

# The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*

Elise Muir\*

*Head of the Institute for European Law, KU Leuven and Visiting Professor, College of Europe*

## Abstract

*This paper investigates the relationship between legislative provisions and fundamental rights by analyzing the Egenberger, IR, Bauer, Max-Planck and Cresco cases. This paper understands these cases as an invitation to reflect on whether, and if so, to what extent, EU fundamental rights' legislation, read in conjunction with the Charter, could have an impact on the scope of application, substance and/or legal effects of the Charter. This paper argues that the Court of Justice's recent case law can be understood as allowing for EU legislative guidance on fundamental rights to interact in an upward process with the rights enshrined in norms with the same rank as EU primary law. This paper sheds light on the constitutional implications of the overlaps between legislation and constitutional norms on fundamental norms while other contributions in this special issue address effectiveness and the right to an effective remedy in a broader sense.*

## I. Introduction

For almost two decades now, EU institutions have been developing a legislative *acquis* that puts flesh on the bones of specific fundamental rights. Common examples are EU legislation in the field of anti-discrimination, and EU legislation on the right to a fair trial in criminal proceedings.<sup>1</sup> The legislative instruments employed show a complex relationship with the fundamental rights to which they give expression. They seek to strike a balance between that right, on the one hand, and other fundamental rights or key EU interests, on the other.

---

\* DOI 10.7590/187479819X15840066091312 1874-7981 2019 Review of European Administrative Law

This paper is part of a reflection on EU fundamental rights law supported by the European Research Council.

<sup>1</sup> E.g. Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty, and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1. See further the contribution by Valsamis Mitsilegas in this Special Issue.

That complexity is further shown through judicial review, as well as judicial interpretation of legislative instruments giving expression to fundamental rights, which inevitably exposes competing visions of the design and scope of the said fundamental rights. The legislature's approach may diverge from that of the Court of Justice of the European Union ('the Court'), or of other European courts. The sensitivity of the matter has been particularly well illustrated in recent years by cases such as *Test-Achats*<sup>2</sup> in which the Court declared that part of the Directive on equal treatment between men and women in the access to and supply of goods and services<sup>3</sup> was invalid. Similarly, the series of cases and legislative revisions related to mutual trust in the Area of Freedom, Security and Justice (AFSJ), in relation to the Dublin system as well as the European Arrest Warrant, shed light on the difficulties of articulating the protection of fundamental rights and the proper functioning of the area without internal borders through EU legislation.<sup>4</sup>

In these well-known cases, fundamental rights enshrined in norms having the legal value of primary EU law have acted as a benchmark against which legislative developments at the EU level were checked. The competing visions of the EU legislature, the Court as well as the European Court for Human Rights have attracted much attention. The underlying tension can be conceptualised in fairly traditional terms: legislation was being tested against, or interpreted in light of, higher ranking norms.

Yet, what if EU secondary law could also influence the content and scope of EU fundamental rights protected at the level of primary law? This reverse process, by which EU legislation may influence the fundamental rights enshrined in instruments such as the Charter of Fundamental Rights of the European Union ('the Charter'), has been subject to very little academic attention to date. Several Court rulings from the past few months, *Egenberger*, *IR*, *Bauer*, *Max-Planck* and *Cresco*,<sup>5</sup> suggest that a conceptual shift in that direction may

---

<sup>2</sup> Case C-236/09 Association Belge des Consommateurs Test-Achats and Others EU:C:2011:100. G.T. Davies, 'Legislative control of the European court of justice' [2014] *CML Rev* 1579, 1595-1598. See also C. Töbler, 'Annotation of Test-Achats' [2011] *CML Rev* 2041.

<sup>3</sup> Directive 2004/113/EC of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

<sup>4</sup> K. Lenaerts, 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust' [2017] *CML Rev* 805; S. Prechal, 'Mutual Trust before the Court of Justice of the European Union' [2017] *European Papers* 75; T. Tridimas and G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' [2019] *German Law Journal* 794.

<sup>5</sup> 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; 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; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* EU:C:2018:874; Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* EU:C:2019:43.

be happening. As a contribution to this Special Issue on the relationship between legislative provisions and fundamental rights, this paper understands these cases as an invitation to reflect on whether, and if so, to what extent, EU fundamental rights' legislation, read in conjunction with the Charter, could have an impact on the scope of application, substance and/or legal effects of the Charter.

This approach to the relationship between legislation and fundamental rights is somewhat counter intuitive. It requires thinking that a derivative norm can affect features of a higher-ranking constitutional norm. Fundamental rights lawyers are traditionally used to fundamental rights norms looking hierarchically downwards, that is, being used as benchmarks, as well as filtering through the decision-making process in a number of sophisticated ways.<sup>6</sup> Nevertheless, it will be argued that the Court's recent case law can be understood as allowing EU legislative guidance on fundamental rights to interact with the rights enshrined in norms having the same rank as EU primary law, in an upward process. The selected cases only relate to the fundamental right to an effective remedy to a marginal extent, unlike other contributions to this volume. Nevertheless, this contribution sheds light of the types of constitutional implications that may derive from overlaps between legislation and constitutional norms on fundamental rights.

The upward process thereby introduced does not concern many fundamental rights yet, but the approach is rapidly expanding. As we shall see, it is driven by reference to the notion of effective judicial protection and raises several important constitutional questions. I will therefore map out the main features of the latest Court case law on horizontal effects of Charter provisions given expression to in EU directives (2). The cases have been selected because they show a particularly interesting interplay between the Charter and legislation which is one of the central themes of this Special Issue (2). I will then critically reflect on how these cases may be defining the future conditions for the horizontal direct effect of the Charter (3). I will conclude in favour of a narrow reading of this new line of cases (4).

## 2. The horizontal effects of provisions of the Charter given expression in EU directives

It has been observed that the wording of Article 19 TFEU, the legal basis for the adoption of anti-discrimination legislation, was 'conspicuously

---

<sup>6</sup> As usefully examined by M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge: Cambridge University Press 2017).

and deliberately neutered, lacking any statement of principle which could be seen as implicitly addressing an obligation to Member States'.<sup>7</sup> Despite this cautious approach of the Treaty makers, the Court has in recent years made innovative use of the provisions of the directives adopted on that legal basis in conjunction with fundamental rights protected at the constitutional level, to extend the possibility to invoke the right to equal treatment not only against the Member States, but also against private parties. This case law on the horizontal effects of the prohibition of discrimination, now enshrined in Article 21(1) of the Charter (2.1.), has also been swiftly extended to the fundamental right to an annual period of paid leave enshrined in Article 31(2) of the Charter (2.2.). In outlining the main features of each of these new lines of case law, I will identify the main characteristics they have in common.

## 2.1. Horizontal effects of the prohibition of discrimination

The body of the Court's case law on the horizontal direct effect of the prohibition of discrimination has its origins in rulings on the fundamental right to equal treatment protected as a general principle of EU law, then developing into a new line of cases on the corresponding right, as enshrined in Article 21(1) of the Charter.

### 2.1.1. From the rulings on the general principle of non-discrimination ...<sup>8</sup>

In the *Mangold* ruling,<sup>9</sup> the findings of which were confirmed with greater precision in *Kücükdeveci*,<sup>10</sup> it was emphasized that EU legislation adopted on the basis of Article 19 TFEU only gives expression to a pre-existing fundamental right protected as a general principle of EU law. The Court filled in the constitutional void created by the open-ended wording of Article 19 TFEU. Ms Küçükdeveci sued her private employer for breach of an obligation enshrined in Directive 2000/78<sup>11</sup>, also known as the Framework Employment Directive, which prohibited age discrimination in employment. The employer had made use of a national law provision that excluded periods of employment completed before the age of 25 from the duration that she had been employed for the

<sup>7</sup> L. Flynn, 'The Implications of Article 13 EC – after Amsterdam, will some forms of discrimination be more equal than others?' [1999] CML Rev 1127, 1133.

<sup>8</sup> I do not wish to elaborate here on the distinction between equal treatment and non-discrimination as the Court seems to pay little attention to the distinction itself.

<sup>9</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709.

<sup>10</sup> Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* EU:C:2010:21.

<sup>11</sup> Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2002] OJ L303/16.

purpose of calculating the notice period for dismissal. The Court requested that the referring court set aside - if need be - the national law provision. This was because it ran counter to the general principle of EU law prohibiting age discrimination<sup>12</sup> as set out concretely in the Framework Employment Directive. This finding was held to apply even in a dispute between private parties.<sup>13</sup> This has also been subsequently confirmed, although in slightly different terms.<sup>14</sup>

A first consequence of this approach is that the existence of secondary legislation giving specific expression to a fundamental right protected as a general principle<sup>15</sup> allows EU law to have a direct impact on the outcome of a dispute between private parties. This outcome surprised observers familiar with the traditional case law of the Court: directives cannot be relied upon against other private parties in national courts.<sup>16</sup> But perhaps more importantly for our purposes, the Court relied on legislation combined with a general principle to reach a result close to what would have been achieved if Article 19 TFEU had been modelled on Article 45 TFEU, prohibiting nationality discrimination against EU workers, or Article 157(1) TFEU, prohibiting gender discrimination in wages. The drafters of Article 19 TFEU however had intended to avoid precisely such development.<sup>17</sup> Article 19 TFEU does not itself prohibit discrimination; it merely enables the legislator to do so.

