Saar Blueprints

Giacomo Marola

Horizontality of EU fundamental rights:
Evolving jurisprudence of the European
Court of Justice

Programm für lebenslanges Lernen

07/2022 DE

About the author

Giacomo Marola is a Ph.D. student at the University of Pavia. He holds a LL.M. in European and International Law by the the Europa-Institut of Saarland University, a Master's degree in Law by the University of Pavia, as a student of Collegio Ghislieri, and a Master's degree in Social Sciences by the University School for Advanced Studies IUSS Pavia.

Preface

This publication is part of an e-paper series (Saar Blueprints), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany. For more information and content visit http://jean-monnet-saar.eu/.

The opinions and analysis within these papers reflects the author's views and is not to be associated with Jean-Monnet-Saar or the respective employers or institutions that the authors work for.

Editor

Lehrstuhl Prof. Dr. Thomas Giegerich

Universität des Saarlandes

Postfach 15 11 50

66041 Saarbrücken

Germany

ISSN

2199-0050 (Saar Blueprints)

Table of contents

1. Introduction

Fundamental rights have traditionally been intended as entitlements aimed at limiting the powers of the State over individuals. However, today it is undisputed that in most legal orders fundamental rights may to a varying extent affect relationships between private parties. The present paper focuses on how fundamental rights protected in the primary law of the European Union (EU), either as general principles of EU law or through the Charter of Fundamental Rights of the European Union ("the Charter"), affect relationships between private parties according to the jurisprudence of the European Court of Justice (ECJ). The article is logically divided in five parts. The first part (paragraph 2) briefly sketches the notion of "horizontality" of fundamental rights and its different operative models. The second part (paragraphs 3) retraces the origins of the ECJ's discourse on the horizontality of the market freedoms and of others related entitlements under the (now) Treaty on the Functioning of the European Union (TFEU). The third part (paragraph 4) addresses three landmark judgments delivered in the early 2000s each of them enshrining a different model of horizontality of fundamental rights protected as general principles of EU law: *Schmidberger*, *Viking* and *Mangold*. After that the Charter has become legally binding through the entry into force of the Lisbon Treaty, a number of judgments have been delivered by relying on and further developing the *Mangold* judgment's underlying rationale. Therefore, in the fourth part of the present article (paragraph 5) a more detailed analysis of these judgments is carried out. The last part (paragraph 6) addresses some selected issues routed in the concerns raised by the *Mangold* line of case law in terms of consistency with the principle of conferral as well as with the principles of legal certainty and legitimate expectations. The paper ends with a summary of findings (paragraph 7).

2. Different models of horizontality of fundamental rights

"Horizontal" effect of fundamental rights may be regarded as an umbrella term that covers a multitude of possible models through which fundamental rights of public law nature affect relationships between private individuals (i.e., private law relationships).[1] According to a classic view in constitutional legal theory, horizontality of fundamental rights may operate on three main tiers: directly, indirectly or through the mediation of

[1] *Engle*, Hanse Law Review 5(2)/2009, p. 165, 172; *Frantziou*, Camb. Yearb. Eur. Leg. Stud. 22(2020), p. 208, 227. "Private law" is intended here in its widest sense as referring to the law that is intended to regulate relationships between private persons.

the State.[2] "Direct" horizontality refers to situations where fundamental rights directly apply to relationships governed by private law. "Indirect" effect refers to situations where private law is interpreted by national courts in the light of fundamental rights. "State-mediated" effect refers to situations where fundamental rights are invoked against State's authorities, but their applications have unavoidable effects on disputes between private parties.

At national level, the way in which fundamental rights affect private law relationships varies significantly amongst different constitutional orders according to the underlying constitutional narratives about the role that the State should play in society.[3] At international level, the way in which fundamental rights enshrined in Treaties affect private relationships depends on the nature of the original Treaty-setting and on the constructions made by judicial or quasi-judicial bodies that are empowered to monitor them. In the system of the European Convention on Human Rights (ECHR), Convention's rights may affect private relationships through the mediation of the State by virtue of the judicially-developed "duty to protect" doctrine.[4] According to the European Court of Human Rights (ECtHR), State's authorities are not only obliged to refrain from infringing themselves the ECHR rights but are also required to adopt suitable measures to protect them.[5] A private party who has suffered a violation of those rights as a result of the conduct of another private party cannot bring a complaint directly against the latter but can bring a complaint against the State by arguing that the latter had failed to take the necessary measures to protect his rights.[6] While there are some examples of a comparable approach in EU law, the horizontal effect of EU law norms of fundamental rights nature has largely developed along different lines. Those developments are strictly related to the doctrine of "direct effect" and its underlying rationale that EU law provisions may translate into individual rights directly enforceable before national courts. Before exploring these developments is necessary to clarify the meaning of some terms that will be used throughout the present study.

---

[2] *Alexy*, p. 358-65.

[3] *Frantziou*, p. 49-50; *Pollicino*, Rivista di diritto dei media 3/2018 p. 138, 139-140.

[4] *Hartkamp*, Eur. Rev. of Priv. L. 3/2010, p. 527, 535; *Walkila*, p. 160.

[5] The concept of positive obligations under the ECHR was seminally introduced by the ECtHR in the "Belgian Linguistic" case; ECtHR, Belgian Linguistic case, App. No 1474/62 to 2126/64, 23 July 1968. *Beijer*, p. 38; *Lavrysen*, p. 3.

[6] *Engle*, Hanse Law Review 5(2)/2009, p. 165, 169; *Hartkamp*, Eur. Rev. of Priv. L. 3/2010, p. 527, 535; *Walkila*, p. 160.

"Horizontal effect of EU law" is understood as referring to the application, either directly or indirectly, of provisions of EU law by a national court adjudicating on a dispute between private parties.[7] "Direct" horizontal effect refers to situations where an EU law provision directly applies to legal relationships by creating, modifying or extinguishing their subjective rights and obligations.[8] Unless otherwise specified, "direct" effect is used interchangeably to refer to situations where an EU law provision is relied upon to obtain the setting aside of a conflicting national rule (so-called "exclusionary" effect) and to situations where that provision is relied upon with the effect of substituting a conflicting national rule (so-called "substitutive" effect).[9] Many private law scholars tend to use "direct" effect of EU law to refer only to the "substitutive" effect.[10] This use of the term is not unknown also to some EU law scholars.[11]

Besides direct effect, there are two further remedies that often come into play in the ECJ case law on horizontality. One remedy is the obligation for national courts to interpret national law in conformity with EU law as far as possible in the light of the methods of interpretation recognized under national law (also known as "indirect" effect).[12] Another remedy is the right for a private party that has suffered damages in his relationship with other private parties because of a Member State's failure to comply with EU law to bring an action for damages against that State (also known as *Francovich* action).[13] This remedy may be regarded as a form of State-mediated effect that in ECJ case law normally comes into play residually when direct effect and consistent interpretation are not available.[14]

---

[7] *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 110; Ibid. (*Walkila*), p. 30.

[8] Ibid. (*de Mol*), p. 110-111; Ibid. (*Walkila*), p. 30-31.

[9] On this distinction see Ibid. (*de Mol*), p. 110-111; *Muir*, CML Rev. 48(1) 2011, p. 39, 42-45; *Timmermans*, Eur. Rev. of Priv. L. 3-4/2016, p. 673, 676.

[10] For an overview of the main positions in this regard see Ibid. (*Timmermans*), p. 679.

[11] Some EU law scholars equally use "direct effect" to refer only to the "substitutive" effect; *Leczykiewicz*, Eur. Rev. Contract Law 16(2)/2020, p. 323, 330. Other scholars similarly distinguish between "primacy" and "direct effect" of EU law, where the former is used to refer to the mere setting aside of conflicting national law and the latter is used to refer to an EU law provision's ability to directly confer rights and obligations upon individuals; *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 1-2. On the relationship between "primacy" and direct effect of EU law see *Leczykiewicz*, in: Chalmers/Arnull (eds), p. 213, 214-215; *Muir*, CML Rev. 48(1) 2011, p. 39, 42-45.

[12] Established by the ECJ since *Von Colson*; ECJ, Judgment of 10 April 1984, Case C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfale,* ECLI:EU:C:1984:153, para. 26-28. When applied to horizontal relationships, the obligation of consistent interpretation is largely regarded as an indirect manifestation of horizontality of EU law; *Timmermans*, Eur. Rev. of Priv. L. 3-4/2016, p. 673, 677.

[13] ECJ, Judgment of 19 November 1991, Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.

[14] *Frantziou*, p. 73-74.

3. The early developments: from *Van Gend* to *Walrave* and *Defrenne II*

The room for a horizontality doctrine in EU law was carved out by the ECJ since *Van Gend En Loos*, where it famously held that the Community legal order comprises, as its subjects, "not only Member States, but also their nationals" and found that sufficiently clear, precise and unconditional Treaty provisions may directly create rights for them that national courts "must protect".[15] In that judgment the ECJ opened the path for translating EU law provisions into individual rights that may be directly enforced before national courts against Member States' authorities. If regarded in the light of the Court's own language and the subsequent case law developments, *Van Gend* already encapsulated the wider concept that EU law provisions could have directly shaped relationships involving individuals by creating both "rights" and "obligations" for them.[16] The post-*Van Gend* case law quickly demonstrated that, to ensure effective market integration, it would have been necessary to extend the direct effect of the Treaty's market freedoms also to restrictions imposed by private actors. The horizontal direct effect of the general prohibition of discrimination on grounds of nationality (now Article 18 TFEU) and of the provisions on the free movement of workers and of services (now Articles 45 and 56 TFEU) was established by the Court since *Walrave*.[17] The case dealt with a rule established by a private international sport federation which required cycling pacemakers to be of the same nationality of cyclists in order to be able to participate to the world championship of motor-paced racing. Such a rule was challenged by two Dutch pacemakers before national courts and upon referral the ECJ established that the now Articles 18, 45 and 56 TFEU "does not apply [only] to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a *collective manner* gainful employment and the provision of services."[18] *Walrave* started a line of case law which subsequently enabled the Court to review against the same Treaty provisions other statutes of sport associations[19] as well as

[15] ECJ, Judgment of 5 February 1963, Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, p. 12-13.

[16] *Frantziou*, p. 60-61; *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 2. As noted by *Frantziou*, at page 12 of the *Van Gend En Loos* judgment the ECJ referred not only to "rights" stemming under the Treaty for private persons, but also about "obligations".

[17] ECJ, Judgment of 12 December 1974, Case C-36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:1974:140.

[18] Ibid., para. 17.

[19] ECJ, Judgment of 14 July 1976, Case C-13/76, *Gaetano Donà v Mario Mantero*, ECLI:EU:C:1976:115, para. 17; ECJ, Judgment of 15 December 1995, Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, ECLI:EU:C:1995:463, para. 82-84.

rules established by hospitals' associations[20] and by professional groups[21]. The *Walrave* rationale had left some traces also in respect to the prohibition of quantitative restrictions on imports and measures having equivalent effect (now Article 34 TFEU) in case *Fra.bo*, where the ECJ found that a German private certification body for copper fittings (DVGW) was bound by Article 34 TFEU since it had in practice "the power to regulate the entry into the German market" for fittings.[22]

The overarching idea behind the *Walrave* line of case law is that the exercise of collective regulatory powers is comparable to the exercise of public law powers and private entities exercising such powers should thus be bound by the market freedoms in the same way of Member States' authorities.[23] The responsibility for private collective regulators' restrictions to the market freedoms ultimately lays upon the Member States, since the latter have mandated, encouraged, authorized or merely allowed private entities to exercise collective regulatory powers.[24]

Walrave prepared the ground for the subsequent judgment in *Defrenne II*[25]. In that case an airline's hostess brought an action against her employer seeking compensation of the damages suffered because of wage discrimination on grounds of gender. Since the relevant Belgian law did not provide for a compensatory remedy for such an offence, the national court inquired the ECJ about the possibility of direct effect of the Treaty's principle of equal pay for male and female workers (now enshrined in Article 157 TFEU).

To determine whether the Treaty's principle enjoyed direct effect, the Court focused on its intended aims, structure and wording. It stressed that the principle enshrined in

---

[20] ECJ, Judgment of 3 October 2000, Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, ECLI:EU:C:2000:530, para. 50.

[21] ECJ, Judgment of 19 February 2002, Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap*, ECLI:EU:C:2002:98, para. 120.

[22] ECJ, Judgment of 12 July 2012, Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, ECLI:EU:C:2012:453, para. 31; *Enchelmaie*r, in: Koutrakos/Snell (eds.), p. 54, 71-74; *Müller-Graff,* in: Amtenbrink/Gareth/Kochenov/Lindeboom (eds.), p. 32, 43-44. Nevertheless, whether *Fra.bo* could fully be regarded as an application of the *Walrave* rationale is to some extent doubtful given that, to conclude about the applicability of Art. 34 TFEU in that case, the ECJ had placed particular emphasis on the State's action and omission. The German legislator qualified the products certified by the DVGW as compliant with national legislation and did not facilitate the practical operativity of any alternative certification solutions; para. 27-29.

[23] Ibid. (*Enchelmaier*), p. 63; *Leczykiewicz*, in: Chalmers/Arnull (eds), p. 213, 216. Broadly speaking, "collective regulation" refers to a private entity's power to stipulate mandatory rules to which a multitude of private parties is subject.

[24] Ibid. (*Enchelmaier*), p. 63 and 66.

[25] ECJ, Judgment of 8 April 1976, Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56.

Article 157 TFEU pursued simultaneously the "economic" goal of ensuring fair competition in the job market between Member States that had fully implemented the principle and those who had not[26] as well as the "social" goal of ensuring "social progress" and "constant improvement of the living and working conditions of the European peoples".[27] On the basis of this double aim, the principle of equal pay for male and female workers was deemed to form "part of the foundations of the Community".[28] The Court then considered the provision to be sufficiently precise to be applied directly by domestic courts at least as far as direct discrimination was concerned.[29] Regarding the word "principle" used in Article 157 TFEU, that term was only used to emphasize the fundamental importance of the provision and could not be relied upon the exclude its direct effect.[30] Nor the fact that Article 157 TFEU was explicitly addressed only to the Member States prevented that provision from being relied upon against a private employer.[31] The ECJ stressed that this provision imposed a specific obligation of result upon the Member States.[32] Being "mandatory" in nature, Article 157 TFEU was found to apply not only to actions of public authorities, but also "to all agreements which are intended to regulate paid labour collectively, as well as to *contracts between individuals*."[33]

Contrary to *Walrave* and the case law on market freedoms, *Defrenne II* dealt with a purely internal situation. Moreover, the private employer was not exercising any collective regulatory power in the sense of *Walrave*. A private employer exercising its individual autonomy to contract was bound to compensate the discriminated employee directly on the basis of Article 157 TFEU.

While in the market freedoms' case law the relevant test for horizontal direct effect largely remains the exercise by private entities of collective regulatory powers, the approach adopted in *Defrenne II* subsequently had some influence on the free movement of workers in case *Angonese*[34]. In this case the ECJ found that a private bank established in Bolzano had breached the prohibition of discrimination between

[26] Ibid., para. 9.
[27] Ibid., para. 10.
[28] Ibid., para. 12.
[29] Ibid., para. 21-24.
[30] Ibid., para. 28.
[31] Ibid., para. 30-31.
[32] Ibid., para. 32.
[33] Ibid., para. 39.
[34] ECJ, Judgment of 6 June 2000, Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:2000:296.

workers on grounds of nationality (now Article 45 TFEU) by setting the requirement that job applicants had to produce a specific certificate of bilingualism in Italian and German as a pre-condition for their applications to be considered. Since such a certificate could have only been issued by the province of Bolzano and persons residing in that province were mainly Italian citizens,[35] the requirement set by the private bank was found to create a disproportionate obstacle to the free movement of workers at the disadvantage of other Member States.[36] In justifying the application of the Article 45 TFEU to a private bank the Court referred to both the arguments developed in *Walrave* and *Defrenne*.[37]

4. Evolving jurisprudence on horizontal direct effect: *Schmidberger*, *Viking* and *Mangold*

In the early 2000s the ECJ further developed its reasoning on horizontal direct effect of EU law norms of fundamental rights nature in three seminal judgments: *Schmidberger*, *Viking* and *Mangold*.

