

HORIZONTAL EFFECT AND THE CHARTER

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Summary: The Charter of Fundamental Rights of the European Union (hereinafter: ‘Charter’)¹ is an act of primary law of the EU. Whilst its Article 51(1) provides that individuals may invoke fundamental rights vis-à-vis the EU or its Member States, it is silent on the issue of whether fundamental rights can be invoked vis-à-vis other individuals.² This discrepancy can be partly clarified by looking into the case law of the Court of Justice. So far, the Court of Justice has recognised such a possibility with regard to the general principle of equality as it is expressed in different forms in the chapter on ‘Equality’ of the Charter and in the directives which implement it. The question this contribution aims to resolve is whether the case law of the Court of Justice opens up such a possibility for other provisions of the Charter as well. The Court of Justice has, however, rejected such a possibility as far as socio-economic fundamental rights from the chapter on ‘Solidarity’ of the Charter are concerned, despite the fact that these provisions are made concrete by directives and the national legislation which implements them. I will argue that this position of the Court of Justice is not consistent with its existing case law on the horizontal effect of the Charter and undermines its full effectiveness.

1. Introduction

It is now hardly a disputed matter that the primary law of the EU may produce horizontal effect, that is to say it may enable individuals to invoke certain of its provisions *vis-à-vis* other individuals. Less explored is the fact that certain provisions of the Charter – within the scope of EU law and which are an expression of the general principle of equality – also produce effects *vis-à-vis* other individuals. The Court of Justice has exclusive powers to determine which provision has such effect and which lacks it. If a particular provision of the Charter has been implemented by a directive and if it has been intended to facilitate the application of a specific general principle of law, then it has horizontal effect. Otherwise

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¹ Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

² Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] ECR I-0000, Opinion of AG Cruz Villalón, para 31.

it lacks it. The Court of Justice has developed its case law on the horizontal effect of the Charter by interpreting the directives particularly in the area of employment law or by adjudicating on their validity with the Charter. Despite the wording of Article 51(1) of the Charter which governs the Charter's scope of application, and according to which individuals may invoke fundamental rights *vis-à-vis* the institutions, bodies, offices and agencies of the Union and the Member States only when they are implementing Union law, the Court of Justice has interpreted it broadly and has held in a number of cases that certain provisions of the Charter directly apply in relationships between individuals. Further, in the future, one may expect an increase of cases where the Court of Justice is confronted with situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights, since among the fundamental rights contained in the Charter are a number which are already part of the existing body of EU law in the form of directives.³

Whilst the Court of Justice's case law on the horizontal effect of the Charter mainly results from preliminary references concerning the directives on employment law, the aim of this article is not to focus on that particular area of law but to examine the horizontal effect resulting from the Charter which forms a part of the primary law of the EU. I will address, in the first place, the most basic questions about the definition of the horizontal effect of fundamental rights in EU law and the justifications for it. Next, I will discuss the relevant case law where the Court of Justice has recognised horizontal effect by applying a general principle of equality, a Treaty or a Charter provision. This case law concerns different forms of prohibition of discrimination which are enshrined in the chapter 'Equality'⁴ of the Charter. I will also analyse the case law where the Court of Justice has not recognised the horizontal effect of the Charter. Presently, these are the right to annual leave and workers' right to consultation and participation in an undertaking, which can be found in the chapter 'Solidarity'⁵ of the Charter. Although these rights constitute

³ Olivier De Schutter, 'Les droits fondamentaux dans l'Union européenne: une typologie de l'acquis' in Emmanuelle Brebosia and Ludovic Hennebel (eds), *Classer les droits de l'homme* (Bruylant 2004) 315. The author cites, among other things, workers' protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), the prohibition of child labour and protection of young people at work (Article 32), the right to reconcile family and professional life (Article 33), and the right of migrant workers to social security (Article 34(2)).

⁴ This chapter contains provisions concerning equality before the law (Article 20), non-discrimination (Article 21), cultural, religious and linguistic diversity (Article 22), equality between men and women (Article 23), the rights of the child (Article 24), the rights of the elderly (Article 25) and the integration of persons with disabilities (Article 26).

⁵ This chapter contains provisions concerning workers' right to information and consultation within the undertaking (Article 27), the right of collective bargaining and action (Article

important principles of European social law, the Court of Justice has not recognised them as general principles of law. Finally, I will argue that the exclusion of the horizontal effect of these provisions undermines the full effectiveness of EU law since, firstly, the right to seek compensation by way of damages from a Member State does not act as a sufficient deterrent on the latter and, secondly, waiting for the national legislator to adopt new legislation which is in conformity with EU law puts the party at the Member State's mercy at least as far as the length of the political process of the adoption of acts implementing the directive is concerned. I will solely examine the concept of horizontal effect in an EU environment and will not study cases before the national courts in the Member States or with regard to the European Convention on Human Rights in relation to the enforcement of fundamental rights by private parties against other private parties. Likewise, I will not discuss horizontal effect in the sphere of EU consumer protection law.

2. The notion of horizontal effect of fundamental rights

On a more general level, the horizontal effect of fundamental rights pursues social goals in the sense that it guarantees fairness in the relationships between individuals. In particular, its role is to neutralise asymmetries in contractual relations between individuals. One of the examples is the employment relationship where the weaker party is not able to protect itself sufficiently from the other party which is in a stronger economic and social position. In such circumstances, the intervention of supranational law is required in order to protect one individual from another. Therefore, horizontal effect is intended to provide a minimum of social justice in the private relations of individuals in order to guarantee basic fairness to the 'weaker' party.⁶

There is no unequivocal definition of horizontal effect. According to Ganten,⁷ norms given horizontal effect bind the citizens of the Member States in their mutual relations, ie *inter se*. Hartkamp⁸ argues that a Treaty provision produces horizontal effect when it may be directly ap-

28), the right of access to placement services (Article 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of young people at work (Article 32), family and professional life (Article 33), social security and social assistance (Article 34), health care (Article 35), access to services of general economic interest (Article 36), environmental protection (Article 37) and consumer protection (Article 38).

⁶ Achim Seifert, 'L'effet horizontal des droits fondamentaux' (2012) 48(4) *Revue Trimestrielle de Droit Européen* 801.

⁷ Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten* (Duncker & Humblot 2000) 23.

