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**MEMORANDUM - Race Equality Directive 2000/43/EC and Charter of Fundamental
Rights**

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Regarding: Research Race Equality Directive and Charter of Fundamental Rights

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2. RESEARCH QUESTIONS

The aim of this memo is to clarify the scope and effect of the Race Equality Directive and the Charter of Fundamental Rights with regard to border police checks at airports on the basis of alleged nationality in the context of racial profiling.



3. THE RACE EQUALITY DIRECTIVE 2000/43/EC

3.1. General context and purpose of Directive 2000/43/EC

In 2000, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹ (the Race Equality Directive, RED) was enacted alongside Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Framework Equality Directive), the latter addressing discrimination on grounds of religion or belief, disability, age or sexual orientation.² Both directives were enacted in the context of a movement within EU non-discrimination law from an internal market-logic towards a social justice and fundamental rights approach, concretised by the Treaty of Amsterdam in 1997, giving the Council the competence³ to take action against discrimination on various grounds.⁴ This new paradigm was confirmed and reinforced by the introduction of the Charter of Fundamental Rights of the European Union (CFR), legally binding since 2009, specifically by its Article 21 on non-discrimination⁵, prohibiting, among others, discrimination on grounds of ‘race, colour [and] ethnic [...]origin’.

Article 1 of the RED stipulates the Directive’s general objective:

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

In this regard, in the *Runevič-Vardyn* judgement, the ECJ stated that the Directive is an expression (for the area that it covers) of the principle of equality as one of the general principles of European Union Law which is recognised in Article 21 CFR.⁶

¹ 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 L180/22.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³ Article 19 TFEU (ex Article 13 EC Treaty).

⁴ See Mathias Möschel, ‘Race Discrimination and Access to the European Court of Justice: Below’ (2013) 50 Common market law review 1433, 1433f.

⁵ *ibid* 1434.

⁶ Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius* (‘*Runevič-Vardyn and Wardyn*’) [2011] ECR I-0378, para 43.



3.2. Personal and material scope of Directive 2000/43/EC

3.2.1. Addressees of the prohibition under the directive

According to Article 3(1) of the Directive, ‘within the limits of the powers conferred upon the Community, [the] Directive shall apply to all persons, as regards both the public and private sectors, including public bodies’.

Thus, the Directive covers relationships between private parties as well as the relationship between the Member States and private parties.⁷

3.2.2. Prohibition of direct and indirect discrimination based on racial and ethnic origin

According to its Article 2(1), the Directive prohibits direct and indirect discrimination based on racial and ethnic origin. While the concepts of direct and indirect discrimination are defined in Article 2(2), the Directive does not contain an explication regarding the concepts of ‘racial’ and ‘ethnic origin’⁸.

The few successful claims based on the RED before the Court of Justice dealt with discrimination based on ethnic origin.⁹ Based on the ECtHR case law, the ECJ, in *CHEZ*, stated that the concept of ethnicity ‘has its origins in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds’ regarding Roma in Bulgaria.¹⁰ In *Jyske Finans* the Court explicitly stated that this list is not exhaustive, and that a person’s country of birth could be one of the factors determining ethnic origin.¹¹ However, according to the Court, a discrimination based solely on the country of birth cannot amount to a discrimination on the basis of ethnic origin.¹²

⁷ Astrid Epiney ‘Art. 19 (ex-Art. 13 EGV) [Bekämpfung von Diskriminierungen]’ in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht Der Europäischen Union Mit Europäischer Grundrechtecharta: Kommentar* (5. Auflage, CH Beck 2016) para 11.

⁸ Recital 6 of Directive 2000/43/EC clarifies that ‘[t]he European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories’.

⁹ See Shreya Atrey, ‘Race Discrimination in EU Law after *Jyske Finans*’ (2018) 55 *Common market law review* 625, 626.

¹⁰ Case C-83/14 *CHEZ Razpredelenie Bulgaria* AD v *Komisija za zashtita ot diskriminatsia* (‘*CHEZ*’) [2015] EU:C:2015:480, para 46.

¹¹ Case C-668/15 *Jyske Finans A/S v Ligebehandlingsævnet* (‘*Jyske Finans*’) [2017] EU:C:2017:278, para 18.

