



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

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ENHANCING ECONOMIC AND SOCIAL RIGHTS WITHIN THE INTERNAL MARKET THROUGH RECOGNITION OF THE HORIZONTAL EFFECTS OF THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

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ABSTRACT: This *Article* aims to ascertain the role of the Charter of Fundamental Rights in promoting economic and social rights within the internal market through an analysis of its applicability in horizontal disputes. Recognition of the horizontal effects of fundamental rights can ensure a minimum level of social justice in relations between individuals, help overturn the division between political and social rights in the Charter and promote an appropriate balance between the market and the social. In a series of rulings in 2018 on paid annual leave, the Court of Justice of the European Union attempted to clarify the legal relationship between the rights enshrined in the Charter and the directives on which those rights are based, and admitted the possibility of relying on certain rights conferred by the Charter in disputes between private parties. In particular, in *Bauer* and *Max-Planck*, the Court argued that art. 31(2) of the Charter, is of a mandatory and unconditional character and sufficient in itself to confer on workers a right to be invoked in horizontal disputes in a field covered by EU law. Recent CJEU case law has recognised horizontal direct effects to a Charter's right outside the scope of the principle of non-discrimination, thus opening a new path to enforcement of the economic and social rights in the internal market and to shaping the future of the European Union through reiteration of its social values and objectives.

KEYWORDS: economic and social rights – internal market - Charter of Fundamental Rights – solidarity chapter – rights and principles – horizontal effects.

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I. ECONOMIC AND SOCIAL RIGHTS AND THE EUROPEAN INTEGRATION PROCESS

The promotion and protection of economic and social rights have always been contentious issues in the European integration process.

It is well known that the Treaty of Rome of 1957 did not confer any legislative competence in the social field on the newly created European Economic Community, giving the European Commission the task of promoting close collaboration between the Member States. A generic reference to the resolve of the founding States to ensure economic and social progress of their countries was in the preamble, where the improvement of the living and employment conditions of their citizens was also identified as a fundamental purpose.¹

In the early years, the Treaty aimed primarily at creating the European Single Market, and there were no Treaty provisions granting the Community explicit competence to take action to protect employees or their organisations. The social deficit was gradually overcome with the adoption of the Single European Act of 1986 and the Community Charter of the Fundamental Social Rights of Workers of 1989 which included several social rights of workers and obligations for member States to realise objectives related to social policy and labour law. However, the real breakthrough came with the Treaty of Maastricht and the Treaty of Amsterdam which favoured the adoption of directives on some economic and social matters, such as, the directives on employers' obligation to inform employees of their working conditions (Directive 91/533/EEC), parental leave (Directive 96/34/EC) and equal treatment (Directive 2000/43/EC).²

The Lisbon Treaty gave a boost to the social dimension within the integration process. Art. 3 TEU provides that the EU strives for the establishment of "a highly competitive social market economy, aiming at full employment and social progress" and a mainstreaming social clause was included in art. 9 TFEU, according to which "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

Despite the innovations introduced by the Lisbon Treaty which grant a significant measure of law making and other competences to pursue these objectives, the most relevant part of the EU's social dimension deals with the effects of other policies, particularly

¹ According to art. 118 of the Treaty establishing the European Community (TEC), the Commission shall have the task of promoting close co-operation between Member States in the social field. On this point see C Barnard, *EU Employment Law* (Oxford University Press 2012) 4 ff.

² For further details on this point see J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in TK Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003) 1, 15 ff.

economic and fiscal policies.³ Indeed, in the years after the Lisbon Treaty came into force, economic and social rights have been negatively affected by the austerity measures imposed by the EU institutions and adopted by the Member States. The European financial assistance mechanisms, are well known, to be based on the use of strict conditionality: all loans awarded are dependent on the recipient State's compliance with economic policy conditions, leading to the dismantling of national labour and social protections in these countries.⁴

The Court of Justice of the European Union (CJEU) was asked to solve the question of the applicability of the EU Charter of Fundamental Rights (henceforth referred to as the Charter) in the context of the European Stability Mechanism (ESM), since austerity measures have affected social benefits (e.g. salary reductions and raising of the retirement age) and the Member States' welfare systems (e.g. cutting spending on public health and public services). However, the Court has consistently adopted a non-interventionist stance with regard to judicial actions challenging the compatibility of austerity measures with the Charter, because the establishment of the ESM outside the EU legal order has the consequence that it is removed from the scope of the Charter as are the Member States on the basis of art. 51 of the Charter.⁵

