should mention here the exception to the freedom of movement of workers specifically and categorically laid down by the Treaty for reasons of public policy, public security or public health (e.g. Art. 45.3 TFEU). These exceptions, which limit the principle of freedom of movement, envisage that a national of another Member State may be treated differently from the EU citizens of the host Member State.[154] When an indirect discrimination occurs, apart from express derogations other objective justifications may be applied. Objective justifications are lawful when they are not grounded on nationality, when they pursue a legitimate aim and are proportionate, and when the same purpose cannot be pursued with a different measure.[155]

EU anti-discrimination directives lay down specific rules for burden of proof, remedies and *locus standi* of collective actors. In relation to age or disability discrimination, moreover, special exemptions apply with regard to: genuine and determining occupational requirements (Article 4 of both '2000 directives and Art. 14(2) of Directive 2006/54/EC); employers with an ethos based on religion or belief (Art. 4(2) of Directive 2000/78/EC); and the armed forces (Article 3(4), Directive 2000/78). A positive duty to provide reasonable accommodation for people with disabilities stems from Art. 5 of Directive 2000/78/EC and from the UNCRPD.

[150] Case *Garcia Avello*, cit. Barnard, Scott 2002.
[151] Case C-10/90, *Masgio,* 7 March 1991, ECLI:EU:C:1991:107; Case *O'Flynn*, cit., para 18-21.
[152] Case *O'Flynn*, cit., para. 21.
[153] Case *Sotgiu*, cit.
[154] Cases *Van Duyn,* cit.; C-115/81 and C-116/81, *Adoui and Cornuaille,* 18 May 1982, ECLI:EU:C:1982:183; Cases C-65/95 and C-111/95, *Shingara and Radiom*, 17 June 1997, ECLI:EU:C:1997:300; Case C-260/89, *ERT,* 18 June 1991, ECLI:EU:C:1991:254; Case C-350/96, *Clean Car,* 7 May 1998, ECLI:EU:C:1998:205; Case C-348/96, *Calfa,* 19 January 1999, ECLI:EU:C:1999:6; Case *Groener,* cit.
[155] Case C-15/96, *Schöning,* 15 January 1998, ECLI:EU:C:1998:3; Case *Allué and Coonan*, cit.; Case *Pastoors and Trans-Cap,* cit.

ANNEX II – THE CHARTER AND MEMBER STATES

According to Article 51(1) CFR, Member States are bound by the Charter 'only when they are implementing Union law'. The CJEU interpreted[156] this clause as meaning that national provisions can be challenged against the Charter only 'when they fall within the scope of EU law', which in turn means that an EU law binding legal rule, other than the Charter article allegedly violated, must be applicable to the situation at issue.

Based on the CJEU's case law the Charter is applicable (at least) to cases where the alleged violation of the fundamental right(s) granted therein concerns:

1) national provisions which are functional to ensure the effective application of EU law at the national level;
2) national provisions on matters covered by EU legislation, or directly affecting it;
3) the application of EU law or the abovementioned provisions by the competent authorities;
4) national provisions limiting the fundamental freedoms of movement foreseen in the Treaties;
5) national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens.

Before discussing briefly each situation it must be stressed that this taxonomy reflects the current state of evolution of the CJEU's case law and, therefore, should not be regarded as an exhaustive one.

Situation 1) encompasses different sets of national provisions/cases of which we single out the principal four. First, there is national legislation enacting the provisions involved specifically in order to give effect to an EU measure. For instance, national legislation transposing a directive. According to the CJEU this category includes also domestic provisions *'intended to ensure that the objective pursued by the Directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted'*.[157]

A second set of relevant cases are those where national provisions in practice give effect to EU law obligations, though they were not adopted specifically for that purpose. For instance, EU legislation often provides that the Member States shall determine effective, proportional and dissuasive sanctions applicable to infringements of national legislation implementing an EU directive. The Member States may enact *ad hoc* rules, but they may also refer to existing rules on sanctions already applicable to purely domestic infringements. Those provisions, when they are used in cases concerning the infringement of the relevant EU directive, fall within the scope of EU law. Therefore, the Charter is the primary reference source of

[156] Notably, in Case C-617/10 *Åckerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105, paragraphs 19-22.
[157] Case C-144/04, *Mangold*, 22 November 2005, ECLI:EU:C:2005:709para. 51. In Case C-528/13, *Léger*, 29 April 2015, ECLI:EU:C:2015:288, for instance, the Court checked a national measure transposing Directive 2004/33/EC on technical requirements for blood donation against Article 21, in conjunction with Article 52(1). The national measure provided for a permanent deferral to blood donation for men who have had a sexual relations with other men. The Court observed that the domestic legislation at issue *'expressly refer[red] to Directive 2004/33 in its preamble'*.

fundamental rights protection based on which they can be challenged.[158] By contrast, (only) domestic fundamental rights standards apply when the same rules on sanctions are used in cases which are not related to EU law infringements.