⁸ Arthur Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law' (2010) 3 *European Review of Private Law* 529.

plied to legal relationships between individuals, in the sense that subjective rights and obligations are created, modified, or extinguished between individuals. Prechal⁹ assesses that horizontal direct effect concerns a situation where a private party invokes EU law against the rules or measures of a private party that are arguably in breach of Community law, with the qualification that these rules or measures do not regulate the exercise and access of free movement in a collective manner. De Mol considers that horizontal effect means that a fundamental right can apply as an autonomous ground for review before a national court in a dispute between private parties.¹⁰

In this contribution, I will use the concept of horizontal effect in the broad sense as a right of a private party to rely *vis-à-vis* another private party directly on a provision of the primary law of the EU.¹¹

Whilst there is no univocal definition of the horizontal effect of EU fundamental rights, it is certain that it limits the private autonomy of individuals because they have to respect fundamental rights in their contractual relationships. In fact, legal orders of the Member States are grounded on the liberal values of the private autonomy of the parties to conclude contracts in the sense that public law should not interfere with their decisions. This right of choice includes a decision on whether private parties will conclude a contract, with whom they will conclude it, and, finally, what the content of their contractual relationship will be. However, the freedom of private parties to conclude contracts between themselves is not absolute and may be limited, for example, by the general principle of equality (Charter). In this context, two situations are likely to occur. One would be that a contractual clause is subjected to a review for its consistency with a general principle of equality (Charter) and, if it is considered incompatible with the latter, it would be declared null and void. In such a situation, an EU norm applies directly between private individuals (*substitution effect*). The second situation would be where the contract is based on a national norm. If the former, after a review in the light of the general principle of equality (Charter), is declared incompatible with the latter, then the provision of EU primary law excludes the application of the inconsistent national norm between individuals (*exclusion effect*).¹²

⁹ Sacha Prechal, 'Direct Effect Reconsidered, Redefined and Rejected' in Jolande M Prinsen and Annette Schrauwen (eds), *Direct Effect-Rethinking: A Classic of EC Legal Doctrine* (Europa Law Publishing 2002) 26.

¹⁰ Mirjam De Mol, 'Dominguez: A Deafening Silence' (2012) 8 European Constitutional Law Review 281.

¹¹ Trevor Hartley, *The Foundations of European Community Law* (4th edn, OUP 1998) 187; Eric Engle, 'Third Party Effect of Fundamental Rights (Drittwirkung)' (2009) 5(2) Hanse Law Review 165.

¹² Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44(4) Common Market Law Review 931; Mirjam de Mol,

The horizontal effect of fundamental rights has been developed by the Court of Justice, but the reasons for its introduction are known only in part. It follows from its decisions that it has been grounded on the effectiveness of EU law and on the pursuit of social justice. Whilst in *Defrenne II*,¹³ *Mangold*¹⁴ and *Kücükdeveci*¹⁵ the Court of Justice emphasised the effectiveness of the primary law of the EU, in *Angonese* it grounded it on the promotion of the free movement of workers.¹⁶ Independently of the grounds for its decisions, it is not clear what the Court of Justice means by the 'effectiveness of EU law'. On this point, the horizontal effect lacks its justification. Does the Court of Justice mean that other means of redress for EU law violations, such as an action for the compensation of damages, an action of the Commission against a Member State, or the duty of consistent interpretation of EU law are not effective tools and thus an alternative intervention of EU law is needed? Does the Court of Justice, by effectiveness of EU law, mean that its intervention in the private sector is as important as that in the state sector? Would a lack of horizontal effect mean that the number of breaches of the general principle of equality will be substantially higher in the private sector? These questions are unanswered by the Court of Justice, so it remains unclear why the effectiveness or promotion of a certain freedom is a rationale for horizontal effect.

One can argue that the horizontal effect of the Charter provisions as expressions of a general principle of law and which have been made concrete with directives is compensation for the lack of horizontal effect of directives. In this sense, Advocate General Bot opines in *Kücükdeveci*¹⁷ that when it is apparent that the national legislation in question

The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-discrimination: (Unbridled) Expansionism of EU Law? (2011) 18(1-2) Maastricht Journal 109, 110-111.

¹³ Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, para 33: 'The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act'.

¹⁴ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

¹⁵ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365, para 53: 'The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so'.

¹⁶ Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4136, para 32: 'The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law'.

¹⁷ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* 2009 [2009] ECR I-365, Opinion of AG Bot, paras 57 to 70.

implementing a directive is contrary to EU law, it is not contested that the national court, within the limits of its jurisdiction, has to ensure the full effectiveness of EU law when it determines the dispute before it.¹⁸ However, national courts may sometimes be confronted with limitations arising from EU law itself. Thus, where proceedings between individuals are concerned, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.¹⁹ Due to this inevitable constraint of the directives, the Court of Justice developed the concept of indirect effect of directives. According to this concept, in applying national law, the national court called on to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive.²⁰

However, this concept also has its limits. A national court cannot always interpret the national law ‘as far as possible’ in the light of the directive.²¹ In such situations, the effectiveness of EU law would be put at risk. If it is true that an injured party may bring an action in tort against a recalcitrant Member State,²² those national authorities and national courts that show least respect for EU law in general are unlikely to show any greater respect for this action, the application of which remains in the hands of national courts.²³ Similarly, the Commission is able to handle just a small number of breaches.²⁴ Furthermore, it may take a while for a national legislator to harmonise its legislation with EU law. It results from these considerations that due to the constraints stemming from the lack of application of directives between individuals, the horizontal effect of the fundamental rights of the EU is necessary in order to assure the full effectiveness of EU law and the effective protection of fundamental

¹⁸ *Kücükdeveci* (n 15) para 48.

¹⁹ Case 152/84 *MH Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, para 48; Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325, para 20; and Joined Cases *Bernhard Pfeiffer (C-397/01)*, *Wilhelm Roith (C-398/01)*, *Albert Süß (C-399/01)*, *Michael Winter (C-400/01)*, *Klaus Nestvogel (C-401/01)*, *Roswitha Zeller (C-402/01)* and *Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, para 108.

²⁰ Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8; *Faccini Dori* (n 19) para 26; and *Pfeiffer and Others* (n 19) para 113.

²¹ *Kücükdeveci* (n 15) para 49; Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre* [2012] ECR I-0000, paras 25-26; and Case C-176/10 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] ECR I-0000, paras 39-40.

²² Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* [1991] ECR I-5357.

²³ See *Hartley* (n 11) 232.

²⁴ *ibid* 202.

rights. In addition, ‘a duty of the national court to disapply conflicting national law which is in conflict with a general principle of law’ may be considered as a sanction imposed on a Member State for not having implemented a directive within the specified time period.²⁵ However, a disapplication of national law and an application instead of a norm of EU law having horizontal effect is limited in time to the moment a national legislator harmonises it with EU law.²⁶

It follows from the foregoing considerations that the existence of horizontal effect is surrounded by uncertainties as to its grounds of existence, its definition and its scope. However, it can at least be firmly argued, in particular from *Defrenne II* and *Angonese* and from the case law referring to these cases, that the Court of Justice has recognised it as far as fundamental rights are concerned based on the objective of social justice.

3. Application of fundamental rights ‘within the scope of EU law’

The scope of the application of the Charter is a question connected with its horizontal effect. With regard to this question, Article 6(2) of the Treaty on European Union provides that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the EU or establish any new power or task for the EU, or modify the powers and tasks as defined in the Treaties.