The 'emptiness' of Article 19 TFEU is partly compensated for by the wording of Article 21 of the Charter, which explicitly prohibits discrimination on certain grounds - including those covered by Article 19 TFEU. The wording of Article 21 of the Charter was inspired by that of Article 19 TFEU, as well as Article 14 of the European Convention on Human Rights (ECHR), and Article 11 of the Convention on Human Rights and Biomedicine.<sup>18</sup> Nevertheless, Article 21 of the Charter and Article 19 TFEU each have different constitutional functions.

---

<sup>12</sup> In subsequent cases, an explicit link was made between the general principle prohibiting discrimination on grounds of age and Article 21(1) of the Charter. E.g. CJEU, Case C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT and Others* EU:C:2014:2, para. 47.

<sup>13</sup> A. Arnulf, 'Editorial, 'Out with the Old' [2006] *European Law Review* 1; M. de Mol, 'The Novel Approach of the Court on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' [2011] *Maastricht Journal of European and Comparative Law* 109, para. IV.3.a.

<sup>14</sup> Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:2016:278.

<sup>15</sup> And more precisely, a general principle of EU law in the cases at hand.

<sup>16</sup> See for instance E. Muir, 'Of ages in - and edges of - EU law' [2011] *CML Rev* 39.

<sup>17</sup> L. Flynn, 'The Implications of Article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others?' [1999] *CML Rev* 1127, 1129 and 1132-1133.

<sup>18</sup> E. de Smijter and K. Lenaerts, 'A "Bill of Rights" for the European Union' [2001] *CML Rev* 273, 283.

Article 21 of the Charter is a benchmark against which to carry out constitutional review, whereas Article 19 TFEU allocates and regulates the exercise of EU competences. Reliance on Article 21 of the Charter to regulate a situation, that instruments adopted on the basis of Article 19 TFEU may not in and of themselves regulate, could therefore appear surprising. It could be perceived as circumventing the functional divide between the Charter on the one hand, understood as an instrument for constitutional review that is not intended to extend the competences of the Union<sup>19</sup>; and the EU Treaties on the other hand, understood as instruments allocating and regulating EU competences.

A second consequence of the *Mangold* and *Kücükdeveci* rulings relates to the way the Court, *after* asserting the constitutional status of the equal treatment norm at hand and giving it unprecedented effects, examines the case on the basis of the legislative text: the reasoning combines the substance of the legislation with the legal effects of the constitutional right. In *Ajos*, the Court further built on this approach. It was held that the Framework Employment Directive gives concrete expression to the principle of equal treatment. The Directive, noted the Court, is intended to facilitate the practical implementation of the principle by specifying exceptions to the principle.<sup>20</sup> Furthermore, the principle can only be directly applicable to disputes between private parties in situations that fall within the scope of the said Directive.<sup>21</sup> As will be discussed later in this Article, the two layers of norms are thus tied up in a very intimate relationship.

#### 2.1.2. ...to the rulings on Article 21(2) of the Charter: Egenberger

In the years immediately after these rulings, there was some hesitation as to whether the chosen solution could apply to branches of the prohibition of discrimination other than age, as well as to the prohibition of discrimination enshrined in Article 21(1) of the Charter, instead of the related general principle.<sup>22</sup> The Court gave a clearly positive answer to both extensions in the *Egenberger* case of April 2018:

---

<sup>19</sup> Consolidated Version of the Treaty on European Union [2008] OJ C15/13 (TEU), art 6(1); *EU Charter of Fundamental Rights*: Charter of Fundamental Rights of the European Union [2010] OJ C83/389 (Charter), art 52(7).

<sup>20</sup> Case C-441/14 *Ajos* EU:C:2016:278, para. 23.

<sup>21</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Employment Directive), paras 24-25.

<sup>22</sup> E.g. AG Mazák, Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* EU:C:2007:604, paras 133 to 138; X. Groussot, L. Pech and G.T. Petursson, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' [2011] Eric Stein Working Paper 24, 29.

'The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, 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 [...]'<sup>23</sup>

Ms Egenberger had been shortlisted in Evangelisches Werk's recruitment process, which included producing a report on all forms of racial discrimination. She was not however selected to be interviewed. It appeared that Ms Egenberger had no religious affiliation, whereas the successful candidate was a 'Protestant Christian active in the Berlin regional church'.<sup>24</sup> She brought a claim for compensation against Evangelisches Werk alleging discrimination on the ground of religion. However, under national law, a difference of treatment on the ground of religion in the context of employment with religious bodies and affiliated organisations was lawful if a particular religion was a justified occupational requirement.

The Court first examined the compatibility of the national rule with the content of the Framework Employment Directive, including the prohibition of discrimination on religious grounds;<sup>25</sup> second, it examined the practical implications of the finding of a breach of the directive in a dispute between private parties.<sup>26</sup> On the second point, the Court recalled the traditional approach according to which national law ought to be interpreted in conformity with EU law.<sup>27</sup> It then formulated a new approach in the event that such consistent interpretation would not be possible.<sup>28</sup> Building on a dynamic initiated in *Küçükdeveci*, the Court stated that the Framework Employment Directive 'does not itself establish the principle of equal treatment in the field of employment and occupation'.<sup>29</sup> Instead, Article 21(1) of the Charter could be directly relied upon to the effect that the national court would be required to guarantee the full effectiveness of, *inter alia*,<sup>30</sup> Article 21 of the Charter 'by disapplying if need be any contrary provision of national law'.<sup>31</sup>

---

<sup>23</sup> *Egenberger* (n 5), para. 76.

<sup>24</sup> *Ibid* [26].

<sup>25</sup> *Ibid* [42]-[69].

<sup>26</sup> *Ibid* [70] et seq.

<sup>27</sup> *Ibid* [71]-[74].

<sup>28</sup> *Ibid* [75] et seq.

<sup>29</sup> *Ibid* [75].

<sup>30</sup> I will come back to the other provisions and Article 47 of the Charter, discussed in *Egenberger* below.

<sup>31</sup> *Egenberger* (n 5), para. 76.

The main features of the rulings in *Mangold* and *Kücükdeveci*, were thereby repeated. The Court granted horizontal effect to the prohibition of discrimination with direct reference to EU constitutional norms, now reflected in Article 21(1) of the Charter. The Court also examined the substance of the case on the basis of the provisions prohibiting discrimination on the ground of religion as enshrined in EU legislation. This approach has been reiterated in two more recent rulings: *IR* and *Cresco*.<sup>32</sup>

In the latter, the Court specified the legal implications of relying on Article 21 of the Charter in a horizontal dispute. It went beyond asserting the duty of the national court to disapply provisions of national law. The Court stated that:

‘where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category.’<sup>33</sup>

It is remarkable that these positive duties result from the legal effects of Article 21(1) of the Charter that is being relied upon against a private employer,<sup>34</sup> albeit only until there is new legislative intervention by domestic authorities.

### 2.1.3. A common denominator: the prohibition of discrimination enshrined in the Framework Employment Directive

There is little doubt that this line of cases enhances the effects of the prohibition of discrimination enshrined in EU secondary law, read in conjunction with Article 21(1) of the Charter. I will use the language of horizontal direct effect borrowed from the Court itself in these cases, to refer to the legal effects described above.<sup>35</sup>

<sup>32</sup> *IR* (n 5); *Cresco* (n 5).

<sup>33</sup> *Cresco* (n 5), para. 79.

<sup>34</sup> Contrast with CJEU, Case 71/85 *State of the Netherlands v Federatie Nederlands Vakbeweging* EU:C:1986:465, where similar legal effects were derived from reliance on the provisions of a directive against a public authority. In opposition to the Court’s approach in *Cresco*, see: AG Bobek, *Cresco* (n 5), 146-196; I. Rossi, ‘The Küçükdeveci ambiguity: “derivative” horizontal direct effect of directives?’ [2019] EU Law Analysis <http://eulawanalysis.blogspot.com> date accessed 17 July 2019, last Section.

<sup>35</sup> E.g. In *Bauer and Willmeroth* the Court first observes that Article 7 of the Working Time Directive itself may not have ‘horizontal direct effect’ before calling for an examination of Article 31(2) of the Charter to obtain the same legal effects; CJEU, *Bauer and Willmeroth* (n 5), paras 70-75 *versus* paras 76 and 92. Please note that there is an academic debate, with which I will not engage for the purpose of this paper, on the tension between the notions of horizontal direct effect and primacy. See for instance: E. Muir, ‘Of ages in – and edges of – EU law’ [2011] CML Rev 39; AG Bobek, *Cresco* (n 5), paras 125-138.