Similarly, the third set of cases relates to the CJEU's established case law according to which and in the absence of EU law rules governing the matter it is for the domestic legal system of each Member State *'to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU law]'*.[159] These procedural rules fall within the scope of the Charter, not only when they were enacted with the specific purpose to comply with the said EU law obligation, but also when they are relied on in EU law related cases, even though they were adopted independently from EU law.

In a fourth set of cases the national provisions allegedly infringing the Charter provide the definition of specific notions and terms used within an EU measure which expressly refers to national law for that definition. Interestingly, those notions and terms may also concern matters outside the competences of the Union.[160]

As regards the situation under 2), so far the CJEU relied on it only in cases falling within the scope of EU anti-discrimination measures, notably cases concerning age discrimination (a detailed overview on these is provided in Annex III). However, it seems applicable also when an allegedly discriminatory provision falls within the scope of a different piece of EU legislation (i.e. not related to discrimination). It deserves special attention because it is particularly far-reaching in terms of national law coverage. Indeed, the *rationale* behind the CJEU's reasoning in cases where this situation materialised is apparently that, once a matter is governed by EU law rules, national provisions dealing with it must comply with all EU fundamental rights and not only with those more connected to those EU law rules.

If this is correct, the scope of application of Article 21 CFR is potentially very broad, given that discrimination issues may arise in any field covered by EU law rules. It must be stressed, however, that the allegedly discriminatory national provision shall concern precisely the same matter governed by EU law rules applicable to the case; the CJEU has indeed pointed out that *'a certain degree of connection [must exist,] above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'*.[161] Moreover, depending on whether the trigger for the application of Article 21 CFR is an EU anti-discrimination directive or not, the legal framework against which the discriminatory nature of the national provision must be assessed is different. Where the connection is provided by an EU anti-discrimination directive, the contested provision will be assessed, essentially, against the directive, rather than against Article 21 CFR itself.[162] An additional limit which applies when the connection is provided by an EU anti-discrimination directive, is that the national provision cannot be challenged against a prohibited ground which is mentioned by Article 21 CFR, but is not also tackled by the relevant directive.

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[158] See, for instance, Article 17 of Directive 2000/78 and Cases C-81/12, *Asociaţia Accept*, 25 April 2013, ECLI:EU:C:2013:275, para. 62, and Case C-54/07, *Feryn*, 10 July 2008, ECLI:EU:C:2008:397, paragraphs 38 and 40.

[159] Case 222/84, *Johnston*, 15 May 1986, ECLI:EU:C:1986:20, para. 16.

[160] Case C-401/11, *Soukupová*, 11 April 2013. See also Case C-400/10 PPU *McB.*, 5 October 2010, ECLI:EU:C:2010:582.

[161] Case C-206/13 *Siragusa*, 6 March 2014, ECLI:EU:C:2014:126.

[162] The Court clarified this point in Case C-416/13, *Vital Pérez*,13 November 2014, ECLI:EU:C:2014:2371: *'when it is ruling on a request for a preliminary ruling concerning the interpretation of [both] the general principle of non-discrimination on grounds of age, as enshrined in Article 21 CFR, and the provisions of Directive 2000/78, in proceedings involving an individual and a public administrative body, the Court examines the question solely in the light of that directive*'.

Situation 2) implies that in cases falling within the scope of EU anti-discrimination legislation, the main added value of Article 21 CFR concerns disputes between private parties. Unlike EU directives, Article 21 may lead to disapplication of national conflicting provisions. By contrast, where the allegedly discriminatory provision falls within the scope of EU 'non-anti-discrimination' legislation, Articles 21 and 52(1) CFR provide the relevant benchmark (see more on this in Annex III).

