The polysemy of anti-discrimination law

The Polysemy of Anti-Discrimination Law: The Interpretation Architecture of the Framework Employment Directive at the Court of Justice

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Abstract

This article proposes a new explanatory framework to understand the transversal developments that have emerged from the recent case law of the Court of Justice of the EU on the Framework Employment Directive. It argues that the Court operates a functional differentiation in the implementation of anti-discrimination norms, which gives rise to a complex interpretation architecture. Following the constitutionalisation of EU equality law, the Court reads three main functions into the Framework Employment Directive: socialisation, integrity and calibration. This differentiation gives rise to competing interpretive paradigms and analytical templates that affect the level and shape of equality protection under the Directive.

1. Introduction

2020 marked the twentieth anniversary of the adoption of the "Framework Employment Directive" guaranteeing equal treatment on grounds of disability, sexual orientation, religion or belief and age in employment and occupation.[1] Together with its twin, the Race Equality Directive,[2] this piece of legislation dramatically expanded the Union's mandate after decades of equality protection strictly limited to sex and nationality.[3] The Framework Employment Directive has considerably contributed to harmonising and consolidating national regimes of equality protection in Europe. Moreover, it is a substantial addition to the Union's social and fundamental rights policies. It has also been home to spectacular developments in EU constitutional law and has given rise to a sustained – at times tense – dialogue between the Court of Justice of the EU (hereinafter CJEU or the Court) and national courts.[4] The Framework Employment Directive is therefore a site of normative complexity that epitomises the legal versatility of the principle of equality.

Sometimes called the "catch-all" Directive due its broad personal scope, the Framework Employment Directive forms a complex patchwork of rules. Although sectoral analyses have offered rich insights into the legal and jurisprudential framework pertaining to discrimination on grounds of age, disability, religion or belief or sexual orientation taken in isolation, the exploration of transversal dynamics in the recent interpretation of the Directive remains limited. Diverse moral foundations, differentiated legal regimes, widely varying amounts of litigation and idiosyncratic jurisprudential approaches in relation to each of the four protected grounds have prompted important questions regarding the consistency and transversal coherence of the "one size-fits-all" regulatory framework created by the Directive. As

[1] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

[2] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[3] The legal basis for this expansion is Article 13 of the Amsterdam Treaty – now Article 19 TFEU.

[4] See e.g. Holdgaard and Schaldemose, "From cooperation to collision: the ECJ's Ajos ruling and the Danish Supreme Court's refusal to comply" (2018) 55 Common market law review 17.

Advocate General Szpunar recently underlined, "Directive 2000/78 is very broad in scope, so that it catches the widest variety of discrimination, in the most diverse forms".[5] This polysemy further complicates the picture. As a single instrument intended to address a wide spectrum of social issues, anti-discrimination law alternately aims to redress material and distributive injustices, abolish obstacles in the access to, and participation in, central social institutions, create social recognition and accommodation for minority groups and foster individual autonomy while protecting human dignity. This plurality has resulted in a fragmented picture of EU anti-discrimination law.

Adding to this complexity, the Court of Justice established the constitutional underpinnings of the Directive by carving out a general principle of non-discrimination on grounds of age in *Mangold*, later confirmed in *Kücükdeveci* and *Dansk Industri*.[6] This process of normative sedimentation proceeded with the horizontal direct effects of Article 21 of the EU Charter of Fundamental Rights (hereinafter EUCFR or the Charter) identified by the Court in *Egenberger, IR v JQ* and *Cresco Investigation*.[7] While commentators have discussed at length the constitutional implications of the anti-discrimination principle expressed in the Directive,[8] its effects on the level and shape of equality protection in the Union have been much less comprehensively examined.

Two decades after the entry into force of the Directive, reflecting on these recent developments in the case law offers an opportunity to recalibrate our understanding of the role and meaning of equality in a context of legal sedimentation and complexification. This article proposes a new explanatory framework to understand these fundamental yet insufficiently theorised legal developments in a transversal manner. It argues that the normative elaboration of the principle of non-discrimination has engendered a functional differentiation in the implementation of anti-discrimination rules. An in-depth analysis of the recent case law reveals that the Court reads three main functions – *socialisation*, *integrity* and *calibration* – into its interpretation of the Directive.[9] This article then examines how these functions generate competing interpretive paradigms, which affect the level and shape of equality protection under the Framework Employment Directive. It shows that each one translates into distinct analytical templates and varying levels of equality protection in the case law of the Court of Justice.

The demonstration proceeds in four steps. Section 2 briefly sets the scene and offers a comprehensive overview of, and novel empirical insights into, the recent case law on the Framework Employment Directive. Relying on an in-depth manual coding of all identifiable judgments, orders and Advocate General opinions published by the Court since 2016 in relation to the Framework Employment Directive, it offers readers quantitative insights that lay the

[5] Opinion of Advocate General Szpunar, *Gennaro Cafaro v DQ* (EU:C:2019:541), para 62.

[6] Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709; Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, EU:C:2010:21; Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

[7] The Charter acquired the same status as the Treaties in 2009. Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257; Case C-68/17, *IR v JQ*, EU:C:2018:696; Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2019:43.

[8] See e.g. Muir, "The fundamental rights implications of EU legislation: some constitutional challenges" (2014) 51 Common Market Law Review 219; Frantziou, "The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle" (2020) Cambridge Yearbook of European Legal Studies 208.

[9] In a different context, Muir has proposed another delineation of the various functions of the prohibition of discrimination as *inter alia* a constitutional benchmark and a regulatory tool; see Muir, "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins" (2019) 20 German Law Journal 817.

ground for the qualitative analysis that follows.[10] Section 3 demonstrates that where anti-discrimination law is deployed as an *instrument for socialisation*, the Court has expanded the reach and boundaries of the Framework Employment Directive in remarkable ways. As further explained in section 3, the notion of socialisation takes on a particular meaning in this context and describes the idiosyncratic form of transnational economic participation that anti-discrimination rules facilitate by removing illegitimate barriers. Section 4 shows that where the bridging potential of constitutional anti-discrimination norms is used to secure the *integrity of the legal framework*, interpretation patterns contribute to this expansion trend by augmenting the reach of the Directive beyond its boundaries.[11] By contrast, section 5 reveals that where EU anti-discrimination law fulfils a *calibration function*, the Court deviates from its own construction of the field. It implicitly relies on a different reading grid that puts fundamental rights at the centre and shifts the analytical framework and review standards applied in ways that clash with the interpretive patterns previously identified. Understanding how these competing paradigms shift the central interpretive tenets of the Court is essential because this impacts the levels of protection observable in the case law and risks creating implicit tiers of scrutiny in the judicial implementation of the Framework Employment Directive in the long run.

2. Setting the scene: A bird's-eye view of the Framework Employment Directive

This section briefly sketches the "bigger picture" that supplies the background for the qualitative analysis that follows. It offers new empirical insights into important trends and developments in the judicial interpretation of the Framework Employment Directive. This bird's-eye view also aims to give readers an overview of the "bulk of the iceberg", going beyond the visible "tip" of landmark cases that have been commented extensively within academic circles.

The story of the interpretation of the Framework Employment Directive started with a bang in 2005 with the now (in)famous *Mangold* decision.[12] Since this first case, a total of 117 claims have reached the Court in relation to the prohibition to discriminate set out in the Directive, giving rise to 95 judgments and 15 orders.[13] Of these cases, 81% arose from preliminary references, 5% from infringement proceedings launched by the European Commission and 14% from other types of proceedings, mostly civil service cases. One third of the judgments pertaining to the Framework Employment Directive emanating from the ECJ since 2016 were Grand Chamber decisions and an Advocate General opinion was published in more than two-thirds of these cases. Referring trends among Member States vary widely. Nearly one third of all preliminary references relating to the Directive since 2005 originated in

[10] The following database was taken as a point of departure but was updated using *Curia* and an additional codebook was created for the sake of the present analysis: C. Kilpatrick and J. Miller, *EU Equality Law Court of Justice Database* (Academy of European Law, EUI) available at <https://equalitylaw.eui.eu/database/>.

[11] I borrow the notion of "integrity" from Niamh Nic Shuibhne, see Shuibhne, "The Integrity of the EU Internal Market: Connecting Purpose and Context for Brexit – and Beyond" in Dimitry Kochenov and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W Gormley* (Cambridge University Press 2019).

[12] Case C-144/04, *Mangold* (2005). The first decision pertaining to a breach of the Directive was rendered a month earlier in the context of infringement proceedings launched by the European Commission against Luxembourg, see Case C-70/05, *Commission v Luxembourg*, EU:C:2005:632.

[13] The lack of correspondence between the number of claims and the total number of decisions is explained by the fact that some cases have been joined and decided together and that some civil service cases gave rise to both orders and judgments in appeal. This count excludes pending cases; it includes cases of both the Court of Justice and the General Court. The cut-off date for this count is 1 February 2021.

Germany. The German and Austrian national courts alone account for nearly half of the referrals.

The past five years have witnessed important changes in the landscape of the anti-discrimination case law. Most notably, the first cases concerning religious discrimination have reached the Court of Justice in 2015.[14] Important continuities also exist, for instance questions of age discrimination have consistently dominated litigation patterns in relation to the Directive, making up 62% of all cases brought to the Court over the period 2005-2021. In turn, questions of discrimination on grounds of disability (17%), sexual orientation (7%) and religion (5%) have led to significantly less litigation.[15] It is interesting to note that although the material scope of the Framework Employment Directive exclusively covers employment, occupation and vocational training, these issues are entry points for multi-dimensional demands that extend beyond the scope of material and distributive disadvantage and include grievances relating to participation in social life and recognition of diversity and difference. This shows that the principle of non-discrimination in employment underpinning the Directive fulfils various socio-regulatory functions.

When compared to other protected grounds in EU anti-discrimination law, the litigation in relation to age, disability, sexual orientation and religion or belief only makes up a quarter of all cases of discrimination decided by the Court of Justice (25%). This is not surprising since sex discrimination (about three quarters of all cases) is prohibited since 1957 in relation to pay, has been the subject of proceedings since 1971 and is protected under multiple legal instruments.[16] By contrast, comparing amounts of litigation over the same time period and since the entry into force of the Framework Employment Directive (2003-2021) shows that the issue of age discrimination (28%) is at the top of the litigation pyramid after gender equality (48%).[17] Table 1 below shows the evolution of the case law of the Court on the Framework Employment Directive in relation to each protected ground.[18] Despite yearly variations, it appears that the number of judgments has dramatically increased overall since 2005. Although age discrimination cases still dominate the landscape, the graph shows a diversification of the case law in terms of the protected grounds at stake.

[14] Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, EU:C:2017:203 and Case C-188/15, *Asma Bougnaoui et Association de défense des droits de l'homme (ADDH) contre Micropole SA*, EU:C:2017:204.

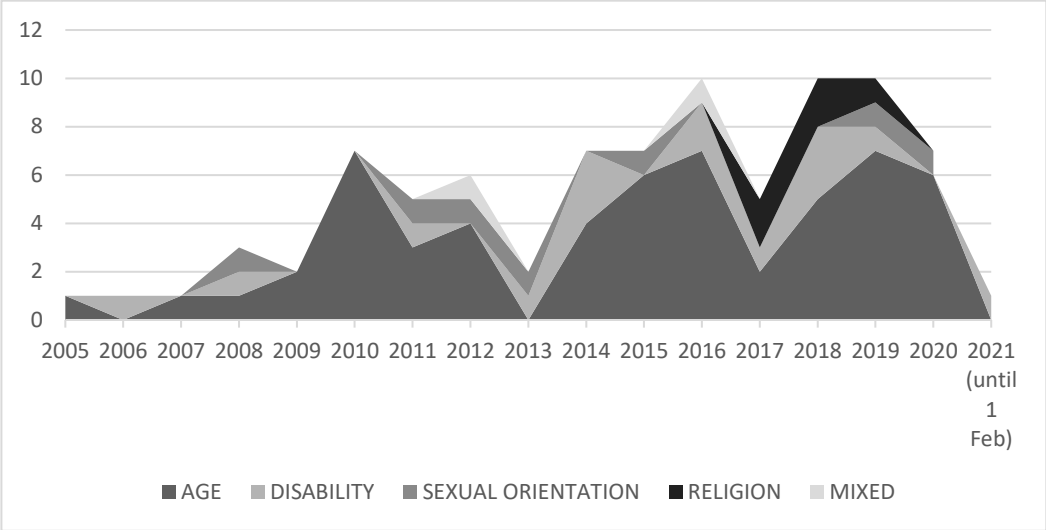
[15] In addition, around 9% of the claims in relation to the Framework Employment Directive were cases of multiple discrimination and most of them invoked a combination of age and sex discrimination. This count excludes cases where it was not possible to identify any discrimination ground protected under the Directive.

[16] Article 157 TFEU guarantees equal pay for work of equal value. Litigation started with the emblematic *Defrenne I* case, see Case C-80-70, *Gabrielle Defrenne v Belgian State*, EU:C:1971:55. This count only includes cases where a protected ground could be identified. Some cases involve multiple grounds.

[17] The comparison spans the period since the transposition deadline of the Framework Employment Directive on 2 December 2003 until February 2021. The prevalence of gender equality in litigation can partly be explained by a greater number of legal instruments. By contrast, over the same period, discrimination on grounds of race (5%), disability (7%), sexual orientation (4%), religion or belief (2%) and multiple discrimination (6%) has made up less than a quarter of all cases (24%).