¹² *Jyske Finans*, paras 19-21.



By contrast, discrimination based on ‘racial origin’ has not yet been interpreted by the ECJ. Scholars criticize this focus on ethnic origin, the aim of the Directive being to address racism.¹³

3.2.3. Material scope

The scope of the RED is the widest of all equality directives¹⁴, as, in contrast to the Framework Equality Directive, it covers the following areas that are not directly related to employment: social protection, including social security and healthcare; social advantages, education and access to and supply of goods and services which are available to the public, including housing.¹⁵

The ECJ has repeatedly stated that the material scope must not be interpreted narrowly. In *Runevič-Vardyn*, the ECJ, after referring to Article 1 of the Directive (see above) as well as to Recital 16, stating that ‘it is important to protect all natural persons against discrimination on grounds of racial or ethnic origin’, found the following:

[I]n the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, **the scope of that directive cannot be defined restrictively.**¹⁶

This was confirmed in *CHEZ* where the Court, after using this same wording, held that the installation at the final consumer’s property of an electricity meter, falls within the scope of the Directive according to Article 3(1)(h), which states that the Directive shall apply to ‘access to

¹³ Atrey (n 9), 638ff.; see also Kimberly Liu and Colm O’Cinneide, European Commission. Directorate General for Justice and Consumers., and European network of legal experts in gender equality and non discrimination., *The Ongoing Evolution of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC: A Legal Analysis of the Situation in EU Member States.* (Publications Office 2019) 50f. <<https://data.europa.eu/doi/10.2838/307887>> accessed 23 April 2021.

¹⁴ See Liu (n 13), 48.

¹⁵ Article 3(1)(e)-(h) and Recital 12 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000 (180); see also *Runevič-Vardyn and Wardyn*, para 41.

¹⁶ *Runevič-Vardyn and Wardyn*, 43 (emphasis added).



and supply of goods and services which are available to the public, including housing’, because it is inextricably linked to the supply of electricity.¹⁷

Besides this general principle that the material scope of the Directive should be interpreted broadly, the fact that there is only a hand full of cases on the RED leads to a lack of definitions as regards its material scope defined in Article 3.

However, where the terminology is identical, there seems to be a ‘carry over’ of the case law concerning EU gender equality law to the 2000 non-discrimination directives.¹⁸ Likewise, as there is significantly more case law on the scope of the Framework Equality Directive than that of the RED, and as their scope is to a certain extent similar, the Framework Equality Directive case law could also be applied to the RED.¹⁹

3.2.4. Application: Access to and supply of goods and services which are available to the public, including housing (Article 3(1)(h) of Directive 2000/43/EC)

Are additional border police checks at an airport covered by the material scope of the RED by virtue of interfering with the access to and supply of goods and services which are available to the public under Article 3(1)(h) of the Directive?

The inclusion in the material scope of access to and supply of goods and services accessible to the public is an expression of the general wide scope of the RED and its connectedness to – universally applicable – human rights.²⁰

In its recent *Braathens Regional Aviation* ruling, the ECJ confirmed that an additional security check based on perceived ethnic origin, related to a commercial internal flight, falls within the scope of the RED:

¹⁷ *CHEZ*, paras 42f.; see also Case C-457/17 *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV* (*‘Heiko Jonny Maniero’*) [2018] EU:C:2018:912, para 36 – followed by a wide interpretation of ‘education’.

¹⁸ Liu (n 13) 45.

¹⁹ *ibid.*

²⁰ See Raphaële Xenidis, ‘Shaking the Normative Foundations of EU Equality Law: Evolution and Hierarchy between Market Integration and Human Rights Rationales’ (2017) LAW 2017/04 EUI Law 14, 25 <<https://cadmus.eui.eu/handle/1814/45489>>.