In *Schmidberger*[38] a German transport company had been prevented from transporting goods through the Brenner motorway, linking northern Italy to Austria, because of the temporary closure of that motorway to allow an environmental demonstration to take place. The transport company brought an action for damages against Austrian authorities arguing that, by failing to ban the demonstration, they breached their obligation to protect free movement of goods.[39] In turn, Austrian authorities argued that the motorway's temporal closure was necessary to protect the demonstrators' fundamental right to assembly. After having found that the failure to ban the demonstration amounted to a restriction of the free movement of goods,[40] the ECJ emphasized that both the free movement of goods and the freedom of assembly were protected under EU primary law and, since none of them was an absolute right, it was to be assessed whether Austrian authorities struck a fair balance between competing

[35] Ibid., para. 38-40.
[36] Ibid., para. 40 and 44.
[37] Ibid., para. 30-35.
[38] ECJ, Judgment of 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.
[39] Ibid., para. 16 and 59. The transport company relied on argument previously upheld by the ECJ in *Spanish Strawberries* (Case C-265/95, para. 30-32) according to which (now) Article 34 TFEU, in combination with the principle of sincere cooperation enshrined in (now) Article 4(3) TEU, entails the obligation for the Member States to take adequate measures aimed at preventing obstacles to free movement of goods created by private parties on their territories.
[40] Ibid., para. 64.

rights.[41] By leaving to those authorities a wide margin of discretion in determining how to reconcile competing fundamental rights,[42] the ECJ ultimately found that, by allowing the demonstration to take place, Austrian authorities did not exceed what was necessary to protect the demonstrators' right to assembly.[43] To that effect, particular emphasis was placed by the Court on the fact that extensive campaigns had been launched in due time informing economic operators of the Brenner Motorway's temporary closure and that Austrian authorities designated various alternative routes to minimize the impact of that closure.[44]

In *Viking*[45] a Finnish operator of ferry services wanted to reflag one of its vessels from Finland to Estonia in order to be able to offer the route operated by that vessel at lower prices by benefitting from lower wage levels in Estonia. The reflagging of the vessel was tantamount to move to another Member State the place of establishment of the Finnish company and was thus protected under the now Article 49 TFEU.[46] A Finnish trade union representing that vessel's crew, supported by an international federation of trade unions, undertook collective actions to induce the company to enter into a collective agreement aimed at ensuring that the reflagging plan did not result in a deterioration of the working conditions of the vessel's crew.[47] In line with *Walrave*, the ECJ first stressed that, since collective agreements are intended to "regulate paid labour collectively", when trade unions undertake collective actions in the negotiation phase of collective agreements they are bound to respect the freedom of establishment.[48] The ECJ easily found those collective actions to amount to a restriction of the employer's freedom of establishment.[49] It then stressed that the trade unions' right to take collective actions was applicable in private relationships as a

[41] Ibid., para. 71, 74, 77-81.
[42] Ibid., para. 82.
[43] Ibid., para. 93.
[44] Ibid., para. 87.
[45] ECJ, Judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772. Soon after the ECJ delivered the similar *Laval* judgment; ECJ, Judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809. In that case a Latvian company (*Laval un Partneri*) posted workers to Sweden for the construction of a school. As a result of the failure of negotiations aimed at determining the rates of pay of the posted workers, Swedish trade unions undertook collective actions by blocking the *Laval*'s sites in Sweden. Similarly to *Viking* the ECJ examined whether trade unions' collective action restricted the free movement of services and whether the restriction could be justified by need of ensuring the respect for the trade unions' right to collective action.
[46] Ibid. (*Viking*), para. 70-71.
[47] Ibid., para. 12-16, 72.
[48] Ibid., para. 33-37 and 57-65.
[49] Ibid., para. 72-74.

general principle of Community law and can be validly relied upon to justify a restriction to the freedom of establishment.[50] In line with *Schmidberger*, the conflicting market freedom and fundamental right had to be balanced against each other.[51] While giving some indication on how this balancing was to be carried out, the ECJ largely left to the referring court to determine whether the trade unions' collective actions actually pursued the legitimate aim of the protection of workers and whether they exceeded what was necessary to pursue that objective.[52]

Mangold[53] was concerned with a German legislation aimed at facilitating the occupation of workers aged over 52 years old by reducing temporal and causal limitations to the possibility of concluding fixed-term employment contracts with them. Mr. Mangold had been employed by a private lawyer with a fixed-term contract pursuant to that legislation and argued before national courts that such a legislation entailed discrimination on grounds of age contrary to Directive 2000/78 (Framework Equality Directive).[54] There were two main factors militating against the possibility of directly relying on this directive. First, the directive's implementation period had not yet expired.[55] Secondly, according to the settled case law directives cannot produce direct effect in horizontal disputes.[56] The ECJ still found horizontal direct effect to be available. First, the Court found the German legislation to entail a disproportionate discrimination on grounds of age contrary to the directive.[57] Then it held that the directive did "not itself laid down" the right to non-discrimination on grounds of age, but rather the source of that right was to be found "in various international instruments and in the constitutional traditions common to the Member States".[58] As such, the right to non-discrimination on grounds of age was deemed to constitute a general principle of

[50] Ibid., para. 43-45 and 77.
[51] Ibid., para. 46 and 79.
[52] Ibid., para. 80-87.
[53] ECJ, Judgment of 22 November 2005, Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709.
[54] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, p. 16–22.
[55] According to the ECJ, directives may have direct effect in vertical relationships with State's authorities only after that the transposition period has expired; ECJ, Judgment of 5 April 1979, Case C-148/78, *Pubblico Ministero v Tullio Ratti*, ECLI:EU:C:1979:110, para. 22-24.
[56] This is also known as "*Marshall* prohibition". Since the *Marshall* judgment the ECJ has repeatedly held that recognizing the directives' horizontal direct effect would be tantamount to equate them with directly applicable EU law instruments, such as regulations. As a result, sufficiently clear, precise and unconditional directives' provisions cannot be directly relied upon in disputes between private individuals. ECJ, Judgment of 26 February 1986, Case C-152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1986:84, para. 48-49.
[57] *Mangold* (*supra* note 53), para. 57-65.
[58] Ibid., para. 74.

Community law.[59] The Court considered that general principles were capable of producing horizontal direct effect and stressed that the national court must ensure the full effectiveness thereof by setting aside any conflicting national provision.[60]

Schimidberger, *Viking* and *Mangold* may be regarded as enshrining three different variants of horizontality of EU law.[61]

Schmidberger enshrines a form of State-mediated horizontality that resembles the ECtHR's approach towards horizontality based on the "duty to protect" doctrine.[62] The case concerned a cross-border situation where a private party relied on an EU norm of fundamental rights nature (a market freedom) against a State's measure that was intended to protect another private party's fundamental right recognized as a general principle of EU law. Since the case entailed a conflict between EU law norms of equal primary law rank, the outcome of this triangular dispute was reached through the balancing of competing rights.[63]

Viking overlaps with *Schmidberger* in two instances. First, the dispute was of cross-border nature so that the relevant market freedom could apply to the case. Secondly, it equally entailed a conflict between a market freedom and a fundamental right protected as a general principle of EU law and thus similarly required a balancing exercise.[64] However, contrary to *Schmidberger*, *Viking* enshrines a form of direct horizontality whereby EU law norms of fundamental right nature are directly invoked in a dispute involving private parties.[65] The object of the ECJ's assessment in *Viking* was not whether a Member State had adequately protected the private parties' conflicting rights, but it rather focused on the actions directly undertaken by the private parties in the exercise of their competing fundamental rights.

---

[59] Ibid., para. 75. Since the implementation period of Directive 2000/78 did not yet expire for Germany at the time of proceedings, for triggering the fundamental rights review based on the general principle the ECJ considered the German legislation to fall within the scope of EU law on the ground that it was intended to transpose another Directive (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43–48); *Mangold* (*supra* note 53), para. 75.

[60] Ibid., para 76-77. When the *Mangold* judgment was delivered it was critically received, especially in some German circles; *Herzog, Gerken*, Stop the European Court of Justice, https://euobserver.com/opinion/26714 (last accessed on 25/07/2022). Although it was ultimately found not to violate the principle of conferral, the judgment had been subsequently subject to an ultra vires review by the German Constitutional Court in the *Honeywell* judgment (BVerfGE 126, 286); *Payandeh*, CML Rev. 48(1)/2011, p. 9, 21-23.

[61] For a similar categorization see *Rosas, Armati*, p. 179-180; *Walkila*, p. 47.

[62] *Frantziou*, p. 72; *Hartkamp*, Eur. Rev. of Priv. L. 3/2010, p. 527, 535; *Prechal*, Revista derecho com. eur. 66/2020, p. 407, 409; *Walkila*, p. 47.

[63] *de Vries*, Utrecht L. Rev. 9(1) 2013, p. 169, 179-180; *Rosas*, Camb. Yearb. Eur. Leg. Stud. 16/2014, p. 347, 348-349; *Walkila*, p. 47-48.

[64] Ibid. (*de Vries*), p. 182; Ibid. (*Rosas*), p. 349-350; Ibid. (*Walkila*), p. 47.

[65] Ibid. (*Walkila*).

Equally to *Viking*, *Mangold* was also concerned with a dispute involving only private parties at national level. However, while displaying some similarities with *Defrenne II*,[66] *Mangold* differs from *Viking* in at least two aspects. First, it dealt with a purely internal situation whereby market freedoms could not come into play. Secondly, there was no conflict of competing individual rights having equal primary law status. Indeed, in *Mangold* a private party (employee) relied on a fundamental right enshrined in EU primary law to counteract the application of a conflicting national measure to his relationship with another private party (employer). The ECJ's assessment did not focus on whether the employer's conduct itself respected the employee's fundamental right to equality, but rather on whether the national law upon which the employer based his conduct complied with a fundamental right as specified in given directive.[67] As such, the outcome of the case was reached by the ECJ by imposing the obligation for national courts to set aside the conflicting national measure based on the primacy of EU law.[68]

After that the Charter became legally binding through the entry into force of the Lisbon Treaty, *Mangold* has emerged as the dominant line of case law on the horizontal effect of EU fundamental rights protected as general principles or under the Charter. In post-Lisbon case law there seems to be no judgments where EU fundamental rights have been applied horizontally either in a situation of "conflict" with market freedoms (in line with *Schmidberger* and *Viking*) or in "derogating" situations (in line with *ERT*)[69]. Accordingly, the next paragraph turns to consider the developments in the *Mangold* line case law following the entry into force of the Charter.

5. Developments in the *Mangold* line of case law after the entry into force of the Charter of Fundamental Rights

[66] Ibid., p. 40.

[67] *Fornasier*, Eur. Rev. Priv. Law 23(1) 2015, p. 29, 44; *Hartkamp*, Eur. Rev. of Priv. L. 3/2010, p. 527, 533-534. Those authors consider that *Mangold* and its progeny could not regarded as examples of horizontal direct effect of EU fundamental rights since those rights are not being used by the ECJ to directly review the activities of private parties. *Dougan* also suggests that in this case law EU fundamental rights affect private relationships only "collaterally", as a result of an ECJ's finding that the relevant national legislation upon which private parties regulated their conducts is contrary to a certain directive. See *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1202-1203.

[68] *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 4-6; *Walkila*, p. 47.

[69] ECJ, Judgment of 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvels and Nicolaos Avdellas and others*, ECLI: EU:C:1991:254. Under the *ERT* line of case law, Member States are bound by EU fundamental rights when they restrict market freedoms and to justify the restriction rely on justification grounds either explicitly recognized in the Treaty or judicially accepted by the ECJ. Cases entailing a "conflict" between market freedoms and fundamental rights (such as *Schmidgerger*, *Viking* and *Laval*) are normally regarded as a subset of the *ERT* "derogation" category; *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1215.

In the next three subparagraphs (5.1.-5.3) the most relevant judgments delivered by the ECJ after the entry into force of the Charter will be examined. All these judgments are based on the approach adopted in *Mangold* and have clarified and further developed several aspects of that approach.

5.1. *Kücükdeveci* and *Dansk Industri*: general principles as "given expression" in directives and the role of legitimate expectations

Similarly to *Mangold*, *Kücükdeveci* and *Dansk Industri* were both concerned with the compatibility of national legislation with the general principle of equality on grounds of age. *Kücükdeveci*[70] focused on a provision of the German Civil Code that excluded the periods of employment performed by workers before the age of 25 from being taken into account in the calculation of the notice period for dismissal.[71] After ten years of employment, Mrs. Kücükdeveci was dismissed at the age of 28 with a notice period of one month.[72] An employee hired after reaching the age of 25 who had worked for the same period as Mrs. Kücükdeveci would have been entitled to a notice period of four months.[73] The national referring court asked the ECJ to clarify the source of EU law by reference of which, either the general principle or Directive 2000/78, it must be assessed the compatibility with EU law of that national provision. The ECJ replied that the basis for such an assessment was "the general principle of European Union law prohibiting all the discrimination on grounds of age, as given expression in Directive 2000/78 (…)".[74] The general principle was found to be applicable on the ground that national provision governed a matter regulated under the directive.[75] The ECJ reviewed the compatibility of national provision with Directive 2000/78 and found that it to amount

[70] ECJ, Judgment of 19 January 2010, Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21.
[71] Ibid., para. 11
[72] Ibid., para. 12-13.
[73] Ibid., para. 14.
[74] Ibid., para. 19-21 and 27. The formula of a directive "giving expression" to the general principle is based on the ECJ's re-elaboration of the *Mangold*'s idea that Directive 2000/78 "does not itself laid down" the general principle, but merely gives concrete shape it (*supra* note 58). In the case law on age discrimination, for disapplication purposes the ECJ has so far continued to rely on the general principle and not on the corresponding Article 21(1) of the Charter. In *Kücükdeveci* (*supra* note 70, para. 22) and *Dansk Industri* (*infra* note 79, para. 22) the ECJ referred to the Charter only for supporting the recognition of non-discrimination on grounds of age as a general principle of EU law; *Frantziou*, p. 91-94 and 149.
[75] Ibid., para. 24-26. *Kücükdeveci* supports the idea that a mere overlap between the subject matter governed by EU legislation and that governed under national law is sufficient to bring the dispute within the scope of EU law so that a general principle may apply; *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 125-128; *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1223.

to a disproportionate discrimination contrary to that directive.[76] Since directives cannot produce direct effect in horizontal relationships, national courts must first verify whether national law can be interpreted in conformity with the directive.[77] If consistent interpretation is not possible, national courts must ensure the full effectiveness of the general principle of non-discrimination on grounds of age by disapplying, if need be, any conflicting national provision.[78]

By elaborating on *Mangold*, in *Kücükdeveci* the ECJ relied on a threefold relationship between the directive and the general principle. First, the directive brought the dispute within the scope of EU law so that the general principle could apply. Second, the directive was used as the parameter of EU law against which the compatibility of national legislation had been substantively reviewed. Third, the general principle, whose scope of protection has been construed as to coincide with that of the directive, generated direct effect in the horizontal dispute.

Dansk Industri[79] dealt with a Danish legislation imposing on employers the obligation to pay a special severance allowance to dismissed employees who had worked continuously for the same undertaking for several years.[80] The legislation excluded from the benefit of the allowance those workers who, at the time of dismissal, "will receive" an old-age pension from the employer under a pension scheme that the workers joined before the age of 50.[81] This exception was interpreted by Danish courts as meaning that dismissed workers were excluded from the special allowance whenever they had "the right" to receive that old-age pension at the time of dismissal.[82] Such an interpretation had the effect of excluding from the special allowance those dismissed workers who, despite being entitled to receive old-age pension from the

[76] Ibid., para. 28-48.

[77] Ibid., para. 46-49.

[78] Ibid., para. 51. Since *Kücükdeveci* the ECJ started to emphasise the role of consistent interpretation and to rely on the general principle for disapplication purposes as a measure of last resort once consistent interpretation with the directive is impossible. Moreover, it is left to national courts to determine whether disapplication is necessary to ensure that the directive's objectives may concretely be achieved (national courts must disapply "if need be"). In the aftermath of conflict raised by *Mangold* with the German Constitutional Court (*supra* note 60), in *Kücükdeveci* the ECJ started to leave to national courts more procedural leeway as to how to ensure the full effectiveness of directives at national level. Growing emphasis on consistent interpretation is confirmed in subsequent case law; *Frantziou*, p. 94; *Ugartemendia*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 11, 19.

[79] ECJ, Judgment of 19 April 2016, Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278.

[80] Ibid., para 6. The special allowance was aimed at providing financial support to dismissed workers who, despite their old age, wanted to look for a new job.

[81] Ibid., the relevant provision was Article 2a(3) of the Law on salaried employees.