In relation to situations 1) and 2), it is also worth stressing that the Charter is binding also on the social partners where they adopt – despite the collective agreements – measures which fall within the scope of EU law.[163]

The situation under 3) encompasses all instances where the alleged violation of the Charter occurred in the context of the application of EU law (notably EU Regulations), or of national legislation giving effect to EU law (within the meaning of situations 1) and 2), by domestic authorities, either judicial or administrative.[164] For instance, border guards apply EU law when they perform their duties under the Schengen Borders Code.[165] Thus, they are bound by the Charter and in case of an infringement – such as a discriminatory treatment under Article 21 CFR – the victim should be granted, by the Member State concerned, effective judicial protection in line with Article 47 CFR.[166] By contrast, the risk of a violation of the prohibition under Article 21 CFR does not seem, in and by itself, sufficient to require the competent domestic authority not to transfer to another Member State a person searched through a European Arrest Warrant (EAW) or an asylum seeker. At the present stage of evolution the case law of the Court refers to the situation where the transfer would expose the person to the risk of inhumane or degrading treatment.[167] Instances of discrimination under Article 21 CFR may possibly be relevant as the cause of that risk.[168] A more direct relevance could be imagined, however, at least in those cases where the EU legislator itself mentioned non-discrimination as an issue worthy of special attention. This happens, for example, in the EAW system.[169]

The situation under 4) encompasses those instances where Member States' action interferes with the fundamental freedoms of movement (of EU citizens, workers and providers of services, goods, services, and capitals) guaranteed by the Treaties. According to CJEU's established case law such action is compatible with EU law only insofar as it can be justified by the attainment of the objectives of general interest foreseen by the Treaties, EU law legislation or the case law of the Court. In addition, the Member State action concerned must pass a proportionality test in relation to the objective pursued, which also includes compliance with EU fundamental rights. In other words, a national measure interfering with a fundamental freedom cannot be held compatible with EU law when it pursues an objective of

[163] Case C-297/10 *Hennigs and Mai*, 8 September 2011, ECLI:EU:C:2011:560, paras. 64-68. See also Case C-447/09 *Prigge and o.*, 13 September 2011, ECLI:EU:C:2011:573.
[164] Case C-329/13 *Stefan*, 8 May 2014, ECLI:EU:C:2014:815.
[165] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1–52.
[166] Case C-23/12 *Zakaria*, 17 January 2013, ECLI:EU:C:2013:24.
[167] See, on the asylum system, Joined Cases C-411/10 and 493/10 *N.S. and others*, of 21 December 2011, para. 106; on the EAW, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi e Căldăraru*, 5 April 2016, para. 94.
[168] See Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, 5 September 2012, ECLI:EU:C:2012:518.
[169] See recital 12 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant: "[nothing] in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons".

general interest in such a way as to breach Article 21 CFR read in conjunction with Article 52(1) CFR. The scope of this situation is also particularly far-reaching, notably because it can attract within the remit of the Charter (and more generally of EU law rules on non-discrimination) national provisions adopted by the Member States in the exercise of their exclusive competences.[170]

Finally, as regards situation 5) it must be recalled that according to established case law of the CJEU when the subject matter of a case is not governed by EU rules (other than the Charter) and the person alleging a violation of his/her fundamental rights has not exercised EU free movement rights, EU law is not applicable, nor is the Charter. These situations, which are commonly defined as 'purely internal', are governed entirely by national law. However, in *Zambrano* the CJEU introduced a limited exception to the 'purely internal situation' rule, arguing that EU law is relevant when national measures *'have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'*.[171] The *Zambrano* case concerned a Colombian national who lived in Belgium with his wife (also a Colombian national) and their two children who were born in Belgium and had acquired Belgian nationality. After having resided and worked for several years in Belgium, Mr and Mrs Zambrano made a request to the Belgian authorities to regularise their situation. Their request was rejected and the two were ordered to leave Belgium. The case arrived before the CJEU which found that '[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, [would have the effect of depriving the genuine enjoyment by the children of their status as EU citizens].'[172]

Subsequent case law of the CJEU shows that violations of fundamental rights cannot as such activate the *Zambrano* exception to the 'purely internal situation' rule. Rather, the measure concerned must have the effect – *de jure* or *de facto* – to compel an EU citizen to leave the territory of the Union.[173] However, EU fundamental rights play a role in relation to the *Zambrano*-exception. As the CJEU clarified in *Réndon Marin*, national measures entailing the effect described in *Zambrano* are not necessarily incompatible with EU law; they indeed are *if* they pass a proportionality test which – as for derogations to the free movement provisions – includes compatibility with EU fundamental rights. Accordingly, in *Réndon Marin*, the CJEU affirmed that Article 20 TFEU *'[precludes] national legislation which requires a third country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union'*.[174]

With the exception described under point 5) above, the situation of sedentary EU citizens is outside the scope of EU law and is entirely governed by national law. It serves no purpose to