According to the existing case law of the Court of Justice, a situation must fall within the scope of EU law for a general principle of law or a Charter to apply.²⁷ The least contested situation is if the situation falls within the scope of a directive which gives effect to the Charter principle which is an expression of a general principle of law. Then, the Court of Justice will not hesitate to recognise the horizontal effect of a fundamental right and will decide the case on the merits. However, the Charter cannot apply to a situation falling outside the scope of EU law, since the requirements flowing from the protection of fundamental rights are binding on Member States ‘whenever they implement EU law’.²⁸ In such a situation, the Court of Justice will reject the applicability of EU law.

²⁵ Sacha Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3(1) *Review of European Administrative Law* 5, 19.

²⁶ Juliane Kokott and Christoph Sobotta, ‘The Charter of Fundamental Rights of the European Union after Lisbon’ (2010) *EUI Working Papers*, Academy of European Law, 2010/6, 14.

²⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000, para 21.

²⁸ Case C-27/11 *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost* [2012] ECR I-0000, para 56.

Some contested situations exist where there is no Member State's implementing legislation, but the subject matter nevertheless falls within the scope of EU law and thus the principle of equality from the Charter is applicable.²⁹ Therefore, the term 'whenever they implement EU law' must be understood broadly and also covers situations which fall within the scope of EU law despite the fact that there is no implementing national legislation. This field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it. According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

An illustrative example of the application of fundamental rights within the scope of EU law is the opinion of Advocate General Sharpston in *Bartsch*³⁰ where she argued that the situation giving rise to the reference does not fall within the scope of EU law. The case concerns the occupational pension scheme of Bosch-Siemens Hausgeräte GmbH ('BSH'). Paragraph 6(4) of the scheme's guidelines provided for a pension to be paid to the widow(er) of an employee who has died during his or her employment relationship, if certain conditions have been met. However, payments will not be made if 'the widow/widower is more than 15 years younger than the former employee'. The widow, Mrs Bartsch, was born in 1965, whereas Mr Bartsch was born in 1944 and died in 2004 whilst employed by BSH. Therefore, one of the conditions for the widow's pension was not met. The respective Advocate General considered that there was no pertinent specific substantive rule of Community law governing the situation in question. In those circumstances, she considered that the general principle of equality, and specifically equal treatment irrespective of age as identified by the Court of Justice in *Mangold*, cannot be applied horizontally. In so saying, she added that she *accepted* that such a general principle can apply (both vertically and horizontally) to the extent that it does so within a specific EU law framework.³¹ The Court of Justice followed her opinion.³²

²⁹ Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd* [1996] ECR I-4661.

³⁰ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-07245, Opinion of AG Sharpston.

³¹ *ibid*, paras 86-87.

³² Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR. I-07245.

4. Specific applications of the general principle of equal treatment between private parties

Traditionally, the principle of equality binds the Union institutions and also the Member States, where they implement, or act within the scope of, EU law. In certain circumstances, it may bind natural and legal persons. This occurs in particular in the areas of prohibition of discrimination on grounds of nationality and sex discrimination.³³

4.1 General principle of equal pay for equal work (Article 23(2) of the Charter)

Indeed, the horizontal effect of fundamental rights of the EU concerning the application of the general principle of equality – the principle of equal pay and prohibition of discrimination on grounds of nationality – existed in the primary law of the EU and was, therefore, legally binding before the adoption of the Charter. So, the horizontal effect of these provisions was, when the Charter was adopted, a well-established rule rather than an exception. Moreover, since corresponding provisions also exist in the Charter, the horizontal effect is also recognised for the latter provisions. In any case, it would be paradoxical if the introduction of the Charter reduced the protection of fundamental rights in primary law.³⁴

The ‘core’ case where the Court of Justice ruled that a Treaty provision concerning a fundamental right has horizontal effect is *Defrenne II*. It concerned the interpretation of Article 119 of the EEC Treaty³⁵ (Article 157 TFEU and Article 23(2) of the Charter). In 1970, Gabrielle Defrenne, an air hostess who worked for the Belgian airline Sabena, brought a legal action against the airline in a Belgian court because it had paid her less than male cabin crew doing the same work. She claimed back-payment of the difference. The Belgian court made a preliminary reference to the Court of Justice and the central question was whether Article 119 of the EC Treaty has direct effect. The wording of this article clearly indicates that it is addressed to the Member States and that they should bring it into force. However, the Court of Justice ruled that Article 119 of the EEC Treaty conferred rights directly on individuals in Member States and that it has horizontal effect. In paragraph 39 which, due to its importance, is reproduced below, the Court of Justice stated:

³³ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2007) 74-75.

³⁴ Opinion of AG Cruz Villalón (n 2) paras 34, 35.

³⁵ It provided: ‘Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work’. Whilst Member States had not implemented Article 119 by 31 December 1961 when the first stage for bringing the Treaty into operation ended, they fixed 31 December 1964 as the new date. Since several Member States did not meet this deadline, the Council issued a directive on equal pay which had to be implemented within one year.

In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

After the Court of Justice observed that this provision was formally addressed to the Member States and that it was sufficiently precise to produce direct effect, it went on and ‘identified and isolated’ the general principle of equal pay for equal work.³⁶ By assessing that this provision was ‘mandatory in nature’, the Court of Justice meant that it was not subject to private autonomy.³⁷

This reasoning of the Court of Justice reminds us partly of the one adopted in *Van Gend en Loos*.³⁸ In fact, Article 12 of the EEC Treaty was formally addressed to the Member States: it imposed an obligation on them but did not expressly grant any corresponding right to individuals to import goods free of any duty imposed after the establishment of the EC. Nor did it state that any such duty would be invalid. One would therefore think that it was not directly effective. However, the Court of Justice took the view that this provision is not prevented from being directly effective merely because it is formally addressed to the Member States and does not expressly confer rights on private individuals.³⁹ The Court of Justice ruled that ‘the very nature of this prohibition’ makes it ideally adapted to produce direct effects in the legal relationship between Member States and its subjects.⁴⁰

4.2 General principle of non-discrimination on grounds of nationality (Article 21(2) of the Charter)

As far as the prohibition of discrimination on grounds of nationality is considered, the Court of Justice held in *Angonese* that a job applicant could sue a private bank before a national court by invoking the principle of free movement of workers – a specific expression of the general

³⁶ Koen Lenaerts, ‘The Principle of Equal Treatment and the Court of Justice’, 21 May 2013, lecture given at the Faculty of Laws of the University of Sofia in Bulgaria, 11 <http://intranet/vicepresid/docs/2013_The%20principle%20of%20equal%20treatment%20and%20the%20ECJ_21%20May%202013_Bulgarie%20Universit%C3%A9%20de%20Sofia_version%20pour%20distribution.pdf> accessed 29 September 2014. This contribution is accessible on the intranet site of the Court of Justice.

³⁷ Koen Lenaerts and Jose Antonio Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47(6) CML Rev 1648, footnote 104.