[82] Ibid.

employer, did not want to exercise their right to retirement and wanted to remain active on the job market.[83] In the former *Ingeniørforeningen i Danmark* the ECJ already found that legislation, as interpreted by national courts, to be contrary to the Directive 2000/78.[84] Since that case concerned a vertical dispute, in *Dansk Industri* the Danish Supreme Court asked the ECJ whether the same conclusion should have applied to a horizontal dispute on the basis of the general principle of equality on grounds of age. The ECJ held that Directive 2000/78 and the general principle had to be intended as having the same scope of protection and thus it found the national legislation to be contrary to the general principle by referring to its previous findings in *Ingeniørforeningen i Danmark*.[85] The Court then stressed that the obligation of consistent interpretation entailed the obligation for national courts the change an established case law at national level.[86] If consistent interpretation with Directive 2000/78 was not possible according to the methods of interpretation recognized under national law, national courts would have had to set aside the relevant legislation pursuant to the general principle.[87]

The Danish Supreme Court also asked whether EU law allowed the general principle of equality on grounds of age to be balanced against the principle of legitimate expectations in a manner that the private employer in the main proceedings could be relieved by the obligation to pay severance allowance to the worker.[88] The ECJ rejected that view by linking this balancing argument to the temporal effects of preliminary rulings. It stressed that the application of the principle of the protection of legitimate expectations, as contemplated by the referring court, would have had the effect of excluding the possibility for the private party that instituted the main proceedings (i.e., the worker) to benefit from the interpretation given by the Court and this would have been tantamount to limit the temporal effect of the preliminary ruling.[89] According to the settled case law, preliminary rulings have *ex tunc* effect and the ECJ itself may decide

[83] This was the situation of Mr. Rasmussen in *Dansk Industri*. He had been dismissed by his employer (*Ajos*) after several years of employment. While Mr. Rasmussen was entitled to old-age pension by *Ajos* under a pension scheme he joined before the age of 50, he did not want to exercise his right to retirement. Mr. Rasmussen asked *Ajos* to pay the special allowance as to obtain financial support in the search of a new job. *Ajos* refused the payment on the basis of the Danish courts' jurisprudence. Mr. Rasmussen's legal heirs later brought an action against *Ajos* claiming for the payment of the severance allowance. Ibid., para. 10-14.

[84] ECJ, Judgment of 12 October 2010, Case C-499/08, *Ingeniørforeningen i Danmark v Region Syddanmark*, ECLI:EU:C:2010:600, para. 47-49.

[85] *Dansk Industri* (*supra* note 79), para. 22-23 and 26.

[86] Ibid., para. 33-34.

[87] Ibid., para. 35.

[88] Ibid., para. 18 and 20.

[89] Ibid., para. 39.

to limit such a temporal effect only in "truly exceptional circumstances".[90] The ECJ stressed that the referring court did not claim that such exceptional circumstances had occurred in the specific case and, in any event, the limitation of the temporal effect of a preliminary ruling could not have affected the main proceedings.[91]

5.2. *Dominguez* and *Association de médiation sociale*: exploring the horizontality of the Charter's social rights

Soon after the entry into force of the Charter the question arose whether the *Kücükdeveci*'s line of reasoning could have been extended beyond its original scope as to cover other fundamental rights and particularly to those that may not have been previously recognized as general principles of EU law, such as the social and economic rights enshrined in Solidarity Title (IV) of the Charter.[92] In cases *Dominguez* and *Association de médiation sociale* the ECJ shows hesitation in affirming the horizontal direct effect of the Charter's social rights.

Dominguez[93] focused on the compatibility of French legislation with the right to paid annual leave enshrined in Article 7 of Directive 2003/88 (Working Time Directive)[94] and reflected at EU primary law level in Article 31(2) of the Charter. The ECJ first found French law to be incompatible with Article 7 of Directive 2003/88.[95] It then instructed the referring national court to determine whether national law could be interpreted consistently with the directive or whether Mrs. Dominguez' employer could be considered a public law body so that the directive could have direct effect.[96] If none of these solutions was available, the only available remedy for private workers adversely

[90] Ibid., para. 40. Since *Denkavit Italiana* (Case C-61/79) the ECJ established that interpretative preliminary rulings clarify the meaning of EU law provisions from the time of their entry into force (*ex tunc* effect). The ECJ has exceptionally accepted to limit the effect of preliminary rulings only to proceedings that were already pending at the time of the judgment or that were subsequently instituted (*ex nunc* effect). A judgment where the ECJ decided to so is *Defrenne II* (*supra* note 25, para. 69-75). To obtain a limitation of the temporal effect of preliminary rulings two criteria must be fulfilled. First, legal relationships established before the delivery of the preliminary ruling must have been established in "good faith": meaning that there must have been good reasons to have erred about the interpretation of EU law. Second, *ex tunc* effect must raise the risk of "serious effects", in particular of financial nature, for the Member States and private parties established in the EU.

[91] Ibid., para. 40-41. Once the case was referred back, the Danish Supreme Court found the ECJ judgment to be *ultra vires*; *Haket*, Rev. Rev. Eur. Adm. Law, p. 135, 139-141.

[92] *Frantziou*, Camb. Yearb. Eur. Leg. Stud. 22(2020), p. 208, 216; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 192.

[93] ECJ, Judgment of 24 January 2012, Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ECLI:EU:C:2012:33.

[94] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time. OJ L 299, 18.11.2003, p. 9-19.

[95] *Dominguez* (*supra* note 93), para. 21.

[96] Ibid., para. 23-40.

affected by the Member State's incorrect transposition was that of bringing a *Francovich* action for damages against that State.[97] Despite the extensive analysis of Advocate General (AG) Trstenjak on the potential horizontal direct effect of Article 31(2) of the Charter,[98] the ECJ chose to remain silent on the possibility of relying on the *Mangold* doctrine.[99] It rather decided to switch to the *Francovich* state liability action as alternative remedy.

In *Association de médiation sociale*[100] (*AMS*) the Court clarified that the *Francovich* state liability action may also operate as a residual remedy if the relevant Charter provision is unable to have horizontal direct effect.[101] That case dealt with the compatibility of a provision of the French labour code with Article 3(1) of Directive 2002/14[102] and the workers' right to information and consultation within the undertaking enshrined in Article 27 of the Charter. The French labour code excluded some categories of workers from being taken into account in the calculation of the staff members' threshold required for establishing trade unions' representations within undertakings.[103] After having found French law to be incompatible with Article 3(1) of Directive 2002/14, the ECJ addressed the question raised by the French Supreme Court as to whether Article 27 of the Charter could be relied upon for disapplication purposes in line with *Kücükdeveci*.[104] By giving an innovative reading of that judgment, the Court stressed that the principle of non-discrimination on grounds of age, now enshrined in Article 21(1) of the Charter, was "sufficient in itself to confer on individuals an individual right which they may invoke as such."[105] The same cannot be said for Article 27 of the Charter insofar as this latter provision refers to "conditions provided

---

[97] Ibid., para. 43.

[98] Opinion of Advocate General Trstenjak delivered on 8 September 2011, Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ECLI:EU:C:2011:559, para. 71-88.

[99] *Fornasier*, Eur. Rev. Priv. Law 23(1) 2015, p. 29, 42; *Leczykiewicz*, Eur. Law Rev. 4/2013, p. 479, 480-482; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 194-195. The ECJ also did not explore the possibility of recognizing the right to paid annual leave as a general principle of EU law; *Nogueira-Guastavino*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 35, 37 and 40.

[100] ECJ, Judgment of 15 January 2014, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2.

[101] Ibid., para. 49-50.

[102] 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. OJ L 80, 23.3.2002, p. 29–34.

[103] *Association de médiation sociale* (*supra* note 100), para. 16.

[104] Ibid., para. 22.

[105] Ibid., para. 47. In *Kücükdeveci* (*supra* note 70) the ECJ did not identify any specific requirement for the general principle of equality on grounds of age to have horizontal direct effect. In *AMS* the ECJ probably read *Kücükdeveci* as requiring a fundamental right enshrined in EU primary law to be "sufficient in itself to confer rights" in order to limit the potential expansion of the *Kücükdeveci* doctrine to all the Charter's rights, particularly to those that, by reason of their wording and structure, are less prone to justiciability.

for by European Union law and national laws and practices."[106] As such, to be "fully effective" that provision "must be given more specific expression in European Union or national law."[107] Since Article 27 is not sufficient by itself "to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with [...] directive [2002/14]".[108]

AMS laid down two main innovations in the ECJ case law on the horizontal direct effect of fundamental rights enshrined in EU primary law. First, the Court clarified that not all the Charter's provisions may produce horizontal direct effect and started to elaborate on the requirements that a given Charter's provision must fulfil in this respect.[109] Despite the emphasis placed by AG Villalón on distinction between "rights" and "principles" within the meaning of Article 52(5) of the Charter,[110] nor in *AMS* nor in its subsequent case law on the Charter's horizontal effect the ECJ explicitly endorsed the relevance of this distinction.[111] In *AMS* the dividing line lies on the way in which the Charter's provision had been designed: if the relevant provision refers to EU and/or national implementing measures and practices, then that provision cannot have horizontal direct effect.[112]

Second, *AMS* clarified that the conditional nature of the Charter's provision cannot be filled out, for disapplication purposes, through a directive satisfying the requirements for direct effect.[113] While this might be read as a rejection of the *Kücükdeveci*'s model of combining directives and fundamental rights for disapplication purposes,[114] it could also by read as an attempt by the ECJ to emphasise the autonomous role of EU fundamental rights in producing horizontal direct effect against the background of the criticisms raised against *Kücükdeveci* that the ECJ was relying on those rights to *de*

---

[106] Ibid., para. 44-45 and 47.
[107] Ibid., para. 45.
[108] Ibid., para. 49.
[109] *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 9-10; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185,
[110] Opinion of Advocate General Cruz Villalón delivered on 14 January 2015, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2013:491, para. 43-80. AG Villalón considered that Article 27 had to be regarded as "principle" within the meaning of Article 52(5) of the Charter. The Court remained silent in this regard; *Krommendijk*, Eur. Cost. Law Rev. 11(2) 2015, p. 321, 346.
[111] *Fornasier,* Eur. Rev. Priv. Law 23(1) 2015, p. 29, 43; *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 10.
[112] The need for further concretization in laws is amongst the main criteria identified in literature to distinguish between "rights" and "principles" under Article 52(5) Charter. The ECJ relied on this argument in *Glatzel* (Case C-356/12) to qualify Article 26 of the Charter as a "principle". One might argue that, despite its silence in *AMS*, the ECJ implicitly considered Article 27 to be a "principle". Alternatively, one could consider Article 27 as "right" that does not fulfill the conditions for direct effect; *Krommendijk*, Eur. Cost. Law Rev. 11(2) 2015, p. 321, 346.
[113] *Supra* note 108. In *AMS* the directive provision was found to fulfill the requirements for direct effect and Article 27 of the Charter was not. The opposite situation where a directive does not fulfil the conditions for direct effect but the Charter does so has not yet been faced by the ECJ.
[114] *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 10.

facto give horizontal direct effect to directives. This latter reading may be supported by the fact that, as shown below, in the post-*AMS* case law the ECJ has essentially continued to rely on synergic relationship between the two sources of law elaborated since *Kücükdeveci.*[115]

5.3. Recent developments in the case law on the Charter's horizontal direct effect

The next three subparagraphs will examine a number of judgments delivered by the ECJ between 2018 and 2021 and respectively dealing with the horizontal direct effect of the right to equality on grounds of religion (5.3.1.) and on grounds of ethnic origin (5.3.2) as well as with the right to paid annual leave (5.3.3.).

5.3.1. *Egenberger*, *IR v JQ* and *Cresco Investigation*: establishing the horizontal direct effect of the right to equality on grounds of religion

In *Egenberger* and *IR v JQ* the ECJ established the horizontal direct effect of the right to equality on grounds of religion and the right to an effective remedy respectively enshrined in Article 21(1) and Article 47 of the Charter.[116]

Both judgments had been delivered upon referral by the German Federal Labour Court and concerned the compatibility of Article 9 of the German Law on Equal Treatment (AGG) with Article 4(2) of Directive 2000/78. Article 9 AGG had implemented Article 4(2) of Directive 2000/78 in a way to ensure that the German Constitutional Court's jurisprudence based on right to self-determination of churches could be maintained.[117] It followed that religious organizations established in Germany enjoyed wide autonomy in administering their own affairs and German civil courts' review of legality of religious organizations' decisions was restrained to a mere "plausibility" review.[118]

[115] *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 193.

[116] *Colombi Ciacchi*, Eur. Const. Law Rev. 15(2)/2019, p. 294, 300; *Frantziou*, p. 106-107; *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 12; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 191-192; *Prechal*, Revista derecho com. eur. 66/2020, p. 407, 415; *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022).

[117] The right of self-determination of churches being recognized in Article 137 of the Weimar Constitution, as referred to by Article 140 of the German Basic Law (*Grundgesetz*).

[118] *Colombi Ciacchi*, Eur. Const. Law Rev. 15(2)/2019, p. 294, 297; *Frantziou*, Mangold Recast? The ECJ's flirtation with Drittwirkung in Egenberger, https://europeanlawblog.eu/2018/04/24/ (last accessed on 25/07/2022).

Egenberger[119] related to discrimination on grounds of religion in access to employment. Mrs. Egenberger applied for a job position offered by a private organization pursuing charitable and religious purposes (the *Evangelisches Werk für Diakonie und Entwicklung*). The position mainly consisted of writing reports on Germany's compliance with the United Nations Convention on Elimination of All Forms of Racial Discrimination.[120] Mrs. Egenberger's application was ultimately rejected on the ground that she did not belong to any religious denomination.[121] The case *IR v JQ*[122] dealt with the imposition by the employer religious organization of differentiated loyalty obligations upon workers performing the same duties. More specifically, the case concerned the dismissal of a primary physician of catholic faith (*JQ*) by his employer, a hospital run by a private organization (*IR*) owned by the German Catholic Church, on the ground that he breached the hospital's ethics by re-marrying with his new partner without having his first catholic marriage been annulled by a church tribunal.[123] The loyalty obligation of adhering to the catholic view of the marriage's indissoluble nature was specifically imposed on physicians of catholic faith, whereas remarriage by physicians of no catholic faith would not have had any consequence on the employment relationship with *IR*.[124]

Egenberger focused on the interpretation of the first subparagraph of Article 4(2) of Directive 2000/78, according to which a difference in treatment based on worker's religious belief in employment relationships with religious organizations is allowed only insofar as the worker's religion constitutes a genuine, legitimate and justified occupational requirement by reason of the nature of occupational activities at stake or of the context in which those activities are carried out. This provision intended to strike a balance between, on one hand, the right of autonomy of churches and religious organizations, as recognized by Article 17 TFEU and protected under Article 10 of the Charter, and, on the other hand, the right to equality on grounds of religion enshrined in Article 21(1) of the Charter.[125] The ECJ stressed that Article 4(2), first subparagraph,

---

[119] ECJ, Judgment of 17 April 2018, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257.
[120] Ibid., para. 24-25.
[121] Ibid., para. 26 and 43.
[122] ECJ, Judgment of 11 September 2018, Case C-68/17, *IR v JQ*, ECLI:EU:C:2018:696.
[123] Ibid., para. 23-26.
[124] Ibid., para. 27, 29.
[125] *Egenberger* (*supra* note 119), para. 50-51. As noted by *Frantziou*, *Egenberger* may be regarded as a controversy about which fundamental right, either the right to self-determination of churches or the right to non-discrimination on grounds of religion, should have driven the interpretation of Article 4(2) of Directive 2000/78 and the national

of the Directive 2000/78 would have been deprived of its effect if it was to be interpreted as allowing religious organizations to authoritatively determine by themselves the occupational activities for which the worker's religion was to be regarded as a genuine occupational requirement.[126] That provision must be interpreted in the light of general purpose of equality pursued by Directive, expressed at primary law level by Article 21(1) of the Charter, as well as in the light of Article 47 of the Charter.[127] While it is for the employing religious organization to determine in the first place whether the worker's religion constitutes a genuine occupational requirement, its determination in this respect must be capable of being subject to an "effective judicial review by which it can be ensured that the criteria set out in Article 4(2) are satisfied in the particular case."[128]
The same line of reasoning had been then extended in case *IR v JQ* to the interpretation of the second subparagraph of Article 4(2) of Directive 2000/78. While that provision recognizes the right for religious organizations to require their employees to act with loyalty to the organizations' ethos, it also stipulates that the other directive's provisions must be complied with.[129] The Court thus considered that the religious organizations' privilege to impose loyalty obligations upon their workers must be exercised in compliance with the criteria set out in the first subparagraph of Article 4(2), as interpreted in *Egenberger*,[130] as well as that the respect of those criteria by the employer organization must be capable of being subject to an effective judicial review before national courts.[131]
In *Egenberger* the ECJ gave detailed guidance on how the criteria set out in Article 4(2) of Directive 2000/78 had to be interpreted by national courts in carrying out that judicial review.[132] In a nutshell, disparity in treatment on grounds of workers' religious

implementing law. *Frantziou*, Mangold Recast? The ECJ's flirtation with Drittwirkung in Egenberger, https://europeanlawblog.eu/2018/04/24/ (last accessed on 25/07/2022).
[126] Ibid., para. 46.
[127] Ibid., para. 47-49. The ECJ thus favoured an interpretation of Article 4(2) of Directive 2000/78 in the light of the right to equality in contrast with the German Constitutional Court's tendency to favour an interpretation of Article 9 AGG in the light of the right to churches to self-determination. This divergency did not result, however, in a threat to an *ultra vires* finding as happened in *Honeywell* with respect to *Mangold* (*supra* note 60). *Frantziou*, Mangold Recast? The ECJ's flirtation with Drittwirkung in Egenberger, https://europeanlawblog.eu/2018/04/24/ (last accessed on 25/07/2022).
[128] Ibid., para. 55.
[129] *IR v JQ* (*supra* note 122), para. 46.
[130] Ibid., para. 49-54.
[131] Ibid., para. 46 and 61.
[132] *Egenberger* (*supra* note 119), para. 60-69. The same is reflected and even amplified in *IR v JQ*. In this latter judgment, he ECJ did not only reiterate the same abstract definitions of the different criteria set out in Article 4(2) already developed in *Egenberger*, but also provided national courts with more practical guidance on how those criteria had to be applied in the specific case. *IR v JQ* (*supra* note 122), para. 49-55 and 56-60.

affiliation is genuine, legitimate and justified when it is "necessary and objectively dictated" by reason of nature of the occupational activities at stake or of the context in which these activities are to be carried out and provided that it complies with the principle of proportionality.[133] By stressing the need of interpreting Article 4(2) of Directive 2000/78 in the light of Articles 21 and 47 of the Charter and by providing objective guidance on how the different criteria set out in the directive must be interpreted, in *Egenberger* the ECJ has directed the balancing of competing rights already struck by the EU legislator through the directive in favour of the protection of the workers' right to equality under Article 21(1) of the Charter.