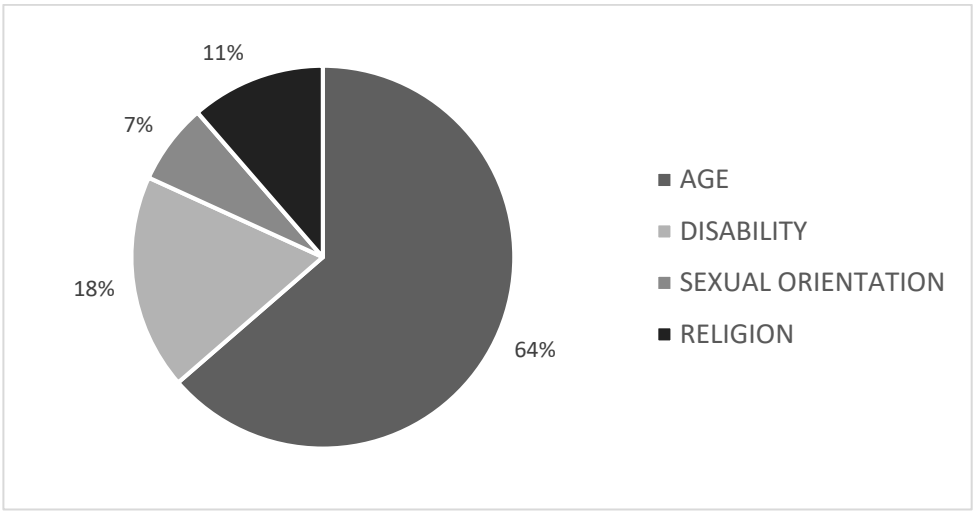
[18] This count leaves aside judgments where no protected ground under the Framework Employment Directive was identifiable.

Table 1: Evolution of the case law (2005-2021)



The analysis proposed in the remainder of this article covers the case law on the Framework Employment Directive of the past five years, spanning the period 2016-2021. The starting point is the judgment in *Dansk Industri*, which represents a critical juncture in the case law both as a pivot between the *Mangold* and the *Egenberger* approaches[19] and as a revealing instance of important tensions in the Court's dialogue with national courts.[20] As shown in Table 2, age discrimination issues continue to prevail in this period while cases involving discrimination on grounds of disability, sexual orientation and religion increased over time but remain largely in the back seat. The increase in preliminary references concerning religious discrimination in recent years has however changed the *de facto* hierarchy in the case law of the Court, with age discrimination at the top, followed by disability, religion and discrimination on grounds of sexual orientation at the bottom.

Table 2: Comparative overview of CJEU judgments on the Framework Employment Directive (2016-2021)



[19] See the introduction of section 4 below.

[20] See e.g. Neergaard and Sørensen, "Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case" (2017) 36 Yearbook of European Law 275.

3. The socialisation function of anti-discrimination norms: A vehicle for purposive expansion in judicial interpretation

The framing of EU anti-discrimination law has shifted over time. Originally an instrument aimed at avoiding market distortions, it has become an important component of the Union's social policy. It has been argued that anti-discrimination rules play a key role in enhancing economic participation in the Union and thereby in developing a form of European transnational socialisation.[21] This rationale is particularly significant in light of the material scope of the Framework Employment Directive, which has its centre of gravity in employment and occupation.[22] In this context, anti-discrimination rights are instrumental to what has been called the EU "access justice" model because they facilitate individual participation in essential social institutions such as the labour market by removing illegitimate barriers to equal opportunities.[23] At the micro-level, this narrative highlights the role of EU anti-discrimination law in guaranteeing that virtually every individual is able to reap the material and symbolic benefits arising from economic participation. At the macro-level, EU anti-discrimination law shapes social relationships and contributes to ensuring an idiosyncratic form of transnational socialisation in which the labour market plays a central role.[24] The (individual) participation narrative and the (collective) socialisation rationale of the Directive are thus two sides of the same coin, which this article calls "the socialisation function" of the Directive.

This section shows a correlation in the recent case law between the Directive's socialisation function and purposive expansion in the interpretation of its scope, concepts and boundaries. In these cases, the notion of effectiveness is often used as a vehicle to materialise and give legal weight to this function of equality law. Where the Court fleshes out the role of anti-discrimination rules as instruments to remove obstacles to participation in labour understood as an essential socialising institution, teleological forms of interpretation can be observed that lead to a purposive expansion of the scope and reach of the Directive (3.1), a strengthening of its enforcement procedures (3.2) and a shifting of some of its conceptual boundaries (3.3).

3.1. *Maximising the reach of the Framework Employment Directive*

The Court of Justice has exercised creativity to maximise the reach of the Directive when interpreting its personal (3.1.1) and temporal scope (3.1.2) and when drawing the limits of its protection (3.1.3).

3.1.1. *A wider approach to the Directive's personal scope: clarifying the tenets of the comparison test*

[21] See e.g. Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (Oxford University Press 2011), 15; Muir, "The Transformative Function of EU Equality Law" (2013) 5 European Review of Private Law 1231, 1241, 1253; Xenidis, "Transforming EU Equality Law? On Disruptive Narratives and False Dichotomies" (2019) Yearbook of European Law e2, e27-e28.

[22] Article 3, Directive 2000/78/EC.

[23] See Micklitz, "Social justice and Access Justice in Private Law" (2011) LAW 2011/02 EUI Working Paper, 20, 23.

[24] The principle of non-discrimination expressed in the Directive is far-reaching despite its *prima facie* limitation to matters relating to employment and working conditions. In the case law covered in this article, it raises issues concerning e.g. the regulation of family relations and marriage, public order and the organisation of social relations through criminal law, freedom of expression in the public sphere, freedom to conduct a business and freedom of religion, etc.

Recent case law offered the Court several occasions to refine its approach to the personal scope of the Directive. Where past cases had shown a formal and restrictive approach centred on in- and outgroup comparisons, the Court relied on the socialisation function of anti-discrimination law to extend the protection to intragroup discrimination and thus broaden the pool of rights holders.

To fall within the personal scope of the Directive, a situation of discrimination must arise either from a differential treatment or a disadvantage *related to* one of the four protected grounds, namely disability, sexual orientation, religion or belief or age. The comparison test, a key heuristic device in the Court's discrimination analysis, plays an essential role in assessing whether such a link exists: if two people or groups who are in a comparable situation but for the protected characteristic are treated differently, the protected characteristic emerges as the variable explaining discrimination.[25] In the case law of the CJEU, "[t]he comparator "with other persons" is […] usually interpreted as meaning that the reference is to persons not having the protected characteristic".[26] For example, in a situation of discrimination on grounds of disability, the comparator is usually an able-bodied person in a similar situation to the applicant. In *Milkova*, the situation fell outside the personal scope of the Directive because the case concerned a difference in the protection against dismissal, not *between* workers with and without disabilities, but *among* workers with disabilities depending on the legal nature of their employment contract.[27]

This dichotomous construction of the comparison test based on in- and outgroups is problematic. First, the actual reference group is often not an "outgroup" or someone who does not share the characteristic, but rather someone who belongs to a group that is privileged on the basis of that characteristic. In the case of discrimination based on sexual orientation, for instance, the relevant comparison is usually between people who are privileged on grounds of their heterosexuality and people who are disadvantaged because they do not "fit" the heteronormative baseline. Those privileged groups serve as the implicit norm against which discrimination is defined. Second, the binary "in" or "out" categorisation in the dichotomous construction of the comparison test is artificial and obfuscates the heterogeneity of protected groups. In the case of age discrimination, for instance, no binary distinction can be made between an in- and an outgroup.[28] Hierarchies and privileges vary contextually along the age continuum. In fact, protected grounds cover a wide spectrum of situations (e.g. different faiths, types of disability and sexual orientation) and the distribution of social privilege or disadvantage fluctuates as a function of these characteristics within protected groups.

In effect, the dichotomous construction of the comparison test erases these intra-group variations and bars access to legal protection for victims of intra-group disadvantage, where the point of reference lies within as opposed to outside the protected group. In *Achbita*, for example, the Court considered a rule prohibiting employees from wearing clothing manifesting their religion or beliefs as not amounting to direct discrimination because it treated religious

[25] The comparability requirement shapes the definitions of direct and indirect discrimination under the Framework Employment Directive: direct discrimination entails treating someone less favourably than another person 'in a comparable situation' and indirect discrimination captures situations where persons suffer a particular disadvantage 'compared with other persons', see Article 2(2)(a) and (b) of Directive 2000/78/EC.

[26] Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (EU:C:2020:479), para 82.

[27] Case C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, EU:C:2017:198, paras. 40-42.

[28] See e.g. Opinion of Advocate General Mazák, *Félix Palacios de la Villa v Cortefiel Servicios SA* (EU:C:2007:106), para 61.

and non-religious employees in a similar fashion.[29] Arguably, a measure specifically targeting religious and belief-related clothing does make a difference based on religion or belief.[30] However, as argued by former Advocate General Sharpston in her shadow opinion in *WABE*, only an in-group comparison between non-religious and religious employees whose religion does not mandate the wearing of a specific apparel on the one hand, and on the other members of religions that do, can reveal "intra-group discrimination" based on the *forum externum*, that is the expressive dimension of religious beliefs.[31] This example shows how the implicit designation of a normative baseline "outside" the protected group as the right comparator can lead to obfuscating discrimination.[32]

Thus, the comparability requirement plays a central role in regulating access to equality protection as the choice of "relevant" comparator by the Court can either include or exclude applicants and thus contribute to broadening or restricting the personal scope of the Directive.[33] In spite of its apparent objectivity, the comparison test entails deep-reaching moral judgements about the desirable level of equality in society.[34] The formula according to which likes should be treated alike and unalike individuals in a different manner is "tautological" in the absence of an external normative point of reference.[35] Because the comparator defines the equality standard, the comparison test is a privileged site for observing how the Court understands the normative telos of the equality principle. Subsequent decisions in *Cresco* and *VL* illustrate a notable shift towards a more inclusive and principled approach to comparators. In particular, by foregrounding the socialisation function of the Directive, the Court has focused on actual disadvantages rather than differences between groups and included intragroup discrimination within the personal scope of the Directive.

In his opinion in *Cresco*, AG Bobek demonstrated how instrumentalising the comparator test in light of different purposes yields different conclusions on the existence of discrimination.[36] *Cresco* concerned the granting of a paid public holiday on Good Friday to employees who are members of certain churches, a provision of Austrian law aiming to accommodate religious celebrations that did not fall on a public holiday. Consequently, if a member of these churches worked on that day, that employee was entitled to double pay. The applicant was not a member of these churches and claimed discrimination on grounds of

[29] Case C-157/15, *Achbita* (2017), para 30. See also Opinion of Advocate General Kokott, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (EU:C:2016:382), paras. 48-49.

[30] This has been argued by AG Sharpston in Opinion of Advocate General Sharpston, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (EU:C:2016:553), para 108.

[31] See Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, 2021), para 122 available at <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>. See also Cloots, "Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui" (2018) 55 Common Market Law Review 589, 608.

[32] Consider also Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ* (EU:C:2021:144), paras. 48, 55.

[33] See MacKinnon, "Reflections on sex equality under law" (1991) Yale Law Journal 1281, 1297; see also Goldberg, "Discrimination by Comparison" (2011) 120 The Yale Law Journal 728 and McColgan, "Cracking the Comparator Problem: Discrimination, ''Equal'' Treatment and the Role of Comparisons" (2006) 6 European human rights law review 650, 666.

[34] See Westen, "The Empty Idea of Equality" (1982) 95 Harvard Law Review 537, 543-545.

[35] See ibid, 547.

[36] Opinion of Advocate General Bobek, *Cresco Investigation GmbH v Markus Achatzi* (EU:C:2018:614), para 55. This discussion demonstrates how '[c]onditioning equal treatment on "likeness" […] functions so as to grant less privileged actors access to the benefits enjoyed by the more privileged only to the extent that the former can prove "sameness" with the latter', see McColgan, *Discrimination, Equality and the Law* (Hart Publishing 2014), 102, 118. See also Fredman, "Substantive equality revisited" (2016) 14 International Journal of Constitutional Law 712, 719-720.

religion. AG Bobek first explained how using a "narrow" comparator, namely employees for whom Good Friday is the most important religious celebration, "preclude[s] any comparability and mean[s] that there is no discrimination".[37] Such a comparison excludes the case from the personal scope of the Directive by bringing out a differentiating criterion that affects religious as well as non-religious employees, thus ruling out religion as the ground for differential treatment. By contrast, a "broad" comparator leads to finding that employees receiving double pay on Good Friday are similar to other employees who receive normal pay for work on that day. Religion is thus the only ground explaining the differential treatment.[38] Following this latter approach, the Court found that an advantage granted to a particular religious subgroup but not to other religious and non-religious employees is discriminatory.[39] While it was already well-established that comparisons should not be conducted in the abstract but rather in light of the nature and purpose of the contested measure,[40] this discussion demonstrates the direct influence of the comparison test on restricting or expanding the personal scope of the Directive.