³⁸ Case 26/62 *Van Gend & Loos (Algemene Transport- en Expeditie Onderneming) NV v Kingdom of Netherlands (inspecteur der invoerrechten en accijnzen)* [1963] ECR 1.

³⁹ See Hartley (n 11) 191.

⁴⁰ See *Van Gend en Loos* (n 38) para 13.

principle of equality – from Article 39 of the EC Treaty⁴¹ (Article 45 of the TFEU and Article 21(2) of the Charter), recognising thus that this provision of the Treaty has horizontal effect. The Court of Justice reasoned that the findings in *Defrenne II* could by analogy apply, since the general principle of equal pay for equal work and the general principle of non-discrimination on grounds of nationality as expressed by the free movement of workers are ‘mandatory in nature’ and therefore the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals. In addition, the Court of Justice considered that the fact that a certain provision of a Treaty is formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down.⁴²

4.3 Prohibition of discrimination on grounds of sex (Article 21 (1) and 23 of the Charter)

*Test-Achats*⁴³ is a case where the Court’s validity review of a directive had direct consequences for a private dispute concerning the application of the prohibition of discrimination on grounds of sex from Article 21(1) of the Charter. The referring court asked in this case whether Article 5(2) of Directive 2004/113⁴⁴ is valid in the light of the (general) principle of equal treatment for men and women. The Court of Justice considered that the purpose of Directive 2004/113 in the insurance services sector is, as reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. It recalled that Recital 19 to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit ‘exemptions’.

The Court of Justice opined that Directive 2004/113 is based on the premise that, for the purposes of applying the (general) principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to

⁴¹ The Court of Justice recognised the direct effect of Article 39 of the EC Treaty also in Case C-36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405.

⁴² See *Angonese* (n 16) para 34.

⁴³ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt and Charles Basselier v Kingdom of Belgium (Conseil des ministres)* [2011] ECR I-00773.

⁴⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services [2004] OJ L373, 37.

insurance premiums and benefits contracted by them are comparable. Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely. The Court of Justice added that such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

In the light of the above, the answer of the Court of Justice to the question referred was that Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012.

On the grounds of this judgment, private parties may invoke Articles 21(1) and 23 of the Charter directly against private insurance companies. In fact, the judgment concerns all insurance contracts whether concluded with a state-owned or a private insurance company. It imposes an obligation on all insurance companies that contracts concluded after 21 December 2012 shall not use gender as an element for discrimination with regard to the calculation of insurance premiums.

4.4 General principle of non-discrimination on grounds of age (Article 21 (1) of the Charter)

The Court of Justice in *Mangold* and *Kücükdeveci* ‘discovered’ the general principle of non-discrimination on grounds of age. While the Charter is in its entirety probably not binding on private individuals, certain grounds mentioned in its Article 21(1) are because they are an expression of a certain general principle of law. In contrast, a Charter provision as such or which is not an expression of a general principle of law has no horizontal effect.⁴⁵

4.4.1 Mangold

In *Mangold*, the referring national court asked the Court of Justice whether Article 6(1) of Directive 2000/78⁴⁶ must be interpreted as precluding paragraph 14(3) of the TzBfG,⁴⁷ a provision of domestic law, which

⁴⁵ Mirjam De Mol, ‘Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law’ (2010) 6(2) European Constitutional Law Review 293.

⁴⁶ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303, 16.

⁴⁷ The Law on Part-time Working and Fixed-term Contracts Amending and Repealing Provisions of Employment Law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 (BGBl 2000, 1966, ‘TzBfG’) that entered into force on 1 January 2001) as amended by the First

authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. Article 6(1) provides that, notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Advocate General Tizzano and the Court of Justice concluded that paragraph 14(3) of the TzBfG must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued since it takes into consideration age as the sole factor.

However, in response to the question referred, Advocate General Tizzano proposed that a national court, hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive. In fact, in view of the duties that flow from the second paragraph of Article 10 of the EC Treaty and the third paragraph of Article 249 of the EC Treaty, the national court is bound to construe those provisions as far as possible in the light of the wording and purpose of the directive, in order to achieve the result sought by it, and this applies also in the cases of directives for which the deadline for transposition into national law has not yet expired.⁴⁸

4.4.1.1 New general principle of law

The Court of Justice did not follow Advocate General Tizzano's opinion and held that it is irrelevant if the period prescribed for the transposition into domestic law of Directive 2000/78 had not yet expired. In this regard, the Court of Justice, by applying quite an innovative approach, emphasised that Directive 2000/78 does not itself lay down the general principle of equal treatment in the field of employment and occupation, but only lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation. It is well known that a directive is an act of secondary law of the Union and is as such subordinated to Union acts which are of a higher hierarchical order. In this context, the Court of Justice stated that the source of the 'new' principle underlying the prohibition of those forms of discrimination is found, as is clear from the third and fourth recitals in the pream-

Law for the Provision of Modern Services on the Labour Market of 23 December 2002 (BGBl 2002 I, 14607).

⁴⁸ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981, Opinion of AG Tizzano, para 122.

ble to Directive 2000/78, in various international instruments and in the constitutional traditions common to the Member States.⁴⁹

This reasoning led the Court of Justice to the finding that the prohibition of discrimination on grounds of age is a general principle of law.⁵⁰ It is well known that general principles of law apply in horizontal and vertical relations,⁵¹ so the mentioned general principle of law perfectly applies in a relation between private parties such as that in the main proceedings where Mr Mangold concluded a fixed-term work contract with Mr Helm. In the light of these considerations, it was immaterial whether the implementation deadline for Directive 2000/78 had expired or not, because the national legislator is in any event bound by general principles of law.⁵²

Furthermore, the finding that the prohibition of discrimination on grounds of age is a general principle of law has far reaching consequences. In this respect, the Court of Justice made the following important statement. By referring to its previous case law in *Simmenthal*⁵³ and *Solred*,⁵⁴ it stated that:

it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.⁵⁵

4.4.2 *Kücükdeveci*

Kücükdeveci confirmed and clarified to a certain extent *Mangold*. Advocate General Bot in his opinion⁵⁶ emphasised the hierarchy of legal

⁴⁹ See *Mangold* (n 14) para 74.

⁵⁰ *ibid*, para 75.

⁵¹ Dorota Leczykiewicz, 'Horizontal Effect of Fundamental Rights' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 174. The author argues that the Court of Justice has tried to rectify the situation of imbalance between the market and social values by making general principles of fundamental rights horizontally applicable.

⁵² See Prechal (n 25) 17 who argues that it is somewhat difficult to understand that where the Member States are explicitly given certain latitude by a directive, this can be overruled by virtue of a general principle of law. I would add that it is unusual that this has been done by virtue of a new general principle of law which was not known to the private parties when they concluded the contract.

⁵³ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 21.

⁵⁴ Case C-347/96 *Solred SA v Administración General del Estado* [1998] ECR I-937, para 30.

⁵⁵ See *Mangold* (n 14) para 77.