During the same period, the Court limited its earlier jurisprudence on the social rights accorded to mobile EU citizens, and interpreted some elements of the EU social legislation through, for instance, an invocation of the freedom to conduct a business as a fundamental right protected by the Charter prevailing over the social rights contained in the Charter.⁶

Due to the failed attempts to engage the Court in debates on the incompatibility of the Memoranda of Understanding with the Charter, and in order to respond to the weakening of social and labour rights during the financial crisis, the European Commission officially launched the European Pillar of Social Rights (EPSR) on 26 April 2017.⁷

From a legal perspective, the Pillar is a soft law instrument that could be adopted as a source of inspiration by the CJEU in its case law and as a reference point for the institution for relaunching the use of the Treaty's Social Title through pre-existing legislative proposal and the new initiatives. For example, the Pillar has to be read together with the revision of the Posting of Workers Directive to ensure the principle of "equal pay for equal

³ S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2017) *EuConst* 23, 24.

⁴ F Costamagna, 'Saving Europe "Under Strict Conditionality": A Threat for EU Social Dimension?' (LPF Working Paper 7-2012).

⁵ F Munari, 'Da Pringle a Gauweiler: i tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo' (2015) *Il Diritto dell'Unione europea* 723 ff.

⁶ Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972. See C Kilpatrick, 'The Displacement of Social Europe: A Productive lens of Inquiry' (2018) *EuConst* 62 ff.

⁷ Communication COM (2017) 250 final from the Commission of 26 April 2017 on establishing a European Pillar of Social Rights.

work". The revision may be seen as a first small step in transforming the principles 5 ("secure and adaptable employment") and 6 ("wages") of the EPSR into concrete measures.⁸ Moreover, principles 2 ("gender equality") and principle 9 ("work-life balance") have been implemented by the revised directive on work-life balance, entered into force on 1 August 2019, which encourages more gender-equalising leave policies.⁹

However, the question arises whether the European Pillar of Social Rights adds to the EU law, considering the existence of the EU Charter of Fundamental Rights. On the one hand, the Pillar goes further than the Charter, since it contains more specific references to economic and social rights and a number of measures that would be legally binding when adopted.¹⁰ On the other, limits still remain: the implementation of the Pillar is subject to the initiative of the EU institutions and the political will of the Member States and the Commission's communication does not indicate appropriate means for addressing the issue of imbalances between economic and social policy and the Economic Monetary Union.¹¹

For these reasons, unlocking the potential of the Charter could be one of the ways, from a legal perspective, to respond to the weakening of the social and economic rights within the internal market. One of the potential effects deals with the horizontality of the economic and social rights enshrined in the Charter. Bearing in mind that parts of social law are horizontal by nature, the next paragraphs will determine some relevant economic and social rights through an analysis of the Charter's applicability in horizontal disputes.

II. PROMOTING ECONOMIC AND SOCIAL RIGHTS WITHIN THE INTERNAL MARKET THROUGH RECOGNITION OF THE HORIZONTAL EFFECTS OF THE CHARTER: LIMITS AND CAVEATS

The overall guarantee of the Charter is reflected in six chapters headed: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. The Solidarity chapter (arts 27-38) mainly covers labour rights and some welfare rights (social security and assistance, healthcare, education and housing); discrimination and gender equality are in the Equality chapter.

The incorporation of economic and social rights in the Charter was one of the most controversial issues during the Charter's negotiation, that was overcome by introducing

⁸ S Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) *EuConst* 210 ff.

⁹ S Garben, C Kilpatrick and E Muir, 'Towards a European Pillar of Social Rights: Upgrading the EU Social Acquis' (2017) *College of Europe Policy Brief* 1.

¹⁰ C De La Porte, 'The European Pillar of Social Rights Meets the Nordic Model' (2019) *Swedish Institute for European Policy Studies, European Policy Analysis* 2.

¹¹ S Deakin, 'What Follows the Austerity? From Social Pillar to New Deal' in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 160, 200 ff.

the distinction between rights and principles.¹² As some authors suggest,¹³ the distinction seems to demarcate the difference between civil and political rights on the one hand, and social and economic rights on the other, while ignoring the principle of indivisibility of fundamental rights.¹⁴

To understand how the Charter may promote economic and social rights within the internal market, it is necessary to consider its scope of application. Art. 6 TEU recognises that the Charter has the status of primary law and “the same legal value as the Treaties”. It is well known that provisions of primary law, whereas they are clear, precise and unconditional, may produce direct effects. But the Charter has its own mainstreaming clause in art. 51(1), which states that “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

Despite the wording of art. 51(1), the Court of Justice has interpreted it broadly, stating that “since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”.¹⁵

The provisions of art. 52(5) of the Charter must also be considered. The paragraph stipulates that “the provisions of this Charter which contain principles may be implemented by legislative and executive acts [...] of the Union, and by acts of Member States when they are implementing Union law. They shall be judicially cognisable only in the interpretation of such acts and in the ruling of their legality”.