The reasoning in *Cresco* represents a milestone in the explicit recognition by the Court that intra-group differences fall within the personal scope of the Directive.[41] This shift is even more salient in *VL*.[42] In this case, a hospital director convened a staff meeting in which he informed employees that those who would submit a disability certificate after the meeting would receive an additional monthly allowance. The measure aimed to encourage employees with disabilities to submit their certificate in order for the hospital to meet its employment target of workers with disabilities and reduce the financial contribution it paid to the "State Fund for the Rehabilitation of Persons with Disabilities". The difference in treatment was made *within* the protected group, on the basis of the date of submission of the disability certificate, so that the referring court found no difference in treatment between workers with and without disabilities.[43] The case posed the question of the personal scope in explicit terms: in AG Pitruzzella's words, "[t]he Court [was] called upon to decide whether the scope of Directive 2000/78, which has traditionally been confined to the prohibition of discrimination between individuals who have a certain protected characteristic and those who do not, may be extended, by means of interpretation, so as to cover situations where persons who have the same protected characteristic (in this instance disability) are treated differently".[44]

For the first time, the Court explicitly addressed the question of the proper use of comparators under the Framework Employment Directive, an issue that had too often remained unprincipled. It first explained that the wording of the Directive "by referring, first, to discrimination 'on' any of the grounds referred to in Article 1 […] and, second, to less favourable treatment 'on' any of those grounds, and by using the terms 'another [person]' and 'other persons'" cannot mean that "the prohibition of discrimination […] is limited only to differences in treatment between persons who have disabilities and persons who do not have

[37] Opinion of Advocate General Bobek, *Cresco Investigation GmbH v Markus Achatzi*, para 56.
[38] Ibid, paras. 51, 56, 70.
[39] Case C-193/17, *Cresco Investigation* (2019), para. 47.
[40] See e.g. Case C-147/08, *Römer v Freie und Hansestadt Hamburg*, EU:C:2011:286.
[41] Case C-193/17, *Cresco Investigation* (2019), paras. 46-50. *Cresco* is cited by AG Pitruzzella in *VL v Szpital Kliniczny* as an authority for the alternative approach to comparators proposed, see Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, footnote 19.
[42] Case C-16/19, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, EU:C:2021:64.
[43] Ibid, para 19.
[44] Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*;ibid;Case C-16/19, *VL v Szpital Kliniczny* (2021), para 28.

disabilities".[45] In addition, it indicated that the Directive does not "specify in any way the person or group of persons that may be used as the benchmark for assessing whether there is such discrimination".[46] The CJEU thus rejected the dichotomous approach to comparators based on in- and outgroups and concluded instead, invoking "the objectives of Directive 2000/78", that it "does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of disability […] to those who do not have disabilities".[47] Where the Court's previous case law ignored hierarchies linked to intragroup differences and relied on homogenising conceptualisations of protected groups that precluded access to anti-discrimination law, *VL* shows more sensitivity. For example, the Court mentioned that certain disabilities are less visible than others or do not require reasonable accommodation so that the requirement to submit a disability certificate might constrain workers with different types or degrees of disability in different ways.[48]

The Court's reading of the socialisation function of the Directive into the principle of effective protection played a pivotal role in this expansive interpretation of the scope of the Directive.[49] *VL* shows a shift in the normative *telos* underpinning the comparison test whereby the Court traded in its "formalistic"[50] approach to comparison based on sameness and difference for a more substantive analysis focused on privilege and disadvantage.[51] Instead of taking the outgroup as the normative baseline, the comparison was based on the best protected subgroup.[52] Doing otherwise, the Court argued, would "diminis[h]" "the protection granted by that directive".[53] The CJEU thereby followed AG Pitruzzella's view that "it is desirable" that requirements concerning "persons who are to be protected and those with whom they may be compared for the purposes of establishing discrimination […are…] interpreted less strictly and with greater attention to the overall objectives of the directive and to its potential effectiveness".[54]

3.1.2. *Back to the future: enhancing the temporal reach of the Directive*

The Court has pursued the purposive expansion of the scope of the Directive in other dimensions too. Embodying this trend is for instance the *E.B.* decision, which *de facto* expands

[45] Case C-16/19, *VL v Szpital Kliniczny* (2021), para 29.
[46] Ibid, para 30.
[47] Ibid, para 31. This reasoning is in line with the expansive approach to the Directive's personal scope adopted in *Coleman*, in which the Court recognised the notion of 'discrimination by association', see Case C–303/06, *S. Coleman v Attridge Law and Steve Law*, EU:C:2008:415.
[48] Case C-16/19, *VL v Szpital Kliniczny* (2021), para 57; referring to Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, para 46.
[49] This is confirmed by AG Pitruzzella who speaks of a '"traditional" function of the directive', see Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, para 82.
[50] See ibid, para 43.
[51] Various conceptualisations of substantive equality exist in the literature, highlighting complementary dimensions of equality such as recognition, redistribution and participation. See e.g. Fredman, "Substantive equality revisited" and MacKinnon, "Substantive Equality: a Perspective" (2011) 96 Minnesota Law Review 1.
[52] Case C-16/19, *VL v Szpital Kliniczny* (2021), para 36. The Court nevertheless did not invalidate the formal approach: 'it is true that instances of discrimination on the grounds of disability, for the purposes of Directive 2000/78, are, as a general rule, those where persons with disabilities are subject to less favourable treatment or are at a particular disadvantage as compared with persons who do not have disabilities', see ibid, para 35.
[53] Ibid, para 35.
[54] Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, para 38.

the temporal reach of EU anti-discrimination law.[55] The case raises the question of the effects of EU anti-discrimination law on present manifestations of discrimination inherited from the past. In *E.B.*, the Court ruled on the grip of the prohibition on discrimination on the continued effects of a disciplinary sanction adopted in the 1970s, long before the adoption of the Framework Employment Directive, which punished "an attempted offence of same-sex indecency" committed by the applicant on two minors.[56] The applicant claimed that the disciplinary sanction was discriminatory on grounds of sexual orientation because the sanction for a similar offence involving "heterosexual or lesbian acts" would have been "significantly less severe".[57] In contrast to AG Bobek's strict limitation of the Directive's temporal reach,[58] the Court proved resourceful in the name of the principle of effective protection. It separated the past decision from its continued effects in the present and found the Directive applicable on part of the sanction.[59] This finding translated in an obligation for the national court to review the legal effects of the sanction starting from the Directive's transposition deadline in 2003 in order to eliminate the effects of discrimination on grounds of sexual orientation.[60] Although the Court framed such an expansive move as a natural derivation and mere application of the scope *ratione temporis* of the Directive, in effect the decision leads to a retrospective application of EU anti-discrimination law to a final administrative decision.[61] *E.B.* broadens the reach of the Directive in time and opens a new route to dismantling past discrimination that shapes the present.[62] In the same perspective, the Court ruled in *Österreichischer Gewerkschaftsbund* and *Leitner* with regard to age discrimination that EU law reaches into past decisions to neutralise their discriminatory effects in the present.[63]

While these cases concern the Directive's reach into the past, the decision in *Associazione Avvocatura per i diritti LGBTI* expanded its temporal scope with regard to the future. In this case, an Italian lawyer had stated publicly during a radio interview that "he would not wish to recruit homosexual persons […] nor to use the services of such persons in his law firm".[64] The CJEU built on its past decisions in *Feryn* and *Accept* to rule that discriminatory statements made by a potential employer constitute direct discrimination even in the absence of identified victims and even outside of an ongoing recruitment procedure.[65] This decision *de facto* expands the reach of the Directive to situations that have a *potential future*, as opposed to an *actual present*, link to employment and recruitment.[66] This is particularly important in light of the

[55] Case C-258/17, *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, EU:C:2019:17.
[56] Ibid, para 20.
[57] Ibid, para 36.
[58] The AG opinion, reckoning that 'morality is a moving target', rejects the 'retroactive application of new rules to a previously existing decision' that has become final and concludes that the legal situation at stake in *E.B.* lies outside the scope *ratione temporis* of the Directive. Opinion of AG Bobek, *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA* (EU:C:2018:663), paras. 110, 117-118.
[59] Case C-258/17, *E.B.* (2019), para 57.
[60] Ibid, para 78.
[61] See Fines, "The temporal applicability of anti-discrimination standards: EB" (2020) 57 Common Market Law Review 243, 250.
[62] Ibid, 254-5.
[63] Case C-24/17, *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich*, EU:C:2019:373; Case C-396/17, *Martin Leitner v Landespolizeidirektion Tirol*, EU:C:2019:375. This was also the opinion of AG Mengozzi in *Stollwitzer*, although the Court did not follow his conclusions. Opinion of Advocate General Mengozzi, *Georg Stollwitzer v ÖBB Personenverkehr AG* (EU:C:2017:893), paras. 50-53.
[64] Case C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, EU:C:2020:289, para 18.
[65] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, EU:C:2008:397; Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*, EU:C:2013:275; Case C-507/18, *Associazione Avvocatura per i diritti LGBTI* (2020).
[66] Case C-507/18, *Associazione Avvocatura per i diritti LGBTI* (2020), paras. 43-46.

participative function of the principle of equality since discriminatory statements might be internalised by applicants and lead to self-censorship, a situation which anti-discrimination law cannot grasp. The preventive turn taken in *Associazione Avvocatura per i diritti LGBTI* thus illustrates particularly well the role played by the Directive in removing barriers to economic participation. This also transpires in the Court's invocation of recital 9 of the Directive whereby "employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential".[67] The Court also recalled the pivotal function of the Directive in "the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons".[68] *Associazione Avvocatura per i diritti LGBTI* thus illustrates particularly well the link between the discursive mobilisation of the socialisation narrative and an expansive interpretive paradigm.

All in all, these cases show how the Court relies on the effectiveness narrative to extend the grasp of the principle of non-discrimination throughout time, to gradually dismantle the discriminatory legacy of the past and to prevent discrimination from taking place in the future. This weaving of equality across time is a key aspect of the socialisation narrative at play in the interpretation of the Directive.

3.1.3. *Setting limits: the socialisation function of equality as a limiting principle*

So far, this section has shown that the Court uses the imperative of effective protection to give legal weight to the socialisation function of the Directive and push forward an expansive reading of its scope whereby anti-discrimination rules serve to remove obstacles to participation. This also transpires from recent cases where the Court utilises this normative *telos* to limit entitlement to the legal protection offered by the Directive. In *Kratzer*, for example, the applicant sought access to the status of victim of discrimination for the sole purpose of claiming financial compensation.[69] He had applied for an internship position and lodged a compensation claim for age discrimination after he was not invited to an interview. The central question was whether the applicant qualified as a person "seeking access to employment…" for the purpose of the Directive or whether his application amounted to an abuse of rights under EU law. The Court read the situation in light of the function of the Directive in "offering […] effective protection against […] discrimination […] concerning 'access to employment'".[70] It thus concluded that an applicant who "is not seeking to obtain the post for which he formally applies" cannot access the legal protection of anti-discrimination law.[71]

The socialisation function of equality also served as a limiting principle in the decision in *YS v NK*, which concerned a claim of indirect discrimination on grounds of sex, age and property.[72] The applicant's pension, a special type that ceased to exist at the end of the 1990s, had been reduced following legal reforms in Austria that aimed to limit public expenditure in relation to the pension system. The reforms affected all pensions of that type exceeding a certain amount, thus only disadvantaging well-off pensioners. The applicant argued that the reforms indirectly discriminated against men, who are the main recipients of large pensions of this type, due to gender segregation patterns in the labour market in the 1990s and the gender

[67] Ibid, para 37.
[68] Ibid, citing recital 11 of the Directive.
[69] Case C-423/15, *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, EU:C:2016:604.
[70] Ibid, para 35.
[71] Ibid.
[72] Case C-223/19, *YS v NK*, EU:C:2020:753.

pay and pension gap. He also claimed that, because the reform affected beneficiaries of a type of legal contract that is no longer in use, older people were put at a disadvantage amounting to indirect age discrimination. The case illustrates how anti-discrimination is amenable to manipulation when its normative purpose is out of sight.

The opinion of AG Kokott makes clear that the applicant's argument is circular: it is only because they were disadvantaged in the past that groups receiving a pension below the threshold are not disadvantaged by the reforms in the present. She argued that absolute comparisons between the groups affected by the measure would yield "a distorted picture" and "only illustrate the social conditions of the time".[73] She also suggested that any unbalance in the result of the comparison test would be "at most linked to an already existing state of inequality" and that any "predominant impact on men would in all likelihood have to be solely attributed to the fact that men, on average, still earn more than women and are over-represented in management positions".[74] Most importantly, AG Kokott brought the normative purpose of EU anti-discrimination law within the analysis to loosen the proportionality test: "the existing economic inequality between the sexes is not exacerbated further in the present case" so "[i]t follows that the requirements regarding the justification of any indirect discrimination are correspondingly lower".[75] This approach, followed by the Court, was applied by analogy to the age discrimination claim, which meant that the Framework Employment Directive had not been infringed.

These "limit" cases illustrate how the Directive functions to enhance a form of equality as individual economic participation that partakes of the Union's idiosyncratic model of transnational socialisation.[76] This socialisation function delimits access to legal protection: anti-discrimination rules serve to ensure that individuals can fully participate in labour and reap the material and symbolic benefits from this participation without illegitimate obstacles.

3.2. *Strengthening the grip of the Directive: an expansive approach to enforcement procedures and remedies*

Relying on the significant development of procedural rules introduced by the Framework Employment Directive,[77] recent case law attests to a focal shift from substantive to procedural, institutional and remedial questions such as the nature and jurisdiction of adjudication bodies, the scope and timing of judicial review procedures and the *locus standi* of institutional litigants. Marshalling general principles of EU constitutional law such as the principle of effective judicial protection to the useful service of the socialisation function of the Directive, the Court has strengthened its expansive interpretive paradigm by consistently ensuring that EU legal subjects can effectively derive rights from EU anti-discrimination law.