The ECJ then considered that it was for national courts to determine whether German law could be interpreted in a way to ensure the balance struck by Article 4(2) of Directive 2000/78, as refined by the Court itself, could be achieved.[134] By considering the scenario in which such an interpretation consistent with the directive was not possible, the ECJ stressed that the principle of equality on grounds of religion is to be regarded as a general principle of EU law and that Article 21(1) of the Charter is "is sufficient in itself" to be relied upon by individuals in horizontal disputes.[135] By referring to *Defrenne II*, *Angonese*, *Ferlini* and *Viking* it further stressed that Article 21(1) of the Charter is "mandatory" and does not differ "from the various provisions of the founding Treaties prohibiting discrimination on various grounds" which were found to be directly applicable in horizontal disputes.[136] Also Article 47 of the Charter was found to be "sufficient in itself" to confer individual rights in horizontal disputes.[137]As a result, when consistent interpretation is not possible, national courts must guarantee "the full effectiveness" of Articles 21 and 47 of the Charter "by disapplying if need be any contrary provision of national law."[138]

Cresco Investigation[139] also dealt with the right to equality on grounds of religion in the field of employment. The case was concerned with an Austrian legislation that qualified Good Friday as a day of public holiday only for employees belonging to four minority

[133] Ibid. (*Egenberger*), para. 69.
[134] Ibid., para. 71-73, 80-81.
[135] Ibid., para. 75-76. Since the facts of *IR v JQ* predated the entry into force of the Charter, for disapplication purposes the ECJ relied on right to equality on grounds of religion as a general principle of EU law; *IR v JQ* (*supra* note 122), para. 67-70.
[136] Ibid., para. 77.
[137] Ibid., para. 78
[138] Ibid., para. 79.
[139] ECJ, Judgment of 22 January 2019, Case C-193/17*, Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2019:43.

Christian churches and provided for a right to supplementary pay if they were required to work on that day.[140] Mr. Achatzi, who did not belong to any of the four Christian churches, worked on Good Friday and his employer (*Cresco Investigation*) refused the granting of supplementary pay.[141]

The ECJ found the Austrian legislation to entail a direct discrimination based on religion incompatible with Article 2 of Directive 2000/78.[142] It stressed that the legislation gave rise to a disparity in treatment between workers on grounds of their religion affiliation and that the situation of workers formally belonging to one of the four minority churches was comparable to that of all other workers, regardless of whether they had a religion.[143] The ECJ considered that the legislation was not proportionate to the need of ensuring the respect of the freedom of religion of workers belonging to the four churches at stake.[144] To this effect, it stressed that workers belonging to other religious minorities had to rely on each employer's goodwill in order to obtain a day off on the days of celebration that are important for their religion and were not provided for any protection by the Austrian legislator.[145] On the basis of the same argument the ECJ further rejected that the Austrian legislation could be regarded as a positive action, within the meaning of Article 7(1) of Directive 2000/78, intended to eliminate an existing disadvantage linked to religion.[146]

The most interesting aspect of *Cresco* is that the ECJ did not merely refer to the national courts' obligation of setting aside the national legislation contrary to Article 21(1) of the Charter. It rather stressed that, until national legislator does not comply with EU law by adopting the measures necessary to reinstate equal treatment,[147] national courts must apply "to persons within the disadvantaged category the same

---

[140] Ibid., para. 9-10, 12.

[141] Ibid., para. 13.

[142] Ibid., para 69.

[143] Ibid., para. 40-51. The ECJ relied on the fact that the legislation granted additional rights to workers by reason of their "formal" belonging to one of the four minority churches, rather than requiring that workers to be under a moral or practical obligation to perform a particular religious duty during Good Friday (para. 46-50).

[144] Ibid., para. 61. The legislation was aimed at allowing members of the four Christian churches at stake to practice their religion on Good Friday, a day that is particularly important for them (para. 16, 19, 25, 45, 57).

[145] Ibid., para. 60.

[146] The disadvantage should have consisted of the fact that workers belonging to the four minority churches, in the absence of such legislation, would have had to work on an important day for their religion. By contrast, for Roman Catholic workers the most important religious festivities were already qualified as public holidays for all workers. The ECJ considered that, even if such a disadvantage were to be existing, the Austrian legislation would have still been disproportionate and contrary to the principle of equality insofar as it did not confer a right to rest to workers belonging to other religious minorities whose days of celebration were not qualified as public holidays for all workers. Ibid., para. 66-68.

[147] Ibid., para. 79, 83, 85, 87-88.

advantages as those enjoyed by persons within the favoured category."[148] It follows that, until national legislator does not comply with EU law, private "employers must recognize, pursuant to Article 21 of the Charter, that [all] employees [...] are entitled to a public holiday on Good Friday" and to grant them with supplementary pay if they are requested to work on that day.[149]

5.3.2. *Braathens Regional Aviation*: exploring the right to an effective remedy's horizontal direct effect in the context of discrimination on grounds of ethnic origin

The horizontal direct effect of the right to effective remedy enshrined in Article 47 of the Charter had been further explored in a judgment delivered in 2021 on case *Braathens Regional Aviation*[150]. Like in *Egenberger*, also in this judgment reliance on Article 47 was aimed at strengthening the procedural dimension of the right to equality enshrined in Article 21(1) of the Charter.

In 2015 a passenger of Chilean origin travelling on an internal flight in Sweden operated by a private airline company (*Braathens*) was subject to a supplementary security check upon decision of the captain on board.[151] The Swedish Equality Ombudsman brought an action for damages against *Braathens* on behalf of the passenger claiming that the latter, by being associated with an Arabic person because of his physical appearance, had suffered discrimination on grounds of ethnic origin.[152] Before national courts *Braathens* accepted to pay damages but denied the existence of any discrimination whatsoever. Based on *Braathens*' acquiescence, Swedish courts ordered the company to pay damages without being possible to infer from the final judgment the existence of the alleged discrimination. Indeed, under Swedish civil procedural law the defendant's acquiescence had the effect of preventing courts from declaring the existence of the alleged discrimination and courts' injunction to pay damages based on that acquiescence did not presuppose a finding to that effect.[153] The ECJ found the national legislation to be contrary to Articles 7 and 15 of Directive

[148] Ibid., para. 80.
[149] Ibid., para. 85-86
[150] ECJ, Judgment of 15 April 2021, Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, ECLI:EU:C:2021:269.
[151] Ibid., para. 18.
[152] Ibid., para. 20.
[153] Ibid., para. 13-17, 25-26, 41-43.

2000/43[154], read in the light of Article 47 of the Charter.[155] On the basis of the combined provisions of Articles 7 and 15 of Directive 2000/43, persons who allegedly suffered discrimination on grounds of ethnic origin must be entitled to have access to judicial protection through a system of sanctions that must be effective, proportionate and dissuasive. The ECJ stressed that a system of sanctions according to which the author of the discrimination is obliged to compensate damages without being possible for the victim to also obtain a declaration that discrimination occurred does not enable the victim to obtain effective reparation nor it has truly deterrent effect as regards the author of the discrimination.[156] If consistent interpretation with the directive is not possible, the referring court must set aside the national rule "owing to the incompatibility of that rule not only with Articles 7 and 15 of Directive 2000/43 but also with Article 47 of the Charter".[157] The directive's provisions "merely gives expression" to Article 47 of Charter, which is "sufficient in itself" to confer rights as already established in *Egenberger*.[158]

5.3.3. *Bauer*, *Max-Planck*, *Hein* and *TSN*: establishing the horizontal direct effect of the right to paid annual leave and its limitations

In *Bauer and Willmeroth*, *Max-Planck* and *Hein* the ECJ established the horizontal direct effect of the right to paid annual leave enshrined in Article 31(2) of the Charter as specified in Article 7 of Directive 2003/88 (Working Time Directive).[159] Article 31(2) of the Charter provides in general terms that "every worker has the right [...] to an annual period of leave." Article 7(1) of Directive 2003/88 specifies that "every worker is entitled to paid annual leave of at least four months in accordance with the conditions [...] laid down by national legislation and/or practice." Article 7(2) provides that the four-weeks minimum period of annual leave may be replaced by an allowance in lieu only in case of termination of the employment relationship. Article 17 of the Directive does

[154] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7.2000, p. 22–26.
[155] *Braathens Regional Aviation* (*supra* note 150), para. 45.
[156] Ibid., para. 48-49.
[157] Ibid., para. 56.
[158] Ibid., para. 57; see also para. 33-34 and 38.
[159] *Frantziou*, Eur. Cost. Law Rev. 15(2)/2019, p. 306, 313; *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 13-14; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 196; *Nogueira-Guastavino*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 35, 46; *Prechal*, Revista derecho com. eur. 66/2020, p. 407, 416-417; *Ugartemendia*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 11, 17-18.

not allow any derogation to Article 7 thereof, but Article 15 allows the Member States to adopt more favourable measures.

Bauer and *Max-Planck* were concerned with the right to an allowance in lieu under Article 7(2) of Directive 2003/88. In *Bauer and Willmeroth*[160] Mrs. Bauer's husband had been an employee of the municipality of Wuppertal, while Mrs. Broßonn's husband had been an employee of a private company owned by Mr. Willmeroth. Following the death of their husbands, Mrs. Bauer and Mrs. Broßonn had demanded, in quality of legal heirs of the deceased workers, the payment by their husbands' employers of the allowance in lieu of the paid annual leave not taken by their husbands before their death. According to the interpretation of the German Federal Labour Court, German law provided for lapsing of the right to paid annual leave in case of the worker's death, with the consequence that that right could neither be converted into an entitlement to an allowance in lieu nor become part of estate of the deceased.[161] In *Max-Planck*[162], before the termination of his fixed-term employment relationship Mr. Shimizu was invited by his employer (*Max-Planck*) to take the leaves acquired during the previous two years and not yet taken. Mr. Shimizu had requested and enjoyed only a small fraction of those leaves and, once the employment relationship ended, had asked for the payment of an allowance in lieu.[163] Also in this case the employer's refusal to pay the allowance in lieu was based on the German Federal Labour Court's interpretation of the relevant provisions of German law. Pursuant to that jurisprudence, the right to paid annual leave, and the consequent right to an allowance in lieu, had to be considered *automatically* lapsed if the worker, during the reference year, had not requested the employer to take the leaves acquired for that period.[164]

In both judgments the ECJ found the relevant national legislation be incompatible with Article 7 of Directive 2003/88 and Article 31(2) of the Charter.[165] In *Bauer*, it stressed that the reason for which the employment relationship is terminated is not relevant as regards the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88.[166] The right to an allowance in lieu is "purely pecuniary in nature" and, in case

[160] ECJ, Judgment of 6 November 2018, Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871.
[161] Ibid., para. 8-9 and 15.
[162] ECJ, Judgment of 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, ECLI:EU:C:2018:874.
[163] Ibid., para. 12.
[164] Ibid., para. 14, 27 and 39.
[165] *Bauer and Willmeroth* (*supra* note 160), para. 63; *Max-Planck* (*supra* note 162), para. 61.
[166] Ibid. (*Bauer and Willmeroth*), para. 45.

of worker's death, is intended to become part of the legal heirs' assets.[167] If the contrary were to be held, the worker's death would result in the retroactive loss of an acquired right and the "very substance" of that right as well as its "effectiveness" would be undermined.[168] In *Max-Planck* the Court considered that Article 7(1) of Directive 2003/88 allows the national legislator to establish that the worker's failure to request annual leave during the relevant reference period would result in the loss of the right, provided that the worker had actually been given the chance to request and enjoy annual leave.[169] To this effect, the Court found it necessary to impose upon the employer an obligation to encourage the worker to request the leave as well as to adequately inform him that, if he fails to do so, the leave will be lost.[170] If the employer would not be imposed with this obligation, the automatic loss of the right to leave upon termination of the reference period, and of connected right to an allowance in lieu, would undermine the effectiveness and the "very essence" of worker's right.[171] Being the weak party of the employment relationship, in the absence of such an obligation for the employer, the worker could be induced not to request the leave to which he is entitled.[172]

In both judgments the Court extended its finding based on Article 7 of Directive 2003/88 to Article 31(2) of the Charter by relying on the Explanations relating to the Charter[173]. According to the Explanations the right enshrined in Article 31(2) is "based on", amongst the others, Article 7 of Directive 93/104, whose content is exactly reproduced in Article 7 of Directive 2003/88.[174] It followed that, as Article 7 of Directive 2003/88, Article 31(2) of Charter likewise precluded the national legislations at stake.[175] If it were to be held otherwise, this would be tantamount to allow Member States to derogate, in contrast to Article 51(2) of the Charter, from the "essence" of the right to paid annual leave.[176]

Since the last part of both judgments are essentially equivalent only the *Bauer* judgment will be considered. The Court stressed that, if consistent interpretation is

[167] Ibid., para. 48
[168] Ibid., para. 49-50.
[169] *Max-Planck* (*supra* note 162), para. 35-38.
[170] Ibid., para. 40, 44-47.
[171] Ibid., para. 26 and 45.
[172] Ibid., para. 41-43 and 48.
[173] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.
[174] *Bauer and Willmeroth* (*supra* note 160), para. 55-58; *Max-Planck* (*supra* note 162), para 52-53.
[175] Ibid. (*Bauer and Willmeroth*), para. 58, 60-62; Ibid. (*Max-Planck*), para. 55.
[176] Ibid. (*Bauer and Willmeroth*), para. 59-60; Ibid. (*Max-Planck*), para. 54.

impossible, the national court "must disapply that national legislation and ensure that the legal heir [of the deceased worker] receives payment from the employer of an allowance in lieu of paid annual leave acquired [...] and not taken by the worker before his death."[177] In the dispute between a legal heir and a public employer (Mrs. Bauer's proceedings) this obligation upon national court is dictated by Article 7(2) of Directive 88/2003, whereas in a dispute between a legal heir and a private employer (Mrs. Broßonn's proceedings) it is dictated by Article 31(2) of the Charter.[178] The ECJ stressed that the effect stemming from Article 31(2) of the Charter upon private employers was not foreclosed by Article 51(1) of the Charter. This provision "does not address" the issue of the horizontal direct effect of the Charter's provisions and "cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility."[179] Article 31(2) of the Charter has been found to be capable of producing horizontal direct effect insofar as it is "mandatory" and "unconditional".[180] The Court gave at least four arguments to this effect.[181] First, it stressed that the right to paid annual leave derives from several international instruments on which the Member States have cooperated or to which they are party. Second, contrary to Article 27 considered in *AMS*, Article 31(2) provides "in mandatory terms" for a "right" to paid annual leave and does not refer to EU and national implementing measures. Third, it reflects an "essential principle of EU social law" the essence of which cannot be derogated by the Member States pursuant to Article 52(1) of the Charter. Fourth, while the Member States are required to specify certain aspects of that right, as regards to "its very existence" no further concretization is required through EU or national legislation.

The case *Hein*[182] dealt with the methods of calculation and the measure of the remuneration due pending the minimum four-weeks period of leave guaranteed under Article 7(1) of Directive 2003/88. According to ECJ jurisprudence, during that period

---

[177] Ibid. (*Bauer and Willmeroth*), para. 92. In *Max-Planck* (para. 81) the Court equally concluded that the national court must not only set aside the conflicting national legislation but also ensure that the worker is granted with the allowance in lieu of the annual leave acquired under Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter.

[178] Ibid. (*Bauer and Willmeroth*), para. 92.

[179] Ibid. (*Bauer and Willmeroth*), para. 87; *Max-Planck* (*supra* note 162), para. 76. By referring to paragraph 77 of *Egenberger* (*supra* note 136; where reference was made to *Defrenne II*), the ECJ stressed that the fact that an EU primary law provision is explicitly addressed only to the Member States does not preclude its application to relations between individuals.

[180] Ibid. (*Bauer and Willmeroth*), para. 85; Ibid. (*Max-Planck*), para. 74.