It is common ground that the dispute in the main proceedings falls within the material scope of Directive 2000/43, since it concerns conduct alleged to be discriminatory, on the grounds of racial or ethnic origin, adopted in the context of access to a service made available to the public, within the meaning of Article 3(1)(h) of that directive.²¹

Although the selection for the security check in *Braathens* was made by an employee of the Swedish regional Braathens airline and not by a public authority, this case still shows that additional security checks, allegedly discriminating on grounds of racial or ethnic origin, concern the access to services made available to the public in the meaning of Article 3(1)(h) of the Directive. Therefore, such additional checks in the context of commercial flights should be within the scope of the RED.

On the other hand, also concerning Article 3(1)(h) of the Directive, in *Runevič-Vardyn* the ECJ stated the following:

It should also be borne in mind that the preparatory work relating to Directive 2000/43, which was adopted by the Council of the European Union, acting unanimously in accordance with Article 13 EC [now Article 19 TFEU], **indicates that the Council was unwilling to take into account an amendment proposed by the European Parliament whereby ‘the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions’ would be included in the list of activities listed in Article 3(1) of that directive and thus come within its scope.**²²

This could be an argument against the inclusion of security checks by public authorities in the scope of the Directive. However, the *Runevič-Vardyn* case dealt with national rules concerning the way in which names were entered on certificates of civil status.²³ In *Runevič-Vardyn*, according to the Opinion of Advocate General Jääskinen²⁴, there was no sufficiently close link between the (public) decision taken and the access to a service.²⁵ It is a reasonable assumption that in the case of security checks at the airport such direct link exists as the selection for an

²¹ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB ‘Braathens’* [2021] EU:C:2021:269, para 31.

²² *Runevič-Vardyn and Wardyn*, para 46, (emphasis added).

²³ *ibid*, para 47.

²⁴ See *ibid*, para 45 referring to the Opinion of AG Jääskinen concerning the scope.

²⁵ *Runevič-Vardyn and Wardyn*, Opinion of AG Jääskinen, paras 60-62.



additional security check automatically affects the enjoyment of the service in question. This service available to the public can be the flight or the free access to and passage within an airport.

3.2.5. Evaluation regarding additional border police checks (access to and supply of goods and services which are available to the public)

Since the Court constantly states that the scope of the RED must not be defined restrictively and considering the recent *Braathens* ruling, explicitly stating that security checks at the airport can fall within the scope of the RED under ‘access to services’, it is likely that additional border police checks fall within its scope, too.

As the scope of the Directive explicitly includes the public sector and public bodies (Article 3(1)), the fact that the selection for the checks is decided on by a police forces does most likely not rule out that additional checks in the context of a commercial flight interfere with the access to services available to the public in the meaning of the Directive.

Yet, there seems to be a tendency in the case law (specifically the *Runevič-Vardyn* ruling) to interpret the scope more restrictively when it comes to alleged discriminations by public authorities.²⁶ However, this can probably be counterbalanced by the wording of Article 3(1) of the Directive.

3.2.6. Scope: Social advantage

The concept of social advantage has not been addressed in the context of the RED (except for a brief mention in Case C-457/17 *Heiko Jonny Maniero*). However, in the context of free movement of workers and adjacent non-discrimination rules the same concept of social advantage has been afforded a very broad definition.²⁷

In *Fiorini (née Cristini) v. SNCF*, Case 32/75 [1975] ECR 1085, 30 September 1975, according to the 2018 Handbook on European non-discrimination law, ‘the complainant was an Italian national living with her children in France, whose late husband had been a “worker” under EU

²⁶ *Runevič-Vardyn and Wardyn*, para 46.

²⁷ European Union Agency for Fundamental Rights, Handbook on European non-discrimination law (Publications Office of the European Union 2018), 123.



law. The French railways offered concessionary travel passes for large families but refused such a pass to Ms Cristini on the basis of her nationality. It was argued that “social advantages” for the purposes of EU law were only those advantages that flowed from a contract of employment. The ECJ disagreed, finding that the term should include all advantages regardless of any contract of employment, including passes for reduced rail fares’.²⁸

In *Criminal Proceedings against Even*, Case 207/78 [1979] ECR 2019, 31 May 1979 (para 22), the ECJ defined the concept of social advantages as: ‘which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States, therefore, seems suitable to facilitate their mobility within the Community’.²⁹

Thus ‘essentially, in the context of free movement, a social advantage relates to any advantage that is capable of assisting the migrant worker to integrate into the society of the host state’ and ‘[t]he courts have been quite liberal in finding an issue to be a social advantage’.³⁰ Examples have included:

- ‘the payment of an interest-free “childbirth loan”. Despite the rationale behind the loan being to stimulate childbirth, the ECJ considered this to be a social advantage as it was viewed as a vehicle to alleviate financial burdens on low-income families;³¹
- the awarding of a grant under a cultural agreement to support national workers to study abroad;³²
- the right to hear a criminal prosecution against an individual in the language of their home state³³.³⁴

²⁸ Ibid.