In *AMS*, the Court had already read its earlier ruling in *Küçükdeveci* as meaning that the horizontal effects of the prohibition of discrimination enshrined in Article 21(1) of the Charter derived from that provision alone. The legal effects of the fundamental right to equal treatment enshrined in the Charter, are thereby understood to be independent from the legal effects of the Framework Employment Directive.<sup>36</sup> The recent rulings on Article 21(1) of the Charter formalise the disjunction between legislative and constitutional versions of the right: unlike the early rulings where it systematically referred to ‘the principle of non-discrimination on grounds of age, *as given expression* in Directive 2000/78’ (emphasis added),<sup>37</sup> the Court now devotes entire paragraphs to Article 21(1) of the Charter alone.<sup>38</sup>

Nevertheless, and despite the Court’s narrative on disconnecting the legislative and constitutional lawyers of norms, in each of the cases on Article 21(1) of the Charter to date, *Egenberger*, *IR* and *Cresco*, the Court heavily relies on *both* layers of norms. Systematically rewording the questions asked by national courts,<sup>39</sup> the Court analyses the substance of the Framework Employment Directive to conclude that there is a violation of EU law, before moving on to investigate the practical and procedural consequences of that finding in a dispute between private parties.<sup>40</sup> As a consequence, and despite the Court’s narrative on the disjunction between the legislative and constitutional lawyer of norms, the legislative instrument acts as the common denominator of these cases.

## 2.2. Horizontal effects of the right to annual paid leave

The Court has considered several attempts to draw parallels between EU anti-discrimination and other policies.<sup>41</sup> A set of causes related to EU social rights has been particularly interesting. Perhaps unsurprisingly, these cases concerned two directives belonging to the EU social *acquis*, an area of EU law which is mainly intended to regulate private relationships and does so by means of directives. It thus provides a wealthy terrain to test the relevance of the *Küçükdeveci* case law on the effects of directives that give expression to a fundamental right in disputes between private parties. Initially, the Court

<sup>36</sup> *AMS* (n 12), para. 47; see also AG Bot, *Bauer and Willmeroth* (n 5), paras 73-79.

<sup>37</sup> E.g. *Seda Küçükdeveci v Swedex GmbH & Co. KG* (n 10), para. 56; see also, although the expression is used less consistently in that ruling: CJEU, *Ajos* (n 14), para. 42.

<sup>38</sup> *Egenberger* (n 5), paras 76-80; CJEU, *IR* (n 5), paras 67-70; CJEU, *Cresco* (n 5), paras 75-87.

<sup>39</sup> *Egenberger* (n 5), para. 70; CJEU, *IR* (n 5), para. 62; *Cresco* (n 5), para. 35.

<sup>40</sup> *Egenberger* (n 5), see paras 42-69 on the substance of the case; CJEU, *IR* (n 5), see paras 38-61 on the substance of the case; *Cresco* (n 5), see paras 35-69 on the substance of the case.

<sup>41</sup> E.g. AG Trstenjak in Case C-101/08 *Audiolux SA e.a. v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* EU:C:2009:410, paras 76-113.

carefully sought to distinguish these specific policy areas from anti-discrimination instruments, but that trend is, at least to some extent, in the process of changing.

### 2.2.1. Initial hesitations on expanding the case law on horizontal effects of fundamental rights beyond the scope of non-discrimination

In *Dominguez*<sup>42</sup> and *Fenoll*,<sup>43</sup> Directive 2003/88 on certain aspects of the organisation of working time (the ‘Working Time Directive’) was considered.<sup>44</sup> Directive 2002/14, examined in the *AMS* case, establishes a general framework for informing and consulting employees in the EU (the ‘Information and Consultation Directive’).<sup>45</sup> The implementation periods of both directives had expired at the time of the disputes.

The provisions of each of the directives that were the subject of litigation in these cases overlapped in terms of subject matter with Charter provisions. Article 7 of the Working Time Directive regulates the right to annual paid leave, as does Article 31(2) of the Charter. Article 3(1) of the Information and Consultation Directive defines its scope of application of the duties to consult and inform employees, while Article 27 of the Charter relates to workers’ right to information and consultation within the undertaking. The Court asserted that both Article 7(1) of the Working Time Directive and Article 3(1) of the Information and Consultation Directive were sufficiently unconditional and precise to be capable of direct effect.<sup>46</sup> There was thus a great similarity with the legal context of the *Mangold* and *Küçükdeveci* cases, where there was an overlap between Article 6(1) of the Framework Employment Directive on age discrimination and the general principle of non-discrimination, also enshrined in Article 21(1) of the Charter.

Despite these similarities, the Court decided not to apply the logic set out in the *Küçükdeveci* case law to the social provisions at hand. It did not understand

---

<sup>42</sup> Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* EU:C:2012:33.

<sup>43</sup> Case C-316/13 *Gérard Fenoll v Centre d’aide par le travail “La Jouvène” and Association de parents et d’amis de personnes handicapées mentales (APEI) d’Avignon* EU:C:2015:200.

<sup>44</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

<sup>45</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80/29.

<sup>46</sup> *Dominguez* (n 42), paras 33-37 and *AMS* (n 12), para. 35.

the secondary legislation as having a special relationship to fundamental social rights: instead, the Court's analysis focused on secondary legislation only.<sup>47</sup> In *Dominguez*, the Court noted that the dispute was between private parties and recalled that the Working Time Directive could not 'of itself' apply to the dispute.<sup>48</sup> No reference was made to Article 31(2) of the Charter, or to a possible general principle of EU law.<sup>49</sup> In *Fenoll*, the Court relied on the timeframe of the claim to dismiss the reference to the Charter. The binding effects of the Charter had not been asserted at the time of the facts.<sup>50</sup> Furthermore, the Court remained silent on the existence of a fundamental right protecting the entitlement to annual paid leave.<sup>51</sup>

In *Dominguez* and *Fenoll* the Court therefore reasoned exclusively on the basis of secondary law. There was also no discussion on the interplay between constitutional norms and secondary legislation. This approach contrasts with the ruling in the *AMS* case on information and consultation of employees. Here, the Court explicitly distinguished the legal setting to which information and consultation of workers belongs from that of anti-discrimination. The demarcation was made by reference to the design of the constitutional norm. The Court noted, in novel terms and as an *obiter dictum*, that the principle of non-discrimination on the ground of age, at issue in *Küçükdeveci* and laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may invoke as such.<sup>52</sup>

The Court decided in *AMS* that in contrast to Article 21, Article 27 of the Charter must be given more specific expression to under EU or national law.<sup>53</sup> It therefore cannot, as such, be invoked in a dispute to conclude that the national provision which is not in conformity with the Information and Consultation Directive should be set aside.<sup>54</sup> Furthermore, the weakness of Article 27 of the Charter cannot be moderated by considering that article in conjunction with the provisions of the Information and Consultation Directive 'given that, since

---

47 See also, more recently: Case C-306/16 *António Fernando Maio Marques da Rosa v Varzim Sol – Turismo, Jogo e Animação*, SA EU:C:2017:844, para. 50.

48 *Dominguez* (n 42), para. 42.

49 See further: M. de Mol, 'Case Note: *Dominguez*: A deafening silence' [2012] *European Constitutional Law Review* 280, 290-291.

50 *Gérard Fenoll v Centre d'aide par le travail "La Jouvène" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* (n 44), paras 45-47.

51 The Court indeed exclusively reasons by reference to the Charter and the Directive: *Gérard Fenoll v Centre d'aide par le travail "La Jouvène" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* (n 43), paras 45-48.

52 *AMS* (n 12), para. 47.

53 *Ibid* [45].

54 *Ibid* [46]-[48].

that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive'.<sup>55</sup> The Court has now confirmed that the *obiter dictum* on Article 21(1) of the Charter implies that the principle of non-discrimination is capable of producing important horizontal effects.<sup>56</sup> It also further built on that approach to assert that Article 31(2) of the Charter may produce horizontal effects, as shall now be seen.

### 2.2.2. Asserting the horizontal effects of Article 31(2) of the Charter: Bauer and Willmeroth

The Court has now indeed recognised, in two rulings of 6 November 2018 - *Bauer and Willmeroth* and *Max-Planck* - that Article 31(2) of the Charter on an annual period of paid leave may be relied upon in a dispute between private parties to disapply a conflicting national rule.<sup>57</sup> With a view to understanding the interplay between secondary law and Charter rights in such a setting, it is useful to sketch out the various stages of the Court's reasoning. I will focus on *Bauer and Willmeroth*. It is the most interesting case, as it involved two applicants in closely related yet distinct situations, thereby best illustrating the impact of the Court's new approach.<sup>58</sup>

Mrs Bauer worked for a public employer and was her husband's heir. The case was joined with that of Mrs Broßonn, whose husband had been employed by a private person, Mr Willmeroth. Both women claimed an allowance *in lieu* corresponding to the outstanding paid annual leave which their husbands had not taken before their death. The provision of EU law at stake was, in terms of secondary law, Article 7 of the Working Time Directive according to which:

‘1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

At the level of EU primary law, the national court also referred to Article 31(2) of the Charter: ‘Every worker has the right to limitation of maximum

---

<sup>55</sup> Ibid 49.

<sup>56</sup> *Egenberger* (n 5), para. 76.

<sup>57</sup> *Bauer and Willmeroth* (n 5), paras 83-90; *Max-Planck* (n 5), paras 69-80.

<sup>58</sup> Although the facts differed slightly, the ruling in *Max-Planck* is very similar to the one in *Bauer and Willmeroth*.

working hours, to daily and weekly rest periods and to an annual period of paid leave.’

On the substance, the question related to whether it is compatible with EU law to deprive the heir from entitlement to an allowance *in lieu* of outstanding paid annual leave where the employment was terminated upon the death of the worker, and where national law precluded an allowance *in lieu* from forming part of the estate of the deceased. In procedural terms, the legal issue in Mrs Broßonn’s case also called for clarification on the legal effects of the EU law provisions that were invoked in a dispute between private persons.