[170] Case C-186/87, *Cowan*, 2 February 1989, ECLI:EU:C:1989:472, para. 19. See also Case C-274/96, *Bickel and Franz*, 24 November 1998, ECLI:EU:C:1998:563.
[171] Case C-34/09 *Zambrano*, 8 March 2011, ECLI:EU:C:2011:124, para 42.
[172] Ibid., para. 43.
[173] Case C-256/11 *Dereci,* 15 November 2011, ECLI:EU:C:2011:734; Case C-434/09 *McCarthy*, 5 May 2011, ECLI:EU:C:2011:277.
[174] Case C-165/14 *Réndon Marin*, 13 September 2016, ECLI:EU:C:2016:675, para. 87. The CJEU explained this exception to the "purely internal situation rule" observing that "[the] above situations have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom" (para. 75).

denounce such situations as contrary to the principle of non-discrimination on grounds of nationality, since this principle cannot be applied. This implies that when the national legislation of a Member State is less favourable than that of the EU, citizens of this Member State who have not exercised the freedom of movement will be subject to a less favourable treatment than the national of a Member State who instead has exercised this freedom.

This situation is known as reverse discrimination: while citizens or companies from other Member States are guaranteed protection against disadvantages when circulating in a 'foreign' territory, the same protection is not afforded to citizens or companies which have always been present in that territory. More specifically, this can occur in two situations: when EU law requires that the principle of mutual recognition applies in a certain sector, or when EU law confers advantages in order to favour the implementation of free movement. Reverse discrimination is therefore a typical implication of EU rules, notably EU rules on free movement, which with a view to facilitating circulation of EU citizens, sometimes confer more rights to EU citizens who are exercising the right to free movement than to the citizens of the host state. At the same time, this form of discrimination between citizens based on whether they have or have not exercised their right to freedom of movement highlights the evident contrast with the principle of equality in force in the individual Member States. This is even more evident when the hypothesis of the citizen who has returned to his/her state of origin is considered. In that case citizens of the same state are discriminated on the grounds of relevance or otherwise of their situation under EU law.

Even though reverse discrimination is a side-product of EU law, the CJEU regards it as a matter of and for national law. Following this reasoning reverse discrimination is determined by the intersecting of national laws with EU law. The situations falling outside the scope of application of EU law fall entirely within the jurisdiction of the national laws and are qualified as purely national cases. However, the CJEU has clearly stated that EU law does not preclude Member States from removing discriminations stemming from a comparison between situations falling inside EU law and those falling outside by extending the EU rules even to cases falling within the national competence. Therefore, the removal of reverse discrimination is at the discretion of the Member States.

ANNEX III – CJEU CASE LAW ON AGE DISCRIMINATION

1. Judgment of 22 November 2005, Case C-144/04 *Mangold*, ECLI:EU:C:2005:709

The CJEU affirms the existence of a general principle of EU law prohibiting discrimination on the grounds of age, which is also applied in disputes between private parties. The litigation from which the preliminary ruling in *Mangold* arose involves two private citizens, an employer and an employee, who disputed the compatibility of German legislation with Article 8 of Directive 1999/70/EC on fixed-term employment[175] and with the prohibition of age discrimination as contained in Directive 2000/78/EC. Notably, the national legislation in question, by way of derogation from the general rule, allowed the conclusion of fixed-term contracts with workers aged 58 and older without any objective justification. The Court ruled that said legislation was not in conformity with Directive 2000/78/EC because it introduced a difference in treatment based solely on age, without taking into account other aspects linked to the structure of the job market or the personal situation of the workers affected.

The peculiarity of the case was that at the time of the dispute the deadline for the implementation of Directive 2000/78/EC in Germany had not yet expired, because the state had taken advantage of the permitted three-year period that could elapse before implementing provisions dealing with age discrimination. The Court nonetheless relied on its case law according to which, pending the deadline for implementation, states shall refrain from enacting provisions that may compromise the effective achievement of the outcome sought by the directive. Yet, according to the well-established case law of the Court, directives cannot entail direct effect in disputes between private parties (direct horizontal effect). Whilst confirming this case law, in *Mangold* the Court based the duty of the referring judge to disapply the contested national legislation on the general principle prohibiting discrimination on grounds of age, whose existence was affirmed for the first time in this case. Indeed, the Court affirmed that *'Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is «to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation», the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States'*.[176]

As a general principle of EU law the prohibition of discrimination on grounds of age is relevant in all situations where EU law applies, which is a condition which was satisfied in *Mangold*, because the contested legislation was a measure implementing Directive 1999/70.[177]

2. Judgment of 19 January 2010, Case C-555/07 *Kücükdeveci*, ECLI:EU:C:2010:21

The CJEU confirmed its *Mangold* ruling and upheld the continuity between the general principle of EU law prohibiting discrimination on grounds of age and the prohibition of age discrimination enshrined in Article 21(1) CFR. Case C-555/07 concerns Ms Kücükdeveci, who was dismissed by her private law employer with a notice that did not take into account the years she had been working before reaching the age of 25. Indeed, the relevant national legislation (Section 622(2) of the German Civil Code) provided that the notice period for