The article stresses the distinction between rights and principles, by clarifying that the latter cannot be given direct effect, but can be used by the CJEU in the interpretation of such acts and in the ruling of their legality.¹⁶ Because the drafters of the Charter could not achieve consensus on the nature of each of its provisions, they decided to leave this matter to the Court’s decision.

¹² J Krommendijk, ‘Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice’ (2015) *EuConst* 321, 321-322.

¹³ J Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’ cit.; F Costamagna, ‘The Internal Market and the Welfare State: Anything New after Lisbon’ in M Trybus and L Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012) 381 ff.

¹⁴ R Pisillo Mazzeschi, ‘Sulla natura degli obblighi internazionali di tutela e promozione dei diritti economici, sociali e culturali’ in F Bestagno (a cura di), *I diritti economici, sociali e culturali. Promozione e tutela nella comunità internazionale* (Vita e Pensiero 2009) 3 ff.

¹⁵ Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 21.

¹⁶ S Peers and S Prechal, ‘Art. 52 – Scope and Interpretation of Rights and Principles’ in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (C.H. Beck, Hart, Nomos 2014) 1455 ff.

Some authors argue that social rights enshrined in the Solidarity chapter have to be deemed principles for different reasons. One reason, for instance, deals with art. 1(2) of Protocol n. 30 which states that “nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law”. Another takes into consideration the Explanations to the Charter asserting that art. 52(5) is consistent “with the approach of the Member States’ constitutional systems to ‘principles’, particularly in the field of social rights”.¹⁷

It is true that some social rights have the character of principles in the sense of art. 52(5), but this does not mean that principles have to be equated with social rights. According to the Explanations, arts 25 (elderly people), 26 (people with disabilities) and 37 (environment protection) contain a principle, while arts 33 (family and professional life) and 34 (social security and social assistance) contain “both elements of a right and a principle”.¹⁸ In any case, the Court has determined that other provisions of the Solidarity Title are individually enforceable, for instance, art. 28 on the right of collective bargaining and action and art. 30 on the right to protection against unfair dismissal in the landmark case *Viking*.¹⁹

The CJEU has already clarified that some provisions of the Charter that contain rights may have direct effect in vertical situations.²⁰ However, the question of whether the Charter’s rights could also have horizontal direct effects is still controversial.

An argument in favour of such effects could be drawn from the preamble of the Charter, which states that the enjoyment of the rights enshrined in it “entails responsibilities and duties with regard to other persons, to the human community and to future generations”.²¹ Furthermore, the Court has recognized horizontal direct effects of some general principles contained in the EU Treaties, then incorporated in the EU Charter, as fundamental rights. It would therefore be reasonable that Charter’s rights could also apply and be invoked in horizontal disputes.²²

¹⁷ S Peers and S Prechal, ‘Art. 52– Scope and Interpretation of Rights and Principles’ cit.; A Kornezov, ‘Social Rights, the Charter, and the ECHR: Caveats, Austerity, and other Disasters’ in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* cit. 385, 407 ff.

¹⁸ Explanations on Art. 52(2) to the Charter of Fundamental Rights of the European Union [2012].

¹⁹ Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union* ECLI:EU:C:2007:772 para. 44, where the CJEU said that the “right to take collective action, including the right to strike, must therefore be recognised as a fundamental right”. See also C Barnard, ‘So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights’ (2019) *ModLRev* 350, 352.

²⁰ Joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865.

²¹ LS Rossi, ‘The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations’ (25 February 2019) European Forum eulawanalysis.blogspot.com.

²² D Gallo, *L’efficacia diretta del diritto dell’Unione negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (Giuffrè editore 2018) 187.