⁵⁶ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365, Opinion of AG Bot.

norms of EU law according to which a directive that has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination cannot reduce the scope of that principle. In fact, the Court of Justice has envisaged the relationship between a norm of primary EU law and a norm of secondary legislation. A comparison can usefully be made between the way in which it has approached the relationship between Article 119 of the EEC Treaty (which became Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC)), which lays down the principle of equal pay for male and female workers, and Directive 75/117/EEC.⁵⁷ In its judgment in *Defrenne II*, which was regrettably not referred to in *Mangold*, the Court of Justice stated that Directive 75/117 provides further details regarding certain aspects of the material scope of Article 119 of the EEC Treaty and also adopts various provisions whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay laid down by that article. It considered that the directive was intended to encourage the proper implementation of Article 119 of the EEC Treaty by means of a series of measures to be taken at the national level without, however, reducing the effectiveness of that article. In its judgment in *Jenkins*,⁵⁸ the Court held, with the same line of reasoning, that Article 1 of that directive, which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the EEC Treaty, in no way alters the content or scope of that principle as defined in that article. The Court referred to that case law in *Cadman*.⁵⁹ Advocate General Bot concludes that it is perfectly logical that the Court of Justice considered in *Mangold* that the fact that the time-limit for the transposition of Directive 2000/78 had not expired could not undermine the effectiveness of the principle of non-discrimination on grounds of age and, in order to ensure that effectiveness, the national court had to disapply provisions of national law which were contrary to Community law.⁶⁰

The Court of Justice in its case law stated that it is settled case law that even a clear, precise and unconditional provision of a directive does not apply in proceedings exclusively between private parties, and that the second sentence of paragraph 622(2) of the BGB⁶¹ was not open to an interpretation in conformity with Directive 2000/78.⁶²

⁵⁷ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L045, 19.

⁵⁸ Case 96/80 *J Jenkins v Kingsgate Ltd* [1981] ECR 911.

⁵⁹ Case C-17/05 *BF Cadman v Health & Safety Executive* [2006] ECR I-9583.

⁶⁰ *ibid*, paras 83-85.

⁶¹ The German Civil Code (Bürgerliches Gesetzbuch).

⁶² See *Küçükdeveci* (n 15) paras 21, 46-49.

The Court of Justice followed the opinion of the respective Advocate General and confirmed, referring to *Mangold* and *Defrenne II*, that the general principle of non-discrimination as given expression in Directive 2000/78 and in Article 21(1) of the Charter applies in proceedings between private parties. In particular, the Court of Justice stated that Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of law in that it constitutes a specific application of the general principle of equal treatment.⁶³ Consequently, the Court of Justice held that:

it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.⁶⁴ (Hereinafter: the *Mangold/Kücükdeveci* approach.)

The *Mangold/Kücükdeveci* approach has very wide implications. A national judge has to disapply 'any' provision of national law which may conflict with a general principle of law, providing that the provision of national law falls within the scope of application of EU law and in particular has been adopted to implement a directive. This may include national law in all fields, such as constitutional, administrative, criminal, civil and employment law, and law adopted by any organism of the state, such as a national assembly, government or a local entity. It may also include national judicial decisions of any court, including a constitutional court.

4.4.3 Main critiques of the *Mangold/Kücükdeveci* approach

The reasoning of the Court of Justice in *Mangold* and consequently in *Kücükdeveci* has been criticised in many ways. At the time of the pronouncement of this judgment, neither international documents on human rights nor the majority of the constitutional traditions of Member States explicitly banned this ground of discrimination,⁶⁵ so the Court of Justice lacked the necessary basis for discovering a new general principle. Moreover, a reference to Article 21 of the Charter would in this regard not be fruitful since back then it was not a binding document but a mere

⁶³ *ibid*, para 50.

⁶⁴ *ibid*, para 51.

⁶⁵ An explicit ban on age discrimination can only be found in the Finnish and Portuguese constitutions. International instruments explicitly prohibiting discrimination in respect of age do not exist. See Marlene Schmidt, 'The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* Judgment' (2006) 7(5) *German Law Journal*, 519.

declaration. Additionally, Advocate General Mazák opined in *Palacios de la Villa*⁶⁶ that “[t]he most salient feature of the judgment in *Mangold* [...] is probably the finding that “the principle of non-discrimination on grounds of age must [...] be regarded as a general principle of Community law”.⁶⁷ In his opinion, the Court of Justice had used that concept to defuse the objection that at the material time the period allowed for the transposition of Directive 2000/78 had not yet expired for Germany, and by applying this concept, the Court of Justice was able to avoid the question about whether the directive has horizontal effect. However, he argued that neither Article 13 EC nor Directive 2000/78 necessarily reflects an already existing prohibition of all the forms of discrimination to which they refer. Rather, the underlying intention was in both cases to leave it to the Community legislature and the Member States to take appropriate action to that effect.⁶⁸ He supported his allegation with *Grant*,⁶⁹ in which the Court of Justice concluded that Community law, as it stood, did not cover discrimination based on sexual orientation.⁷⁰ He recalled that if the *Mangold* judgment was followed, the so-called domino effect could occur because not only prohibition on grounds of age, but all specific prohibitions of the types of discrimination referred to in Article 1 of Directive 2000/78 would have to be regarded as general principles of law.⁷¹

Advocate General Ruiz-Jarabo Colomer took the view in *Maruko*⁷² that the ‘essential character’ of the right to non-discrimination on the ground of sexual orientation which can also be found in Article 21(1) of the Charter is of a different order to that which the Court attributed to the principle of non-discrimination based on age in *Mangold*. However, it is unclear what he meant by this opinion, given the fact that it seems that this provision of the Charter does not differentiate between the level of le-

⁶⁶ Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of AG Mazák.

⁶⁷ *ibid*, para 79.

⁶⁸ In his Opinion in Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467, paras 46-56), AG Geelhoed criticised the Court of Justice for having deduced the principle of non-discrimination on grounds of age from the principle of equality. In addition, he noted the potentially far-reaching economic and financial consequences of claims to equal treatment based on the prohibitions set out in Article 13 of the EC Treaty. The interpretation of measures based on Article 13 of the EC Treaty must not be stretched by relying on the words “[w]ithin the limits of the powers conferred by [the Treaty] upon the Community” in that article, and still less by relying on the general policy of equality. Such an approach would impinge upon decisions made by the Member States in the exercise of powers which they still retain. Accordingly, he advocated a more restrained interpretation than that adopted by the Court in *Mangold*.

⁶⁹ Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-00621.

⁷⁰ *ibid*, para 95.

⁷¹ *ibid*, para 96.

⁷² Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-0000, para 78 of the Opinion and the footnotes thereto.

gal protection accorded to the principle of non-discrimination on grounds of age and that on grounds of sexual orientation.

However, the Court of Justice does not seem to share these doubts. In fact, it follows from its ruling in *Römer*⁷³ that the prohibition of discrimination on grounds of sexual orientation in Article 21(1) of the Charter is a general principle of law.