In *Garda Síochána*, for example, the referring court asked whether a division of jurisdiction between a statutory body competent to hear cases of discriminatory practices in the workplace and a national court entrusted with hearing cases of legislative discrimination

[73] Opinion of Advocate General Kokott, *YS v NK* (EU:C:2020:356), para 64.
[74] Ibid, para 76.
[75] Ibid.
[76] Consider also Case C-198/15, *Invamed Group Ltd and Others v Commissioners for Her Majesty's Revenue & Customs*, EU:C:2016:362, where the Court decided that the definition of disability that prevails under the Framework Employment Directive only applies to the effective participation of workers in the labour market and cannot be extended to the field of transport.
[77] See Muir, "Procedural Rules in the Service of the 'Transformative Function' of EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along" (2015) 8 Review of European Administrative Law 153, 159.

involving the potential disapplication of national rules was compatible with EU law.[78] Reframing the question and essentially ignoring the referring court's assessment that the division of jurisdiction complies with the legal principles of equivalence and effectiveness,[79] the CJEU gave precedence to the unitary and effective enforcement of EU anti-discrimination law over the Member State's procedural autonomy by declaring the division of jurisdiction incompatible with EU law.[80] In *A.K.*, the Court further explained that cases concerning the application of the Framework Employment Directive cannot fall "within the exclusive jurisdiction of a court which is not an independent and impartial tribunal" because it would otherwise "deprive [individuals] of any effective remedy within the meaning of [Article 47 EUCFR] and of Article 9(1) of [the] Directive" on the defence of rights.[81]

In *Leitner*, an Austrian case of age discrimination following a reform of the pension system, the Court found a breach of the right to effective judicial protection in light of Article 9 of the Directive read in conjunction with Article 47 EUCFR.[82] Contradicting Advocate General Saugmandsgaard Øe,[83] it argued that where "a civil servant who was disadvantaged by the […] remuneration and advancement system [that existed before a reform] cannot challenge the discriminatory effects of the [transition mechanism established by the reform], he will not be in a position to enforce all the rights that he derives from the principle of equal treatment".[84] Procedural rules for review were also at stake in *Land Sachsen-Anhalt*, a case concerning the time limit for claiming the payment of a financial compensation for age discrimination.[85] The Court ruled that the time limit made it "excessively difficult" for litigants to "exercise th[eir] rights" and thus breached the principle of effectiveness and Article 9 of the Directive on the enforcement of non-discrimination rights.[86]

Lastly, in *Associazione Avvocatura per i diritti LGBTI* the Court has also made sure that institutional litigants, and in particular collective actors, can resort to EU anti-discrimination law to challenge discrimination issues at national level. Although Article 9(2) of the Directive did not foresee such an obligation, the transposition in national law made more generous provisions and the Court confirmed that associations with a legitimate interest have standing in damage claims related to the Directive and pursued in the name of the public

[78] Case C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission*, EU:C:2018:979.
[79] Ibid, para 31.
[80] It rejected the AG's cautious assessment of the case in light of *Simmenthal*, *Costanzo* and *CIF*, see Opinion of Advocate General Wahl, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* (EU:C:2018:698). See Case C-378/17, *Minister for Justice and Equality and Commissioner of the Garda Síochána* (2018), paras, 41, 44, 49-50. The principle of primacy is also prominent in the Court's analysis.
[81] Case Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, EU:C:2019:982, paras. 165, 171. The cases featured claims of age discrimination by Polish judges against a national reform lowering their retirement age with the effect that judges above 65 were dismissed.
[82] The reform was adopted after the CJEU ruling in Case C-530/13, *Leopold Schmitzer v Bundesministerin für Inneres*, EU:C:2014:2359, see Case C-396/17, *Leitner* (2019).
[83] Opinion of Advocate General Saugmandsgaard Øe, *Martin Leitner v Landespolizeidirektion Tirol* (EU:C:2018:993), para 75.
[84] Case C-396/17, *Leitner* (2019), para 64.
[85] Case Joined Cases C-773/18, C-774/18 and C-775/18, *TK and Others v Land Sachsen-Anhalt*, EU:C:2020:125, para 80.
[86] Ibid, paras. 87, 90-91, 94.

interest in the absence of individual applicants.[87] This decision supports the role of legal mobilisation in filling enforcement gaps in EU equality law.[88]

In these cases, the imperative of effective protection serves as a vehicle for the socialisation function of the Directive and translates the social objectives of the Directive in legal terms. Guaranteeing effective procedures facilitates access to justice and ensures that rights holders are able to secure their participation in the labour market and reap the benefits therefrom. This results in the deployment of the expansive interpretive paradigm with regard to the enforcement of the Directive.

3.3. *Refining the conceptual tool kit of anti-discrimination law: one step forward, two steps back?*

This subsection shows how the expansive interpretive paradigm that translates the socialisation function of the Directive clashes with a more formal and restrictive approach to equality as consistency, giving rise to contrasting constructions of the conceptual tenets and boundaries of anti-discrimination law. This variation in the interpretive lens of the Court can be observed in relation to the scope and limits of direct discrimination (3.3.1) and indirect discrimination (3.3.2) and with regard to the identification of intersectional discrimination (3.3.3).

3.3.1. *Expanding the boundaries of direct discrimination*

The trend of expansive interpretation noted in the previous subsections is also visible in relation to the conceptual boundaries the Directive, in particular as regards the scope of the notion of direct discrimination. EU anti-discrimination law distinguishes between *direct* discrimination, understood as differential treatment on grounds of a protected characteristic, and *indirect* discrimination, that is situations where a particular disadvantage to a protected group arises from a neutral measure.[89] Whereas a formal understanding of equality as consistency has led to a restrictive reading of the notion of direct discrimination,[90] this section shows that the socialisation function of the Directive has been invoked to justify an expansive reading, with direct consequences on the strictness of judicial review. Direct discrimination in fact limits the possibility for defendants to justify discrimination whereas indirect discrimination can be objectively justified where a measure fulfils "a legitimate aim and the means of achieving that aim are appropriate and necessary".[91] In particular, the Court has refined its approach to the neutrality test that separates direct and indirect discrimination by distinguishing measures that are neutral towards a protected ground from those that are only *apparently* neutral.

For instance, the Court in *VL*, building on earlier case law,[92] found several "indicia" indicating that the decision of an employer to grant a monthly allowance to employees with

[87] Case C-507/18, *Associazione Avvocatura per i diritti LGBTI* (2020), paras. 24, 62-65.
[88] See Passalacqua, "Homophobic Statements and Hypothetical Discrimination: Expanding the Scope of Directive 2000/78/EC: ECJ 23 April 2020, Case C-507/18, Associazione Avvocatura per i diritti LGBTI" (2020) 16 European Constitutional Law Review 513.
[89] See Article 2(2)(a) and (b) of Directive 2000/78/EC.
[90] See e.g. Case C-157/15, *Achbita* (2017).
[91] Ibid.
[92] Case C-16/19, *VL v Szpital Kliniczny* (2021), para 48, citing Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, EU:C:2008:179 where measures based on marital status gave rise to direct discrimination on grounds of sexual orientation where only persons of different sexes can marry; Case C-499/08, *Ingeniørforeningen i Danmark v Region Syddanmark*, EU:C:2010:600 where differences in treatment

disabilities based on the date on which they submit their certificates is in fact "inextricably linked to disability" despite its neutral framing.[93] Following AG Pitruzzella, the purpose of the employer was to reduce its contribution to a disability fund so that the real "criterion of differentiation was the receipt of a new disability certificate such as would increase the number of disabled persons employed".[94] The link to disability is clear as "only a disabled worker is in a position to obtain a disability certificate, and consequently disability is the necessary prerequisite for an employee" to obtain the allowance at stake.[95] On this basis, the Court proposes a more purposive interpretation of the causality requirement between a measure and a protected ground, which conditions a finding of direct discrimination.[96] In so doing, it expands the boundaries of the notion and the pool of potential situations that fall under its stricter justification regime.

The contrasting lines of reasoning in *Achbita*, *Bougnaoui* and the joined cases *WABE* and *Müller Handels*, which involved proceedings by female employees wearing a headscarf against the neutrality dress codes put in place by German private employers, also illustrate the stakes of delimiting direct discrimination.[97] In *WABE*, former Advocate General Sharpston argued in her "shadow opinion" that direct discrimination should extend to measures that specifically disadvantage a clearly identifiable minority group, namely employees wearing "mandated religious apparel".[98] Shifting the focus from treatment to effects, she proposed an "enlarged definition of direct discrimination" which includes situations where "an employer imposes a criterion that he either knows or ought reasonably to have known will inevitably place a member of a particular group in a less favourable position on the basis of any of the grounds" protected under the Directive.[99] Underpinning this expansive definition of direct discrimination is the consideration that "'neutrality' that in reality predictably denies employment opportunities to particular, very identifiable, minority groups is false neutrality".[100] The framing of this argument, which revolves around the objectives of the Directive in terms of removing obstacles to participation in the labour market, again leads to an interpretive augmentation of the central concept of direct discrimination.[101]

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based on entitlement to an old age pension caused direct age discrimination where only persons having reached a certain age can access this entitlement; and Case C-356/09, *Pensionsversicherungsanstalt v Christine Kleist*, EU:C:2010:703 where national rules permitting the dismissal of employees entitled to a retirement pension led to direct sex discrimination where women have this entitlement earlier than men. This reasoning is also in line with early equal treatment case law, where the Court treated supposedly gender neutral measures linked to pregnancy as, in reality, a form of direct sex discrimination tied to a strict justification regime, see e.g. Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, EU:C:1990:383.

[93] Case C-16/19, *VL v Szpital Kliniczny* (2021), paras. 50-53. These indicia include, for example, the fact that the rights granted by the certificate derive from disability status. The Court did not exclude the possibility of indirect discrimination and left it to the referring court to assess.

[94] Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, para 64.

[95] Ibid, para 68. Yet the AG did not consider the case as amounting to direct discrimination.

[96] This is also in line with earlier case law on so-called discrimination by association, see Case C–303/06, *Coleman* (2008); Case C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, EU:C:2015:480.

[97] Joined Cases C-804/18 and C-341/19 *IX and MH Müller Handels GmbH v WABE eV and MJ* EU:C:2021:594.

[98] Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 123 available at <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>.

[99] Ibid, para 263 (emphasis added) citing as authority Case C-83/14, *CHEZ* (2015).

[100] Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 265.

[101] Ibid, para 265.

Despite citing *VL*, the Court did not follow the corresponding expansive approach according to which a seemingly neutral measure that in fact makes a difference between workers whose religion mandates a *forum externum* and others should be considered inextricably linked to religion and thus directly discriminatory.[102] Instead, the Court reiterated the finding in *Achbita* that an internal rule enjoining "in a general and undifferentiated way" all workers to dress neutrally "does not establish a difference of treatment based on a criterion that is inextricably linked to religion or belief" and thus cannot amount to direct discrimination.[103] It only accepted that direct discrimination arises where a differentiation is made to the same effect but *explicitly*, that is where the neutrality rule only targets "conspicuous, large-sized signs" as opposed to others.[104]

3.3.2. *Conceptual confusion in the analysis of indirect discrimination: a worrying trend*

Absent the socialisation function of the Directive, the Court has privileged a formal approach to equality as consistency rather than using the teleological interpretive lens observed earlier. In contrast to the interpretive expansion of the concept of direct discrimination, the Court's case law displays some worrying reasoning in relation to the notion of indirect discrimination. Examples are particularly numerous in the field of age discrimination.

In numerous instances for example, albeit identifying indirect discrimination as the relevant doctrinal path, the Court has applied the stricter analytical framework akin to direct discrimination. This has often resulted in finding no discrimination and *de facto* narrows the scope of indirect discrimination. In particular, the Court has looked for a "link" with a protected ground and "less favourable treatment", which are traditional attributes of the direct discrimination framework as defined in the directives. By contrast, the definition of indirect discrimination requires no such link but rather a *neutral* measure that *de facto* creates a particular *disadvantage* to a protected group. In *Escribano Vindel* the Court for example concluded that discrimination on grounds of age was absent because "it d[id] not appear that the difference in treatment […] has any indirect link with age".[105] In *Commune di Gesturi*, the Court equated an "indirect difference of treatment on grounds of age" with a finding of *prima facie* indirect discrimination.[106] Sometimes this approach is mixed with elements of the traditional framework of indirect discrimination. In *Bowman* for instance, the Court asked "whether, despite a neutral wording, [the measure] disadvantages in actual fact a much greater number of persons of a certain age or within a certain age group" but concluded that the criterion was "neither inextricably nor indirectly linked to age" so that it did "not lead to a difference in treatment *indirectly* based on age".[107] In *Land Sachsen-Anhalt*, the Court observed that a measure "treat[ed] […] judges and civil servants differently on grounds of age" although it was "not, as such, intrinsically linked to age and d[id] not make any distinction between the persons concerned" but did not engage further with the difference between direct and indirect discrimination.[108]

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[102] Joined Cases C-804/18 and C-341/19 *WABE* (2021), para 73.
[103] Ibid, para 52 and Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ*, paras. 48, 55 following Case C-157/15, *Achbita* (2017), paras. 29-32.
[104] Joined Cases C-804/18 and C-341/19 *WABE* (2021), para 73.
[105] Case C-49/18, *Carlos Escribano Vindel v Ministerio de Justicia*, EU:C:2019:106, para 55. See also Horton, "Escribano Vindel: Age Discrimination and Judicial Independence" (2020) 6 International Labor Rights Case Law 70, 71.
[106] Case C-670/18, *CO v Comune di Gesturi*, EU:C:2020:272, paras. 26-27, 29.
[107] Case C-539/15, *Daniel Bowman v Pensionsversicherungsanstalt*, EU:C:2016:977, paras. 24, 28, 32 (emphasis added).
[108] Case Joined Cases C-773/18, C-774/18 and C-775/18, *Land Sachsen-Anhalt* (2020), paras. 37-39.

The CJEU has also tended to reframe the distinction between direct and indirect discrimination around the direct or indirect nature of the link to a protected ground instead of assessing whether a neutral measure gives rise to a "particular disadvantage" to a protected group. In *Stollwitzer*, for example, the Court concluded that the criterion for differentiation was "not, directly or indirectly, based on age or […] linked to age", which precluded a finding of discrimination.[109] In *Horgan and Keegan*, the Court identified a recruitment date as a neutral measure that could cause indirect discrimination but still found it "necessary to ascertain whether teachers […] are *treated differently*" from the comparator group.[110] Explaining that "[t]he measure is not based on a criterion which is inextricably or indirectly linked to the age of the teachers", it did not consider "that the new rules establish a difference of treatment on grounds of age".[111] This reasoning borders on tautology and effectively excludes neutral measures having the effect of perpetuating inequalities from the scope of the Directive.[112] While the predominance of this approach in the field of age discrimination could be explained by the fact that it is challenging to identify specific age groups in relation to which to assess disadvantage, this narrowing down of the concept of indirect discrimination nonetheless reflects a formal interpretation of equality as consistency. This prevents the Court from apprehending the proper function of the concept of indirect discrimination as an instrument to dismantle structural barriers to participation in society.