This is highly important, since the horizontal effect of fundamental rights pursues social goals in the sense that it guarantees fairness in relationships between individuals.²³ In particular, its role is to overcome asymmetries in contractual relations between individuals, e.g. in an employment contract, where the intervention of law is required in order to protect one individual from another.²⁴ Therefore, the horizontal effect is expected to ensure a minimum level of social justice in relations between individuals in order to guarantee equality and social justice to the weaker party.²⁵

The horizontal effect of fundamental rights, and specifically of social rights, has been developed by the Court of Justice in rulings on the fundamental right to equal treatment protected as a general principle of EU law, then developing into a new line of cases on the corresponding right, as enshrined in art. 21 of the Charter.

In the *Mangold*²⁶ and *Kücükdeveci*²⁷ cases, the CJEU recognised, for the first time, the horizontal direct effect of the principle of non-discrimination mediated by the directives which give the principle concrete effect.²⁸ In these two cases the judges affirmed that the general principle as given expression in Directive 2000/78 (on equal treatment in employment and occupation), applies in proceedings between private parties since it meets two conditions: the principle is mandatory in nature and it is sufficient in itself to confer on individuals a right which they may invoke before national judges.²⁹

This case law has been considered by some scholars as an isolated exception to the lack of horizontal direct effect of general principles and fundamental rights, because they are normally the means to protect private individuals *vis-à-vis* public authorities and they are abstract and need to be expressed in legislation before they can be applied to private individuals.³⁰

Some years after the Lisbon Treaty entered into force, the Court ruled on the unclear legal relationship between the rights contained in the Charter and the directives on which

²³ F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) *ColumJEurL* 194 ff.

²⁴ S Sever, 'Horizontal Effect and the Charter' (2014) *Croatian Yearbook of European Law and Policy* 39, 41-42.

²⁵ F Ferraro, 'Vecchi e nuovi problemi in tema di efficacia diretta orizzontale della Carta' (22 May 2019) *Federalismi.it* www.federalismi.it 6.

²⁶ Case C-144/04 *Mangold* ECLI:EU:C:2005:709.

²⁷ Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21.

²⁸ *Kücükdeveci* cit. para. 50. See G Di Federico, 'Le discriminazioni in base all'età nella più recente giurisprudenza della Corte di giustizia: da Mangold a Georgiev [...] e oltre' (2011) *Studi sull'integrazione europea* 585 ff.

²⁹ *Mangold* cit. para. 77; *Kücükdeveci* cit. para. 53.

³⁰ M De Mol, 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law' (2010) *EuConst* 293 ff.; E Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in A Arnull, C Barnard, M Dougan, E Spaventa (eds), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 199, 208 ff.

those rights are based in the *Association de médiation sociale (AMS)* judgement.³¹ The case dealt with a French non-profit association, the majority of whose working staff were hired on the basis of “accompanied-employment contracts”. According to the French Labour Code, this category of workers should not be considered when calculating staff numbers in the undertaking. Applying this rule, *AMS* did not recognise the appointment of a union representative, since the association did not reach the minimum threshold of employees required in French law.³²

On the one hand, the Court emphasised that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.³³ On the other, it did not recognise a horizontal effect of art. 27 of the Charter on the workers’ right to information and consultation (and specified in art. 3 of Directive 2002/14) which provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices. For this article to be fully effective, “it must be given more specific expression in EU or national law”.³⁴

While in the *Kücükdeveci* judgment the principle of non-discrimination, as general principle of EU law, then enshrined in art. 21 of the Charter, is sufficient in itself to confer on individuals a right to invoke it *vis-à-vis* other individuals, the wording of art. 27 of the Charter cannot have horizontal effect.

Despite the Opinion of AG Cruz Villalon who proposed that “art. 27 of the Charter, given specific substantive and direct expression in art. 3 para. 1 of Directive 2002/14, may be relied on a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation”,³⁵ the Court seemed to suggest that the *caveat* in art. 27, which subordinates the right to information and consultation to the cases and the conditions provided for by Union law and national law and practices, would likely indicate that the right is not self-sufficient.

Moreover, the CJEU did not give any answer on the nature of art. 27, since it did not establish whether it is a right or a principle³⁶ but did not exclude the possibility that Title IV of the Charter may contain provisions capable of being invoked as such in horizontal disputes. Rather, the Court suggested that an assessment must be made entitlement by

³¹ Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2.

³² N Lazzarini, ‘(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: AMS’ (2014) CMLRev 907 ff.

³³ *Association de médiation sociale* cit. para. 42, in line with *Åkerberg Fransson* cit. para. 42.

³⁴ *Association de médiation sociale* cit. para. 45.

³⁵ Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2013:491, opinion of AG Cruz Villalon, para. 80.