In *Kofoed*,⁷⁴ Advocate General Kokott points out a danger for the legal certainty of EU law. She stated that, in cases falling within the scope of Directive 90/434,⁷⁵ a general principle of Community law prohibiting the misuse of law has been given specific effect in Article 11(1)(a) of the directive and has been expressed in a concrete manner. She warned that if it were to be permitted, in addition, to have recourse to a general principle which in terms of content is much less clear and precise, there would be a danger, thus, that the harmonisation objective of Directive 90/434 would be undermined and the legal certainty surrounding the restructuring of companies which it seeks to achieve would be jeopardised. Moreover, such an approach would undermine the prohibition, already mentioned, on directly applying untransposed provisions of directives to the detriment of individuals.

4.4.4 Evaluation of the critiques

The only weak point of the *Mangold/Kücükdeveci* approach is that the Court of Justice did not manage to reconcile, on grounds of clear and persuasive arguments, the effects a directive may produce and the effects of the application of the general principle of non-discrimination.⁷⁶ However, *Kücükdeveci* can be considered as a partial clarification of *Mangold* since the Court of Justice explained that it is the general principle of law expressed in a directive and in a Charter provision which applies between private parties. One may argue that it is regrettable that back in *Mangold* the Court of Justice did not for the first time refer to the Charter, taking into account that Article 21(1) of the Charter explicitly provides, *inter alia*, that for measures which fall within the scope of Union law, any discrimination based on any ground such as age shall be prohibited. However, the Charter was at the time not a legally binding document but a mere declaration. Therefore, reference to it would not calm the many critiques of this judgment.

⁷³ Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECR I-0000 accessed 25 September 2014.

⁷⁴ Case C-321/05 *Hans Markus Kofoed v Kingdom of Denmark (Skatteministeriet)* [2007] ECR I-05795.

⁷⁵ Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L225, 1.

⁷⁶ See Prechal (n 25) 19.

Despite a great deal of criticism, the German Constitutional Court (*Bundesverfassungsgericht*) held that *Mangold* was not a case *ultra vires* with regard to the conferral of powers to the EU.⁷⁷ Firstly, it considered that the situation of *Mangold* was regulated by legislation transposing Directive 2000/78. Secondly, it took the view that the Court of Justice did not fundamentally alter the division of competences in limiting the discretion of the German legislator before the date for the transposition of Directive 2000/78 had passed. Thirdly, it stressed that by ‘inventing’ a new general principle of law, the Court of Justice had not created a new competence of the European Union, since Directive 2000/78 which creates a general framework for combating age discrimination was passed by the Council, so that it was the Member States who had extended the competences of the Union in this area.⁷⁸

5. Limits of the application of the *Mangold/Kücükdeveci* approach between private individuals

5.1 Right to paid annual leave (Article 31(2) of the Charter)

5.1.1 Dominguez and the silence of the Court of Justice

In *Dominguez*, the Court of Justice did not at all address the issue of whether the right to paid annual leave from Article 31(2) of the Charter applies in a proceeding between private parties,⁷⁹ despite the fact that it was specifically asked by the referring court to do so. Since there was a normative conflict between a national provision of law and a directive, the national court asked the Court of Justice whether Article 7 of Directive 2003/88⁸⁰ must be interpreted as meaning that in proceedings between individuals a national provision which makes entitlement to paid annual leave conditional on a minimum period of actual work during the reference period, which is contrary to Article 7, must be disregarded.

In contrast, the issue of horizontal effect was extensively discussed by Advocate General Trstenjak⁸¹ who, among other things, emphasised the division of competences between the Union and Member States and stated that the first sentence of Article 51(1) of the Charter clearly deter-

⁷⁷ Decision of 6 July 2010 (2 BvR 2661/06).

⁷⁸ See Malte Beyer-Katzenberger, ‘Judicial Activism and Judicial Restraint at the Bundesverfassungsgericht: Was the Mangold Judgment of the European Court of Justice an Ultra Vires Act?’ (2011) 11 ERA Forum 517.

⁷⁹ For the possible reasons why the Court of Justice did so, see De Mol (n 10).

⁸⁰ 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.

⁸¹ Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre* [2012] ECR I-0000, Opinion of AG Trstenjak.

mines the entities bound by fundamental rights and that to assess the function of the fundamental right in Article 31 of the Charter according to its regulatory purpose amounts to nothing more than the establishment of a 'duty of protection' on the EU and the Member States. This view of the respective Advocate General can hardly be reconciled with the case law of the Court of Justice on the horizontal effect of the Treaty. Therefore, since the Charter does not recognise the horizontal effect of fundamental rights, she concluded that private individuals are not directly bound by the fundamental right in question. It can be added that the mentioned provision is neutral as to the question of the horizontal effect of the Charter since it neither prohibits it nor implies it. She added, as a further argument against the horizontal effect of fundamental rights in general, that private individuals cannot satisfy the legislative proviso contained in Article 52(1) of the Charter according to which '[a]ny limitation on the exercise of rights and freedoms recognized by this Charter must be provided for by law', since the laws can only be passed by the Union or its Member States. Even if the right to paid annual leave was a general principle of law, the respective directive is, in the opinion of the Advocate General, not specific enough.

The Court of Justice observed that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law. It went on to consider that in the dispute in the main proceedings, the national court states that the first paragraph of Article L 223-2 of the French Labour Code (*Code du travail*), which makes entitlement to paid annual leave conditional on a minimum of one month's actual work during the reference period, is not amenable to an interpretation that is compatible with Article 7 of Directive 2003/88.⁸²

However, the Court of Justice did not rule out the possibility for the national court to determine, taking the whole body of domestic law into consideration, in particular Article L 223-4 of the *Code du travail*, and applying the interpretative methods recognised by domestic law, with a view to ensuring that Article 7 of Directive 2003/88 is fully effective and to achieving an outcome consistent with the objective pursued by it, whether it can find an interpretation of that law that allows the absence of the worker due to an accident on a journey to or from work to be treated as being equivalent to one of the situations covered by that article of the *Code du travail*.⁸³

If such an interpretation is not possible, the Court of Justice observed that it is necessary to consider whether Article 7(1) of Directive 2003/88 has a direct effect and, if so, whether Ms Dominguez may rely

⁸² See *Dominguez* (n 21) paras 16, 23-26.