Advocate General Pitruzella endorsed this worrying trend explicitly in *VL*, arguing that the "case involves indirect discrimination and the link with the protected characteristic, albeit indirect, is nevertheless inextricable".[113] He put forward a restrictive conceptualisation of indirect discrimination as "intended […] to prevent two like groups that share the same protected characteristic from being treated differently because of a situation that is intrinsically linked to, although not caused by, the protected characteristic".[114] This analytical shift curbs the diagnostic power of the concept of indirect discrimination, the strength of which is precisely to capture disadvantage arising from the interaction between rules that are neutral towards a protected characteristic and society's unequal social *status quo*. The reach of indirect discrimination is thereby limited to situations of "apparent" neutrality as opposed to all situations involving a neutral measure.[115] In turn, this recalibration limits the scope of direct discrimination to situations where a relationship of causality exists between the protected ground and the measure at stake as opposed to an "inseparable" link, regardless of its nature.[116]

The contrast between this line of reasoning and the Court's ultimate decision in *VL* highlights the difference an interpretive paradigm centred on the socialisation rationale of the Directive makes. As demonstrated above, a formal understanding of equality as consistency leads to a weaker conceptualisation of indirect discrimination that centres on the link with a protected characteristic. Where the Court explicitly uses the Directive as an instrument to

[109] Case C-482/16, *Georg Stollwitzer v ÖBB Personenverkehr AG*, EU:C:2018:180, para 40.
[110] Case C-154/18, *Tomás Horgan and Claire Keegan v Minister for Education & Skills and Others*, EU:C:2019:113, para 20.
[111] Ibid, para 27.
[112] In several other cases, the Court spares itself the analysis of whether a particular disadvantage arises, see e.g. Case C-49/18, *Escribano Vindel* (2019) and Case C-644/19, *FT v Universitatea „Lucian Blaga" Sibiu and Others*, EU:C:2020:810.
[113] Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, para 78 and footnote 27.
[114] Ibid, para 85.
[115] Ibid, paras. 85 and 77-78.
[116] The AG's line of reasoning also contradicts the Court's case law on direct discrimination where an 'inseparable' link exists between the contested measure and the protected ground, see Case C-177/88, *Dekker* (1990).

remove structural barriers to participation opportunities, the notion of indirect discrimination takes on a broader scope and focuses on the effects of a given measure on a protected group's inclusion or exclusion from such opportunities. Offering a welcome recalibration, the Court for example invited the referring court in *VL* to check whether the practice of granting an allowance based on the reception date of disability certificates puts employees with specific types of disability at a particular disadvantage.[117]

3.3.3. *Enriching the conceptual toolbox? Intersectional discrimination between implicit awareness and explicit rejection*

The expansive interpretive paradigm linked to the socialisation function of the Framework Employment Directive has also allowed the Court to devote some attention to complex forms of discrimination. Although the Court argued *in Parris* that "no new category of discrimination resulting from the combination of more than one […] grounds […] may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established",[118] other cases in fact illustrate how it has implicitly acknowledged intersectional discrimination in the name of the effectiveness of the Directive. In *Bedi* for example, the Court considered the interaction of vectors of disadvantage associated with age and disability where an applicant's bridging assistance was terminated as he became entitled to early retirement due to his disability. The Court adopted the same approach as in *Odar* and noted "that severely disabled persons have specific needs stemming both from the protection their condition requires and the need to anticipate possible worsening of their condition".[119] Motivating the finding of discrimination was "the risk that severely disabled persons may have financial requirements arising from their disability which cannot be adjusted and/or that, with advancing age, those financial requirements may increase".[120]

Further in *E.B.*, the Court rightly observed that the disciplinary sanction imposed at the time on the applicant applied differently to male and female "homosexual acts": while the latter were treated on par with "heterosexual acts", the sanction was heavier if men were involved.[121] Although framed as a case of discrimination on grounds of sexual orientation, the Court implicitly recognised the intersection of discrimination on grounds of gender and sexual orientation. The analytical framework chosen, comparing the position of individuals convicted for "male homosexual indecency" with that of those convicted for "heterosexual or female homosexual indecency", reflects awareness that both protected grounds play a role in shaping discrimination.[122] By contrast, had the Court performed a comparison solely based on sexual

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[117] The Court excludes any possible justification, see Case C-16/19, *VL v Szpital Kliniczny* (2021), paras 57-59.

[118] Case C-443/15, *David L. Parris v Trinity College Dublin and Others*, EU:C:2016:897, para 80. By contrast, see Opinion of Advocate General Kokott, *David L. Parris v Trinity College Dublin and Others* (EU:C:2016:493), paras. 4, 153, 157 and Opinion of Advocate General Kokott, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, para 121.
The Court's reasoning defeats the very definition of intersectional discrimination, namely discrimination arising from the combination of different systems of inequality that is not the addition of stand-alone instances of discrimination. See e.g. Xenidis, "Multiple discrimination in EU anti-discrimination law: towards redressing complex inequality?" in Uladzislau Belavusau and Kristin Henrard (eds), *EU anti-discrimination law beyond gender* (Hart Publishing 2018), 72-73.

[119] Case C-312/17, *Surjit Singh Bedi v Bundesrepublik Deutschland and Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland*, EU:C:2018:734, para 75. See also Case C-152/11, *Johann Odar v Baxter Deutschland GmbH*, EU:C:2012:772, para 69.

[120] Case C-312/17, *Bedi* (2018), para 75.

[121] See section 3.1.2. Case C-258/17, *E.B.* (2019), para 67.

[122] Ibid, para 60. See also Case C-528/13, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, EU:C:2015:288, para 49. AG Mengozzi had found 'clear indirect

orientation, it would have been unclear whether sexual orientation is the ground for differentiation since homosexual women are not affected by the heavier disciplinary sanction. These cases demonstrate how discursively grounding the interpretation of the Framework Employment Directive in the integration of a diverse EU citizenry in the labour market and protecting connected rights triggers purposive analytical patterns that have implicitly but effectively expanded the conceptual map of antidiscrimination law, even where the Court had explicitly shown resistance.

The Court will have further occasions to refine its conceptual approach to intersectional discrimination in the near future.[123] If the issue had also surfaced in *Achbita* and *Bougnaoui* although the claims were exclusively framed in terms of religious discrimination,[124] in *WABE* the referring court explicitly posed the question of "indirect discrimination on the grounds of religion and/or gender".[125] In her shadow opinion, former Advocate General Sharpston examined headscarf bans from the perspective of "double" and "triple discrimination" on grounds of religion, gender and ethnic origin.[126] Arguing that the ban could primarily disadvantage female workers from migrant communities given the composition of the labour market sectors at issue in these cases – the childcare sector in *WABE* and cashier positions in *Müller* – Sharpston advised "an enhanced level of scrutiny to the sequential aspects of the justification being advanced by the employer".[127] Comparing this participation-centred approach with the Court's mechanical refusal to examine the question because sex discrimination falls within the scope of another directive reveals once again the influence which the Directive's socialisation objectives are likely to exert on the analytical framework deployed.[128]

To sum up, section 3 has argued that the Court has pushed forward a framing of equality as a participative device to justify an expansive approach to the scope, enforcement and concepts of the Directive. However, this expansionist trend has not fully extended to more complex areas of the conceptual map of EU anti-discrimination law. In particular, the Court's approach to the notions of indirect and intersectional discrimination displays some confusion and hesitations. These variations arise from competing interpretive paradigms. Where the Court gives legal weight to the socialisation function of the Directive, understood as a regulatory device aimed to enhance participation in the labour market and the reaping of associated material and symbolic benefits, interpretation tends to be purposive and expansive. This has allowed for a clarification, consolidation and sophistication of the case law. By contrast, where the socialisation function of the Directive remains in the background, an

discrimination' 'consisting of a combination of different treatment on grounds of sex — since the criterion in question relates only to men — and sexual orientation — since the criterion in question relates almost exclusively to homosexual and bisexual men', see Opinion of Advocate General Mengozzi, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* (EU:C:2014:2112), para 44.

[123] See e.g. Case C-344/20 *L.F. v S.C.R.L.* (request for a preliminary ruling referred on 27 July 2020).

[124] Even if she concluded to no such fact, the AG acknowledged that 'for example, […] a ban imposed by the employer puts not only employees of a particular religion but also employees of a particular sex, colour or ethnic background at a particular disadvantage […] might indicate that that ban is disproportionate'. See Opinion of Advocate General Kokott, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, para 121.

[125] Joined Cases C-804/18 and C-341/19 *WABE* (2021).

[126] Like AG Rantos, she concluded however that the facts before the Court do not permit an analysis of the issue, see Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, paras. 267, 296.

[127] Ibid, para 270.

[128] Joined Cases C-804/18 and C-341/19 *WABE* (2021).

understanding of equality as consistency seems to prevail "by default", leading to a narrower and more restrictive approach to the scope and conceptual toolbox of the Directive.

4. Ensuring the integrity of the anti-discrimination architecture across normative levels: Augmenting the reach of the Directive

EU anti-discrimination law has been called "the first fundamental rights policy" of the EU.[129] As such, it is an area of normative sedimentation and thus a privileged site of articulation of EU legislation with higher-order constitutional norms. The "constitutionalisation" of equality rights is taking place across the board in EU anti-discrimination law. On the one hand, the Court of Justice has recognised the existence of a general principle of non-discrimination on grounds of age with direct horizontal effect and gradually extended its scope to several of the protected grounds listed in Article 19 TFEU.[130] Even though its articulation so far remains unsystematic, it is reasonable to think that the constitutionalisation of EU anti-discrimination law is a transversal phenomenon.[131] On the other hand, this constitutionalisation movement has also taken the form of a "Charterisation" of EU equality rights. For example, over the past five years, the Charter was invoked in more than three quarters of the judgments rendered in relation to the Directive, either by the referring court or on the Court's own motion, and Article 21(1) was at stake in most of these cases.[132] Gradually, Article 21(1) EUCFR has gained in normative autonomy and has come to embody the unwritten general principle as the source of direct horizontal effects. Whereas in *Dansk Industri*, the Court still followed the *Mangold-Kücükdeveci* approach and primarily derived the horizontal direct effects from the general principle,[133] in *Egenberger* and subsequent cases such as *IR* and *Cresco* the Court deemed Article 21 "sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law".[134] These findings gave rise to an obligation for national courts to disapply national law where it cannot be interpreted in conformity with the Directive without resorting to *contra legem* interpretation.[135]

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[129] Muir, *EU equality law: the first fundamental rights policy of the EU* (Oxford University Press 2018).

[130] Case C-144/04, *Mangold* (2005); Case C-414/16, *Egenberger* (2018), para 76. The Court also hinted at the existence of a general principle of non-discrimination in relation to sexual orientation and disability, see Case C-147/08, *Römer* (2011), paras. 59–60, citing *inter alia Case C-144/04, Mangold (2005)* and Case C-555/07, *Kücükdeveci* (2010) and Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA*, EU:C:2006:456, para 56 confirmed in Case C-354/13, *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*, EU:C:2014:2463, para 32.

[131] When reading Article 21 EUCFR in combination with Article 19 TFEU, it is difficult to imagine what interpretive principles could justify drawing a line between certain protected grounds such as age and religion, and others such as disability or sexual orientation. This is confirmed by AG Wathelet who 'see[s] no reason why certain discrimination criteria would be treated differently when they all achieve the same result' and speaks of 'a fundamental constitutional value of the EU legal order, which the Court has recognised as a general principle of EU law', see Opinion of Advocate General Wathelet, *IR v JQ* (EU:C:2018:363), paras. 85-86.

[132] I could count 34 judgments out of 45 (76%) in which the Charter was invoked.

[133] Case C-144/04, *Mangold* (2005), para 75 and Case C-555/07, *Kücükdeveci* (2010), para 21. Article 21(1) was limited to a supporting role, see Case C-441/14, *Dansk Industri* (2016), para 22.

[134] Case C-414/16, *Egenberger* (2018), para 76 citing Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2014:2, para 47. In *IR* the Court reiterated its position, explaining that '[b]efore the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal status as the treaties, that principle derived from the common constitutional traditions of the Member States', while it is 'now enshrined in Article 21 [EUCFR]', see Case C-68/17, *IR v JQ* (2018), para 69.
The direct effects of the Charter were later confirmed in the area of social law in Case Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871.

[135] In his opinion in *Dansk Industri*, AG Bot insisted that consistent interpretation remains the privileged solution and that the disapplication of national law is only a 'palliative' for the lack of direct horizontal applicability of the

This section argues that the Court has utilised constitutional norms to augment the reach of the Directive in order to secure the coherence and integrity of the anti-discrimination architecture beyond the formal limits of the Directive. The Court mobilises primary law to secure, first, the integrity of the legal framework where it displays gaps and second, its coherence and uniformity across the different normative layers. In so doing, constitutional norms export the regulatory framework and analytical template of the Directive outside its scope of application. In other words, this integrity-enhancing function entrusted to anti-discrimination rules fuels an expansive interpretive paradigm that transplants the legal protection afforded by the Directive outside its own boundaries. The effect overall is a strengthening of the legal protection regime established by the Framework Employment Directive. A bidirectional relationship of complementarity can be observed in interpretation patterns. On the one hand, the Directive serves as a bridge to the Charter which performs a gap-filling role in relation to the scope of the Directive (4.1) and its limited enforceability in horizontal disputes (4.2). On the other hand, the Directive itself is used to fill normative voids where it serves to import the refined analytical framework developed by the Court under secondary law into the interpretation of constitutional norms (4.3).