First, on the *substantive* point, the Court recalled that ‘every worker’s right to paid annual leave must be regarded as a particularly important principle of EU social law’.<sup>59</sup> The Court then insisted, relying on Article 7 of the Working Time Directive, that ‘the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law, that right also including the entitlement to payment’.<sup>60</sup> The Court further stressed that the loss of a worker’s right to an allowance *in lieu*, without the worker having actually had the opportunity to exercise the right to paid annual leave, ‘would undermine the very substance of that right’.<sup>61</sup> The Court added that the financial compensation after the worker’s death was ‘essential to ensure the effectiveness of the entitlement to paid annual leave granted to the worker’.<sup>62</sup>

Continuing to discuss the substance of the case, the Court then focused on the relevant provisions of the Charter. The right to annual paid leave, is ‘not only particularly important, but is also expressly laid down in Article 31(2) of the Charter’.<sup>63</sup> More specifically ‘Article 31(2) of the Charter [...] enshrines the “right” of all workers to an “annual period of paid leave”’.<sup>64</sup> According to the Explanations Relating to the Charter of Fundamental Rights (‘Explanations on the Charter’, or ‘Explanations’), which must be taken into account for the interpretation of the Charter,<sup>65</sup> Article 31(2) of the Charter is indeed ‘based’ *inter alia* on today’s Article 7 of the Working Time Directive.<sup>66</sup>

---

<sup>59</sup> *Bauer and Willmeroth* (n 5), para. 38.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* [49].

<sup>62</sup> *Ibid* [50].

<sup>63</sup> *Ibid* [51].

<sup>64</sup> *Ibid* [54].

<sup>65</sup> TEU, art 6(1) and Charter, art 52(7).

<sup>66</sup> *Bauer and Willmeroth* (), paras 55-56.

This intimate relationship between the Charter right and EU secondary law allows the Court to conduct a parallel reading of Article 7 of the Working Time Directive and Article 31(2) of the Charter: the expression ‘annual paid leave’ in each of them ought to have the same meaning.<sup>67</sup> The Court deems its analysis of the substance of Article 7 of the Working Time Directive on entitlement to an allowance *in lieu* to be applicable to the interpretation of Article 31(2) of the Charter.<sup>68</sup> The threat to the very substance of the right enshrined Article 7 of the Working Time Directive, like the one at stake in these cases, is deemed equivalent to a threat to the ‘essential content’ of the fundamental right to an annual period of paid leave in Article 31(2) of the Charter.<sup>69</sup> Such a threat is understood to automatically lead to a breach of that fundamental right.<sup>70</sup> The national rule is therefore in breach of both Article 7 of the Working Time Directive and Article 31(2) of the Charter.<sup>71</sup>

Secondly, on the *procedural* aspects of the case, the Court recalled its traditional case law according to which a national provision conflicting with EU law must only be disapplied to the extent that a consistent interpretation is not possible.<sup>72</sup> Moreover, provisions of a directive that are unconditional and sufficiently precise may be relied upon before the national courts by individuals against the State.<sup>73</sup> Nevertheless, none of that traditional case law could support Mrs Broßonn’s position in the event that national law could not be interpreted in conformity with EU law,<sup>74</sup> as the former employer of her late husband was a private person.<sup>75</sup>

Mrs Broßonn’s legal issues thereby provided an opportunity to expand the case law on the horizontal effects of the prohibition of discrimination in the Charter to a fundamental social right. For that purpose, the Court recalled how the matter was brought within the scope of Article 31(2) of the Charter with reference to the analysis carried out on the substance of the case, where an intimate link between the Charter provision and Article 7 of the Working Time Directive as implemented in national law had been discussed.<sup>76</sup> The Court also stressed again that the ‘right to paid annual leave constitutes an essential prin-

---

<sup>67</sup> Ibid [57].

<sup>68</sup> Ibid [58].

<sup>69</sup> Ibid [59].

<sup>70</sup> Ibid [61]. See further: K. Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ [2019] German Law Journal 779 (also further discussed below).

<sup>71</sup> *Bauer and Willmeroth* (n 5), para. 62.

<sup>72</sup> Ibid [65]-[69].

<sup>73</sup> Ibid [70]-[75].

<sup>74</sup> Ibid [69].

<sup>75</sup> Ibid [76]-[78].

<sup>76</sup> Ibid [79], with cross-references to paras 52-63.

principle of EU social law’;<sup>77</sup> it is itself mainly derived from other instruments at European and international level.<sup>78</sup> Building on these assertions, and in the same way as in the early cases on the horizontal effects of the prohibition of discrimination, the Court noted that Article 7 of the Working Time Directive does not itself establish the right to annual paid leave.<sup>79</sup>

The legal analysis was thereby framed with reference to the constitutional version of the right to an annual period of paid leave, beyond the secondary legislation. That right, said the court, is ‘mandatory in nature’.<sup>80</sup> The mandatory terms of Article 31(2) of the Charter distinguish that provision from Article 27 of the Charter at stake in *AMS*, discussed above, in that Article 27 cross-refers to other provisions of EU and national law or practices.<sup>81</sup> The Court further distinguished between the very existence of the right to an annual period of paid leave, and the conditions for the exercise of the right. Unlike the conditions for its exercise, the existence of the right enshrined in Article 31(2) of the Charter does not need to be given concrete expression by further legal acts. It is therefore ‘both mandatory and unconditional in nature’.<sup>82</sup> It can ‘in itself’ confer on workers a right that they may rely on in disputes between private parties.<sup>83</sup>

In conclusion, it was held that the national court ought to set aside national legislation preventing the allowance *in lieu* from being passed on to the heir, and to ensure that the heir receives payment.<sup>84</sup> That obligation on the national court is dictated by ‘Article 7 of Directive 2003/88 and Article 31(2) of the Charter where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual’.<sup>85</sup>

### 2.2.3. Parallels with the case law on the horizontal effect of the prohibition of discrimination

In all these new cases, as in the anti-discrimination cases examined in the previous section, the substance of the Charter provision was in-

---

<sup>77</sup> Ibid [80].

<sup>78</sup> Ibid [81]-[82].

<sup>79</sup> Ibid [83].

<sup>80</sup> Ibid.

<sup>81</sup> Ibid [84].

<sup>82</sup> Ibid [85].

<sup>83</sup> Ibid.

<sup>84</sup> Ibid [92].

<sup>85</sup> Ibid.

formed by the content of secondary legislation: Article 31(2) of the Charter and the Working Time Directive respectively.<sup>86</sup> Yet, the legal effects of the finding of a violation of the Working Time Directive are anchored in Article 31(2) of the Charter. What lessons can be inferred from this emerging set of cases for the future horizontal effects of the Charter?

### 3. In search of coherence: a doctrine of horizontal effects of the Charter?

The Court's case law on the horizontal effects of rights enshrined in EU directives as well as in the Charter has therefore been evolving very quickly over the past months. The rulings referred to above, in *Egenberger*, *IR*, *Cresco* (on non-discrimination) as well as *Bauer and Willmeroth*, and *Max-Planck* (on periods of annual paid leave), were all handed down by the Grand Chamber of the Court. We therefore ought to enquire whether a coherent approach to the relationship between Charter rights and provisions of the directives that give them expression emerges from the two lines of case law.

I will investigate what the conditions for Charter provisions as such to have horizontal effect might be (3.1), as well as the impact that the cases may have on the Charter's function in the EU legal order (3.2.). Emphasis will be placed on the very specific composition of the cases at hand: the Court's case law on the horizontal effects of the Charter to date is limited to situations where Charter and legislative rights co-exist and are intimately inter-related, the legislative right giving expression to the constitutional version of the right (3.3.).

#### 3.1. Conditions for the horizontal effects of provisions of the Charter (as such)

The Court has, in recent case law, consistently asserted that the horizontal effects of the right not to be discriminated against, as well as well of the right to annual paid leave, derive from provisions of the Charter 'in themselves': Article 21(1)<sup>87</sup> and Article 31(2) of the Charter respectively.<sup>88</sup> Before challenging this assertion or at the very least nuancing it (see below), it must be noted that a set of criteria for the identification of Charter provisions capable

---

<sup>86</sup> *Ibid* [57], [59], [63]; *Max-Planck* (n 5), paras 54-57.

<sup>87</sup> *Egenberger* (n 5), para. 76; *IR* (n 5), para. 69; *Cresco* (n 5), para. 76.