[181] Ibid. (*Bauer and Willmeroth*), para. 83-85; Ibid. (*Max-Planck*), para. 72-74.

[182] ECJ, Judgment of 13 December 2018, Case C- 385/17, *Torsten Hein v Albert Holzkamm GmbH & Co*, ECLI:EU:C:2018:1018.

Article 7(1) confers to the worker the right to receive the "normal" remuneration (i.e., the same remuneration that he receives in periods of work).[183] Mr. Hein, an employee of a construction company (*Holzkmann*), between 2015 and 2016 enjoyed 30 days paid leave accrued in 2015.[184] However, pending that period of leave he received a renumeration inferior to the "normal" one insofar as in 2015 he had been placed on short-time work for about six months.[185] This was due to the fact that the collective agreement for the construction industry, by making use of the possibility offered to that effect by German law, provided that periods of short-time work were to be taken into account only partially for the calculation of the renumeration due pending the period of annual leave.[186] The ECJ found German law to be contrary to Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter. It first established that Mr. Hein had accrued, pursuant to Article 7(1) of the Directive 2003/88, two-weeks of minimum period of leave and that during that period he should have received the normal renumeration.[187] Being Article 7(1) a minimum harmonization rule, the Court established that other worker-friendly measures provided for in the collective agreement could not be taken into account to compensate the failure of granting workers with the normal renumeration during the period of leave accrued under that provision.[188]

Upon request by the referring court, the ECJ considered that its preliminary ruling did not give rise to any risk of serious economic consequences and thus that it was not necessary to limit its effect only to employment relationships established after the delivery of the judgment.[189] The Court then addressed the question about whether national courts could abstain from imposing upon private employers the consequences of the Member State's failure to comply with EU law in order to protect the private employers' legitimate expectations as to the maintenance of national jurisprudence that had previously confirmed the legality of relevant collective agreement.[190] By referring to *Dansk Industri* the ECJ stressed that application of the principle of

[183] Ibid., para. 32.
[184] Ibid., para. 12.
[185] Ibid., para. 16, 35-37.
[186] Ibid., para. 13-15.
[187] Although Article 7(1) guarantees a minimum period of four weeks of annual leave, Mr. Hein was placed on short-time work for about six months within the relevant reference year. According to the ECJ, periods of short-time work cannot be considered "actual work" and thus do not give rise to a right to paid leave. Since Mr. Hein did not actually work for about half of the reference year, he accrued only half of the minimum four-weeks period of annual leave guaranteed under Article 7 (1). Ibid., para. 25-29.
[188] Ibid., para. 43-47.
[189] Ibid., para. 57-60. For the criteria normally adopted by the ECJ on whether it is appropriate to decide on the temporal effect of preliminary rulings, *supra* note 90.
[190] Ibid., para. 20.

legitimate expectations would have the effect of excluding the possibility for the worker in the main proceedings to benefit from the interpretation given by the ECJ and would therefore be comparable to a limitation of the temporal effect of its judgment. Such a limitation could only be accepted in exceptional circumstances that the Court found not to occur in the present case.[191]

The case *TSN*[192] revealed the limits of the horizontal direct effect of Article 31(2) of the Charter relied upon in *Bauer and Willmeroth* and *Max-Planck*. The case concerned two workers who had been sick pending the annual leave guaranteed by their respective collective agreements. Having been unable to actually enjoy their leaves, both workers asked for carrying-over of the leaves to the following year.[193] The leaves for which they requested the carry-over exceeded the four-weeks minimum period provided under Article 7(1) of Directive 2003/88. The respective employers refused carry-over since the Finnish law on annual leave, to which collective agreements referred, guaranteed carry-over on grounds of illness only in relation to a period of four-weeks of annual leave.[194]

The main issue before the ECJ was whether Article 31(2) of the Charter could be invoked to ensure the carry-over of the period of leave exceeding the minimum of four-weeks guaranteed under the Article 7(1) of Directive 2003/88. The ECJ first found that, when a national legislation regulates the period of leave exceeding the minimum of four-weeks, that legislation fall outside the scope of protection guaranteed under Article 7(1) of Directive 2003/88 and could not be reviewed against that provision.[195] It then considered that Article 31(2) of the Charter was not applicable and therefore could not be relied upon for displaying horizontal direct effect in the main proceedings.[196] To conclude that the Finnish law was not "implementing" EU law within the meaning of Article 51(1) of the Charter, the ECJ proceeded in three steps. First, it stressed that the mere fact that a national legislation falls within an area of EU competence is not sufficient to trigger the application of the Charter.[197] Second, in the social policy areas listed in Article 153(2) TFEU the EU had been given only with supportive competences

[191] Ibid., para. 61-62.
[192] ECJ, Judgment of 19 November 2019, Joined Cases C-609/17 and C-610/17*, Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, ECLI:EU:C:2019:981.
[193] Ibid., para. 18-22, 25-27.
[194] Ibid., para. 13-14, 23, 30.
[195] Ibid., para. 35-36, 40.
[196] Ibid., para. 55-56.
[197] Ibid., para. 46.

and the measures adopted on that legal basis, such as Directive 2003/88, can only establish "minimum requirements", meaning that the Member States are left free to maintain or introduce more protective measures.[198] The ECJ distinguished the situation where EU legislation establishes "minimum requirements" from the situation where EU legislation leaves discretion to the Member States to opt between a variety of actions and from the situation in which it authorizes Member States to adopt specific measures.[199] Third, it stressed that when Member States adopt more favourable measures they are regulating aspects that are not governed by EU law and in respect of which EU law does not impose any obligation. Provided that the minimum protection granted under EU law is not affected, more favourable national measures fall outside the scope of EU legislation and thus of the Charter.[200]

The case *TSN* shows that Article 31(2) of the Charter may produce horizontal direct effect only insofar as the relevant national legislation is capable of affecting the minimum protection granted under Article 7 of Directive 2003/88. Since the EU legislature makes extensive use of minimum harmonization directives in the area of social policy and other policy areas,[201] *TSN* is very likely to have implications on other Charter provisions that in future might be found capable of displaying horizontal direct effect by preventing them from having such an effect beyond the aspects strictly regulated under minimum harmonization directives.[202]

6. Evaluating the *Mangold* line of case law through the lens of the principle of conferral and the principle of legal certainty and legitimate expectations

Ever since *Mangold*, this line of case law's underlying rationale had given rise to concerns in terms of inconsistency with the principle of conferral as well as with the principle of legal certainty and legitimate expectations. This section analyzes some

[198] Ibid., para. 47-48.

[199] Ibid., para. 50. Drawing a distinction between EU legislation of minimum harmonization and other forms through which EU legislation leaves discretion to Member States, such as in the case of "optioning" rules considered as falling within the scope of the Charter since the case *N.S.* (Joined Cases C-411/10 and C-493/10), raises the difficult question on how such a distinction could work in practice; *Tecqmenne*, Eur. Const. Law Rev. 16(3) 2020, p. 493, 510-512.

[200] Ibid., para. 51-53.

[201] For an overview see *Tecqmenne,* Eur. Const. Law Rev. 16(3) 2020, p. 493, 509.

[202] According to some, relying on the Charter's horizontal direct effect beyond the aspects strictly regulated under minimum harmonization directives would be tantamount to extend these directives' scope of application in breach of the principle of conferral and of Article 51(1) of the Charter. *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022).

selected issues routed in these concerns by focusing first on the principle of conferral (6.1.) and then on the principle of legal certainty and legitimate expectations (6.2).

6.1. The *Mangold* line of case law and its relation with the principle of conferral

The EU is based on the principle of conferral.[203] The impact of this principle on the overall structure of the EU legal order is particularly evident in the system of fundamental rights of protection. The Charter of Fundamental Rights is not mean to extend the EU competences beyond what is envisaged in the Treaties but only to act as a shield against fundamental rights' abuses in the spheres of actions of the EU.[204] Regarding the application of the Charter to Member States' measures, the impact of the principle of conferral is also apparent in the limitation provided for under Article 51(1).[205] Consistently with the scope of application of general principles of Community law, that provision limits the application of that Charter to Member States only to the extent that they are "implementing Union law".[206]

Ever since *Mangold* the question arouse whether this line of case law has the effect of altering the division of powers between the EU and its Member States as well as the choice of legal instrument by the EU legislator (6.1.1.). Against this background, it is submitted that the ECJ's choice since *Mangold* to assert the horizontal direct effect of EU fundamental rights regardless of the inability of the corresponding Treaty provisions and implementing legislations to have that effect remains in principle entirely legally defensible. In this line of case law, respect for the principle of conferral should rather be ensured by using caution in identifying the types of connection with EU law that may trigger the application of the Charter to Member States' actions under Article 51(1) (6.1.3.). By contrast, Article 51(1) should not be read as affecting in principle the Charter's ability to display horizontal effect on the basis of the mere textual argument that private parties are not mentioned therein as Charter's addresses (6.1.2). Finally,

---

[203] According to this principle, the EU may act "only within the limits of the competences conferred upon it by the Member States in the Treaties", whereas any other competence "remain with the Member States."; Articles 4(1) and 5(2) TEU.

[204] Art. 6(1)(2) TEU; Art. 51(2) of the Charter.

[205] *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1209-1210; *Lenaerts*, Eur. Cons. Law Rev. 8(3) 2012, p. 375, 376-377; *Snell*, Eur. Public Law 21(2) 2015, p. 285, 290-291.

[206] For an overview on (historical) debate on whether the notion of "implementing Union law" intended or had the effect of narrowing down the scope of application of general principles of EU law defined in the pre-Lisbon case law by reference to the apparently wider notion of "scope of Union law", see Ibid. (*Dougan*), p. 1204-1207. Since *Fransson* the ECJ famously opted for a reading of Article 51(1) aimed at maintaining consistency in the scope of application of the Charter and of general principles; ECJ, Judgment of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, 19-23.

it is argued that the ECJ should strive for maintaining consistency between the requirements for a given Charter's provision to display horizontal direct effect and the traditional requirements for direct effect of EU law (6.1.4.).

6.1.1. Relationship between Treaty provisions, directives and EU fundamental rights: is the *Mangold* line of case law altering the division of powers?

In the *Mangold* line of case law the ECJ has granted horizontal direct effect to EU fundamental rights regardless of the inability of the corresponding Treaty provisions and implementing legislations to have direct effect. Directive 2000/78[207] and Directive 2000/43[208] were adopted on the legal basis of (now) Article 19(1) TFEU. This Treaty provision had been consciously drafted by the Member States as to confer to the EU institutions the power to legislate against discrimination based on the grounds listed therein and not to confer directly effective rights to individuals.[209] Moreover, the EU institutions had opted for directives as legal instruments to regulate this area, an instrument that according to the ECJ itself is not capable of having horizontal direct effect.[210]

In *Bauer* and *Max-Planck* the ECJ had equally granted horizontal direct effect to the right to paid annual leave enshrined in Article 31(2) of the Charter as specified in Article 7 of Directive 2003/88 (Working Time Directive). This directive was adopted on the legal basis of Article 153 TFEU. This Treaty provision is equally not intended to confer directly effective rights and even specifically mandates the use of directives as legal instruments to regulate the social policy areas listed therein.[211]

Despite the ECJ's growing insistence since *AMS* that the relevant EU fundamental right must be "sufficient of itself" to directly confer rights in horizontal relationships,[212] the synergic relationship between directives and the correspondent fundamental rights developed since *Kücükdeveci* has remained largely unaltered.[213] The most recent

---

[207] *Supra* note 54; considered in *Mangold* (*supra* note 53), *Kücükdeveci* (*supra* note 70), *Dansk Industri* (*supra* note 79), *Egenberger* (*supra* note 119), *IR v JQ (supra* note 122) and *Cresco Investigation* (*supra* note 139).
[208] *Supra* note 154; considered in *Braathens Regional Aviation* (*supra* note 150).
[209] *Dashwood*, Camb. Yearb. Eur. Leg. Stud 9/2007, p. 81, 106-107; *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 132; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 190.
[210] *Supra* note 56; Ibid. (*Muir*); Ibid. (*de Mol).*
[211] Ibid. (*Muir*), p. 203.
[212] *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 9-10; *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022); *Ugartemendia*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 11, 16.
[213] *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 193 and 205-206.

judgment on *Braathens Regional Aviation* seems even to mark a semantic return to the *Kücükdeveci*'s formula of EU fundamental rights "given expression" in directives.[214] As sketched above (5.1.), in this line of case law the synergic relationship between EU fundamental rights and directives operates on three levels.[215] First, the directive brings the dispute within the scope of EU in order to trigger the application of the correspondent fundamental right. Second, the directive is the parameter of EU law against which the compatibility of the disputed national legislation is reviewed and the directive is relied upon to fill the content of the hierarchically superior fundamental right. Indeed, as the ECJ explicitly clarified in *Dansk Industri*, a separate review of the disputed national legislation's compatibility with fundamental rights protected at EU primary law level is not necessary since those rights and corresponding directives' provisions should be considered as having the "the same scope of protection".[216] Third and finally, the fundamental right protected at EU primary law level is relied upon to produce direct effect should there be no space for an interpretation consistent with the relevant directive.

The synergic relationship between EU fundamental rights and directives' provisions in the *Mangold* line of case law has led some authors to question whether it still makes sense to exclude the directives' horizontal effect in the first place.[217] Besides that, it has also been argued that the granting horizontal direct effect to EU fundamental rights irrespectively of the inability of the corresponding Treaty provisions and implementing legislations to have direct effect may be regarded as being at odds with the division of powers between the EU and its Member States as well as with the EU legislature's choice of the legal instruments.[218] Against this background, it should be emphasized that the ECJ's recognition of EU fundamental rights' horizontal direct effect since *Mangold* was and still remains entirely legally defensible.[219] Fundamental rights protected as general principles of EU law or under the Charter are autonomous sources of law within the EU legal order that, as such, should be unaffected by the limitations that might apply to the direct effect of the corresponding Treaty provisions

[214] *Supra* note 158.
[215] This partition has been inspired by *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 199-200 and 212-213.
[216] *Dansk Industri* (*supra* note 79), para. 23.
[217] *Craig*, Eur. Law Rev. 3/2009, p. 349, 372; *Dashwood*, Camb. Yearb. Eur. Leg. Stud 9/2007, p. 81, 106.; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 203; the ECJ has so far maintained the "*Marshall* prohibition" (*supra* note 56) and confirmed it quite recently; ECJ Judgment of 7 August 2018, Case C-122/17, *David Smith v Patrick Meade and Others*, ECLI:EU:C:2018:631, para 42.
[218] Ibid. (*Dashwood*), p. 107; *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 132; Ibid. (*Muir*), p. 190 and 203.
[219] *Dougan*, in: Arnull/Barnard/Dougan/Spaventa (eds.), p. 219, 227-228.

or implementing legislations.[220] The granting of horizontal direct effect to EU fundamental rights does not seem to raise significant concerns under the principle of conferral as long as EU fundamental rights are applied horizontally to situations that are already regulated under EU implementing legislation.[221]

6.1.2. Article 51(1) as inherent obstacle to the Charter's ability to have horizontal effect?

The debate on whether Article 51(1) should be read as foreclosing the Charter rights' general ability to have horizontal effect traces back to time when the Charter became legally binding through the entry into force of the Lisbon Treaty.[222] The main argument in support of the thesis according to which Article 51(1) should foreclose the Charter' general ability to have horizontal effect is a textual one. Since Article 51(1) lists amongst the Charter's addresses only the EU institutions and its Member States it should follow *a contrario* that the Charter could not in principle be relied upon to impose obligations upon private parties.[223]

Several arguments have been invoked to support the opposite thesis and some of them left traces in the ECJ reasoning in *Egenberger*, *Bauer* and *Max-Planck*. A first set of arguments establishes a parallelism with the market freedoms case law. Since horizontal direct effect of the market freedoms and of Article 157 TFEU is well-established in the ECJ case law, it will be paradoxical and problematic to treat differently the Charter's rights.[224] Moreover, as established by the ECJ in *Defrenne II* in relation to Article 157 TFEU, the fact that provisions of EU primary law may be explicitly addressed only to the Member States does not prevent their application to private relationships.[225] Another argument establishes a parallelism with the ECHR.

---

[220] Ibid.

[221] Ibid.

[222] *Frantziou*, Camb. Yearb. Eur. Leg. Stud. 22(2020), p. 208, 210.

[223] *Kokott*, *Sobotta*, EUI AEL 2010/6, p. 1, 14; *Lenaerts*, Eur. Cons. Law Rev. 8(3) 2012, p. 375, 377. This position was seminally defended before the ECJ by AG Trstenjak in *Dominguez*; Opinion of Advocate General Trstenjak on *Dominguez* (*supra* note 98), para. 80-83.