4.1. *Expanding the Directive's reach via the fundamental right to equality*

Where a case did not fall within the personal scope of the Directive, the Court of Justice has nonetheless proven creative. In *Milkova* for example, the Court relied on the material scope of the Directive as a gateway to the general principle of non-discrimination.[136] The case concerned measures of protection against dismissal from which certain categories of employees with disabilities could benefit depending on the legal status of their employment.[137] The applicant claimed that excluding her from these protection measures because she was a civil servant rather than an employee amounted to discrimination on grounds of disability. The CJEU noted however that the difference in treatment was based on the nature of the employment relationship as opposed to the grounds protected by the Directive.[138] Where Advocate General Saugmandsgaard Øe found the case to fall outside the scope of the Directive,[139] the CJEU pirouetted out by considering that the contested measure amounted to positive action on grounds of disability and thus fell within the scope of the Directive.[140] The Advocate General had suggested that even if the Court found a link with Article 7(2) of the Directive, provisions on positive action conferred a "right" and no "obligation" on Member States, which remained free to restrict the scope of positive action measures.[141] Yet for the Court the link with Article 7(2) provided a bridge to the scope of application of the Charter following Article 51(1) so that the general principle of equal treatment enshrined in Articles 20 and 21 EUCFR could apply.[142]

In effect, the Court arrived at a similar conclusion to the one reached in *VL* but through another route. Instead of reading a difference in treatment *within* a protected group as falling

Directive and should remain the 'ultimate solution'. See Opinion of Advocate General Bot, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* (EU:C:2015:776), paras. 47-48, 64-65.

[136] Case C-406/15, *Milkova* (2017).

[137] Ibid, para 25.

[138] Ibid, para 40.

[139] Opinion of Advocate General Saugmandsgaard Øe, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* (EU:C:2016:824), para 58.

[140] Based on Article 7(2) of Directive 2000/78/EC, para 50.

[141] Opinion of Advocate General Saugmandsgaard Øe, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, paras. 72-73.

[142] Case C-406/15, *Milkova* (2017), paras. 54-55.

directly within the personal scope of the Directive, it compared "the positions of employees with a particular disability" with those of "civil servants with the same disability" in light of the principle of equal treatment contained in Articles 20 and 21 EUCFR.[143] This led to a proportionality test in which the Court suggested that the distinction made among workers with disabilities is unjustified because it is inadequate to the aims of positive action.[144] The Court's enabling reading of the material scope of the Directive serves as a gateway to the fundamental right to equal treatment contained in Articles 20 and 21 EUCFR, which in turn export the regulatory framework of the Directive on positive action beyond its scope of application and *de facto* expand its reach.

This expansive approach to the scope of the Directive raises several questions. In contrast to the refined reflection on the personal scope of the Directive in *VL*, the generic analysis conducted in *Milkova* remains problematically vague and unprincipled, albeit in line with the objectives of the Directive. For example, the Court remains silent on the *de facto* expansion of the personal scope of anti-discrimination norms through the application of the general principle of equal treatment anchored in the Charter. It is also unclear whether the analysis is grounded in Article 20 or 21. In the latter case, there is no methodological indication on how the differentiating criterion in *Milkova*, namely the legal nature of the employment relationship, is covered under Article 21(1) Charter. Since it does not explicitly list legal relationships as protected grounds, it is legitimate to ask whether its applicability derives from its openly framed list of protected characteristics.[145] Even though this articulation of secondary and primary norms supports the *de facto* expansion of the scope of application of the Directive and the coherent enforcement of its objectives, it poses deeper questions regarding the conditions and limits of such complementarity.

4.2. *Bridging enforcement gaps: The direct remedies of direct effect*

The Court of Justice has also actively utilised constitutional norms to strengthen the enforcement of the Directive when reaching the limits of its applicability. While previous cases had left the question of legal remedies partly open, the Court's recent case law developed a full remedial "recipe".[146] In *Milkova* and *Cresco*, the novelty was that the Court derived the "levelling up" remedy from the general principle of non-discrimination and from Article 21 EUCFR. In *Milkova* the referring court asked the CJEU what consequences a breach of EU law would have in terms of individual remedies for the victims.[147] The Court explained that a breach of EU non-discrimination law not only entails setting aside national law, but also "granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category" where there is "a valid point of reference" and "as

[143] Ibid, para 58.
[144] Ibid, paras. 61, 64. It remains for the referring court to assess whether this is so.
[145] Article 21(1) EUCFR lists 'any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.
[146] See Case Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland*, EU:C:2014:2005, paras. 93, 95-96; Case C-417/13, *ÖBB Personenverkehr AG v Gotthard Starjakob*, EU:C:2015:38, paras. 46-47. See the subsequent application of the 'levelling up' formula in Case C-24/17, *Österreichischer Gewerkschaftsbund* (2019); Case C-396/17, *Leitner* (2019); Case Joined Cases C-773/18, C-774/18 and C-775/18, *Land Sachsen-Anhalt* (2020).
[147] See fourth question: Case C-406/15, *Milkova* (2017), para 32.

long as measures reinstating equal treatment have not been adopted".[148] The consequence was that the protection measures against dismissal had to extend to civil servants with disabilities.[149]

This "levelling up" remedial formula takes a whole new dimension in horizontal disputes, where it *de facto* creates a direct positive obligation for private parties in the context of the horizontal application of fundamental rights and general principles. While decisions in cases such as *Dansk Industri*, *Egenberger* and *IR v JQ* had concluded by requiring the disapplication of national rules in horizontal disputes, they did not address the question of the legal effects of such disapplication in terms of remedies. This led Advocate General Bobek to argue that the term "horizontal" in what scholars call the "horizontal direct effects doctrine" is misleading. Apart from bringing about the disapplication of incompatible national provisions, he suggested that neither the general principle of non-discrimination nor Article 21(1) EUCFR have substantive direct effects in horizontal disputes.[150] In *Cresco*, he insisted that "[n]ew stand-alone obligations cannot be created *solely* on the basis of the Charter for private parties" and that "[i]mbuing those provisions with horizontal direct effect" would "ope[n] the door to extreme forms of judicial creativity".[151] He criticised the "distinct flavour of circumvention of one's own previously imposed limits" which would arise with the direct application of the Charter in Cresco's horizontal dispute.[152] He also questioned the "paradox […] implied by the levelling up solution" arguing that "what has disappeared [after disapplication following the *Egenberger* formula] cannot subsequently be applied to anyone at all" and wondering that yet "somewhat miraculously, the same provision that was removed when applicable to some is immediately resurrected in order to be applied to all".[153] In other words, he considered that a private employer cannot be obliged as a matter of EU law to expand the pool of beneficiaries of a discriminatory provision to comply with the general principle of equal treatment. Rather, he recommended a *Francovich*-style damages action against the State since the discrimination arose from the application of national legislation.[154]

In its decision, the Court disagreed and deployed the "levelling up" remedial formula to fill the gap in the direct horizontal effects doctrine left by the *Dansk Industri*, *Egenberger* and *IR v JQ* line of case law. Relying on Article 21(1) EUCFR, it imposed a direct obligation on private employers to extend the benefit foreseen by national legislation and giving rise to religious discrimination to all employees as long as the legislature has not reinstated equality. Hence, *Cresco* takes the "mandatory" effect of the general principle of non-discrimination anchored in Article 21(1) EUCFR one step further.[155] Even where the discrimination is created by the national legislature, compliance with EU law entails not only the disapplication of the discriminatory rule at stake, but also new legal obligations for the private defendant. Following the "equalising up" principle developed by the Court, these legal obligations are substantial.[156] In *Cresco*, the private employer is obliged to provisionally bear the cost of extending the holiday and pay benefit to all parties that have been discriminated against on grounds of their religion until the law is changed. *Cresco* indicates that the enforcement of the non-discrimination rights derived from the Directive, backed by Article 21(1) EUCFR, takes precedence over key interests on the side of liable private parties who are subject to an interim

[148] Ibid, paras. 66-68.
[149] Ibid, paras. 69-70.
[150] Opinion of Advocate General Bobek, *Cresco Investigation GmbH v Markus Achatzi*, paras. 118, 127, 131.
[151] Ibid, paras. 141, 146.
[152] Ibid, para 145.
[153] Ibid, para 162.
[154] Following Opinion of Advocate General Tanchev, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (EU:C:2017:851), para 119.
[155] Case C-193/17, *Cresco Investigation* (2019), paras. 69, 76-77.
[156] Ibid, paras. 79-80.

burden and must subsequently seek damages against the Austrian State. Continuing to unravel the doctrine according to which directives do not have a direct horizontal effect, the Court closed the loop in relation to the horizontal direct effects doctrine by creating a system of legal remedies capable of ensuring the enforcement of the Framework Employment Directive across the public/private divide. In these cases, Article 21 EUCFR thus takes on a positive gap-filling function to ensure the coherent application of the normative content of the Directive in areas where its reach is limited.[157] The Charter thereby serves as a vehicle to export the expansive interpretative paradigm beyond the formal limits of the Directive.

4.3. *A bidirectional relationship: Blurring the normative hierarchy*

The use of primary law to augment the reach of the Directive has produced a complex legal conundrum. It has been argued, for example, that the developments exposed above confuse the regulatory function of anti-discrimination legislation with the specific function of the fundamental right to equality anchored in the Charter, namely that of serving as a benchmark for judicial review and the interpretation of secondary law.[158] The case law shows that the Directive fulfils paradoxical roles. On the one hand, it acts as a *connector* where the lack of compliance with its provisions brings a dispute within the scope of application of the Charter as defined in Article 51(1). In this configuration, the general principle and Article 21 EUCFR are autonomous constitutional norms capable of producing direct effects in both vertical and horizontal disputes. On the other hand, the Directive acts, at the same time, as a *translator* of the principle of equal treatment to which it gives its specific content, contours and limits. There is therefore a tension, not only between the regulatory and benchmark functions of these legislative and constitutional embodiments of equality, but also in the interdependent nature of their normative relationship. Where the Directive only provides the link for the Charter to apply, its provisions enjoy a certain degree of normative autonomy due to the direct effects of Article 21. Yet at the same time, the Court relies on the content of the Directive to "fill" the normative space of Article 21 with interpretive substance that can be readily applied. In these cases, the "natural" relationship according to which constitutional norms serve to test and interpret legislative norms is reversed and the relationship between the two levels becomes bidirectional.[159]

Four configurations exist: cases where the Directive applies; cases that fall within the scope of the Directive but where the Directive is not directly applicable; cases where a situation falls outside the scope of the Directive but where the Directive nonetheless provides the link to EU law that renders the Charter applicable; and cases that fall completely outside the scope of the Directive. In the first configuration, namely vertical cases where the Directive applies, the Charter is sometimes invoked together with the Directive but does not play a substantive role in the assessment of discrimination.[160] In general, the Court examines these cases in the light of the directive only and mentions of Article 21 are purely declaratory.[161]

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[157] In *Milkova*, it ensured that a difference in treatment that fell outside the personal scope of the Directive but impacted one of its protected groups did not escape the grasp of EU anti-discrimination law, see Case C-406/15, *Milkova* (2017) and section 3.2.1.

[158] See Muir, "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins", 821, 828-829 and Muir, "The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer" (2019) 12 Review of European Administrative Law 185, 204-205.

[159] Muir, "The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer", 199-200.

[160] The Charter may however play its traditional function as a benchmark for fundamental rights review.

[161] See Opinion of Advocate General Szpunar, *Gennaro Cafaro v DQ*, para 51 citing Case C-416/13, *Mario Vital Pérez v Ayuntamiento de Oviedo*, EU:C:2014:2371, para 25 and e.g. the decisions in Case Joined Cases C-773/18,

The second configuration corresponds to cases that fall within the scope of the Directive but where it is not directly applicable because the dispute is horizontal. In these cases, "[t]he relationship between Article 21(1) [EUCFR] and Directive 2000/78 is […] not one of mutual exclusion" but "rather one of concretisation and complementarity" in particular for the purpose of consistent interpretation or the disapplication of national law.[162] Although the general principle applies directly, reading it together with secondary law is necessary to respect "balance struck […] by the EU legislature".[163] In this configuration, the general principle of non-discrimination enshrined in Article 21(1) EUCFR fills the gap arising from the lack of direct horizontal applicability of the Directive by importing its content and analytical framework into the constitutional norm that is directly applicable. As a result, "the corresponding analytical framework under both is bound to be similar" and "the approach under both should follow the same logic in order to ensure a coherent approach to judicial review".[164] In cases where the constitutional norm takes over from the Directive to reach into private disputes, authority stems from the constitutional norm but content and substance stem from the legislative norm. Such an overlap is apparent in cases such as *Egenberger*, *IR* and *Cresco*, where Articles 21(1) and 47 EUCFR are read in conjunction respectively with Articles 4(2) and 2 and Articles 9 and 16 of the Directive. In effect, the Charter "exports" the analytical and remedial framework of the Directive to horizontal disputes.

This approach triggered stark disagreement. In *Cresco*, the Advocate General remarked that "[t]here appears to be a growing body of case-law of th[e] Court which effectively imports the (often quite sophisticated) content of directives into provisions of the Charter before applying those Charter provisions horizontally".[165] Acknowledging that "[s]ince the content of the rights and obligations flowing from the Charter are unclear, it might [indeed] be tempting to search for answers in the relevant secondary legislation", Advocate General Bobek however decried the "uncritical and direct "transliteration" of the content of a directive into a Charter provision".[166] He argued that such an approach risks conditioning the direct effect of the Charter to the existence of secondary legislation and questioned whether this "de-constitutionalis[ation]" of the Charter is compatible with its role of "yardstick for the review of secondary law".[167] In fact, the bidirectional relationship between the Directive and the Charter whereby the Directive acts as both a *connector* to the normative authority of the Charter and a *translator* determining the shape and substance of its content borders on circularity.[168] It is questionable whether the Charter can perform its function as a normative benchmark for reviewing subordinate norms if it is at the same time a moving target that takes the specific form of, and operationalises, the very subordinate norms it is read in conjunction with.

The paradox by which the constitutionalisation of EU anti-discrimination law leads to a form of "deconstitutionalisation" of the Charter is starker in the third configuration of cases, namely situations that fall outside the scope of the Directive but where the Directive

C-774/18 and C-775/18, *Land Sachsen-Anhalt* (2020), para 14 or Case C-24/17, *Österreichischer Gewerkschaftsbund* (2019), para 47.

[162] Opinion of Advocate General Bobek, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro* (EU:C:2017:235), paras. 27-28.