<sup>88</sup> *Bauer and Willmeroth* (n 5), para. 85; *Max-Planck* (n 5), para. 74.



of producing the horizontal effects described in the past section emerges from the Court's case law.<sup>89</sup>

The Court uses similar terminology in both lines of cases. In *Egenberger*, and as reiterated in subsequent cases on Article 21(1) of the Charter, the Court asserts that the prohibition of discrimination on the grounds of religion or belief 'is mandatory'. Furthermore, Article 21(1) of the Charter 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them'.<sup>90</sup> In *Bauer and Willmeroth*, as reiterated in *Max-Planck* which is just as connected to Article 31(2) of Charter, the Court asserted that Article 31(2) of the Charter is 'both mandatory and unconditional in nature' and is 'sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer'.<sup>91</sup>

At the outset, one may be struck by the emphasis on the 'mandatory' nature of the relevant provisions of the Charter, which is the first element on which the Court insists. This is distinct from the requirement that a provision be 'sufficiently clear and precise' to produce direct effect, that is often used as a criterion to trigger the direct effect of a provision of EU law.<sup>92</sup> Nevertheless, it shall be recalled that such 'traditional' criteria are not used or checked systematically.<sup>93</sup> Irrespective of the precise expression used by the Court, what it is primarily concerned with is whether the national judge is in a position to establish whether the provision of EU law has been breached.<sup>94</sup>

As for the second element in each set of cases, the fact that Article 21(1) of the Charter is sufficient in itself and Article 31(2) of the Charter is unconditional, the Court contrasts the wording of these articles with that of Article 27 of the Charter.<sup>95</sup> In *AMS*, as already noted, the Court had emphasized that Article 27 of the Charter ought to be given more specific expression in EU or national law. This would suggest that Charter provisions that defer to EU or national

---

<sup>89</sup> See also: T. Lock, *Commentary on Article 51(1) CFEU* (Oxford: Oxford University Press 2019) 2247 and L. Rossi, 'The Küçükdeveci ambiguity: "derivative" horizontal direct effect of directives?' [2019] EU Law Analysis, second addition <http://eulawanalysis.blogspot.com> date accessed 17 July 2019.

<sup>90</sup> Case C-414/16 *Egenberger* EU:C:2019:43, para. 76; *IR* (n 5), para. 69; *Cresco* (n 5), para. 76.

<sup>91</sup> CJEU, *Bauer and Willmeroth* (n 5), para. 85; *Max-Planck* (n 5), para. 74.

<sup>92</sup> For an example taken from the very same set of cases: *Bauer and Willmeroth* (n 5), para. 72.

<sup>93</sup> See for instance M. Bobek, 'The effects of EU law in the national legal systems' in C. Barnard and S. Peers, *European Union Law* (Oxford: Oxford University Press 2014) 145.

<sup>94</sup> See Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* EU:C:1976:56, paras 23-24.

<sup>95</sup> *Egenberger* (n 90), para. 76 (which must be read in the light of paragraphs 46 and 47 of *AMS* where the comparison between Articles 27 and 21(1) of the Charter is drawn); *Bauer and Willmeroth* (n 5), paras 84-85.

law for further clarification, as many do, may not have horizontal direct effect. Such a reading of the rulings may be supported by the proviso, in Article 52(5) of the Charter, according to which the provisions of the Charter containing principles may be further implemented at the EU or national levels.<sup>96</sup> Articles containing such ‘principles’ shall be judicially cognisable ‘only in the interpretation of such acts and in the ruling on their legality’<sup>97</sup>, this could be read as excluding the possibility for such articles to produce horizontal direct effect.<sup>98</sup>

### 3.2. The Charter’s function in the EU legal order

Along with a reflection on the requirements related to the wording of each specific provision of the Charter, the new lines of case law raise a broad set of questions on the Charter’s function in the EU legal order. There is little doubt that the Charter is intended to benefit individuals. Yet, until the rulings in *Egenberger* and *Bauer*, it was not clear from the wording of Article 51(1) of the Charter - defining its field of application - that the Charter could also be directly relied upon *against* them.<sup>99</sup> What then do these new lines of case law tell us about the Charter’s function in the EU legal order?

This question is very similar to that raised by the older rulings in *Mangold* and *Küçükdeveci* on the horizontal effects of the general principle of equal treatment. These cases indeed triggered a vivid controversy involving not only academics but also European higher courts, such as the German Constitutional Court and the Danish Supreme Court. Concerns here related to compliance with the principles of conferral<sup>100</sup> as well as to legal certainty and the protection of the legitimate expectations of private parties.<sup>101</sup> Similar reactions could also be seen resurfacing after the recent *Egenberger* and *Bauer and Willmeroth* cases.<sup>102</sup>

<sup>96</sup> I am most grateful to Catherine Barnard for useful discussions on this point.

<sup>97</sup> Article 52(5) of the Charter, emphasis added.

<sup>98</sup> See the emphasis on the ‘right’ contained in Article 31(2) of the Charter: CJEU, *Bauer and Willmeroth* (n 5), para. 54. For further discussion on this point see: S. Peers and S. Prechal, ‘Scope and Interpretation of Rights and Principles’ in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (London: Hart Publishing 2014) 151.

<sup>99</sup> In opposition to that argument: see for instance Opinion of AG Trstenjak, Case C-282/10 *Dominguez* EU:C:2011:559, para. 81; AG Bobek, *Cresco* (n 5), para. 140 see further note 35 supra.

<sup>100</sup> E.g. BVerfG, Order of the Second Senate of 6 July 2010, 2 BvR 2661/06, as translated and available at <https://www.bundesverfassungsgericht.de> date accessed 17 July 2019, paras 78-79 and Dissenting Opinion of Justice Landau on the order of the Second Senate of 6 July 2010, 2 BvR 2661/06.

<sup>101</sup> E.g. Judgment of the Danish Supreme Court of 6 December 2016, Case 15/2014, DI, acting on behalf of *Ajos A/S v Estate of A*, pages 45 et seq. as translated and available at <http://www.supremecourt.dk> date accessed 17 July 2019.

<sup>102</sup> See for instance: Bobek and Rossi, above footnote 35.

Those concerns for the principle of conferral, legal certainty and legitimate expectations may also make it difficult to reconcile the case law of the Court that continues to take a traditional approach to the lack of horizontal direct effect of directives, with the assertion that the Charter may be relied upon for the same purpose.<sup>103</sup> For instance in *Smith*, the Court recently recalled its case law on the lack of horizontal direct effect of directives and explained that:

‘[i]f the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations’.<sup>104</sup>

In cases such as *Egenberger* or *Bauer and Willmeroth* one may wonder if the legal effects given to the Charter are not similar to those excluded by the Court in *Smith*. The legislature opted for directives to regulate non-discrimination and annual paid leave, but it was also bound to do so in the case of the latter.<sup>105</sup> Furthermore, neither Article 19 TFEU, nor Article 153 TFEU, which are the legal bases for each of the two legislative instruments, have direct effect. In granting horizontal direct effect to the corresponding Charter provisions, the Court therefore employed a source of law that was different to that explicitly chosen by the legislature or identified by the constituent power,<sup>106</sup> the latter not having referred to individuals as immediate addressees of the Charter in Article 51(1) of the Charter.

This selective use of legal sources is particularly clear in *Bauer and Willmeroth*.<sup>107</sup> The Court specified that the legal effects of EU law in that case derived from Article 7 of the Working Time Directive and Article 31(2) of the Charter, where the dispute was between a private and a public party, and only the second of those provisions, where the dispute was between private parties.<sup>108</sup> The Court therefore selected the legal sources that allowed it to assert horizontal direct effect depending on the framing of the dispute - vertical or horizontal.

---

<sup>103</sup> See also: AG Bobek, *Cresco* (n 5), para. 140. For earlier studies on the legal effects of directives see for instance: T. Tridimas, ‘Black, White, and Shades of Grey: Horizontality of Directives Revisited’ [2001] Yearbook of European Law 327; M. Dougan, ‘The “Disguised” Vertical Direct Effect of Directives?’ [2000] Cambridge Law Journal 586.

<sup>104</sup> Case C-122/17 *Smith* EU:C:2018:631, para. 42; referred to in Joined Cases C-569/16 and C-570/16 *Bauer and Willmeroth* (n 5) para. 76.

<sup>105</sup> See the wording of Article 153(2)(b) TFEU.

<sup>106</sup> See for instance AG Bot, *Bauer and Willmeroth* (n 5), footnote 62 on the matter.

<sup>107</sup> *Ibid* [78]-[79], [92].

<sup>108</sup> *Ibid* [92].

This could be seen to be at odds with the EU legislature's choice of instrument as well as constituent powers. In relation to Article 31(2) of the Charter, the peculiarities of the Court's approach to different legal sources may be felt particularly acutely in countries such as Poland, the United Kingdom and the Czech Republic. These countries had indeed sought to ensure that 'nothing in Title IV of the Charter creates justiciable rights applicable to [these countries] except in so far as [these countries] provided for such rights in [their] national law'.<sup>109</sup>

The Court does engage, although only to a certain degree, with the concerns thereby identified. In *Egenberger*, the Court referred back to its *obiter dictum* in *AMS*<sup>110</sup> and insisted on the similarities between the prohibition of discrimination in Article 21 of the Charter and in provisions of the TFEU. More specifically, the Court relied on case law granting horizontal direct effect to the prohibition of discrimination in EU law to support its finding that Article 21(1) of the Charter also has horizontal direct effect. The horizontally-directly effective provisions identified by the Court are: Article 157(1) TFEU on equal pay for equal work, Article 45 TFEU on the abolition of any discrimination based on nationality between workers, Article 18 TFEU on the prohibition of nationality discrimination within the scope of application of the Treaties and Article 49 TFEU on the prohibition of restrictions on the freedom of establishment.<sup>111</sup>

The parallel between Article 21 of the Charter and the substance of the related provisions may seem compelling, in that the said provisions are primarily intended to eliminate discrimination. The Court however did not explain why the effect of the Charter could be equated to these provisions of the TFEU. The Court did not discuss the wording of Article 51(1) of the Charter: nor did it address the conferral of powers or legal certainty/legitimate expectations. However, there is an important functional divide between the Treaties and the Charter. The Treaties allocate competences between the EU and the Member States, at times by means of directly effective provisions. The Charter acts as a buffer against abuses of fundamental rights and is not meant to affect the allocation of competences and powers of the EU.<sup>112</sup> Bridging from one function to the other has important constitutional implications, as it amounts to the Charter being applied to situations that may not be regulated by provisions of the TFEU or secondary legislation taken separately.