⁸³ *ibid.*, para 31.

on that direct effect against her employer, the CICOA,⁸⁴ in view of its legal nature.⁸⁵ In fact, the Court of Justice considers it possible that the public tasks entrusted to the CICOA might assimilate its position to that of the state, so that Article 7(1) of the Directive 2003/88 could accordingly be invoked against the CICOA. It entrusted this determination to the national court. If that provision fulfils the conditions required to produce a direct effect, the consequence would be that the national court would have to disregard any conflicting national provision. If that is not the case, the Court of Justice, referring to *Pfeiffer and Others*, observed that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.⁸⁶

In such a situation, the party injured as a result of domestic law not being in conformity with EU law can nonetheless ask, if appropriate, for compensation for the loss sustained.⁸⁷

5.1.2 *Heimann*⁸⁸

In this case, the Court of Justice did not find a normative conflict between the respective national provision and the right to paid annual leave. At the very outset, the Court of Justice noted that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of EU social law.⁸⁹ It is, as a principle of EU social law, expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties.⁹⁰ It is to be noted that the right to annual leave can, according to Article 52(5) of the Charter, be implemented by legislative and executive acts taken by institutions, bodies and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. Additionally, principles shall be cognisable only in the interpretation of such acts and in the ruling of their legality. In other words, provisions of the Charter which contain principles do not have horizontal effect in proceedings between individuals.

⁸⁴ The Centre informatique du Centre Ouest Atlantique, a body operating in the field of social security.

⁸⁵ *Dominguez* (n 21) para 32.

⁸⁶ *ibid*, para 33.

⁸⁷ *ibid*, para 43, referring to *Francovich and Others* (n 22).

⁸⁸ Joined cases C-229/11 and C-230/11 *Alexander Heimann (C-229/11) and Konstantin Toltschin (C-230/11) v Kaiser GmbH* [2012] ECR I-0000.

⁸⁹ *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund (C-350/06) and Stringer and Others v Her Majesty's Revenue and Customs (C-520/06)* [2009] ECR I-179, para 54; and Case C-337/10 *Georg Neidel v Stadt Frankfurt am Main* [2012] ECR I-0000, para 28.

⁹⁰ Case C-214/10 *KHS AG v Winfried Schulte* [2011] ECR I-0000, para 37; and *Neidel* (n 89) para 40.

However, the Court of Justice pointed out that a worker's right to minimum paid annual leave, guaranteed by EU law, applicable in a situation where the worker could not fulfil his obligation to work during the reference period due to an illness, cannot be applied *mutatis mutandis* to the situation of a worker on short-time work, such as that in this case. Therefore, Article 31(2) of the Charter and Article 7(1) of Directive 2003/88⁹¹ must be interpreted as meaning that they do not preclude national legislation or practice, such as a social plan agreed between an undertaking and its works council, under which the paid annual leave of a worker on short-time work is calculated according to the rule of *pro rata temporis*.

5.2 Association de médiation sociale: Provision of the Charter which is 'not sufficient in itself to confer individual rights on individuals'

In this case, the trade union 'Union départementale CGT des Bouches-du-Rhône' appointed Mr Laboubi as representative of the trade union section created within the AMS. The AMS is an association governed by private law, even if it has a social objective. It challenged that appointment and claimed that it had staff numbers of fewer than 11 and, *a fortiori*, fewer than 50 employees and that, as a result, it was not required, under the relevant national legislation, to take measures for the representation of employees, such as the election of a staff representative. Additionally, AMS considered that it was necessary to exclude from the calculation of its staff numbers, in accordance with Article L 1111-3 of the Labour Code, apprentices, employees with an employment-initiative contract or an accompanied-employment contract, and employees with a professional training contract ('employees with assisted contracts'). It is to be noted that because of the legal nature of the AMS, the trade union cannot rely on the provisions of Directive 2002/14, as such, against that association. One of the questions before the Court of Justice was, therefore, whether Article 27 of the Charter applies between private parties.

5.2.1 Opinion of the Advocate General

While the Advocate General Cruz Villalón in *Association de médiation sociale* proposed that the *Mangold/Kücükdeveci* approach should be extended to the right of workers to information and consultation 'within the undertaking' referred to in Article 27 of the Charter, the Court of Justice did not follow this opinion. The Advocate General based his proposal on the following arguments. Since the horizontal effect of fundamental rights is not unknown to EU law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the

⁹¹ 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.

worse.⁹² He opined that Article 27 may be relied on in a dispute between individuals. In other words, that possibility cannot be denied on the basis of the argument that the Charter, as a consequence of the provisions of Article 51(1), has no relevance in relations governed by private law⁹³ and added that the right of workers to information and consultation within the undertaking, as guaranteed in Article 27 of the Charter, should be understood as a ‘principle’ for the purposes of Articles 51(1) and 52(5), and concluded, on the basis of the second sentence of Article 52(5) of the Charter, that Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14,⁹⁴ may be relied on in a dispute between individuals, with the potential consequences that this may have concerning the non-application of the national legislation.⁹⁵ Consequently, Advocate General Cruz Villalón proposed to the Court of Justice to interpret Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, as meaning that it precludes national legislation which excludes a specific category of workers, namely those with ‘excluded contracts’, from the calculation of staff numbers for the purposes of that provision.⁹⁶

5.2.2 *Judgment of the Court of Justice*

The Court of Justice did not follow Advocate General Cruz Villalón’s opinion. Right at the outset, it emphasised that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.⁹⁷ Thus, since the national legislation at issue was adopted to implement Directive 2002/14, Article 27 of the Charter is applicable to the case in question.⁹⁸ It went on to observe that Article 27 of the Charter, titled ‘Workers’ right to information and consultation within the undertaking’, provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices. For this article to be fully effective, it must be given more specific expression in EU or national law.⁹⁹ It concluded that it is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that Article that Article 3(1) of Directive 2002/14, as a directly

⁹² Opinion of AG Cruz Villalón (n 2) para 35.

⁹³ *ibid*, para 41.

⁹⁴ 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 [2002] OJ L80, 29.

⁹⁵ Opinion of AG Cruz Villalón (n 2), para 80.

⁹⁶ *ibid*, para 97.

⁹⁷ See *Akerberg Fransson* (n 27) para 19.

⁹⁸ See *Association de médiation sociale* (n 21) paras 42, 43.

⁹⁹ *ibid*, paras 44, 45.

applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.¹⁰⁰ The important issue the Court of Justice addressed was whether the *Mangold/Kücükdeveci* approach was transposable to Article 27 of the Charter. The answer of the Court of Justice in this respect was negative. While in its judgment the principle of non-discrimination on grounds of age, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such, the wording of Article 27 of the Charter is not.¹⁰¹ The Court of Justice added that this finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14.¹⁰²

Accordingly, in the same way as in *Dominguez*, a party injured as a result of domestic law not being in conformity with European Union law can nonetheless go through a national court in order to obtain, if appropriate, compensation for the loss sustained.¹⁰³

It follows from the foregoing that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L 1111-3 of the Labour Code, is incompatible with EU law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.¹⁰⁴

6. Conclusions

The concept of horizontal effect of the Charter, in light of the existing case law on this subject, is not an unlimited one.