[175] Notably, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).
[176] *Mangold*, para. 74.
[177] Ibid., para. 75.

dismissal should be proportional to the length of the service, but working years completed before the employee reached the age of 25 should not be considered. The national court before which the woman challenged the dismissal and alleged its incompatibility with EU law, asked the CJEU to clarify its *Mangold* judgment. Confirming *Mangold*, the Court reiterated that Directive 2000/78/EC only gives specific expression to the prohibition of age discrimination, which under EU law has the status of a general principle deriving from international instruments and the constitutional traditions common to the Member States. Unlike in *Mangold*, it also referred to Article 21(1).[178]

The Court also reiterated that *'[for] the principle of non-discrimination on grounds of age to apply (...) [a] case must fall within the scope of European Union law'*. This condition was satisfied because, unlike in *Mangold*, the allegedly discriminatory conduct occurred after the expiry of the implementation period of Directive 2000/78, and *'[on] that date [i.e., the date where the period expired] that directive had the effect of bringing within the scope of [EU] law the national legislation at issue in the main proceedings, which concerned a matter governed by that directive, in this case the conditions of dismissal'*.[179] Thus, in *Kücükdeveci* there was no question of anticipatory effects of a directive, but only a question about the scope of application of a general principle of EU law. Whilst in *Mangold* the link between the national situation and EU law was given by the application of Council Directive 1999/70/EEC, only Directive 2000/78/EC could provide the link to EU law in *Kücükdeveci*. Indeed, the contested national provision concerned an issue - conditions of dismissal - covered by that directive, as provided by its Article 3(1).[180]

When examining whether EU law precluded domestic legislation such as that at issue, the Court referred in reality to a 'mixed-parameter', relying on *'the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78'*.[181] Indeed, the test for justification of a difference of treatment on the grounds of age was modelled on Article 6(1) of the directive. After finding the contested legislation in contrast with EU law the Court confirmed its precedent *Mangold* also with respect to the issue of direct horizontal effects. Firstly, it reaffirmed the traditional position whereby such effects are precluded to the directive. Secondly, it considered that there was no space to solve the conflicts by interpreting the domestic legislation in conformity with EU law. Finally, it held that *'the national court, hearing proceedings between individuals, [shall] ensure that the principle of non-discrimination on grounds of age, as given expression by Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement (...) to ask the Court for a preliminary ruling on the interpretation of that principle'*.[182]

3. Judgment of 19 April 2016, Case C-441/14 *Dansk Industri (DI)*, ECLI:EU:C:2016:278

With the judgment in this case the CJEU added an important precision to its *Mangold-Kücükdeveci* case law, clarifying that neither the principles of legal certainty and the protection of legitimate expectations nor the possibility to claim liability of the state for the violation of EU law can alter the obligation of a national court, hearing a case between private parties, to disapply national legislation which is in contrast with the general principle

[178] Ibid., para. 22.
[179] Ibid., paras. 24 and 25. On this particularly far-reaching criterion of connection between national law and the scope of application of EU law, see Annex X, notably the text under ii).
[180] According to this, Directive 2000/78/EC 'shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to (...) (c) employment and working conditions, including dismissals and pay'.
[181] Ibid., para. 27.
[182] Ibid., para. 56.

prohibiting age discrimination, when the conflict cannot be solved through consistent interpretation of the domestic legislation with EU law.

The preliminary ruling in *Dansk Industri* arose from a dispute between the heirs of Mr Rasmussen and his former private law employer, who, based on the applicable national legislation, had refused to grant a severance allowance on the grounds that the employee was entitled to claim an old-age pension from the employer under a pension scheme that Mr Rasmussen had joined before reaching the age of 50. At that time the CJEU had already declared the incompatibility of that legislation with Directive 2000/78/EC. The referring judge sought, in effect, guidance on the implications of the Court's previous findings in a dispute involving private parties. The Court of Justice reiterated the same reasoning developed in *Kücükdeveci*: directives lack direct horizontal effect. However, Directive 2000/78/EC merely gives expression to the general principle of EU law prohibiting age discrimination, which is also enshrined in Article 21 of the Charter and applies in all situations falling within the scope of EU law. The situation of Mr Rasmussen concerns a matter – the conditions of dismissal – which is covered by Directive 2000/78/EC.