²⁹ See *ibid.*

³⁰ *ibid.*, 124.

³¹ Case 65/81 *Reina v. Landeskreditbank Baden-Württemberg* [1982] ECR 33.

³² Case 235/87 *Matteucci v. Communauté française of Belgium*, [1988] ECR 5589.

³³ Case 137/84 *Criminal Proceedings against Mutsch* [1985] ECR 2681.

³⁴ European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law* (Publications Office of the European Union 2018), 125.



The term social advantage is most likely used deliberately in the RED to correspond with the existing broad interpretation used in the context of free movement. However, due to the lack of case law on this link, this has not been explicitly confirmed. Further research would be required.

3.3. Direct effect

Direct effect refers to the idea that an EU law provision becomes an immediate source of law for the national court or administration. Direct effect is closely linked to the principle of EU primacy which states that all national provisions, however framed should respect EU primacy. For an EU law to have direct effect it must firstly satisfy the *Van Gend en Loos* criteria, namely that the law is clear, precise and unconditional.³⁵ Moreover, given that Directives are to be transposed into national law, they in principle only have direct effect when the *Van Gend en Loos* criteria are fulfilled and when the transposition period has passed and they have not been transposed.³⁶ However, directives may only have vertical direct effect meaning that citizens can only invoke their rights in relation to the state³⁷. Nevertheless, it is important to note that in instances where the party is an emanation of the state, by fulfilling the so-called *Foster* criteria³⁸, then direct effect can also be invoked against these.

The transposition deadline of the RED was back in 2003, and the Directive has been transposed into Dutch Law. Therefore, it should be this transposition from which the rights are derived. Nevertheless, if this is done incorrectly or incompletely, it is possible to directly invoke the RED, within a vertical situation, against the Dutch State. Moreover, it is important to note that directives do have Indirect Effect, meaning that the principle of primacy still applies to the transposed directive. Therefore, if the Dutch transposition of the Directive is not in line with the RED, it must be rendered inapplicable for it would constitute a violation of EU law, or if possible, Dutch law must be interpreted in line with the RED.

³⁵ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR.

³⁶ Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337, para 12.

³⁷ Case C-91/92, *Paola Faccini Dori v Recreb Srl* [1994] ECR 03325, para 25.

³⁸ Case C-188/89 A. *Foster and others v British Gas plc* [1990] ECR 03313.



3.4. Direct and Indirect Discrimination

According to Article 2(1) of the Directive, ‘the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin’. Furthermore, Article 2(2) defines direct discrimination ‘to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’,³⁹ while indirect discrimination is understood ‘to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.⁴⁰

Therefore, while direct discrimination is more overt, indirect discrimination is harder to identify and consequentially proof. Nevertheless, the differentiation between these two is very important as the justification for the behaviour is different. Direct discrimination is harder to justify as so can only be done under specific conditions and for specific reasons. However, indirect discrimination can be justified under less strict conditions.

4. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

4.1. General applicability of the CFR to measures by Member States – Article 51(1) CFR

According to the first sentence of Article 51(1) of the CFR the provisions of the Charter are addressed to the Member States ‘only when they are implementing Union law’. ‘Union law’ within the meaning of Article 51(1) includes the entire primary law, secondary and tertiary EU law.⁴¹ Thus all ‘situations governed by European Union law’ are accompanied by fundamental rights guarantees under the Charter.⁴²

³⁹ Directive Art 2(2)(a).

⁴⁰ Directive Art 2(2)(b).