[224] Opinion of Advocate General Villalón on *Association de médiation sociale* (*supra* note 110), para. 34. In academic literature see *Frantziou*, p. 85-86. At para. 77 of *Egenberger* (*supra* note 119) the ECJ referred to the case law on horizontality of market freedoms and Article 157 TFEU by quoting *Defrenne II*, *Angonese*, *Viking* and *Ferlini* to conclude that Article 21(1) of the Charter was "mandatory" and thus capable of having horizontal direct effect.

[225] *Supra* note 31; *Frantziou*, Camb. Yearb. Eur. Leg. Stud. 22(2020), p. 208, 210-211. In *Bauer* and *Max-Planck* (*supra* note 179) the ECJ referred to paragraph 77 of *Egenberger* (where reference was made, *inter alia*, to *Defrenne II*) and stressed that the fact that an EU primary law provision is explicitly addressed only to the Member States does not preclude its application to relationships between private parties.

Horizontality of the ECHR's rights through the State's mediation under the "duty to protect" doctrine is a consolidated concept in the ECtHR jurisprudence and this jurisprudence shall be taken into account in interpreting the corresponding Charter's rights pursuant to Article 52(3) of the Charter.[226] Lastly, a set of arguments relates to intended purpose of Article 51(1) of the Charter.[227] Not from the text of Article 51(1) nor from the preparatory works or the Explanations relating to the Charter it could be inferred that this provision was intended to address the issue of the horizontal effect of fundamental rights.[228] The purpose of Article 51(1), as further reflected in Article 51(2) of the Charter and Article 6(1) of the Treaty on European Union (TEU), is that of ensuring that the Charter does not alter the division of competences between the EU and its Member States by conferring to the former a general competence in the area of fundamental rights' protection. As long as a legal relationship falls within the scope of application of EU law so as to trigger the application of the Charter to Member States' measures, the vertical or horizontal nature of the relevant legal relationship is neutral from the perspective of Article 51(1) of the Charter.[229]

6.1.3. Types of connection with EU law relied upon to trigger the horizontal application of EU fundamental rights

Article 51(1) of the Charter provides that the Charter applies to the Member States "only when they are implementing Union law." Like fundamental rights protected as general principles of EU law, the Charter's rights are not self-standing. They bind the Member States only to the extent that national measures display a sufficiently qualified connection with EU law.[230] Although the exact categorization of the ECJ case law on Article 51(1) is subject to constant debate, national measures that have been found

[226] *Ugartemendia*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 11, 12.
[227] An argument based on the intended purpose of Article 51(1) is relied upon by the ECJ in *Bauer* and *Max-Planck* (*supra* note 179), where it held that Article 51(1) of the Charter "does not address" the issue of the horizontal direct effect of the Charter's provisions. The ECJ has not said, however, what Article 51(1) is intended to address.
[228] Opinion of AG Villalón on *Association de médiation sociale* (*supra* note 110), para. 31; *Frantziou*, p. 85. It is often emphasized that horizontality is supported by recital 6 of the Charter's Preamble according to which enjoyment of the Charter's rights "entails responsibilities and duties with regard to other persons, to the human community and to future generations." *Frantziou*, p. 85; *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022).
[229] *Frantziou*, p. 84-85; *Prechal*, Revista derecho com. eur. 66/2020, p. 407, 418.
[230] The question about the extent to which EU fundamental rights bind the Member States is often labelled as the "federal question". *Eeckhout*, CMLR 39(5) 2002, p. 945, 946; *Groussot, Pech, Petursson*, in: de Vries/Bernitz/Weatherill (eds.), p. 97, 98; *Snell*, Eur. Public Law 21(2) 2015, p. 285, 285-286.

capable of being reviewed against the Charter are traditionally grouped in two categories: the "implementation" category and the "derogation" category.[231]

Regarding the "derogation" category, Member States are bound by EU fundamental rights when they restrict market freedoms and to justify the restriction rely on justification grounds either explicitly recognized in the Treaty or judicially accepted by the ECJ (also known as "ERT doctrine").[232] As noted above (para. 4.), in the case law on horizontality the only cases where EU fundamental rights have so far been applied horizontally on the basis of the market freedoms are *Schmidberger*, *Viking* and *Laval*.

Regarding the "implementation" category, in the ECJ case law the notion of "implementation" covers a wide range of situations where the Member States implement EU primary or secondary law through the activity of their legislative, executive and judicial organs. To establish whether Member States' measures amount to "implementation" of EU law in its general case law the ECJ has often alternated between a rather flexible approach and a more systematic approach based on a set of guiding criteria.[233] In the *Mangold* line of case law, the ECJ has relied upon two types of connections between national law and EU law for the purpose of triggering the application of EU fundamental rights in horizontal relationships. In a first set of cases the disputed national legislations were specifically intended to transpose the relevant directives into national legal orders.[234] In a second set of cases the disputed national legislations, albeit not specifically transposing the relevant directives, were regulating aspects falling within the directives' personal and material scope of application.[235] So far the *Mangold* line of case law has not raised significant accusations against the ECJ of having relied on excessively tenuous connections with EU law for the purpose of applying the Charter to national measures.[236] The ECJ has nonetheless been invited to proceed with caution and eventually to not apply the Charter to national measures regulating situations that fall outside the scope of application of the relevant directives.

---

[231] *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1211; Ibid. (*Groussot, Pech, Petursson*); Ibid. (*Snell*), p. 290.

[232] *Supra* note 69. *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 50; *van der Mei*, MJECL 22(3) 2015, p. 432, 434.

[233] *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1231; *Snell*, Eur. Public Law 21(2) 2015, p. 285, 292-297.

[234] *Mangold* (*supra* note 53), para. 75; *Association de médiation sociale* (*supra* note 100), para. 24-26; *Egenberger* (*supra* note 119), para. 31; *IR v JQ* (*supra* note 122), para. 14; *Bauer and Willmeroth* (*supra* note 160), para. 52-53; *Max-Planck* (*supra* note 162), para. 31-34.

[235] *Kücükdeveci* (*supra* note 70), para. 24-26; *Dansk Industri* (*supra* note 79), para. 24-25; *Cresco Investigation* (*supra* note 139), para. 76; *Braathens Regional Aviation* (*supra* note 150), para. 31-34.

[236] For critical position see *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 126-127; *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1223-1226. Those authors suggest that considering the Charter applicable by virtue of the mere overlap between the disputed national law and the material scope of the relevant directive, as in *Kücükdeveci*, is a deviation from the general case law on the reach of EU fundamental rights to national measures.

Should the ECJ apply the Charter to these situations, this would be tantamount to extend the EU competences and to circumvent Article 51(1) of the Charter.[237] While the need of proceeding with caution in determining the Member States' measures falling under the scope of the Charter is fully appreciable in itself, caution should not come at the expense of the consistency in the overall case law based on Article 51(1). The risk of raising accusations of "competence creep" lies probably behind the ECJ's restrictive approach in *TSN* about the applicability of the Charter to national measures providing more extensive protection than that provided under minimum harmonization directives.[238] In the judgment ECJ has distanced itself from the Opinion of AG Bot where it was essentially suggested that, since minimum harmonization directives explicitly allow Member States to adopt more favourable measures, those national measures should be regarded as the "domestic extension" of minimum harmonization directives and thus as amounting to implementation thereof.[239] In his Opinion AG Bot carried out a careful revision of the ECJ case law and suggested that the fact that EU legislation may leave a margin of discretion to the Member States has not traditionally prevented the ECJ from reviewing discretionary national measures pursuant to the Charter.[240] In the judgment the ECJ has drawn a distinction between minimum harmonization and other forms through which EU legislation leaves discretion to Member States without carrying out a clear revision of its former case law on Article 51(1) and without establishing why such a distinction should be drawn as a matter of theory and how it could be implemented in practice.[241]

---

[237] *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 212-213; *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022).

[238] If regarded in the light of the prior horizontality case law the approach relied upon in *TSN* revives the restrictive approaches formerly adopted in the area of EU social policy in *Dominguez* and *AMS*. *TSN* may also be read along the line of ECJ case law on EU citizenship that suggests growing deference to national systems of fundamental rights protection in the areas of social policy that are not strictly regulated through EU legislation, in particular *Dano* (Case C-333/13). *Frantziou*, Paid Annual Leave and Collective Agreements after the TSN Judgment (C-609/17 and C-610/17), https://eulawlive.com/blog/2019/11/22/ (last accessed on 25/07/22); *Tecqmenne*, Eur. Const. Law Rev. 16(3) 2020, p. 493, 507-508.

[239] Opinion of Advocate General Bot delivered on 4 June 2019, Joined Cases C-609/17 and C-610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, ECLI:EU:C:2019:459, para. 82 and 86.

[240] Ibid., para. 82-92.

[241] *Frantziou*, Paid Annual Leave and Collective Agreements after the TSN Judgment (C-609/17 and C-610/17), https://eulawlive.com/blog/2019/11/22/ (last accessed on 25/07/22); *Tecqmenne*, Eur. Const. Law Rev. 16(3) 2020, p. 493, 510-512.

6.1.4. Requirements for the Charter's rights to have horizontal direct effect: mandatory and unconditional nature

Once the Charter is found to be applicable under Article 51(1), the relevant question turns to be which requirements the relevant Charter provision must fulfill to have horizontal direct effect. By continuing on the path traced in *AMS*, in the case law delivered from 2018 onwards the ECJ has put particular emphasis on two criteria: the "mandatory" and "unconditional" nature of the relevant Charter's provision.[242]

If it is accepted as a matter of principle that Charter's provisions may produce direct effect in horizontal relationships, then the case law should strive to maintain consistency between the requirements that are necessary in this regard and the traditional requirements for direct effect of EU law provisions.[243] Admittedly, establishing whether the test based on the criteria relating to the "mandatory" and "unconditional" nature of the relevant Charter's provision perfectly coincides with traditional test for direct effect of EU law provisions based on their sufficient clarity, precision and unconditionality is rather a difficult task. This difficulty is twofold. On one hand, the traditional requirements for direct effect are not always used and checked systematically by the ECJ.[244] On the other hand, the ECJ case law on horizontality shows that the requirement relating to the Charter provision's "mandatory" nature is not always being used with the same meaning in the case law on Article 21(1) and in the case law on Article 31(2) of the Charter.[245]

The "unconditionality" requirement traces back to *AMS* and is relied upon with essentially the same meaning in the case law on Articles 21(1), 47 and 31(2) of the Charter. In the case law on Articles 21(1) and 47, the ECJ refers to the fact that these provisions are "sufficient" in themselves and do not need "to be made more specific by provisions of EU and national laws to confer on individuals a right which they may rely on as such."[246] In the case law on Article 31(2) the ECJ similarly refers to the fact that the right to paid annual leave, regarding "its very existence", does not need "to be given concrete expression by the provisions of EU or national law."[247] The "unconditionality"

---

[242] *Frantziou*, Camb. Yearb. Eur. Leg. Stud. 22(2020), p. 208, 217-218; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 200-201; *Prechal*, Revista derecho com. eur. 66/2020, p. 407, 420,

[243] *Dougan*, in: Arnull/Barnard/Dougan/Spaventa (eds.), p. 219, 239-240.

[244] *Bobek*, in: Barnard/Peers (eds.), p. 140, 145.

[245] For a similar stance see *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 200-201 and 210.

[246] *Egenberger* (*supra* note 119), para. 76 and 78; *IR v JQ* (*supra* note 122), para. 69; *Cresco Investigation* (*supra* note 139), para. 76; *Braathens Regional Aviation* (*supra* note 150), para. 57.

[247] *Bauer and Willmeroth* (*supra* note 160), para. 85; *Max-Planck* (*supra* note 162), para. 74.

requirement essentially denotes that a Charter provision must not require further concretization of the relevant fundamental right through EU and/or national laws and practices.[248]

In *Mangold* line of case law the requirement about the "mandatory" nature of the relevant Charter provision had been explicitly introduced by the ECJ since *Egenberger*. The term "mandatory" seems to be used with three different meanings in the ECJ case law. Two meanings are common to the case law on Article 21(1) and on Article 31(2) of the Charter, whereas a third meaning is specifically relied upon in relation to Article 31(2) of the Charter.

First, the term is used in connection to the "unconditionality" requirement as to denote the sufficient precision of the relevant Charter provision and thus its justiciability before national courts. In this sense, the term seems to incorporate the traditional criteria for direct effect of EU law provisions.[249]

According to the second meaning, "mandatory" seems to be used to denote either the nature of the relevant Charter's right as a general principle of EU law or the fundamental importance of that right in the EU legal order.[250] In the case law on Article 21(1) the ECJ has repeatedly held the right to non-discrimination "is mandatory as a general principle of EU law" and that "regarding its mandatory nature" Article 21(1) "is no different [...] from the various provisions of the founding Treaties prohibiting discrimination on various grounds [...]."[251] In its case law the ECJ has often qualified the market freedoms as being "fundamental" or as forming part of "the foundations of the Community".[252] In *Defrenne II* the ECJ equally considered Article 157 TFEU as being "part of the foundations of the Community."[253] The same use of term is reflected in the case law on Article 31(2) of the Charter where the ECJ stressed that the right to paid annual leave is mandatory as an "essential principle of EU social law".[254]

---

[248] For an overview of the Charter provisions that refer to EU and/or national laws and practices see *Leczykiewicz*, Eur. Law Rev. 4/2013, p. 479, 488. Some authors stress that reliance on the unconditionality requirement is likely to predominantly affect the horizontal direct effect of the Charter's Solidarity Title; *Frantziou*, Eur. Cost. Law Rev. 15(2)/2019, p. 306, 313.

[249] *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 201; *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022).

[250] *Timmermans*, Eur. Rev. of Priv. L. 3-4/2016, p. 673, 684.

[251] *Egenberger* (*supra* note 119), para. 76-77; *IR v JQ* (*supra* note 122), para. 69; *Cresco Investigation* (*supra* note 139), para. 76-77.

[252] *Oliver, Roth*, CML Rev. 41(2) 2004, p. 407, 407-408.

[253] *Supra* note 28.

[254] *Bauer and Willmeroth* (*supra* note 160), para. 83; *Max-Planck* (*supra* note 162), para. 72. The category of "particular important principle of EU social law" was introduced by the ECJ in respect of the right to paid annual leave since *BECTU* (Case C-173/99). This category is normally considered distinct from that of general principles

Finally, in the case law on Article 31(2) of the Charter the term "mandatory" is also used to denote the "absolute" nature of the relevant Charter's right.[255] In this case law the ECJ has essentially linked the "minimum" non-derogable protection granted by Article 7 in combination with Articles 15 and 17 of Directive 2003/88 to the "essence" of the correspondent Charter's right.[256] The ECJ approach in this case law suggests that the right to a minimum period of four weeks of paid annual leave and the connected right to an allowance in lieu enshrined in Article 7 of Directive 2003/88 constitute the non-derogable "essence" of the right to paid annual leave enshrined in Article 31(2) read in combination with Article 52(1), first sentence, of the Charter.[257]

Besides the fact that it does not seem to be reflected in the traditional analysis of direct effect of EU law, the construction based on the "essence" adopted in respect of Article 31(2) of the Charter may be ill-suited in respect of other fundamental right protected under the Charter. This construction could not work for equality rights since those rights inevitably require a balancing exercise between competing interests whenever a difference in treatment of comparable situations is established.[258] Even if such a construction will be limited to socio-economic rights or other rights where it could be theoretically possible to identify an absolute essential nucleus, it will not always be possible to rely on secondary legislation for the purpose of defining the essence of the relevant Charter's right. Reliance on secondary legislation to define the essence of the Charter's right was conceptually sustainable and practically possible in the context of the right to paid annual leave because of the nature of Article 7 of Directive 2003/88 as a non-derogable provision of minimum harmonization. In the absence of these characteristics, it will be more difficult to rely on a provision of secondary legislation to define the content of the "essence" of the corresponding Charter's right.

---

of EU law. *Krommendijk*, Eur. Cost. Law Rev. 11(2) 2015, p. 321, 329; *Nogueira-Guastavino*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 35, 41.

[255] *Rossi*, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/2022).

[256] *Lenaerts*, Ger. Law j. 20(6) 2019, p. 779, 790-792. This approach is reflected by the ECJ's insistence in *Bauer and Willmeroth* (*supra* note 160, para. 49, 59-62) and in *Max-Planck* (*supra* note 162, para. 26, 54-56) on the "very essence" of the right to paid annual leave as protected through Article 7 of Directive 2003/88. In the same vein, in *Hein* (*supra* note 182, para. 43) the ECJ stressed that any more favourable measure of national law cannot be invoked to justify the failure of granting workers with the normal renumeration during in the period of leave guaranteed under Article 7 of Directive 2003/88.

[257] Respect for the "essence" of the Charter rights is laid down in Article 52(1) as one of the conditions that must be fulfilled for a limitation to a fundamental right to be justified. Any limitation affecting the essence of a Charter's right is considered as automatically disproportionate without being possible to engage in a balancing exercise between competing interests or rights. Ibid. (*Lenaerts*), p. 779-780.

[258] *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 210.