The national court is under a duty to disapply the national legislation if it conflicts with the general principle prohibiting age discrimination, as expressed in Directive 2000/78/EC, if the conflict cannot be solved through consistent interpretation.[183] The Court nonetheless held that *'[n]either the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation'*.[184]

[183] Ibid., paras. 22-25 and 35.
[184] Ibid., para. 43. Interestingly, the Danish Supreme Court (the referring judge in *Dansk Industri*) 'disobeyed' to the Court of Justice: it indeed refused to disapply conflicting domestic legislation, arguing that the Danish Accession Act does not empower it to give precedence to an EU unwritten general principle over national law. The only remedy available to the employer was therefore a damage action against the State for breach of EU law. For a comment on the Danish Supreme Court's "answer" to the CJEU, see S. Klinge, "Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle", 13 December 2016, available here http://eulawanalysis.blogspot.it/2016/12/dialogue-or-disobedience-between.html.

ANNEX IV – INTERPLAY BETWEEN EU LAW SOURCES

Ground of prohibited discrimination	TFEU		Article 21 CFR	Direct effect
	Power to enact EU legislation	EU Legislation enacted and field	Prohibition within the scope of EU law	
Nationality	✓ [art. 18 TFEU]	Directive 2004/38/EC [Free movement] Directive 2014/54/EU [facilitating freedom of movement for workers]	✓	✓ YES art. 18 [Including horizontal: *Angonese*] No Directives
Sex	✓ [art. 19 TFEU; art. 157 TFEU]	Directives 2004/113/EC [access to and supply of goods and services] 2006/54/EC [employment and occupation]	✓	✓ YES Art. 157 [Including horizontal: *Defrenne - equality between women and men*] No art. 19
Race	✓ [art. 19 TFEU]	Directive 2000/43/EC [employment and occupation, social protection and advantages, education, access to goods and supply of services]	✓	No art. 19 No directive 2000/43/EC No judgment so far on 21 CFR
Colour	NO		✓	?
Ethnic origin	✓ [art. 19 TFEU]	Directive 2000/43/EC [employment and occupation, social protection and advantages, education, access	✓	No art. 19 No directive 2000/43/EC

		to goods and supply of services]		No judgment so far on 21 CFR
Social origin	NO	NO	✓	No judgment so far on 21 CFR
Genetic features	NO	NO	✓	No judgment so far on 21 CFR
Language	NO	NO	✓	No judgment so far on 21 CFR
Religion or belief	✓ [art. 19 TFEU]	Directive 2000/78/EC [employment and occupation]	✓	No art. 19 No directive 2000/78/EC No judgment so far on 21 CFR
Political or any other opinion	NO	NO	✓	No art. 19 No directive 2000/78/EC No Judgment so far on 21 CFR
Membership of a national minority	NO	NO	✓	No judgment so far on 21 CFR
Property	NO	NO	✓	No judgment so far on 21 CFR
Birth	NO	NO	✓	No judgment so far on 21 CFR

Disability	✓ [art. 19 TFEU]	Directive 2000/78/EC [employment and occupation] UNCRPD	✓	No art. 19 No directive 2000/78/EC No judgment so far on 21 CFR
Age	✓ [art. 19 TFEU]	Directive 2000/78/EC [employment and occupation]	✓	No art. 19 No directive 2000/78/EC YES Art. 21 CFR [Including horizontal: *Mangold*, *Kücükdeveci*, *AMS*, *Dansk Industri*]
Sexual orientation	✓ [art. 19 TFEU]	Directive 2000/78/EC [employment and occupation]	✓	No art. 19 No directive 2000/78/EC No judgment so far on 21 CFR
Other grounds	NO	NO	✓ non-exhaustive list of prohibited grounds	No judgment so far on 21 CFR

ANNEX V – LIST OF PETITIONS RECEIVED

National minorities and language (par. 3.2.)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
0609/2013	LT	Poland	Alleged discrimination against the Lithuanian-speaking minority in Poland in education sector. Closing of schools teaching in the Lithuanian language in Poland's Puńsk district due to a lack of funding.	no	Outside the scope of EU law.
0111/2016	RO	Romania	Alleged discrimination against Hungarian-speaking minority. Impossibility for the Hungarian minority in Romania to use Hungarian in administrative proceedings and no implementation of a domestic decree requiring three-language local place name signs.	no	(petition still open)
0141/2016	SK	Slovakia	Alleged discrimination on grounds of language. National legislation prohibiting bilingual signs for railway stations that indicate place names of Hungary or Slovakia.	no	(petition still open)
1123/2013	AT	Austria	Alleged discrimination on grounds of disability. Use of signs language by deaf persons. Although Austrian language of signs is constitutionally recognised as an official language, deaf Austrian citizens cannot use it as a first language and are obliged to learn spoken German in school.	no	Outside the scope of EU law.