³⁶ On this point see, also, the opinion of C Barnard, ‘So Long, Farewell, Auf Wiedersehen, Adieu: So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights’ cit. 354, who affirms: “In the rather opaque judgment of the Court of Justice in *AMS* the Court seemed to confirm that social rights were in fact principles”.

entitlement, having regard to the wording of the relevant provision of the Charter and the related explanation.³⁷

It is evident that the approach of the CJEU is prudent and, for some authors,³⁸ it lacks coherence if one considers the *Mangold* and *Kücükdeveci* judgements. Others point out that arts 21 and 27 of the Charter have different effects, since the principle of non-discrimination on the grounds of age is directly applicable and it may have horizontal direct effect without affecting the prerogative of the EU or the national legislator.³⁹

In any case, *AMS* confirms the complexity of the questions relating to the horizontal application of the economic and social rights enshrined in the Charter, especially from a political point of view, since the Member States fear that EU and national judges could interfere with policies that have significant budgetary implications.⁴⁰ Furthermore, if one considers the vagueness and the incompleteness of fundamental rights in the social field, recognizing horizontal direct effect could lead to self-empowerment of the judiciary in determining what conduct complies with the EU law to the detriment of the national legislators.⁴¹

The Court has tried to go further the wording of art. 51(1), by using Charter's rights in horizontal dispute as expressions of a general principle of law and implemented by directives. The application of fundamental rights in combination with directives is surely a mechanism which restrict the power of judges. Directives can concretise fundamental rights, but without national implementation they cannot be properly used against individuals.⁴² For that reason, AG Trstenjak in *Dominguez* stressed on the importance of a fundamental right providing a precise and unambiguous standard in order to be applied in horizontal disputes.⁴³

The questions left unresolved in the aforementioned cases may be partially answered by the recent judgements of the CJEU on paid leave. However, before continuing with the analysis it is necessary to understand if horizontal protection of the Charter rights may promote better protection of the economic and social rights within the market.

³⁷ N Lazzarini, '(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties: *AMS*' cit. 931-932.

³⁸ E Frantziou, 'Case C-176/12 Association de médiation sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) *EuConst* 332 ff.; ME Gennusa and A Rovagnati, 'Implementation and Protection of Workers' Fundamental Rights. Innovations in the Post-Lisbon Treaty landscape' in G Palmisano (ed.), *Making the Charter of Fundamental Rights a living instrument* (Martinus Nijhoff 2015) 106, 137-142.

³⁹ K Lenaerts and JA Gutiérrez-Fons, 'The European Court of Justice as the Guardian of the Rule of EU Social Law' in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* cit. 433, 453-454.

⁴⁰ *Association de médiation sociale*, opinion of AG Cruz Villalon, cit. para. 49.

⁴¹ D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) *ELR* 479, 489.

⁴² *Ibid.* 486.

⁴³ Case C-282/10 *Dominguez* ECLI:EU:C:2011:559, opinion of AG Trstenjak, paras 137-138.

The concept of the horizontal effect of fundamental rights, as explained before, can prevent asymmetries in private contractual relationships, such as those between employer and employee or between trader and consumer. The imbalance of power between the parties (i.e. a worker or a consumer and a large multinational corporation or an Internet search engine) may lead to imposition by one party onto the other specific contractual condition utilised to lower standards of fundamental rights.⁴⁴ Therefore, the possibility of invoking fundamental rights horizontally can protect claimants in precarious situations by recognising them “not just as deserving claimants whose employment conditions and dismissal had been unfair, but also as equal holders of rights – a civic status from which they had been alienated, through their employment”.⁴⁵

Moreover, the CJEU is called to find a coherent solution and to avoid different interpretations across the EU, since national courts are faced with cases concerning the horizontal effects of the Social Title of the Charter and there could be the risk of legal uncertainty about when exactly citizens can invoke the Charter.⁴⁶ Applying the Charter in horizontal situation is a delicate issue, particularly when national judges are called on balancing competing individual rights, since they could end up in threatening the uniform protection of fundamental rights within the internal market.

III. NEW CHALLENGES IN THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS THROUGH THE CHARTER’S EFFECTS IN HORIZONTAL DISPUTES

In a series of judgments given in 2018, the CJEU attempted to clarify the legal relationship between the rights enshrined in the Charter and the directives on which those rights are based, and admitted the possibility of relying on certain rights conferred by the Charter in dispute between private parties.