[163] Case C-414/16, *Egenberger* (2018), para 81.

[164] Opinion of Advocate General Bobek, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, para 27.

[165] Opinion of Advocate General Bobek, *Cresco Investigation GmbH v Markus Achatzi*, para 142.

[166] Ibid, paras. 142-143.

[167] Ibid, para 144.

[168] The complexity and instability of such a legal construct led AG Bobek to state that 'it would perhaps be advisable to revisit the issue of horizontal direct effect of directives' instead of 'moving heaven and earth to ensure that [the lack of horizontal direct effect of directives] has no practical consequences'. See ibid, para 145.

nonetheless provides the link to EU law that renders the Charter applicable.[169] In *Milkova* for instance, despite their autonomous status as rights-conferring norms (at least in the case of Article 21) and the location of the dispute outside of the scope of the Directive, the Court still relies on Article 7(2) of the Directive to "translate" the Charter provisions in the proportionality test and the "levelling up" remedy.[170] Another example is *YS v NK*, where the Court was asked to examine the question of discrimination on grounds of property under Article 21(1) in addition to questions of age and sex discrimination.[171] The CJEU indicated that the dispute at stake could only fall within the scope of the Charter to the extent that it is capable of giving rise to discrimination on grounds of sex and/or age.[172] In other words, a breach of the Framework Employment Directive would provide the necessary link to EU law but the situation would lie outside its scope since it concerns discrimination on grounds of property, a criterion not protected under the Directive.[173] In such a case, one would have expected the Court to resort to the open justification framework and proportionality test laid out in Article 52(1) EUCFR. Instead, the Court transplanted the analytical template of the Directive to the examination of discrimination on grounds of property in order to reject a breach of Articles 20 and 21(1) EUCFR.[174] It explained that "assuming that it can be shown that the difference in treatment identified […] puts persons with a certain amount of property at a particular disadvantage, such a situation is capable of being justified" applying the same justification framework as for sex and age discrimination.[175] The same contradiction is found in the Advocate General's opinion which imports the justification test laid out by the Directives in relation to indirect discrimination into Article 21 and ignores the separate test foreseen by Article 52(1) EUCFR.[176] The argument that "it is in any case not possible for any standards other than those in respect of discrimination on grounds of sex to apply" contradicts the statement that the anti-discrimination directives do not "determine the normative content of th[e] fundamental right [to equality]".[177]

This importation of the analytical framework of the Directive into constitutional norms becomes even more problematic in the last configuration, namely cases that fall completely outside the scope of the Directive. In *Fries* for example, the dispute concerned the extinction of the employment contract of an aircraft pilot upon a certain age and fell outside the scope of the Framework Employment Directive. In spite of this, the Advocate General claimed that "the analytical framework under Article 21(1) [EUCFR] is bound to be similar" to that of the Directive and that "the categories and interpretation developed under the directive may serve

[169] See for example Case C-406/15, *Milkova* (2017), paras 50-54: the Court deems the Charter applicable because "the legislation at issue in the main proceedings comes within the scope of Article 7(2) of Directive 2000/78 and, as such, pursues an objective covered by EU law, for the purposes of the Court's settled case-law adopted in order to determine whether such a national measure falls within the implementation of EU law within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union".
[170] Ibid, para 64.
[171] Case C-223/19, *YS v NK* (2020).
[172] Ibid, paras 80-81, citing Opinion of A.G. Kokott in Case C-223/19, *YS v. NK*, para 98.
[173] See Opinion of Advocate General Kokott, *YS v NK*, para 106.
[174] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.
[175] Opinion of Advocate General Kokott, *YS v NK*, para 85.
[176] Ibid, para 101.
[177] Ibid, para 108. The effect is that 'any discrimination on grounds of property would therefore at least have to be regarded as justified'.

as inspiration to flesh out the content of Article 21(1) [EUCFR]".[178] Even if the Court conducted the assessment under Article 52(1) EUCFR, it followed this suggestion by justifying the status of civil aviation safety as an objective of general interest based on its nature of legitimate objective within the meaning of Article 2(5) and Article 4(1) of the Directive.[179] Hence, the importation of the content of the Directive into constitutional norms takes place both in situations that lie within and outside the scope of application of the Directive.[180]

All in all, this section has shown that the constitutionalisation and "Charterisation" of EU anti-discrimination law has led to a functional differentiation whereby constitutional norms play a bridging and gap-filling role to secure the integrity of the legal framework laid out by the Directive. This translates into a second type of interpretive paradigm that complements the expansive interpretive patterns observed in relation to the socialisation function of anti-discrimination rules by augmenting the reach of the Directive in areas beyond the formal scope of application of the Directive. The cost of such congruence is a bidirectional relationship between constitutional and legislative norms that blurs the established normative hierarchy and creates legal uncertainty.

5. The calibration function of anti-discrimination norms: A competing equality paradigm

The Court has also, however, deviated from the construction of the anti-discrimination framework exposed above. Besides the socialisation and integrity functions examined above and the associated expansion and augmentation paradigms, it has also used constitutional anti-discrimination norms for purposes of calibration. A last empirical trend that emerges from recent case law is indeed the role of the Charter in translating the principle of equal treatment in terms of fundamental and human rights. In this context, the interpretation of the Directive in light of the Charter has been the basis for internal and external forms of calibration both within the EU legal order and between EU law and international human rights law regimes. Internally, the Charterisation of anti-discrimination law channels fundamental rights norms from outside equality law into the interpretation of the Directive, thus contributing to the calibration of EU law with the Union's fundamental rights regime (5.1). Externally, the Charterisation of anti-discrimination law offers space for the translation and import of human rights norms into the interpretation of the Directive, which to a certain extent leads to parallelisation with the legal standards and analytical framework of the European Convention on Human Rights (5.2). The calibration mandate entrusted by the Court to anti-discrimination norms fuels a third, competing, interpretive paradigm that affects the level and shape of equality protection under the Framework Employment Directive in a different way. It shifts the central interpretive tenets and review standards of the Court, which impacts the levels of protection observable in the case law.

5.1. *Internal calibration: Conflicts of fundamental rights and the balancing rationale*

The constitutionalisation of EU anti-discrimination law has led to putting the rights derived from the Directive in the balance with other fundamental rights. While some of the Charter's

[178] Opinion of Advocate General Bobek, *Werner Fries v Lufthansa CityLine GmbH* (EU:C:2017:225), paras. 29-30. He suggests for instance that the occupational requirements justification is equally applicable to Article 21(1) EUCFR.
[179] Case C-190/16, *Werner Fries v Lufthansa CityLine GmbH*, EU:C:2017:513, paras. 42-43.
[180] But consider also Case C-198/15, *Invamed Group and Others* (2016), paras. 30-34.

substantive rights have backed the prohibition of discrimination,[181] the Charterisation of EU anti-discrimination law has also led to conflicts of fundamental rights and pitted the principle of non-discrimination against competing rights and interests. This has channelled specific balancing patterns in the area of anti-discrimination law. In principle, the scope of the fundamental rights review induced by the Charter extends to the entire catalogue of rights covered.[182] Yet one fundamental right has recently started to play a particularly controversial role in relation to the interpretation of the Framework Employment Directive. Article 16 on the freedom to conduct a business has imported economic concerns framed as fundamental rights into EU anti-discrimination law. Where the Court had previously rejected economic or budgetary considerations as legitimate aims *per se*,[183] Article 16 has been granted a more privileged status, which affects the parameters of the established proportionality test.

Already invoked in other areas of EU law to curb competing rights,[184] Article 16 EUCFR acquired a prominent role in the context of religious discrimination.[185] In *Achbita* and *WABE*, the Court held that "[a]n employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 [EUCFR] and is, in principle, legitimate".[186] This way, it raised the economic interest contained in Article 16 to the level of an acceptable justification for *prima facie* indirect discrimination. In this broad interpretation, Article 16 is capable of trumping competing Article 21 EUCFR on the prohibition to discriminate and Article 10 on the freedom of religion.

These cases show that the framing of equality as a fundamental right that comes along with the Charterisation of EU anti-discrimination law is liable to lower the level of protection by leading to balancing Article 21(1) EUCFR with competing rights. This is visible when comparing the balancing outcome in both cases with the reasoning offered more than a decade ago in *Feryn*, where the Court had excluded that customers' racist attitudes and stereotypes could represent a valid justification for discrimination.[187] It had embraced the Advocate General's argument that "[t]he contention made by Mr Feryn that customers would be unfavourably disposed towards employees of a certain ethnic origin is wholly irrelevant to the question whether the Directive applies" and that "[e]ven if […] true, it would only illustrate that "markets will not cure discrimination" and that regulatory intervention is essential".[188]

In his opinion in *WABE*, Advocate General Rantos not only sets aside this finding in the name of economic fundamental rights but he also interprets Article 16 even more broadly

[181] E.g. Article 15(1) on the right to engage in work in Case C-670/18, *Comune di Gesturi* (2020), para 44 or Article 47 on effective judicial protection in Case Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (2019).

[182] This has however been disputed in Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 99: 'if all the rights enshrined in the Charter are applied simultaneously with a view to interpreting Directive 2000/78, the end result could be that it is impossible to implement fully and uniformly the provisions of that directive'. Compare with the argument that such a restriction would amount to 'putting blinkers on a horse', see Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 240.

[183] See e.g. Case C-24/17, *Österreichischer Gewerkschaftsbund* (2019), para 40.

[184] See e.g. Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, EU:C:2013:521, para 31.

[185] Case C-157/15, *Achbita* (2017), para 38 and Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 66.

[186] Case C-157/15, *Achbita* (2017), paras. 37-38 and Joined cases 804/18 and 341/19 *WABE* (2021), para 63.

[187] Directive 2000/43/EC. See Case C-54/07, *Feryn* (2008), paras. 16, 18.

[188] Opinion of Advocate General Poiares Maduro, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (EU:C:2008:155), para 18 citing Cass Sunstein, 'Why markets don't stop discrimination', in: *Free markets and social justice*, Oxford University Press, Oxford, 1997, 165.

than previously validated by the Court.[189] In *WABE*, he proposes that the Court extends the scope of acceptable justifications from crafting a neutral corporate image to generically taking into account "customers' wishes". [190] Such an approach is liable to lead to companies being allowed to take into account clients' – and more broadly society's – discriminatory prejudices and harmful stereotypes.[191] Unpacking some of these prejudices, former Advocate General Sharpston pointed out in her "shadow opinion" how "implicit value judgements" underpin the very concept of a neutral corporate image. For example, the "no headgear rule" implicitly "*assumes* that wearing mandated religious apparel that covers the head […] makes the employee look 'untidy'".[192] Such rules regulating professional appearance embed majority norms defining acceptable looks and turn them into injunctions that either police minority groups into erasing "difference" or exclude them from valuable social goods such as labour. In other words, the balancing upheld by the Court in *Achbita* and pursued in the opinion in *WABE* aims to "fix" the minority group rather than society's discriminatory attitudes. Even though the Court did not follow Advocate General Rantos' overbroad approach to Article 16 and actually restricted the scope of acceptable justifications to situations where the employer can demonstrate a "genuine need" for a neutrality policy, it reiterated the conclusion that indirect discrimination on grounds of religion can be justified on economic grounds.[193]

What can explain the difference in approaches between *Feryn* and *Achbita* and the stark contrast in Sharpston's "shadow opinion" and the Court's decision in *WABE*? Beyond the political sensitivity of questions pertaining to the place of religion in society, contrasting these analyses reveals two competing equality paradigms. In the first instance, the analytical framework deployed prioritises the objectives of EU anti-discrimination law in terms of participation in the labour market.[194] For instance, a socialisation-centred rationale emerges in several instances from Sharpston's reasoning in *WABE.* She recalled that the Directive aims to "ensure that everyone can access the employment market under conditions that respect their identity and their dignity" and the fundamental role this plays in the economic and emotional development of individuals and society.[195] Beyond evident "altruistic reasons", anti-discrimination law also responds to "hard-nosed practical considerations" in avoiding socio-economic exclusion and cultural marginalisation that could lead to "social unrest and worse".[196] In this connection, Sharpston opposes "true" neutrality that accommodates diversity and fosters religious tolerance to "negative neutrality" that denies participation opportunities

[189] Case C-157/15, *Achbita* (2017), para 37. This justification has also been challenged because the goal of projecting a 'neutral' corporate image can be fulfilled by creating a corporate uniform that accommodates the forum externum dimension of the freedom of religion, see Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, paras. 129-130.

[190] Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ*, paras. 66-68. Note the contradiction: as long as customers' wishes are taken into account as part of an institutionalised policy and not upon clients' requests, this constitutes a legitimate aim. In other words, if discriminatory prejudices are raised to the rank of general rule as opposed to applied case-by-case, the employer is within the scope of a justification.

[191] See also Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 311.

[192] Ibid, paras. 132-133. She also cites the example of the 'no facial hair rule' that create 'guaranteed' disadvantage towards minority groups for whom it is mandated religious practice. See also Opinion of Advocate General Sharpston, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, para 74.

[193] Joined cases 804/18 and 341/19 *WABE* (2021), paras 64 and 70.

[194] In *Feryn* for example, the Court considered that accepting customers' discrimination would be contrary to the Directive's 'objective of fostering conditions for a socially inclusive labour market'. Case C-54/07, *Feryn* (2008), para 24.

[195] Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 40.