---

<sup>109</sup> Protocol 30, Article 2(2) and European Council Conclusions, Annex 1, art 1 [data.consilium.europa.eu/doc/document/ST-15265-2009-REV-1/en/pdf](http://data.consilium.europa.eu/doc/document/ST-15265-2009-REV-1/en/pdf) date accessed 8 November 2019.

<sup>110</sup> See above, Section 2.2.1.

<sup>111</sup> *Egenberger* (n 5), para. 77 and cases quoted therein; see also AG, *Dominguez* (n 99), paras 121-126 before that.

<sup>112</sup> TEU, Article 6(1)(2) and Charter, Article 51(2).

It must be noted that the Explanations on Article 21 CFEU state that, although Article 21(1) of the Charter draws on Article 19 TFEU, which is the legal basis for the Framework Employment Directive, each of these constitutional provisions play distinct roles:<sup>113</sup> Article 19 TFEU confers power on the EU to adopt legislative acts which may cover action between private individuals. In contrast, the provision in Article 21(1) of the Charter does not create any power to enact anti-discrimination laws in these areas of Member State or private action. Article 21 of the Charter only addresses discrimination by the Member States when they are implementing EU law. The Court's approach in *Egenberger* and related case law seems to disregard the Explanations on the Charter. Unlike the cases on annual paid leave, which will be discussed below, the Court makes no mention of the Explanations on the Charter in the cases on Article 21 of the Charter.

The lack of clarity on why the Court is departing from the said Explanations on the Charter is addressed, although again only to a limited extent, by the ruling in *Bauer and Willmeroth*. The Court indeed specifically turns to the wording of Article 51(1) of the Charter, in what can be perceived as an effort to explain why the Charter may regulate relationships between private parties. According to the Court, although Article 51(1) of the Charter does not identify individuals as being directly required to comply with the Charter, this 'cannot [...] be interpreted as meaning that it would systematically preclude' that possibility.<sup>114</sup> However, somewhat surprisingly, the Court supports this reading of Article 51(1) of the Charter with reference to the ruling in *Egenberger* where the said article was not discussed as such.<sup>115</sup> This circular reasoning therefore provides only a few elements as an answer to appease the concerns identified above.

### 3.3. Direct horizontal effect of Charter provisions given expression to in EU directives

Despite the lack of clarity on the Court's rationale behind its decision to grant certain provisions of the Charter horizontal direct effect, several features of this new line of cases allow light to be shed on its future implications. As a consequence of the concerns expressed in the last sub-section, I will argue that these new rulings ought to be narrowly interpreted. As noted already, the Court has, since *AMS*, insisted on the disjunction between the

---

<sup>113</sup> Elaborating on the respective functions of the various expressions of the principle of equal treatment in EU law, see E. Muir, 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins' [2019] German Law Journal 817.

<sup>114</sup> *Bauer and Willmeroth* (n 5), para. 87.

<sup>115</sup> Paras 88-89. In *Egenberger* the Court merely asserted the mandatory effects of Article 21 CFEU: CJEU, *Egenberger* (n 5), para. 77.

legal effects of Charter provisions from those of the related directives. Nevertheless, in all the cases under scrutiny, the matter is brought within the scope of EU law by a legislative provision showing a number of very specific features, or towards which the Court expresses specific concerns, as will now be discussed.

### 3.3.1. Specific nature of the legislative instruments bringing the matter within the scope of EU law

Although this may seem obvious, it is worth recalling that the Charter may only be relied upon when the dispute falls within the scope of EU law. The same naturally holds true and is uniquely important because the Charter is not meant to extend the EU's competences and powers, when the direct effect of the Charter is relied on against a private person. Once again, the rulings in *Egenberger* on non-discrimination, and *Bauer and Willmeroth* on annual paid leave, aptly illustrate this point. In *Egenberger*, the Court stated that Article 21(1) of the Charter '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*' (emphasis added).<sup>116</sup> In *Bauer and Willmeroth*, the Court asserted that Article 31(2) of the Charter is 'sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer *in a field covered by EU law and therefore falling within the scope of the Charter*' (emphasis added).<sup>117</sup>

It is remarkable that, to date, the case law on the horizontal direct effect of the Charter is brought within the scope of EU law by incorrectly implemented 'directives',<sup>118</sup> a specific instrument within the EU legal order. As noted above, and as reconfirmed by the Court in these very same cases, directives do not produce horizontal direct effect. In the rulings under scrutiny, the horizontal direct effect of provisions of the Charter is only resorted to once all possibilities to rely on the directive have been exhausted, including both horizontal direct effect and conform interpretation.<sup>119</sup> In that sense, the Charter could be seen as being used as a last resort option to mitigate the lack of horizontal direct effect of directives intended to regulate horizontal situations.<sup>120</sup>

<sup>116</sup> *Egenberger* (n 5), para. 76.

<sup>117</sup> *Bauer and Willmeroth* (n 5), para. 85.

<sup>118</sup> As noted for instance by AG Tanchev, Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* EU:C:2019:181, para. 100.

<sup>119</sup> See for instance: *Egenberger* (n 5), paras 75, 79 and 82; *Bauer and Willmeroth* (n 5), paras 68-69, 78-79 and 92.

<sup>120</sup> Illustrating the far reaching implications of the duty of consistent interpretation when Article 31(2) of the Charter is used in conjunction with provisions of the Working Time Directive: C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* EU:C:2019:402, paras 59-70.

The directives bringing the matter within the scope of EU law in the said cases, share further additional features. First, in all five cases, the directives contain the same right as that protected by the provision of the Charter that has been given horizontal effect: the directive prohibiting discrimination on ground of religion, in *Egenberger*, *IR* and *Cresco*, as well as the directive on periods of annual paid leave, in *Bauer and Willmeroth* and *Max-Planck*. Second, provisions of the directives containing the said right themselves fulfil the conditions to produce direct effect.<sup>121</sup> Third, although in procedural terms these directives do not have horizontal direct effect, in substance, the said directives are intended to apply to relationships between private parties.<sup>122</sup> Therefore, although the EU constituent powers or the EU legislature have opted for non-horizontally effective instruments, the EU legislature had expressed the wish to regulate disputes between private parties.

### 3.3.2. Ensuring the effectiveness of the rights enshrined in EU directives

Closely related to the specific features of the directives under scrutiny, one reading of the Court's rulings is that the Charter is only brought in to fill in a very specific gap in the judicial protection of the rights concerned. The Court would thereby ensure the effectiveness of existing rights, rather than creating new ones or unduly extending the legal effects of existing rights. This approach may be supported by two aspects of the rulings in *Egenberger*, as well as to some extent, in *Bauer and Willmeroth*.

On the one hand, when discussing the substance of the case in *Egenberger*, the Court places special emphasis on the need to ensure that the general principle prohibiting discrimination on the grounds of religion or belief, enshrined in the Framework Employment Directive and in Article 21 of the Charter, is actually observed.<sup>123</sup> This is supported with reference to two articles from the Chapter on 'Enforcement and Remedies' in the said Directive. The elements taken from secondary law are swiftly backed up with a reference to Article 47

---

<sup>121</sup> This is particularly clear in the case law on annual paid leave: *Bauer and Willmeroth* (n 5), paras 72-75 (in relation to Article 7 of the Working Time Directive). It is less clear in the case law on non-discrimination on the ground of religion due to the formulation of Article 4(2) of the Framework Employment Directive at stake in the first two cases (*Bauer and Willmeroth* and *IR*). Nevertheless, the prohibition of discrimination enshrined in the Framework Employment Directive, as such, is directly effective.

<sup>122</sup> Framework Employment Directive, Article 3(1); Working Time Directive, Article 1(3).

<sup>123</sup> *Egenberger* (n 5), paras 47-48.

of the Charter on the right to an effective remedy.<sup>124</sup> This reference to Article 47 of the Charter may be understood as a response to the national court's concern for limited possibilities of judicial review of churches' decisions in that case.<sup>125</sup> Furthermore, in *Bauer and Willmeroth*, the Court notes the need to ensure 'effective protection' of the health and safety of workers through a period of actual rest.<sup>126</sup>

On the other hand, when discussing the legal effects of the prohibition of discrimination in the dispute between private parties in *Egenberger*, the Court relies not only on Article 21 of the Charter, but again also on Article 47 of the Charter.<sup>127</sup> Article 47 of the Charter is used in conjunction with the provisions of the Framework Employment Directive for the Court to decide on its jurisdiction on substance,<sup>128</sup> as well as in conjunction with Article 21 of the Charter to support the Court's conclusion on the horizontal direct effect of the prohibition of discrimination.<sup>129</sup> The Court is extremely concise on this last point, only extending its reasoning on Article 21 of the Charter.<sup>130</sup> The Court also does not revert to the horizontal effects of Article 47 of the Charter in either of the other cases discussed herein, it only insists on the full effectiveness of either Article 21 of the Charter<sup>131</sup> or Article 31(2) of the Charter.<sup>132</sup> In *Bauer and Willmeroth*, the need to enhance the enforceability of fundamental social rights is particularly strongly put forward by the Advocate General.<sup>133</sup>

Little can therefore be inferred from *Egenberger* on the legal effects of Article 47 of the Charter. The cases on the horizontal effect of the Charter can nevertheless be read as addressing a lacuna, created by the lack of horizontal direct effect of directives, in the system for the judicial protection of existing and directly effective EU rights.