Firstly, it follows from its existing case law that the Court of Justice is not willing to transpose the *Mangold/Kücükdeveci* approach to provisions other than those which are a specific expression of the principle of equality in the chapter on 'Equality' of the Charter. *Dominguez* does not shed light on this approach, although Article 31(2) of the Charter states, in unequivocal terms, like Article 21(1) on the prohibition of discrimination, that '[e]very worker has the right to [...] an annual period of paid leave' which amounts to a kind of minimum protection which must be accorded to every worker in the EU. However, the right to paid annual

¹⁰⁰ *ibid*, paras 46.

¹⁰¹ *ibid*, para 47.

¹⁰² *ibid*, para 49.

¹⁰³ *ibid*, para 50.

¹⁰⁴ *ibid*, para 51.

leave is, as the Court of Justice pointed out in *Heimann*, a ‘particular important principle of European Social Law’ and not a general principle of law. In contrast, the prohibition of non-discrimination on grounds of age in *Mangold/Kücükdeveci* is a specific application of the principle of equality which is a general principle of law applicable between private parties. Similarly, the prohibition of discrimination on grounds of sex and nationality is also a general principle of law, therefore granting horizontal effect to Articles 21(2) and 23 of the Charter.

Secondly, *Association de médiation sociale* is the first case which gives minimum criteria for distinguishing the provisions of the Charter which have horizontal effect from those which do not have such effect. The distinguishing criteria which can be deduced from that case are whether or not a provision of the Charter is ‘sufficient in itself to confer individual rights on individuals’. Oddly enough, the Court of Justice does not mention that a certain provision must at the same time be an expression of a general principle of law, putting into question the central feature of the *Mangold/Kücükdeveci* approach. The Court of Justice does not explain what the content of ‘sufficient in itself’ is, leaving to itself a margin of discretion to decide on a case-by-case basis which provision of the Charter has horizontal effect and which does not. The concept partly resembles the vertical effect of a directive according to which a provision must be clear, unconditional and sufficiently precise in order to produce such an effect. However, in the light of the criteria arising from *Association de médiation sociale*, one may deduce from the clear and unequivocal wording of Article 31(2) that, in so far as this provision does not refer to the further implementing measures adopted by the EU or its Member States, it has horizontal effect. In contrast, a provision like Article 27 of the Charter which provides that workers must, at various levels, be guaranteed information and consultation in the cases and ‘under the conditions provided for by European Union law and national laws and practices’ is conditional upon the adoption of further measures. Several articles of the Charter include more general formulations excluding their direct effect, such as: ‘under the conditions established by national laws and practices’ (Articles 28, 30 and 35) or ‘in accordance with the rules laid down in Union law and national laws and practices’ (Article 34). Even if it is not expressly stated in Article 31(2), the right to paid annual leave is also conditional upon further implementing measures since at least its length and the authority for its approval must be determined in advance so that this right can be applied in practice. It is somehow difficult to understand that if the provision of the Charter is conditional upon the adoption of further implementing measures, it is not relevant for the assessment of its eventual horizontal effect if these measures really exist or not. One of the examples is Directive 2002/14 and the national legislations transposing it which implement Article 27 of the Charter. Nevertheless,

the Court of Justice ruled that this circumstance is immaterial for the evaluation of an eventual horizontal effect of that provision. However, it results from the *Mangold/Kücükdeveci* approach, *Defrenne II* and *Angonese* that in this case law the Court of Justice held that it was immaterial that a provision of primary law of the EU was formally addressed to the Member States, preferring instead to recognise horizontal effect on the ground that a provision at issue was mandatory in nature. In the same sense, fundamental rights are also mandatory in nature since they cannot be limited by means of a private contract, but ‘by law’, as Article 52(2) of the Charter provides.

Thirdly, the concept of the horizontal effect of fundamental rights comes from its social function which is, as Seifert argues, the prevention of asymmetries in private contractual relationships, a tool which perfectly fits into the socio-economic rights contained in the chapter on ‘Solidarity’ of the Charter. Taking into account its function, as well as the fact that the *Mangold/Kücükdeveci* approach has been developed within the employment law *acquis*, it is odd that Article 52(5) of the Charter which seeks to distinguish the provisions of the Charter containing ‘principles’, ie socio-economic rights, was adopted with a view to rendering these rights largely non-justiciable. It is well known that several Member States feared that the recognition of particular economic and social rights in the Charter would result in the judicialisation of public policy, particularly in areas of significant budgetary importance. In fact, what would ultimately be called ‘principles’ were described in the initial drafts as ‘social principles’. Although the adjective would later be removed, it is clear that the main concern of the authors of the Charter concerned rights to social benefits and social and employment rights.¹⁰⁵ However, the application of the *Mangold/Kücükdeveci* approach also implies financial concerns for the private actors, and the Court of Justice did not rule in *Mangold* that the authors of Article 13 of the EC Treaty did not presuppose direct effect for this provision, but rather gave priority to the action on the part of Member States. Therefore, budgetary implications for the Member States will not be the central issue preventing the eventual recognition of the horizontal effect of the ‘Solidarity’ rights in the Charter.

Fourthly, it follows from the *Mangold/Kücükdeveci* approach that the prevailing rationale of the Court of Justice for horizontal effect is the full effectiveness of EU law, although its meaning is difficult to discern. Notwithstanding that the Court of Justice has never explained what is meant by this legal concept and that this notion is to be deduced from other sources of EU law, such as the Opinions of Advocates General, it is not clear why the Court of Justice does not apply the same concept in

¹⁰⁵ Opinion of Advocate General Cruz Villalón (n 2).

Dominguez and *Association de médiation sociale*. As mentioned above, the right of the party injured to seek compensation of damages is not a legal remedy that acts as a sufficient deterrent for a Member State which violates EU law. Additionally, whether such an action is founded or not is decided by the courts of Member States. Likewise, the party injured may be reluctant to sue its own Member State also for other reasons, such as the high fees of court proceedings, their length, the number of legal conditions which have to be fulfilled for the success of such an action, and, finally, the unpredictability of the outcome of the proceeding. These deterrents, as well as the fact that the correct implementation of a directive lies in the hands of a national legislator (politics), and not with the court (law), water down considerably the protection that the chapter on 'Solidarity' of the Charter aims to guarantee.

Fifthly and lastly, paradoxically, the prevailing objective of the chapter 'Solidarity' of the Charter should be the reinforcement of the protection of the 'weaker' party and not the contrary. After all, by introducing more fairness into relationships between private parties, the horizontal effect of fundamental rights pursues the objectives of social justice. The shift of the case law of the Court of Justice towards this objective would constitute an important move towards the social character of the EU, taking into account, as the Preamble to the Charter and Article 2 of the Treaty on European Union stipulate, that the Union is founded on universal values of human dignity, freedom, equality and solidarity. The recognition of the horizontal effect of the Charter's socio-economic rights would contribute to these values on which the Union is founded.

The answer to the question that this article poses is, unfortunately, not positive in its entirety, since the full effectiveness of EU law, as far as the horizontal effect of numerous fundamental rights and, in particular, socio-economic rights are concerned, is still a goal to be achieved.