6.2. The *Mangold* line of case law and its relation with the principle of legal certainty and legitimate expectations

Ever since *Mangold* this line of case law had been criticized for giving rise to sensitive issues in terms of legal certainty and legitimate expectations.[259] These concerns are mainly routed in the fact that the *Mangold* line of case law results in the direct imposition of obligations upon private parties (normally employers) (6.2.1) without taking into account their legitimate expectations to plan and carry out their business in the light of the pre-existing national legal framework.[260] The absence of any consideration in the ECJ's assessment on the private employers' position is the result of the fact that the *Mangold* line of case law is based on an "hybrid" horizontal construction, where the imposition of direct obligations upon private parties is treated by the ECJ as a "collateral" effect of a Member State's failure to comply with a given directive (6.2.2.). To address the concerns raised by this "hybrid" horizontal construction in terms of attributability and legal certainty, it is suggested that in this line of case law the ECJ should consider more actively the possibility of introducing a methodology for balancing the competing private parties' rights and interests. After having shown that in the *Mangold* line of case law the horizontal direct effect of EU fundamental rights has essentially come into play in absolute terms (6.2.3.), a solution is proposed to introduce a methodology of balancing based on the need to protect private employers' legitimate expectations (6.2.4.).

6.2.1. Imposition of direct obligations upon private employers: from a mere "exclusionary" to a full-fledged "substitutive" direct effect?

In the *Mangold* line of case law EU fundamental rights are relied upon by the ECJ with the effect of imposing an obligation upon a private party (normally an employer) to treat another private party (normally an employee) in conformity with EU directives.[261] In the majority of judgments examined in paragraph 5, the direct effect produced by EU fundamental rights is of a mere "exclusionary" nature. By following the approach adopted in *Mangold* and *Kücükdeveci*, the case law examined above suggests that reliance on EU fundamental rights entails primarily the obligation upon national courts

[259] *Craig*, Eur. Law Rev. 3/2009, p. 349, 373-374; *Leczykiewicz*, Eur. Law Rev. 4/2013, p. 479, 482-483; Ibid. (*Muir*), 203-204; *Timmermans*, Eur. Rev. of Priv. L. 3-4/2016, p. 673, 676.
[260] Ibid. (Craig); Ibid. (*Leczykiewicz*).
[261] *Craig*, Eur. Law Rev. 3/2009, p. 349, 372; *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 123; *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 207-208.

to merely set aside any conflicting provision of national law. This have led some authors to argue that the *Mangold* line of case law cannot be regarded as a true manifestation of horizontal direct effect of EU law but rather as a mere application of the principle of primacy.[262]

Even by accepting the merits of that view, it seems that in *Bauer*, *Max-Planck* and *Cresco* the ECJ is progressively opening the door to a direct effect of "substitutive" nature.[263] In these judgments, the ECJ seems to consider that the direct effect of Charter's rights does not entail the mere setting aside of the conflicting national legislation, but it rather requires national courts to impose specific rights and obligations upon private parties.[264] EU fundamental rights seem to come into play to regulate by themselves the private relationships without resorting to the residual body of national law. This approach inevitably strengthens the view according to which in the *Mangold* line of case law EU fundamental rights operate as direct sources of rights and obligations for private parties.[265]

6.2.2. The *Mangold* line of case law as an "hybrid" horizontal construction: horizontal effect without horizontal reasoning?

Either through disapplication or through substitution, reliance on EU fundamental rights in the *Mangold* line of case law has the effect of directly altering legal relationships between private parties.[266] At the same time, this line of case law cannot be fully equated with the purer form of direct horizontality that has found expression in the ECJ case law addressing situations of conflict between market freedoms and fundamental rights (*Viking* and *Laval*). Differently than that case law, in *Mangold* line of case law the

---

[262] *Fornasier*, Eur. Rev. Priv. Law 23(1) 2015, p. 29, 44; *Hartkamp*, Eur. Rev. of Priv. L. 3/2010, p. 527, 533-534; *Leczykiewicz*, Eur. Rev. Contract Law 16(2)/2020, p. 323, 330. This is particularly the case for those scholars who use the notion of "direct" effect to refer to "substitutive" effect; see *supra* notes 10-11. Insofar as in the *Mangold* line of case law emphasis is placed upon a national courts' obligation, it has also been suggested to read this line of case law in terms of a duty upon national courts to "protect" fundamental rights; *Bermejo*, in: Izquierdo-Sans/Martínez-Capdevila/Nogueira-Guastavino (eds.), p. 51, 67-69. Nevertheless, this vertically-oriented reading sits uneasily with the underlying rationale of the "direct effect" doctrine as elaborated since *Van Gend En Loos*; *supra* paragraph 3. According to that judgment the EU has developed into a legal order intended to directly confer individual rights that are apt to enforcement before national courts. *Van Gend* seems to conceive national courts as merely providing individuals with the necessary assistance to practically enforce their rights.

[263] *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 12-15; *Leczykiewicz*, Eur. Rev. Contract Law 16(2)/2020, p. 323, 333.

[264] *Bauer and Willmeroth* (*supra* note 160), para. 92; *Cresco Investigation* (*supra* note 139), para. 85-86; *Max-Planck* (*supra* note 162), para. 81.

[265] *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 15-17; *Leczykiewicz*, Eur. Rev. Contract Law 16(2)/2020, p. 323, 333.

[266] *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 121-122.

ECJ's assessment does not focus on the whether the private parties' conducts themselves complies with EU fundamental rights, but rather on whether the national laws on the basis of which private parties organized their activities comply with EU fundamental rights specified in directives.[267]

Mangold and its progeny presuppose a breach by the Member States of their obligation to adequately transpose directives into national legal orders. The issue of central concern for the ECJ is to assess the compatibility of given national legislation with a certain directive.[268] Once the relevant national legislation is found incompatible with the directive, EU fundamental rights are relied upon to produce horizontal direct effect.[269] The underlying purpose of the ECJ approach is that to put pressure on Member States to comply with EU directives by conferring to private parties the right to rely to those directives, mediated by fundamental rights having primary law status, before national courts.[270] The imposition of rights and obligations upon the opponent private parties is essentially treated by the ECJ as a "collateral" effect of a Member State's failure to adequately transpose a given directive.[271]

This "hybrid" horizontal construction raised problems of attributability and legal certainty. Private parties (normally employers) must bear the consequences of the Member States' failure to comply with EU directives and are ultimately responsible for a breach of EU law directly attributable to the Member States.[272] To avoid responsibility before national courts, private actors have to organize their business in a manner compatible with EU fundamental rights specified in directives by eventually disregarding any conflicting provision of national law.[273] There might be situations where private actors behaved opportunistically by taking advantage of a national legislation contrary to EU law, but there might also be situations where they have acted in good faith and did not expect, nor they could reasonably expect, that the relevant national legislation was contrary to EU law.[274] Failure to draw a dividing line based on

---

[267] *Fornasier*, Eur. Rev. Priv. Law 23(1) 2015, p. 29, 44; *Hartkamp*, Eur. Rev. of Priv. L. 3/2010, p. 527, 533-534.
[268] *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 121; *Dougan*, in: Arnull/Barnard/Dougan/Spaventa (eds.), p. 219, 224-225; Ibid. (*Fornasier*); Ibid. (*Hartkamp*).
[269] *Muir*, Rev. Eur. Adm. Law 12(2) 2019, p. 185, 199-200.
[270] *Craig*, Eur. Law Rev. 3/2009, p. 349, 372; *de Mol*, Maastricht J 18(1-2)/2011, p. 109, 123; Ibid. (*Muir*), p. 207-208.
[271] Ibid. (*de Mol*), p. 121; *Dougan*, CML Rev. 52(5)/2015, p. 1201, 1202-1203.
[272] *Frantziou*, Camb. Yearb. Eur. Leg. Stud. 22(2020), p. 208, p. 222-223; *Leczykiewicz*, Eur. Law Rev. 4/2013, p. 479, 487. This attributability concern is only indirectly redressed through the right for the affected private employers to bring a *Francovich* action against Member States.
[273] *Parodi*, in: Buscemi/Lazzerini/Magi/Russo (eds.), p. 97, 100.
[274] *Leczykiewicz*, Eur. Law Rev. 4/2013, p. 479, 487.

the private employers' attitude towards the pre-existing national legal framework would result in a system of strict liability where they must inevitably and automatically bear the consequences of the Member States' failure to comply with EU law.[275]

Since in the *Mangold* line of case law the ECJ is imposing direct obligations upon private employers on the basis of EU fundamental rights addressed to employees, the importance of balancing the employees' rights against the employers' rights should not be neglected.[276] The added value of introducing a methodology for balancing the private parties' competing rights and interests would be at least twofold. First, it would contribute to translate this line of case law into a purer form of direct horizontality, conceptually similar to that relied upon in *Viking* and *Laval*, where the conducts of the opponent private parties form part of the assessment and their conflicting rights are balanced against each other. Secondly, and perhaps most importantly, it would contribute to reduce the concerns raised by this line of case law in terms of attributability and legal certainty, by consequently enhancing its legitimacy in the eyes of national courts and civil society.

6.2.3. Balancing of conflicting private parties' rights in the *Mangold* line of case law

The analysis of the case law dealt with in paragraph 5 shows that in the *Mangold* line of case law EU fundamental rights have essentially come into play in absolute terms. As clarified in *Dansk Industri* and *Hein*, the national courts' obligation of setting aside the conflicting national law cannot be balanced out with the interest of protecting private employers' legitimate expectations.[277] In the *Mangold* line of case law some sort of balancing between competing interests is relied upon by the ECJ only in the phase concerning the review of the compatibility of the disputed national legislations with the relevant directives. In this regard, the ECJ's approach differs significantly between the case law on the right to equality and the case law on the right to paid annual leave.

As ultimate consequence of the ECJ's construction of Article 7 of Directive 2003/88 as constituting the "essence" of Article 31(2) of the Charter, in the case law on right to paid annual the space for a balancing exercise is extremely limited. Since Article 7 of

[275] Ibid.

[276] *Gualco*, *Lourenço*, European Papers 1(2) 2016, p. 643, 651-652; *Maciejewski*, *Teilen,* Eur. Law Rev. 5/2017, p. 706, 720-721; *Lazzerini*, MPIL Research Paper No. 2020/38, p. 1, 19-20; *Parodi*, in: Buscemi/Lazzerini/Magi/Russo (eds.), p. 97, 113.

[277] *Dansk Industri* (*supra* note 79), para. 39-41; *Hein* (*supra* note 182), para. 57-62.

Directive 2003/88 is conceived by the ECJ as enshrining a minimum non-derogable right, in the ECJ judgments there is essentially no space for an assessment focusing on the proportionality of the limitations provided under national law to the minimum period of four weeks of paid annual leave.[278]

By contrast, in all the cases on the right to equality the ECJ has carried out a proportionality assessment aimed at determining whether a difference in treatment permitted under national law was justified by the need of protecting competing interests of public law nature.[279] This approach stems from the different nature of Directive 2000/78 as an instrument that, on one hand, provides for a general prohibition of discrimination on various grounds and, on the other hand, allows the Member States to establish in their national laws differences in treatment that are necessary to protect legitimate interests.[280] If compared with the other judgments delivered on Directive 2000/78, in *Egenberger* the issue of balancing played a stronger role. In that judgment the ECJ was not called upon to merely review the proportionality of a disparity in treatment permitted under national law. The ECJ was essentially requested to determine which fundamental right, either the right to autonomy of churches or the right to equality on grounds of religion, should have prevailed in the interpretation of Article 4(2) of Directive 2000/78.[281] After having established that right to equality on grounds of religion should have prevailed at the level of the directive's interpretation, also in this judgment the horizontal direct effect of Article 21(1) of the Charter operated in absolute terms. If consistent interpretation with the directive was not possible, national courts must have set aside the conflicting national law pursuant to the Charter. The ECJ did not carry out a separate balancing between conflicting rights at the level of the Charter's horizontal direct effect.[282]

---

[278] This is clearly shown by *Hein* (*supra* note 182, para. 43), where the ECJ stressed that any more favourable measure of national law cannot be invoked to justify the failure of granting workers with the normal renumeration during in the period of leave guaranteed under Article 7 of Directive 2003/88. In *Max-Planck* (*supra* note 160, para. 35-38) the ECJ similarly stressed that Member States may regulate some concrete modalities of exercise of the rights enshrined in Article 7 of Directive 2003/88 in order to take into account the various interests involved but cannot undermine the effective enjoyment of these rights.

[279] These interests include *inter alia*: the interest of promoting occupation of older workers (*Mangold*), the interest of affording employers with flexibility in personnel management and of strengthening workers' protection according to the length of service (*Kücükdeveci*), the interest of protecting the freedom of religion of minority churches (*Cresco Investigation*).

[280] See Articles 2(1), 2(2), 2(5), 4, 5, 6 and 7 of Directive 2000/78.

[281] *Supra* notes 125 and 127.

[282] *Frantziou*, Mangold Recast? The ECJ's flirtation with Drittwirkung in Egenberger, https://europeanlawblog.eu/2018/04/24/ (last accessed on 25/07/2022); *Frantziou*, p. 107.

The lack of a balancing directly addressing the competing fundamental rights of the employees and of the employers in the *Mangold* line of case law is the ultimate consequence of the hybrid horizontal construction that characterizes this line of case law. Since the matter before the ECJ is to assess whether national law complies with a given directive, any question of balancing between the private parties' competing fundamental rights has at the most come into play at the level of the interpretation of the relevant directive (as in *Egenberger*).

6.2.4. A proposal for a methodology of balancing based on the protection of private employers' legitimate expectations

To introduce a methodology for balancing the private parties' competing rights and interests would not necessarily alter the essential characteristics of *Mangold* as a line case law primarily dealing with incorrect transposition of directives at national level. The balancing between competing rights should not operate at the level of the review of the compatibility of the disputed national legislation with the relevant directive. Since it is the Charter's horizontal direct effect that results in the imposition of a corresponding obligation for private employers, the proposed balancing exercise should be introduced at the level of the Charter.

More specifically, it should be necessary to establish whether and to which extent the national courts' obligation of setting aside the conflicting national legislation (or of granting specific entitlements to private employees) may be outweighed by the need of protecting the private employers' legitimate expectations.[283] "Legitimate expectations" is intended here as the subjective interest of private parties, in particular entrepreneurs, to organize and conduct their affairs on the basis of the established legal framework without being displaced in short time by unexpected changes in the pre-existing legal scenario.[284] This balancing exercise should not be entirely left to national courts. The ECJ should provide guidance based on Article 52(1) second sentence of the Charter on the elements to be taken into account in the balancing and on the concrete modalities through which the balancing has to be carried out.[285] While

[283] *Gualco*, *Lourenço*, European Papers 1(2) 2016, p. 643, 651-652; *Maciejewski*, *Teilen*, Eur. Law Rev. 5/2017, p. 706, 720.
[284] *Tesauro*, p. 111.
[285] Article 52(1) second sentence of the Charter provides that limitations to the Charter's rights must respect the principle of proportionality and are justified only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

the elements to take into account in this balancing exercise may well vary on a case-by-case basis, a central aspect will be the predictability of the ECJ's interpretation of the relevant directives according to the prior ECJ case law and the concrete ability for entrepreneurs to foresee that interpretation in the light of their available means.[286]

The opportunity of considering the private employers' legitimate expectations had been emphasized by national referring courts. In *Dansk Industri* and *Hein* the ECJ rejected this view by linking the protection of legitimate expectations to the temporal effect of preliminary rulings.[287] According to the ECJ, applying the principle of protection of legitimate expectations would amount to a factual limitation of the *ex tunc* effect of the ECJ judgments. This temporal limitation would only be possible in "truly exceptional circumstances" where there had been good reasons to have erred about the interpretation of EU law and where *ex tunc* effect may cause "serious difficulties" of financial nature on the Member States' public and private sectors.[288]

The existence of an overlap between the practical consequences deriving from granting protection to legitimate expectations and those deriving from the temporal limitation of the preliminary rulings to a mere *ex nunc* effect is undeniable. The protection of private employers' legitimate expectations could factually be reached only through a limitation of the ECJ's ruling to a mere *ex nunc* effect.[289] Nevertheless, linking the protection of legitimate expectations to the ECJ case law on preliminary rulings' temporal effect raises conceptual concerns.[290] The ECJ's conceptualization of the limitation of its preliminary rulings' temporal effect does not primarily concern the perspective of the affected individual interests. The driving force behind the ECJ case law is that of ensuring effective and uniform interpretation and application of EU law.[291]

By linking the protection of legitimate expectations to the preliminary rulings' temporal effect, the ECJ is blurring the connections existing between the protection of legitimate expectations and the fundamental rights' domain.[292] While legal certainty is largely regarded as a structural principle for a legal system at large, the protection of legitimate expectations is increasingly considered in connection with the fundamental rights'

---

[286] *Maciejewski*, *Teilen*, Eur. Law Rev. 5/2017, p. 706, 720.