---

<sup>124</sup> Ibid [49].

<sup>125</sup> I am grateful to Sacha Prechal for pointing that out.

<sup>126</sup> *Bauer and Willmeroth* (n 104), paras 42, 48-50. See also *Max-Planck* (n 5), paras 35 and 38 as well as 44-48.

<sup>127</sup> Ibid [78].

<sup>128</sup> Ibid [59]. See also *IR* (n 5), para. 45.

<sup>129</sup> *Egenberger* (n 90), para. 82.

<sup>130</sup> Ibid [78].

<sup>131</sup> *IR* (n 5), para. 71; CJEU, *Cresco* (n 5), para. 78.

<sup>132</sup> *Bauer and Willmeroth* (n 104), para. 91; *Max-Planck* (n 5), para. 80.

<sup>133</sup> E.g. AG Bot, *Bauer and Willmeroth* (n 104), para. 57.



### 3.3.3. Protecting the essence of the fundamental rights enshrined in EU legislation

The ruling in *Bauer and Willmeroth* could also be read as seeking to protect the ‘essence’ of the fundamental right to an annual period of paid leave enshrined in Article 31(2) of the Charter.<sup>134</sup> This indeed results from a joint reading of the two parts of the ruling that relate to the substantive and procedural aspects of the case.

On the substantive aspect of the case, as noted above and now with emphasis added, the right to annual leave and to payment constitute two aspects of the same right which is an ‘essential’ principle of EU social law.<sup>135</sup> The Court refers to the ‘very substance’ of the right,<sup>136</sup> and to ‘essential’ measures to ensure its effectiveness.<sup>137</sup> The Court then transposes its findings, primarily based on Article 7 of the Working Time Directive to its reading of Article 31(2) of the Charter. The threat to the very substance of the right enshrined Article 7 of the Working Time Directive, as the one at stake in these cases, is deemed equivalent to a threat to the ‘essential content’ of the fundamental right to an annual period of paid leave in Article 31(2) of the Charter.<sup>138</sup> On the procedural dimension of the case, the Court stresses that the ‘very existence’ of the right to an annual period of paid leave enshrined in Article 31(2) of the Charter does not need to be given concrete expression by further legal acts. It is therefore ‘both mandatory and unconditional in nature’.<sup>139</sup> It can ‘in itself’ confer on workers a right that they may rely on in disputes between private parties.<sup>140</sup>

If read in conjunction, as the Court itself invites us to do,<sup>141</sup> these two parts of the ruling on substance and procedural implications may suggest that it is the ‘essence’ of the fundamental right to an annual period of paid leave in Article 31(2) of the Charter that is given horizontal direct effect. The concept of ‘essence’ of fundamental rights, often equated with ‘very substance’ or ‘very existence’

---

<sup>134</sup> Using a similar concept of ‘hard core of minimum protection’ and ‘essential content’ but without relating it specifically to the concept of ‘essence’ within the meaning of Article 52(1) of the Charter: AG Bot, Joined Cases C-609/17 and C-610/17 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* (C-609/17), other party *Fimlab Laboratoriot Oy and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry* (C-610/17), other party *Kemi Shipping Oy* EU:C:2019:459, paras 69 and 112.

<sup>135</sup> CJEU, *Bauer and Willmeroth* (n 5), para. 39.

<sup>136</sup> *Ibid* [49].

<sup>137</sup> *Ibid* [50].

<sup>138</sup> *Ibid* [59].

<sup>139</sup> *Ibid* [85].

<sup>140</sup> *Ibid* [85].

<sup>141</sup> *Ibid* [79], with cross-references to paras 52-63.

of a right, is one of the criterion set out in Article 52(1) of the Charter for the analysis of limits to fundamental rights. While the concept still has an unclear bearing,<sup>142</sup> Lenaerts proposes to use it as a way of explaining,<sup>143</sup> and also thereby circumscribing, the horizontal direct effects of Article 32(1) of the Charter.

The impact of this proposal on the Court's future case law are unknown. Two things are clear however. Firstly, the concept of 'essence' was not alluded to in the cases on Article 21(1) (and Article 47) of the Charter. There is therefore a possibility that, even if the concept was used to articulate the horizontal direct effect of the Charter, this could be limited to Article 31(2), and/or to other fundamental social rights in the Charter, for instance. If so, the approach could be related to the use being made of the concept of 'minimum core' of socio-rights in the context of the International Covenant on Economic, Social and Cultural Rights, as argued by Thielbörger.<sup>144</sup> This approach allows the implementing of the minimum core by States to be demanded, immediately and independently of resources, and to address the disputed justiciability of this category of rights.<sup>145</sup>

Secondly, even if the concept was used beyond the scope of Article 31(2) and/or to other fundamental social rights in the Charter, it may be ill-suited to explain the case law on the horizontal effects of the principle of non-discrimination in Article 21(1) of the Charter. Indeed, the principle of equal treatment inevitably requires a balancing act between competing interests whenever differential treatment between comparable situations is established. The very architecture of the fundamental right to equal treatment therefore makes it difficult to identify the essential content to be protected in absolute terms, including in horizontal situations.<sup>146</sup> This is unless the concern is simply to ensure the survival of the fundamental right, that is to protect it against erasure, but in that case the concept of 'essence' actually adds little to the principle of effectiveness as discussed above.

Finally, if the concept of 'essence' were to be a determining factor in deciding on the horizontal effects of provisions of the Charter, it must now be asked how to define the essence of the fundamental rights at hand. The ruling in *Bauer*

---

<sup>142</sup> See M. Dawson, O. Lynskey and E. Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' [2019] *German Law Journal* 763, 768-769.

<sup>143</sup> K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' [2019] *German Law Journal* 779, 790-792.

<sup>144</sup> P. Thielbörger, 'The "Essence" of International Human Rights' [2019] *German Law Journal* 924, 934-936.

<sup>145</sup> See for instance the reference to positive duties on *Bauer and Willmeroth*, para. 90; see further AG Bot, *Bauer and Willmeroth* (n 5), para. 57.

<sup>146</sup> See further: E. Muir, 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins' [2019] *German Law Journal* 817.

and *Willmeroth* seems to rely on the content of EU secondary law for the definition of the notion of ‘essence’.<sup>147</sup> This observation calls for an examination of the specific function of the directives at hand in these cases.

### 3.3.4. Specific function of directives giving expression to a Charter right

The directives at hand were attributed a very peculiar role in the cases under examination. The cases on the horizontal effects of the fundamental right not to be discriminated against, as well as more recently the cases on annual paid leave, were decided on the substance with reference to the directives, while the legal effects were derived from the Charter.<sup>148</sup>

In *Egenberger*, this shift from secondary law to constitutional law is carefully orchestrated. As Article 1 of the Framework Employment Directive makes it clear, the Directive lays down a general framework ‘with a view to putting into effect in the Member State the principle of equal treatment’.<sup>149</sup> The Court derives from this that ‘the directive is [...] a *specific expression*, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter’ (emphasis added).<sup>150</sup> For the rest, on the substance of the case, the Court does not return to consideration of Article 21 of the Charter.<sup>151</sup> When examining the legal effects of the case, however, the Court observes that the Directive as such cannot be relied upon in a dispute between private parties, but it recalls that the directive ‘does not in itself establish the principle of equal treatment’.<sup>152</sup> Turning back to the wording of Article 1 of the Directive, the Court shifts the analysis to Article 21 of the Charter.<sup>153</sup>

The innovation of the ruling in *Bauer and Willmeroth* is that the Charter is discussed to a greater extent in the context of the analysis of the substance of the case. Yet, even here, the content of the directive is used to inform the definition – and arguably the ‘essence’<sup>154</sup> - of the fundamental right to an annual

<sup>147</sup> Similarly: AG Bot, *TSN* (n 134), para. 112.

<sup>148</sup> See also to that effect: AG Bot, *Bauer and Willmeroth* (n 5), paras 87-91; AG Bobek, *Cresco* (n 5), paras 119-123 and 125; AG Bot, *TSN* (n 134), paras 107-110 and L. Rossi, ‘The Küçükdeveci ambiguity: “derivative” horizontal direct effect of directives?’ [2019] EU Law Analysis, third section <http://eulawanalysis.blogspot.com> date accessed 17 July 2019.

<sup>149</sup> *Egenberger* (n 5), para. 47.

<sup>150</sup> *Ibid.*

<sup>151</sup> Neither does it so in other rulings on the substance of the prohibition of discrimination on grounds of religion or belief, *IR* and *Cresco*.