[196] Ibid and paras. 38-39.

to minority groups.[197] The participative equality model she reads in EU anti-discrimination law orientates the balancing exercise, which prioritises the role of anti-discrimination norms as a tool for socialisation in conditions of cultural and religious diversity over competing interests.[198]

By contrast, in *Achbita* and *WABE*, equality is framed in terms of a classic balancing between competing fundamental rights and focuses on finding a fair compromise between divergent interests in society. Such an approach is also reminiscent of the early non-discrimination case law of the Court, which was inspired by the freedom of movement template stemming from internal market law. The inclusion, diversity and participation objectives fade from the reasoning. In *WABE*, the Court weighs "the legitimate wishes of […] users and the adverse consequences that that employer would suffer in the absence of that policy" through a typical balancing of the employer's freedom to conduct a business under Article 16 EUCFR, the parents' right to ensure the education of their children in accordance with their own views under Article 14(3) EUCFR, and the employee's right to manifest her religion under Article 10 EUCFR.[199] The clash between the balancing paradigm and the socialisation rationale is most visible in the necessity prong of the proportionality test. In *Achbita*, the Court indicated that the necessity test should involve an assessment of whether the neutrality policy only applies to employees who have visual contact with customers and whether it would have been possible for the employer, without incurring unreasonable costs, to offer the applicant an alternative post in which she would not have been in "visual contact" with customers.[200] This "back office" solution, implicitly endorsed by the Court in *WABE*, reflects a search for the compromise that can maximise all involved fundamental rights while ensuring the least invasive restriction.[201]

However, such a "compromise" readily clashes with the participative model of equality and is liable to strengthen discriminatory attitudes and prejudices and further entrench economic and social inequalities.[202] Following Sharpston, "an approach that would consist of moving any hijab-, dastar- or kippah-wearing employee […]into a back office, safely locked away from any contact with customers (and probably also […] thereby placed at a significant and continuing disadvantage in terms of career path) is [not] what the EU legislature had in mind when formulating Directive 2000/78".[203] Not only does such a balancing outcome undermine the objectives of diversity and inclusion put forward by the Treaties and the Charter, but it also jeopardises the function of anti-discrimination law as an instrument fostering economic participation and socialisation.

The Court's reading of the Directive in light of the fundamental rights regime established by the Charter has thus affected the nature and shape of equality protection in contrasting ways. The internal calibration function fulfilled by anti-discrimination norms has led the Court to import analytical patterns and review standards from the balancing framework that characterises fundamental rights review in the interpretation of the Directive, which has occasionally diminished the level of protection derived by the Court.

5.2. *External calibration: a site of alignment with international human rights law*

[197] Ibid, para 265.
[198] Ibid, paras. 39, 134.
[199] Joined cases 804/18 and 341/19 *WABE* (2021), paras. 65-70.
[200] Case C-157/15, *Achbita* (2017), para 43. For a similar reasoning, see Opinion of Advocate General Kokott, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, paras. 108, 119 and footnote 44 and Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ*, paras 62-63.
[201] See Joined cases 804/18 and 341/19 *WABE* (2021), paras. 69-70.
[202] In this sense, see also Weiler, "Je Suis Achbita" (2017) 28 European Journal of International Law 989.
[203] Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 243.

The Charterisation of EU anti-discrimination law has also led to a form of external calibration whereby the Court has imported the legal standards and analytical framework developed by the European Court of Human Rights (ECtHR) into the interpretation of the Directive. This parallelisation of EU law and international human rights norms, albeit inscribed both in the Treaties and the Charter, has affected the level of protection derived by the Court from the Directive. Although Article 6(3) TEU guarantees that fundamental rights enshrined in the European Convention on Human Rights (ECHR) are simultaneously general principles of EU law and Article 52(3) EUCFR ensures a correspondence in meaning and scope between the fundamental rights listed in the ECHR and in the Charter, the Union is free to provide more extensive protection. The recent case law of the Court shows how difficult such a calibration exercise is. On the one hand, the Court has duly reviewed the case law of the ECtHR to extract its interpretation of fundamental rights such as the freedom of religion. On the other hand, the interpretation that emerges should be adjusted to the Union's equality paradigm through a proportionality test that makes space for the idiosyncratic socialisation function of EU anti-discrimination law. Yet, this is where concerns on diversity, inclusion and social participation seem to get "lost in translation". Absorbing the construction of human rights norms by the ECtHR leads to three forms of "acculturation" in the conceptualisation of anti-discrimination norms under the Directive at the CJEU: a shifting analytical framework, differing definitions and different settings in the proportionality test.

Concerning the analytical framework, Advocate General Sharpston argued in *Bougnaoui* that "there is a fundamental difference in the intellectual analysis underlying" the two courts' approach to discrimination. Whereas the CJEU focuses on the detailed framework and objectives laid out by the Directive, the ECtHR conducts a "restrictions-based approach" in which the principle of non-discrimination plays an ancillary role and which relies exclusively on the balancing of competing human rights.[204] As mentioned above, the anti-discrimination case law of the Court of Justice has evolved from such an approach, which originated in the balancing patterns linked to the freedom of movement case law. Yet, a restrictions-based approach on other terms resurfaces in the interpretation of the Directive. In *Achbita* for example, the right to non-discrimination laid out in the Directive "hosts" an evaluation of the restrictions to the freedom of religion accepted by the ECtHR under Article 9 ECHR. In effect, the shift towards a restrictions-based approach leads the Court to implicitly import to some extent the review standards and definitions used by the ECtHR. This is visible, for instance, in the differentiated protection granted by the CJEU to the *forum internum* (religious beliefs) and the *forum externum* (their manifestations) in *Achbita* and *WABE*, which the CJEU imported into the analysis of indirect discrimination following the analytical framework developed by the ECtHR and which arguably lowered the level of protection under the Directive.[205]

The notion of indirect discrimination and its open-ended justification regime is particularly amenable to the transplant of a restrictions-based approach infused with the review standards of the ECtHR. As Sharpston argued, "the position may be essentially the same in the context of indirect discrimination, inasmuch as the derogations permitted under EU legislation require there to be a legitimate aim that is proportionate, thereby mirroring the position under

[204] Opinion of Advocate General Sharpston, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, paras. 58, 60.

[205] See Vickers, "Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace" (2017) 8 European Labour Law Journal 232, 250.

the ECHR".[206] The risk is then that that the calibration of EU and ECHR fundamental rights norms leads to an approximation with the levels of protection developed by the ECtHR, in particular in relation to the different parameters it has developed in its own proportionality test.[207]

It has been argued, for example, that the doctrine of the "margin of appreciation", imported from the case law of the ECtHR, has played a problematic role in the *Achbita* decision.[208] In particular, Advocate General Kokott argued in her opinion that regard for Member States' national identities should be factored into the proportionality test proposed by the Court.[209] This argument postulates that the lack of Union-wide consensus on the place of religion in society should yield a certain margin of discretion for Member States in relation to the implementation of the prohibition to discriminate on grounds of religion. In practice, this means balancing the prohibition of religious discrimination against other "interests", for instance the principles of *laïcité* in France and *neutralité* in Belgium.[210] While this argument did not readily transpire from the Court's decision in *Achbita*, the outcome of the proportionality test in fact accommodates such a consideration and the argument recurred in subsequent religious discrimination cases.

For example in *Egenberger*, which concerned the scope of the derogation from the prohibition on direct discrimination for ethos-based organisations under Article 4(2) of the Directive, Advocate General Tanchev explained that "by contrast with the other grounds of discrimination listed in Article 19 TFEU, there is no sufficient consensus between national constitutional traditions on the circumstances in which differences in treatment on religious grounds may be genuine, legitimate and justified".[211] This led him to argue that religion as a protected ground possesses a special status compared to the other grounds listed in the Directive, and that Article 10 EUCFR on the freedom of religion and Article 12 on the freedom of assembly and of association should outweigh Article 21 prohibiting discrimination. According to him, Member States enjoy a "broad margin of appreciation" and the proportionality test should favour their autonomy.[212]

Despite the Court's rejection of this interpretive lens in *Egenberger*, *IR* or *Cresco*,[213] the recent *WABE* decision shows that the religious discrimination case law has been a fertile ground for consensus-based human-rights-driven framings of equality. In *WABE*, the Court explicitly confirmed the importation of the consensus-based approach and margin of appreciation doctrine from the ECtHR while pondering on whether constitutional measures protecting religious freedom could be considered "more favourable provisions" in the sense of

[206] Sharpston, *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 63.
[207] Such approximation is also problematic when it affects the definitions of core concepts under the Directive, see Opinion of Advocate General Pitruzzella, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, footnote 29.
[208] See Vickers, "Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace", 249.
[209] Opinion of Advocate General Kokott, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, paras. 125, 127.
[210] Ibid, para 38.
[211] Opinion of Advocate General Tanchev, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, para 123.
[212] Ibid, paras. 122-123.
[213] Whereas Article 17 TFEU on the 'dialogue with churches, and religious and philosophical organisations' would have yielded an outcome more favourable to churches and thereby national regulators, Article 21 EUCFR tilts the balance. See Lourenço, "Religion, discrimination and the EU general principles' gospel: Egenberger" (2019) 56 Common Market Law Review 193.

Article 8(1) of the Directive.[214] It argued that the Directive "leaves a margin of discretion to the Member States, taking into account the diversity of their approaches as regards the place accorded to religion and beliefs within their respective systems".[215] "[I]n the absence of a consensus at EU level", it indicated that "Directive 2000/78 allows account to be taken of the specific context of each Member State [to achieve] the necessary reconciliation of the different rights and interests at issue, in order to ensure a fair balance between them".[216]

The approximation of the meaning and scope of fundamental rights protected under the ECHR through Article 52(3) EUCFR risks becoming, not only an avenue for conceptual calibration and a threshold ensuring minimum levels of protection, but also an analytical "Trojan horse" importing the adjudication patterns prevailing at the ECtHR.[217] This would be problematic for several reasons. First, such an approximation risks broadening the scope of acceptable derogations and thus lowering the level of protection available under the Directive. Second, it threatens the transversal coherence of the general principle of non-discrimination across protected grounds. The external calibration of anti-discrimination norms has indeed mainly (but not uniformly) taken place in the area of religious discrimination so far, thus creating an *ad hoc* framework of protection that is hardly transplantable to other protected grounds such as sexual orientation or age. Third, such approximation of review standards, and in particular the consensus-driven proportionality test at the ECtHR, is liable to undermine the uniform interpretation of EU law across Member States. While the minimum harmonisation approach of the Directive has served to accommodate a higher level of constitutional protection of religious freedom in Germany in the *WABE* decision, the calibration of the CJEU's fundamental rights review could also go in the opposite direction and *de facto* cap levels of protection against discrimination based on Member State's margin of appreciation. Fourth, the competing interpretive paradigm that emerges from the external calibration function of EU anti-discrimination norms could override the purposive expansionism that derives from the socialisation function of the Directive. Hence, where the Charter is involved, the parallelisation of the Union's fundamental rights corpus with the ECtHR's case law threatens to create implicit tiers of scrutiny at multiple levels in the interpretation of the Directive.

6. Conclusion

Taking a bird's-eye view of recent case law, this article has shown how the recent case law on the interpretation of the Framework Employment Directive epitomises the functional polysemy of the principle of equality and non-discrimination in EU law. It has proposed a transversal explanatory framework to understand how the Court of Justice has woven together the different legal rationales and embodiments of the principle of non-discrimination when interpreting the Directive. Theorising the functional differentiation performed by the Court in the implementation of anti-discrimination norms, it identified three competing interpretive paradigms which affect the substance and level of protection against discrimination.

After offering new empirical insights in section 2, the third section showed that the Court has relied on the socialisation function of anti-discrimination norms to expand the reach

[214] In effect, the CJEU considers Germany's higher level of constitutional protection of religious freedom as more favourable provisions, which allows the referring court to give more weight to the protection against discrimination its balancing exercise.
[215] Joined cases 804/18 and 341/19 *WABE* (2021), para 86.
[216] Ibid, para 88 following Opinion of Advocate General Rantos, *IX v WABE e.V and MH Müller Handels GmbH v MJ*, para 107.
[217] Consider also Opinion of Advocate General Saugmandsgaard Øe, *Martin Leitner v Landespolizeidirektion Tirol*, para 73 and Case C-396/17, *Leitner* (2019), paras. 63-64.

of the Directive. Using the imperative of effective protection to give legal weight to the function of the Directive in boosting individual participation in labour and transnational socialisation, the Court has purposively maximised the personal and temporal scope of the Directive, strengthened its enforcement and expanded its conceptual boundaries. By contrast, where the socialisation function of anti-discrimination norms fades from the Court's reasoning, an in-depth examination of the case law shows that a "default" analytical grid of equality as consistency takes over. It generates a restrictive form of interpretation, in particular in relation to challenging concepts such as indirect and intersectional discrimination where the Court's case law remains underdeveloped on balance.

The fourth and fifth sections have shown how the constitutionalisation and Charterisation of EU anti-discrimination law have led to competing interpretive paradigms, pulling the Court's case law in contradictory directions. On the one hand, constitutional anti-discrimination norms have been used to support the integrity, coherence and uniformity of the legal framework laid out by the Directive. In so doing, these norms serve as bridges and gap-fillers and augment the reach of the Directive beyond the formal limits of its applicability. This has complemented and reinforced the expansive trend identified in section 3, but also generated tensions and a certain degree of incoherence in the articulation of legislative and constitutional norms, which could lead to future interpretive uncertainty. On the other hand, constitutional anti-discrimination norms have been used by the Court as a space for calibration with the internal fundamental rights regime and external human rights regimes. In this context, the Court has detracted from its own construction of the anti-discrimination architecture and imported some of the typical review standards and analytical patterns from fundamental and human rights adjudication into its interpretation of the Directive. In so doing, it has generated a third interpretive paradigm that clashes with its purposive expansion and augmentation approaches and is liable to curtail the protection afforded by the Directive.

Understanding the transversal trends spelled out in this article is of fundamental importance in light of the risk that the functional differentiation operated by the Court when implementing the Directive creates implicit tiers of scrutiny and differing levels of protection. Articulating the Court's recent interpretive developments in a systematic, transversal and comprehensive manner is also essential to apprehend the coherence of the complex, fragmented and multi-facetted field that is EU anti-discrimination law. Finally, the reflection proposed in this article might show relevance beyond the borders of the Directive, since the Court has used the interpretation of the Framework Employment Directive as a laboratory for normative experimentation and innovation before exporting its findings to other areas of EU law.