[287] *Supra* notes 88-91 and 190-191. In *Dansk Industri* the ECJ's unsympathetic stance resulted in an *ultra vires* finding by the Danish Supreme Court (*Højesteret*, Decision of 6 December 2016, Case 15/2014); *Haket*, Rev. Rev. Eur. Adm. Law, p. 135, 139-141.

[288] *Supra* note 90.

[289] *Maciejewski*, *Teilen*, Eur. Law Rev. 5/2017, p. 706, 714.

[290] Ibid., p. 714-715.

[291] Ibid., p. 708-709 and 714.

[292] Ibid., p. 714.

domain.[293] This subjective reading of the protection of legitimate expectation is not even absent in the ECJ jurisprudence on the protection of legitimate expectations as a general principle of EU law.[294]

7. Conclusion

In the EU legal order the discourse on horizontality is inevitably affected by the limited reach of EU fundamental rights. Fundamental rights protected under the Charter or as general principles of EU law are not self-standing. They may only come into play when private relationships display sufficiently qualified connections with EU law.

In situations of "conflict" with market freedoms the ECJ has occasionally relied on a form of State-mediated horizontality based on the "duty to protect" doctrine (*Schmidberger*) as well as on a form of horizontality where the ECJ directly reviewed the actions undertaken by private parties in the exercise of their competing market freedoms and fundamental rights (*Viking* and *Laval*). Nevertheless, cases where fundamental rights had been applied horizontally on the basis of the market freedoms remains few in number and the related jurisprudence largely underdeveloped.

In the majority of cases EU fundamental rights have been applied horizontally on the basis of the fact that national laws regulating private relationships were intended to transpose directives or fell within the directives' scope of application. In the *Mangold* line of case law fundamental rights protected under primary EU law are essentially relied upon to produce the legal effect (i.e., horizontal direct effect) that could not be realized through directives according to the established case law. The jurisprudence originating in *Mangold*/*Kücükdeveci* and culminating in *TSN* shows that fundamental rights are not being relied upon to regulate private relationships that are not strictly regulated under EU legislation. While the reach of EU fundamental rights to private relationships may well vary depending on the ECJ's construction of the scope of EU law in each specific case, the fact remains that EU fundamental rights remains inherently limited in their scope of application as automatic consequence of the EU's limited competences based on the principle of conferral.

Be that as it may, the *Mangold* line of case law remains conceptually based on a hybrid horizontal construction. The ECJ review does not focus on whether private parties' conduct complies with fundamental rights, but rather on whether the national law on

[293] Ibid., p. 713.
[294] Ibid., p. 715-718.

the basis of which private parties organized their conduct complies with EU fundamental rights specified in directives. Fundamental rights impose rights and obligations upon private parties as a “collateral” effect of the Member States’ incorrect transposition of directives at national level. Introducing a methodology for balancing based on the protection of private employers’ legitimate expectations could contribute to translate this hybrid horizontal construction into a purer form of directly horizontality and to reduce the concerns raised by this line of case law in terms of attributability and legal certainty.

Thus far the ECJ has found three Charter’s rights to be capable of having horizontal direct effect: the right to equality under Article 21(1), the right to paid annual leave under Article 31(2) and the right to an effective remedy under Article 47 of the Charter. It is just a matter of time before that other EU fundamental rights will be found to satisfy the requirements based on the “unconditional” and “mandatory” nature of the relevant fundamental rights’ provision. Moreover, in the recent case law the ECJ seems to be relying on a horizontal direct effect of “substitutive” nature. The very likely expansion of the *Mangold* doctrine to other fundamental rights coupled with the possible reliance on a direct effect of a “substitutive” nature would make it even more compelling for the ECJ to introduce a methodology for balancing the competing rights and interests of the opponent private parties.

8. Bibliography

Alexy, Robert (translation by Rivers, Julia), A Theory of Constitutional Rights, Oxford University Press (New York, United States), 2002.

Beijer, Malu, The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations, Intersentia (Cambridge, United Kingdom), 2017.

Bermejo, Nuria, Fundamental Rights and Horizontal Direct Effect Under the Charter, in: Izquierdo-Sans, Cristina/Martínez-Capdevila, Carmen/Nogueira-Guastavino, Magdalena (eds.), Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation, Springer (Cham, Switzerland), 2021, p. 51-74.

Bobek, Michail, The Effects of EU Law in the National Legal Systems, in: Barnard, Catherine/ Peers, Steve (eds.), European Union Law, Oxford University Press (New York, United States), 2014, p. 140-173.

Colombi Ciacchi, Aurelia, The Direct Horizontal Effect of EU Fundamental Rights - ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ, in: European Constitutional Law Review, 15(2) 2019, p. 294-305.

Craig, Paul, The Legal Effect of Directives: Policy, Rules and Exceptions, in: European Law Review, 34(3) 2009, p. 349-377.

Dashwood, Alan, From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?, in: Cambridge Yearbook of European Legal Studies, 9/2007, p. 81-109.

de Mol, Mirjam, The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?, in: Maastricht Journal of European and Comparative Law, 18(1-2) 2011, p. 109-135.

de Vries, Sybe A., Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, in: Utrecht Law Review, 9(1) 2013, p. 169-192.

Dougan, Michael, In Defence of *Mangold*?, in: Arnull, Anthony/ Barnard, Catherine/Dougan, Michael/Spaventa, Eleanor (eds.), A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood, Hart Publishing (Oxford, United Kingdom), 2011, p. 219-244.

Dougan, Michael, Judicial review of Member State action under the general principles and the Charter: Defining the “scope of Union law”, in: Common Market Law Review, 52(5) 2015, p. 1201-1245.

Editorial Comments: “Horizontal Direct Effect – A law of Diminishing Coherence?”, in: Common Market Law Review, 43(1) 2006, p. 1-8.

Eeckhout, Piet, The EU Charter of Fundamental Rights and the Federal Question, in: Common Market Law Review, 39(5) 2002, p. 945 – 994.

Enchelmaier, Stefan, Horizontality: the application of the four freedoms to restrictions imposed by private parties, in: Koutrakos, Panos/Snell, Jukka (eds.), Research Handbook on the Law of the EU's Internal Market, Edward Elgar Publishing (Cheltenham, United Kingdom), 2017, p. 54-81.

Engle, Eric, Third Party Effect of Fundamental Rights (Drittwirkung), in: Hanse Law Review, 5(2) 2009, p. 165-173.

Fornasier, Matteo, The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?, in: European Review of Private Law, 23(1) 2015, p. 29-46.

Frantziou, Eleni, Mangold Recast? The ECJ's flirtation with Drittwirkung in Egenberger, European Law Blog, 24 April 2018, https://europeanlawblog.eu/2018/04/24/ (last accessed on 25/07/22).

Frantziou, *Eleni*, Paid Annual Leave and Collective Agreements after the TSN Judgment (C-609/17 and C-610/17), EU Law Live, 22 November 2019, https://eulawlive.com/blog/2019/11/22/ (last accessed on 25/07/22).

Frantziou, Eleni, The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis, Oxford University Press (New York, United States), 2019.

Frantziou, Eleni, The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle, in: Cambridge Yearbook of European Legal Studies, 22/2020, p. 208–232.

Frantziou, Eleni, (Most of) the Charter of Fundamental Rights is Horizontally Applicable, ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et al, in: European Constitutional Law Review, 15(2) 2019, p. 306–323.

Groussot, Xavier, Pech, Laurent, Petursson, Gunnar Thor, The Reach of EU Fundamental Rights on Member State Action after Lisbon, in: de Vries, Sybe/Bernitz, Ulf/Weatherill, Stephen (eds.), The Protection of Fundamental Rights in the EU After Lisbon, Hart Publishing (Oxford, United Kingdom), 2013, p. 97-117.

Gualco, Elena, Lourenço, Luísa, "Clash of Titans". General Principles of EU Law: Balancing and Horizontal Direct Effect, in: European Papers, 1(2) 2016, p. 643-652.

Haket, Sim, The Danish Supreme Court's *Ajos* judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order, in: Review of European Administrative Law, 10(1) 2017, p. 135-151.

Hartkamp, Arthur, The Effect of the EC Treaty on Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law, in: European Review of Private Law, 3/2010, p. 527-548.

Herzog, *Roman*, *Gerken*, *Lüder*, Stop the European Court of Justice, EUobserver, 10 September 2008, https://euobserver.com/opinion/26714 (last accessed on 25/07/22).

Kokott, Juliane, Sobotta, Christoph, The Charter of Fundamental Rights of the European Union after Lisbon, European University Institute – Academy of European Law (EUI AEL), Working Paper 2010/6, p. 1-15.

Krommendijk, *Jasper*, Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice, in: European Constitutional Law Review, 11(2) 2015, p. 321-356.

Lavrysen, Laurens, Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative obligations under the European Convention on Human Rights, Intersentia (Cambridge, United Kingdom), 2016.

Lazzerini, Nicole, The Horizontal Application of the General Principles of EU law: Nothing Less than Direct Effect, Max Planck Institute for Comparative Public Law and International Law (MPIL), Research Paper No. 2020-38, p. 1-21.

Leczykiewicz, Dorota, Effectiveness of EU law Before National Courts: Direct Effect, Effective Judicial Protection, and State Liability, in: Chalmers, Damian/Arnull, Anthony (eds.), The Oxford Handbook of European Union Law, Oxford University Press (New York, United States), 2015, p. 212-248.

Leczykiewicz, Dorota, Horizontal Application of the Charter of Fundamental Rights, in: European Private Law Review, 38(4) 2013, p. 479-497.

Leczykiewicz, Dorota, The Judgment in *Bauer* and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations, in: European Review of Contract Law, 16(2) 2020, p. 323-333.

Lenaerts, Koen, Exploring the Limits of the EU Charter of Fundamental Rights, in: European Constitutional Law Review, 8(3) 2012, p. 375-403.

Lenaerts, Koen, Gutiérrez-Fons, José A., The EU Internal Market and the EU Charter, Exploring the 'Derogation Situation', in: Amtenbrink, Fabian/Davies, Gareth/Kochenov, Dimitry/Lindeboom, Justin (eds.), The Internal Market and the Future of European Integration. Essays in Honour of Laurence W. Gormley, Cambridge University Press (Cambridge, United Kingdom), 2019, p. 49 – 64.

Lenaerts, Koen, Limits on Limitations: The Essence of Fundamental Rights in the EU, in: German Law Journal, 20(6) 2019, p. 779-793.

Maciejewski, Tim, Theilen, Jens, Temporal Aspects of the Interaction between National Law and EU Law: Reintroducing the Protection of Legitimate Expectations, in: European Law Review, 5/2017, p. 706-721.

Muir, Elise, Of ages in – and edges of – EU law, in: Common Market Law Review, 48(1) 2011, p. 39-62.

Muir, Elise, The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*, in: Review of European Administrative Law, 12(2) 2020, p. 185-215.

Müller-Graff, Peter-Christian, Direct Horizontal Effect of the Basic Freedoms of the EU Internal Market, in: Amtenbrink, Fabian/Davies, Gareth/Kochenov, Dimitry/Lindeboom,

Justin (eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley, Cambridge University Press (Cambridge, United Kingdom), 2019, p. 32-48.

Nogueira-Guastavino, Magdalena, A Principle Vanishes and a Right Arises: Paid Annual Leave As a Fundamental Right and Its Impact on Liability for Breach of EU Law, in: Izquierdo-Sans, Cristina/Martínez-Capdevila, Carmen/Nogueira-Guastavino, Magdalena (eds.), Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation, Springer (Cham, Switzerland), 2021, p. 35-49.

Oliver, Peter, Roth, Wulf-Henning, The Internal Market and the Four Freedoms, in: Common Market Law Review, 41(2) 2004, p. 407-441.

Parodi, Monica, The EU Charter of Fundamental Rights as the Source of Judicially Enforceable Obligations to the Activity of Private Companies, in: Buscemi, Martina/Lazzerini, Nicole/Magi, Laura/ Russo, Deborah (eds.), Legal sources in Business and Human Rights. Evolving Dynamics in International and European Law, Brill Nijhoff (Leiden, The Netherlands), 2020, p. 97-120.

Payandeh, Mehrdad, Constitutional review of EU law after *Honeywell*: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice, in: Common Market Law Review, 48(1) 2011, p. 9-38.

Pollicino, Oreste, L'efficacia orizzontale dei diritti fondamentali previsti dalla Carta. La giurisprudenza della Corte di giustizia in materia di digital privacy come osservatorio privilegiato, in: Rivista di diritto dei media, 3/2018, p. 138-163.

Prechal, Sacha, Horizontal direct effect of the Charter of Fundamental Rights of the EU, in: Revista de Derecho Comunitario Europeo, 66/2020, p. 407-426.

Rosas, Allan, Armati, Lorna, EU Constitutional Law – An Introduction, 2nd Edition, Hart Publishing (Oxford, United Kingdom), 2012.

Rosas, Allan, Balancing Fundamental Rights in EU Law, in: Cambridge Yearbook of European Legal Studies, 16/2014, p. 347-360.

Rossi, Lucia Serena, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations, EU Law Analysis, 25 February 2019, http://eulawanalysis.blogspot.com/2019/02/ (last accessed on 25/07/22).

Snell, Jukka, Fundamental Rights Review of National Measures: Nothing New under the Charter?, in: European Public Law, 21(2) 2015, p. 285-308.

Tecqmenne, Maxime, Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification of the Scope of EU Law in Situations Involving National Discretion?: ECJ (Grand Chamber) 19 November 2019, Joined Cases C-609/17 and C-610/17, *TSN,* in: European Constitutional Law Review, 16(3) 2020, p. 493-512.

Tesauro, Giuseppe, Diritto dell'Unione Europea, settima edizione, CEDAM (Padova, Italia), 2012.

Timmermans, Christiaan, Horizontal Direct/Indirect Effect or Direct/Indirect Horizontal Effect: What's in a Name?, in: European Review of Private Law, 24(3/4) 2016, p. 673-685.

Ugartemendia, Juan Ignacio, The Horizontal Effect of the EU Charter of Fundamental Rights in the Case Law of the Court of Justice, in: Izquierdo-Sans, Cristina/Martínez-Capdevila, Carmen/Nogueira-Guastavino, Magdalena (eds.), Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation, Springer (Cham, Switzerland), 2021, p. 11-21.

van der Mei, Anne Pieter, The Scope of Application of the EU Charter of Fundamental Rights - ERT Implementation, in: Maastricht Journal of European and Comparative Law, 22(3) 2015, p. 432-439.

Walkila, Sonya, Horizontal Effect of Fundamental Rights in EU Law, Europa Law Publishing (Groningen, The Netherlands), 2016.

9. Table of cases of the European Court of Justice

ECJ, Judgment of 5 February 1963, Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

ECJ, Judgment of 12 December 1974, Case C-36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:1974:140.

ECJ, Judgment of 8 April 1976, Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56.

ECJ, Judgment of 14 July 1976, Case C-13/76, *Gaetano Donà v Mario Mantero*, ECLI:EU:C:1976:115.

ECJ, Judgment of 5 April 1979, Case C-148/78, *Pubblico Ministero v Tullio Ratti*, ECLI:EU:C:1979:110.

ECJ, Judgment of 27 March 1980, Case C-61/79, *Amministrazione delle finanze dello Stato v Denkavit italiana Srl*, ECLI:EU:C:1980:100.

ECJ, Judgment of 10 April 1984, Case C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfale,* ECLI:EU:C:1984:153.

ECJ, Judgment of 26 February 1986, Case C-152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1986:84.

ECJ, Judgment of 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvels and Nicolaos Avdellas and others*, ECLI: EU:C:1991:254.

ECJ, Judgment of 12 July 2012, Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, ECLI:EU:C:2012:453.

ECJ, Judgment of 15 January 2014, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2.

ECJ, Judgment of 22 May 2014, Case C-356/12, *Wolfgang Glatzel v Freistaat Bayern*, ECLI:EU:C:2014:350.

ECJ, Judgment of 11 November 2014, Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

ECJ, Judgment of 19 April 2016, Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278.

ECJ, Judgment of 17 April 2018, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257.

ECJ Judgment of 7 August 2018, Case C-122/17, *David Smith v Patrick Meade and Others*, ECLI:EU:C:2018:631.

ECJ, Judgment of 11 September 2018, Case C-68/17, *IR v JQ*, ECLI:EU:C:2018:696.

ECJ, Judgment of 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, ECLI:EU:C:2018:874.

ECJ, Judgment of 6 November 2018, Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871.

ECJ, Judgment of 13 December 2018, Case C- 385/17, *Torsten Hein v Albert Holzkamm GmbH & Co*, ECLI:EU:C:2018:1018.

ECJ, Judgment of 22 January 2019, Case C-193/17*, Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2019:43.

ECJ, Judgment of 19 November 2019, Joined Cases C-609/17 and C-610/17*, Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, ECLI:EU:C:2019:981.

ECJ, Judgment of 15 April 2021, Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, ECLI:EU:C:2021:269.