<sup>152</sup> *Egenberger* (n 5) 75.

<sup>153</sup> *Ibid* [76].

<sup>154</sup> *Bauer and Willmeroth* (n5), para. 59.

period of paid leave in the Charter.<sup>155</sup> The discussion of the substance of Article 31(2) of the Charter, inspired from that of the Working Time Directive, results from a four-stage reasoning. To start with, the Court explains that the right to paid annual leave is not only enshrined in the directive, it is also a particularly important principle of EU social law and is expressly laid down in Article 31(2) of the Charter.<sup>156</sup> Next, as the national legislation implements the directive, Article 31(2) of the Charter is intended to apply to the situation at hand.<sup>157</sup> Furthermore, it follows from the wording of Article 31(2) of the Charter that it enshrines the ‘right’ of all workers to an annual period of paid leave.<sup>158</sup> Finally, the Explanations relating to Article 31 of the Charter make it clear that the said article is ‘based’, *inter alia*, on the Working Time Directive.<sup>159</sup>

There is therefore little doubt that the Court felt it necessary both to draw from the content of the directive to decide on the substance of the fundamental right in the Charter, and to justify its approach to the joint reading of the two layers of norms.<sup>160</sup> EU legislation and EU constitutional law therefore entertain an extremely peculiar and intimate relationship. The Court itself shows awareness of the need to clarify the articulation of the two overlapping sources: when national courts will be called on, in a dispute between individuals, to balance competing fundamental rights, and they will have to take into consideration the balance struck between those interests by the EU legislature.<sup>161</sup> While deferral to legislative guidance is understandable, this still fails to explain why the Charter is used to circumvent the institutional limitations of directives.

### 3.3.5. Mind the legislative gap!

Taking stock of the Court’s repeated choice to assert the horizontal direct effect of the Charter, and irrespective of the conceptual and legal doubts expressed above, it is only natural to ask what the other provisions of the Charter to be granted horizontal direct effect will be. One must be particularly cautious when considering an expansion of this case law outside of the

---

<sup>155</sup> Ibid [57]–[63].

<sup>156</sup> Ibid [50].

<sup>157</sup> Ibid [53].

<sup>158</sup> Ibid [54].

<sup>159</sup> See further the history of Article 7 of the current Working Time Directive: AG Bot, *Bauer and Willmeroth* (n5), paras 55–56 and 87–88; *Max-Planck* (n 5), paras 52–53.

<sup>160</sup> *Bauer and Willmeroth* (n5), para. 83. Similar techniques, bringing together constitutional and legislative versions of the right, can be noticed in other recent cases on Article 31(2) of the Charter: e.g. *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* (n 120), paras 30–32; *António Fernando Maio Marques da Rosa v Varzim Sol – Turismo, Jogo e Animação, SA* (n 47), para. 50.

<sup>161</sup> *Egenberger* (n 90), para. 80.

very specific settings identified above. It shall be recalled that in all these cases: the matter was brought within the scope of EU law by a directive, whose content was sufficiently clear, precise and unconditional to be directly effective in vertical disputes, and overlapped with the relevant Charter right. Beyond such settings, the Court will be more exposed to accusations of undue expansion of EU competences or powers.

Examples of cases on the borderline with respect to the legal effects of the Charter may be where the principle of equal treatment under one of the grounds protected by EU equality legislation is invoked, in a situation falling within the scope of EU law, but where that situation is not actually regulated by the said equality legislation. An example can be constructed by analogy to the ruling in *Léger*<sup>162</sup>, concerning a claim of discrimination on the ground of sexual orientation against domestic measures implementing Commission Directive 2004/33 on technical requirements for blood and blood components.<sup>163</sup> The said Directive requires Member States to ensure that, once the donation of blood or blood components has been agreed, donors provide specific information to the establishment collecting the blood.<sup>164</sup> It therefore does not relate to employment, and its implementation is not covered by the prohibition of discrimination on the ground of sexual orientation as enshrined in the Framework Employment Directive. It would seem delicate to assert the horizontal direct effect of Article 21(1) of the Charter in a case between a blood donor and a private blood establishment, where the matter is brought within the scope of EU law by a Directive on technical requirements for blood, without having an impact on the limits of the competences and powers of the EU.

Instead, and in light of the Court's insistence on the Explanations on the Charter in *Bauer and Willmeroth*, one could be tempted to turn to the Explanations for guidance on possible horizontally-directly effective provisions of the Charter.<sup>165</sup> A careful reading of these allows for identification of several types of sources for the protection of EU fundamental rights contained in the Charter. References are made to national legislation,<sup>166</sup> and more frequently to EU legislation, as a 'source' allowing the origins of given fundamental rights enshrined in the Charter to be traced. The wording of the Explanations is polymorphic on

---

<sup>162</sup> Case C-528/13 *Léger* EU:C:2015:288.

<sup>163</sup> Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components [2002] OJ L91/25.

<sup>164</sup> *Ibid*, art 3.

<sup>165</sup> See also L. Rossi, 'The Küçükdeveci ambiguity: "derivative" horizontal direct effect of directives?' [2019] EU Law Analysis, third section <http://eulawanalysis.blogspot.com> date accessed 17 July 2019.

<sup>166</sup> E.g. Explanations, Article 10(2) of the Charter on the right to conscientious objection.

that point. Some fundamental rights are ‘based on’ specific provisions of EU legislation.<sup>167</sup> Others are ‘based on’ full instruments of EU secondary law.<sup>168</sup> Concerning a distinct set of provisions, in particular in the title on ‘Solidarity’, the Explanations use a more roundabout kind of wording to describe the relationship between Charter provisions and EU secondary legislation: one Charter provision ‘draws on’ EU legislation,<sup>169</sup> another ‘reflects’ the rules arising from EU legislation.<sup>170</sup>

We could therefore imagine Charter provisions ‘based on’ EU directives, in situations brought within the scope of EU law by that same directive, and where the directive as well as the Charter contain related provisions that would be directly effective, to offer a fruitful platform for the further development of the horizontal direct effect of the Charter. Yet, as also clear from the rulings in *Egenberger* where the Explanations were not mentioned at all, the Court makes selective use of the Explanations. Furthermore, such Explanations ‘do not as such have the status of law’.<sup>171</sup> It is therefore difficult to predict how future case law on the matter will develop.

#### 4. Conclusion

The circumstances in which provisions of the Charter were given horizontal direct effect in *Egenberger*, *Bauer and Willmeroth* and in other related cases, are very specific. While one could only focus on the specificities of the Charter provisions at stake to understand the Court’s cases, it is submitted that detailed attention ought also to be paid to the legislative instruments having brought these disputes within the scope of EU law. They are directives, give expression to a fundamental right, contain directly effective provisions and have substantive content which intended to apply in horizontal disputes. These elements could play an important role in guiding, as well as circumscribing future case law on the matter.<sup>172</sup>

It may be tempting to use EU fundamental rights law to support ‘a constitutional posture’ and to act as ‘a legitimising device’ for the process of European

---

<sup>167</sup> E.g. Explanations, Article 23 of the Charter or Article 11(2) on freedom of expression.

<sup>168</sup> E.g. Explanations, Article 8 of the Charter on protection of personal data; Article 31 of the Charter on fair and just working conditions; Article 32 of the Charter on prohibition of child labour and protection of young people at work.

<sup>169</sup> E.g. Explanations, Article 30 of the Charter on protection in the event of unjustified dismissal and Article 33 of the Charter on family and professional life.

<sup>170</sup> E.g. Explanations, Article 34 of the Charter on social security and social assistance.

<sup>171</sup> Explanations, Preamble, Single para.

<sup>172</sup> See also: AG Bot, *TSN* (n 134), paras 106-113.

integration,<sup>173</sup> there are however also dangers associated with the use of a constitutional narrative on rights.<sup>174</sup> Fundamental rights can reasonably be understood to be subject to disagreement in an EU currently made up of 27 or 28 Member States.<sup>175</sup> A constitutional narrative removes these rights from the realm of political processes and limits possibilities to challenge them.<sup>176</sup> It risks creating confusion between the various, constitutional and legislative, layers of rights.<sup>177</sup> In the context of EU law, this approach may also lead to unsettling the system of allocation of competences.<sup>178</sup> It is therefore submitted that the emerging line of cases on the horizontal effects of the Charter ought to be interpreted restrictively and treated with extreme caution, to avoid rocking the emerging EU fundamental rights regime as such.

---

<sup>173</sup> T. Tridimas and G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' [2019] German Law Journal 794, 816.

<sup>174</sup> For an illustration of the resistance to related developments, see the preliminary questions in *Ajos* and the response to the Court's ruling by the Danish Supreme Court, above.

<sup>175</sup> As noted for instance by AG Tanchev, *Egenberger* (n 5), para. 123.

<sup>176</sup> See for instance: J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press 1999) 112; A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' [2000] 37 CMLRev 1307, 1329; B. de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?' [2001] 8 Maastricht Journal of European and Comparative Law 81, 84.

<sup>177</sup> AG Trstenjak, *Dominguez* (n 42), paras 154-159; AG Bobek, *Cresco* (n 5), paras 142-144.

<sup>178</sup> See for instance: AG Bobek, *Cresco* (n 5), para. 141.