0839/2014	DA	LT	Free movement of services (Audio-Visual Media Services Directive). Suspension of the retransmission of certain Russian-language TV channels in Lithuania, as a reaction to the EU-Russia dispute over Ukraine.	no	Within the scope of Directive 2010/13/EU (AVMS Directive), but no violation.
0217/2014	LT	LT	The petitioner, acting on behalf of a group of deputies to the lower house of parliament of the Republic of Lithuania (Electoral Action of Poles in Lithuania), reports of multiple violations of the rights of ethnic minority in Lithuanian by the national administrative and judicial authorities.	no	Outside the scope of EU law.

Obstacles to the free movement of LGBT families (para. 3.3.1)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
0807/2015	IT	Italy	Lack of recognition of same-sex marriage. The petitioner is an homosexual civil servant who claims to have being obliged to hide his homosexual relation at work.	no	View not requested.
0513/2016	HE	UK; HE	Lack of recognition of parenthood in LGBT families. The petitioner is married to a British lady and gave birth to a child in Spain. Whilst in the Spanish birth certificate both women are registered as parents, only the biologic mother would be granted parental status both in Greece and the UK.	no	(petition still open)
0320/2016	FR	France	Obstacles to free movement of family members of EU citizens. The petitioner and his non-EU same-sex partner, who are currently leaving outside the EU, would like to move in the EU. He claims having experienced discrimination on ground of sexual orientation during their dealings with the French consulates in Cape Town and in London.	no	View not requested.

0611/2015	IT	Not specified	Homophobia in general. The petitioner generically appeals against homophobia, indicating that it is attributable to a lack of education of adults and adolescents.	no	View not requested.
0647/2015	IT	(generic reference to Italian society)	Homophobia in general. The petitioner generically reports on an homophobic atmosphere in Italy.	no	View not requested.
1338/2015	FR	FR	Homophobia in general. According to the petitioner, France has not taken sufficient measures to fight effectively against homophobia.	no	View not requested.

National citizenship law potentially entailing loss of EU citizenship (para. 3.3.2.)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
1315/2015	HU	Slovakia	National legislation providing for the automatic loss of Slovak citizenship in case of taking of the nationality of another State.	no	Information requested from the Slovakian authorities.

Free movement rights of non-EU family members of EU citizens (para. 3.3.3.)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
1164/2013	ET	UK	Obstacles to free movement of family members of EU citizens. Refusal of the UK to recognise the passports of the ethnic Russians (the Alien Passport). The mother of the petitioner is refused entry in the UK, where the daughter (an Estonian citizen married to a British citizen) lives. Alleged discrimination against the Russian minority in Estonia by the UK.	no	Not enough information to pursue the case any further.

Alternative care for children (par. 3.4.)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
1852/2013 1655/2013	LA	UK	Alleged discrimination on grounds of ethnicity, religion and language by UK social services.	Artt. 10, 22, 24 and 33 CFR Art. 3 Racial Equality Directive	EU law not applicable.
1847/2013	NL	UK	Alleged discrimination on grounds of ethnicity and religion by UK social services.	Art. 10 CFR Racial Equality Directive	=
2498/2013	UK	UK	The petitioner disagrees with the decision to place her children in alternative care. No instances of discrimination are alleged and, based on information provided, it is difficult to identify any.	no	=
2543/2013	UK	UK	The petitioner complains of the conduct of the social services, but no instances of discrimination are alleged and, based on information provided, it is difficult to identify any. The petitioner complains also about a travel ban.	no	=
2546/2013	LT	UK	The petitioner complains of the conduct of the social services, alleging, inter alia, that her child is not allowed to speak his mother tongue (Lithuanian).	no	=

Age (par. 3.5.)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
0962/2014 1103/2014	ES	Spain	Age-limits for recruitment. The petitioners complain of the maximum age-limit for access to the Guardia Civil (30 years).	General reference to the EU Charter in petition 0962/2014 and to Art. 21(1) TFEU in petition 1103/2014)	Recalls relevant case law of the CJEU and informs on the amendment of the contested legislation.
0309/2015	SK	SK	Age-related dismissal of senior public officers. Dismissal of some senior officers in the Slovakian Ministry of Foreign Affairs, determined only by their age. Alleged ongoing practice of purging senior officials.	no	Responsibility of Slovakia to ensure correct application of Directive 2000/78.