⁴¹ Hans Jarass ‘Art. 51 Anwendungsbereich’ in Hans D Jarass, *Charta der Grundrechte der Europäischen Union unter Einbeziehung der sonstigen Grundrechtsregelungen des Primärrechts und der EMRK: Kommentar* (2021) para 20.

⁴² Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (‘Åkerberg’) [2013] EU:C:2013:105, para 19.



In general, the ECJ interprets ‘implementing the Union law’ very broadly. In the landmark case *Åkerberg Fransson* the Court ruled that the existence of general obligations of the Member State under (primary or secondary) EU law related to the national act in question suffices to establish an ‘implementation of EU law’ for the purpose of Article 51(1) CFR.⁴³ It is thus not necessary that the national act in question transposes EU law (in the sense of Article 288(3) TFEU) for the Charter to be applicable, ‘acting within the scope of EU law’ is enough.⁴⁴

However, in *Hernández* the ECJ clarified that ‘the concept of “implementing Union law”, as referred to in Article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other’.⁴⁵ In particular, it does not suffice that a national measure comes within in area where the Union has competences.⁴⁶ In general, subsequent to *Åkerberg Fransson*, the Court seems to be returning to a narrower approach concerning application of the Charter to measures of Member States and the approach seems to depend on the area concerned.⁴⁷

4.2. Article 21(1) TFEU and Article 51(1) CFR

As the concept of ‘implementing Union law’ under Article 51(1) CFR includes all primary law (see above), it is conceivable that national measures directly linked to the use of the right to free movement granted to Union citizens under Article 21(1) TFEU fall within the scope of the Charter. The ECJ has, however, not yet delivered a ruling on this matter. In *Alokpa*, despite the referring court explicitly mentioning the CFR in the context of free movement under Article 21(1) TFEU, the ECJ did not elaborate on the issue of applicability of the Charter in such situation.⁴⁸

⁴³ *Åkerberg*, paras 25-27.

⁴⁴ See *Åkerberg*, para 28.

⁴⁵ Case C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others (‘Hernández’)* [2014] EU:C:2014:2055, para 34.

⁴⁶ *Hernández*, para 36.

⁴⁷ See Eleanor Spaventa, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights : The Dilemma of Stricter or Broader Application of the Charter to National Measures* (Study for the Peti Committee) (Publications Office of the European Union, 2016) 23ff. <<http://op.europa.eu/en/publication-detail/-/publication/0fde0886-dac5-11e5-8fea-01aa75ed71a1/language-en>> accessed 30 April 2021.

⁴⁸ Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l’Emploi et de l’Immigration (‘Alokpa’)* [2013] EU:C:2013:645, paras 19, 37; see Spaventa (n 47) 23.



4.3. Article 21(1) CFR

Article 21(1) states:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

As a preliminary remark, it is worth noticing that the prohibition of discrimination on the grounds listed in this provision is closely linked to human dignity (Article 1 CFR), because those grounds are mostly unchangeable characteristics.⁴⁹

Article 21 CFR recognises the principle of equality, which is a general principle of EU law.⁵⁰ The prohibition contained in Article 21 is an enforceable right⁵¹ as it is ‘sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law’.⁵²

The ECJ’s *Egenberger* and *Cresco Investigation GmbH* rulings illustrate the far-reaching effects of Article 21 CFR. In both judgements the fundamental importance of the prohibition to discriminate⁵³ was illustrated by the fact that it was even applicable among private parties where they could not rely on the respective secondary law (Directive 2000/78/EC)⁵⁴, due to a lack of direct effect.

This function of Article 21 CFR to protect individuals from discrimination where they are not protected otherwise should also be taken into consideration regarding racist discrimination and in the context of the RED.

⁴⁹ Matthias Rossi, ‘EU-GRCharta Artikel 21 Nichtdiskriminierung in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht Der Europäischen Union Mit Europäischer Grundrechtecharta: Kommentar* (5. Auflage, CH Beck 2016) para 3.

⁵⁰ *Runevič-Vardyn and Wardyn*, para 43 (see above).

⁵¹ Hans Jarass, ‘Art. 21 Nichtdiskriminierung’ in Hans D Jarass, *Charta der Grundrechte der Europäischen Union unter Einbeziehung der sonstigen Grundrechtsregelungen des Primärrechts und der EMRK: Kommentar* (2021), para 3.

⁵² Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (‘*Egenberger*’) [2018] EU:C:2018:257, para 76.

⁵³ Both cases deal with discrimination on grounds of religion in the context of Directive 2000/78/EC.

⁵⁴ Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* [2019] EU:C:2019:43, para 78; *Egenberger*, para 82.



4.3.1. Relationship to Article 14 ECHR

The relationship between Article 14 ECHR and Article 21 CFR must in principle be examined in the light of Article 52(3) CFR which states:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Yet, the two provisions have different structures as Article 14 ECHR is an accessory right⁵⁵ while Article 21 CFR is not restricted to the rights granted under the CFR. It is thus conceivable that Article 21 CFR has a broader scope than Article 14 ECHR in the sense of being applicable, regardless of another fundamental right under the Charter being affected.

4.4. Application to additional border police checks at an airport (Article 21(1) CFR)

With regard to Article 52(1) CFR, additional border police checks qualify as ‘implementing EU law’ provided the applicability of the RED to those checks that has been explored above.

Additional border police checks and risk profiles, insofar as they include (perceived) race and/or ethnic origin as a selection criterion, qualify as a prohibited discrimination under Article 21(1) CFR.

5. ALLEGED NATIONALITY

According to a report of the European network of legal experts in gender equality and non-discrimination, ‘[e]xperts argue that nationality is a proxy of racial or ethnic origin and hold that as a minimum, discrimination based on nationality should amount to indirect discrimination

⁵⁵ Sven Hölscheidt, ‘Art. 21 Nichtdiskriminierung’ in Jürgen Meyer and Sven Hölscheidt, *Charta der Grundrechte der Europäischen Union* (5. Auflage 2019, Nomos), para 4.



under the RED'⁵⁶. Further, 'it suffices to establish that the aggrieved person was perceived as not of the majority ethnic origin, that is as foreign or an immigrant' and '[l]abels such as Roma, Moroccan and Russian signify non-majority ethnicity'.⁵⁷

According to the analysis in the report mentioned above, in *Feryn*⁵⁸, the ECJ held 'that direct discrimination based on racial or ethnic origin arose from the less favourable treatment of Moroccans/immigrants' and '[e]ven though the nationality of potential victims was not discussed in the judgment, given the lack of explicit limitation of its scope to Belgian nationals, protection is extended to the racially targeted groups regardless of the immigration status of their individual members'.⁵⁹

In *Meister*⁶⁰, 'the racial or ethnic origin was signified by a foreign (Russian)-sounding name and a foreign diploma'.⁶¹

Moreover, the report of the European network of legal experts in gender equality and non-discrimination summarises that 'the relationship between discrimination on grounds of ethnic origin, nationality and place of birth in *Jyske Finans*⁶² can be characterised as follows: when comparing the treatment of Danish nationals who objectively differ in relation to their place of birth (within or outside the borders of EU or EEA countries), account being taken of other proxies, such as their names and nationality at birth, it may be assumed that direct or indirect discrimination has taken place on the basis of racial or ethnic origin'.⁶³

Overall, the concept of 'alleged nationality' has not been explored further in the case law and additional research would be advised, mainly in academic sources.

⁵⁶ Lilla Farkas, The meaning of racial or ethnic origin in EU law: between stereotypes and identities (European Commission 2017), 111 (citation omitted).

⁵⁷ *ibid*, 112.

⁵⁸ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] EU:C:2008:397.

⁵⁹ Lilla Farkas, 'The meaning of racial or ethnic origin in EU law: between stereotypes and identities' (European Commission 2017), 112.

⁶⁰ Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] EU:C:2012:217.

⁶¹ Lilla Farkas, 'The meaning of racial or ethnic origin in EU law: between stereotypes and identities' (European Commission 2017), 112.

⁶² Case C-668/15 *Jyske Finans A/S v Ligebehandlingsævnet ('Jyske Finans')* [2017] EU:C:2017:278.

⁶³ Lilla Farkas, 'The meaning of racial or ethnic origin in EU law: between stereotypes and identities' (European Commission 2017), 113.