Access to social benefits and health care (not analysed specifically in the text)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
2314/2013 2545/2013	ES & DE	Poland	Alleged discrimination on grounds of nationality in relation to access to a student card for public transportation. Whilst in theory all EU students in the Netherlands have access to a special card providing free access to public transportation, or discounted fares, in practice the registration's procedures cut out non-Dutch nationals.	Art. 3.2 TEU; Artt. 18-25 TFEU; Titles IV and V TFEU	Opened infringement proceedings against the Netherlands, but the CJEU held that no violation was at issue.
1121/2015	DE	The Netherlands	Alleged discrimination on grounds of nationality. The petitioner, a German citizen living in the Netherlands, complained that a Dutch organization wrongly took money from his pension for financing his health insurance. In his view, this would have was prevented him from accessing health care services in Germany. He was also requested to pay higher berthing fees than Dutch owners of boats, on the same spot.	no	No violation as regards the claim concerning access to health care. Insufficient information to deal with the claim concerning berthing fees.

1368/2013	PO	MT	Free movement of EU citizens – Issuing and renewal of residence documents. The petitioner is dissatisfied with the Maltese authorities' new system for issuing and renewing e-Residence documents for citizens of EU Member States. He lives in Gozo and had to travel three times to the capital Valletta to return old documents, obtain a provisional one and then get the final document.	No	Case falls within the scope of Directive 2004/38/E but there is no violation.
2294/2013	ES	ES	Alleged discriminatory refusal of the issue of a resident card for a TCN who is the familiar of an EU citizen.	No	Whilst Directive 2004/38/EC is not applicable, information provided is not sufficient to establish whether case falls within the scope of Directive 2003/109/EC.
2642/2013	FR	?	The petitioner has faced difficulties in getting a signed S2 form for planned medical treatment, private medical insurance being too expensive for young expatriates. Thus he's seeking intra-European medical insurance arrangements for major illnesses and measures to enable all European citizens suffering from a severe or chronic illness to return to their country of origin for treatment, in order to avoid isolation from their families.	No	EU law does not make it obligatory on Member States to conclude intra-European agreements on medical cover for serious illnesses but does nonetheless provide for coordination of Member States' national systems in order to provide EU nationals – who are free to work outside their country of origin – with the assurance that they will not be discriminated against in regard to health insurance benefits.

Sex (not analysed specifically in the text)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
2406/2014	IE	EU and Member States	Equal treatment between men and women. According to the petitioner, EU and national initiatives against violence would lead to 'men discrimination', insofar as they target violence against women only.	no	View not requested.
0530/2015	IT	IT	Equal access to services. Petitioner complains of discrimination by means of the charging of different prices to men and women for admission to public premises, such as cinemas and discos.	General reference to discrimination on ground of gender banned by EU law	Responsibility of Italy to ensure correct application of Directive 2004/113/EC.
0381/2016	SW	SW	The petitioner urges the EU to include measures protecting breast feeders in the anti-sex discrimination framework.	no	View not requested.

Race and ethnicity (not analysed specifically in the text)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
0678/2013	UK	UK (Public University)	Equal treatment at work (public education) – Victimisation. Alleged unfair treatment by the employer, which is said to have taken action against the petitioner because s/he provided information concerning university recruitment procedures to an official from the Racial Equality Commission or represented a colleague in a labour relations hearing.	Article 9 of Council Directive 2000/43/EC	EU law applicable, but no discrimination at issue.

Disability (not analysed specifically in the text)

Petition number	Petitioner Nation.	Responsible alleged discrim.	Issue	EU law references by petitioner	Commission view
1274/2013	ES	EU	Air transport. Alleged discriminatory nature of some provisions of Regulation (EC) No 1107/2006, insofar as they allow air carriers to deny the boarding of people with disabilities for security reasons; to require them to be accompanied, and to set a time frame for the request for assistance at the airport.	Regulation No 1107/2006 (EC).	Compatibility of the Regulation with EU primary law and no need to revise it in the short or medium term.

CAT: QA-01-17-161-EN-C (paper)
CAT: QA-01-17-161-EN-N (pdf)

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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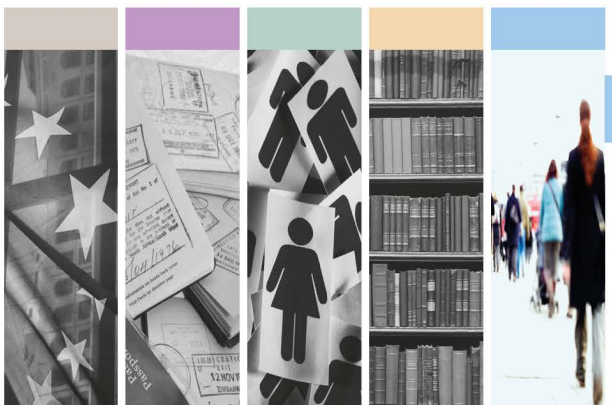

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