The first two cases were *Egenberger*⁴⁷ and *IR v JQ*,⁴⁸ which dealt with religious discrimination in church-based employment in Germany, and enhanced the previous case law on the direct effect of the general principle of non-discrimination begun with *Mangold* and *Kücükdeveci*.

The cases addressed the prohibition of all discrimination on the grounds of religion or belief based on art. 21(1) of the Charter and art. 4(2) of Directive 2000/78 which allows difference of treatment based on religion or belief within churches and other religious organizations, under specific and objective conditions. The central question submitted

⁴⁴ A Seifert, ‘L’effet horizontal des droits fondamentaux, Quelques réflexions de droit européen et de droit compare’ (2012) RTDE 801 ff.

⁴⁵ E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 182.

⁴⁶ E Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights in the European Union* cit. 678-679.

⁴⁷ Case C-414/16 *Egenberger* ECLI:EU:C:2018:257.

⁴⁸ Case C-68/17 *IR* ECLI:EU:C:2018:696.

for preliminary ruling was the following: if art. 4(2) of the Directive could not be interpreted in conformity with the EU law (since there is a contrast between the norm of the directive and German law), may a national court disapply a provision of national law incompatible with art. 21 of the Charter?⁴⁹

The Court considered art. 21(1) “sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by the EU law”⁵⁰ and it explained that “(as) regards its mandatory effect, art. 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals”.⁵¹ The CJEU had the opportunity again to address the issue and clarify the full meaning of *Egenberger* and *IR* in *Cresco* of January 2019,⁵² where the Court held that the Austrian legislation was contrary to art. 21 of the Charter, since it considers Good Friday a paid public holiday for members of four churches only. Until measures reinstating equal treatment have been adopted by the Member States, employers are under an obligation to ensure equal treatment for their employees and to recognise paid leave to those employees who are not members of any church.⁵³

The cases mentioned above go further than *Mangold* and *Kücükdeveci* in clarifying the compatibility of the direct horizontal effect of the principle of non-discrimination with the obligation of national courts to balance competing fundamental rights.⁵⁴ Particularly, in *Egenberger* the CJEU stated that, due the vagueness of the clashing provisions at stake (art. 17 TFEU on the autonomy of religious organisation, and arts 21 and 47 of the Charter), the national judges have to make reference to the available EU norms (which concretise the fundamental rights) and to the general principle of proportionality as sources of inspiration for the balancing. In this way, the exercise of one or more fundamental rights will be only diminished rather than completely excluded.⁵⁵

⁴⁹ L Lourenço, ‘Religion, Discrimination and the EU General Principle’s Gospel: Egenberger’ (2019) CMLRev 193 ff.

⁵⁰ *Egenberger* cit. para. 76 and *IR* cit. para. 69.

⁵¹ *Egenberger* cit. para. 77.

⁵² Case C-193/17 *Cresco Investigations* ECLI:EU:C:2019:43.

⁵³ See LS Rossi, ‘The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations’ cit.; M Pearson, ‘Religious Holidays for the Non-religious? Cresco Investigations v. Achatzi’ (2019) ILJ 468 ff.

⁵⁴ A Colombi Ciacchi, ‘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’ (2019) EuConst 294, 305.

⁵⁵ L Lourenço, ‘Religion, Discrimination and the EU General Principle’s Gospel: Egenberger’ cit. 204.

A decisive step forward in direct application of the social rights enshrined in the Charter in relationships between individuals was taken by the *Bauer*⁵⁶ and *Max-Planck*⁵⁷ rulings of November 2018 on the right to a period of paid annual leave affirmed by article 31(2) of the Charter.

The first ruling was based on two facts: the Stadt Wuppertal and Volker Willmeroth (the owner of a private company) did not want to pay the claimants an allowance in lieu of annual leave not taken by the husbands of Mrs Bauer and Mrs Broßann before their death, according to a German law which restricts the worker's ability to claim compensation for leave not taken prior to the termination of the contract. The Court recognised that German legislation does not comply with Directive 2003/88, but the main proceedings concerned a horizontal situation and, as it is well known, the Directive could not be invoked directly between private parties.⁵⁸

The CJEU overturned its approach and argued, for the first time that art. 31(2) of the Charter has horizontal direct effects. The innovative element of this decision lies in the fact that the proceedings concerned litigation between a worker and his employer, since in *Egenberger*, the right of paid annual leave is not used in horizontal relations, but in vertical situations between an individual and a court.⁵⁹

Moreover, it clarified the *KHS*⁶⁰ and *Dominguez*⁶¹ cases, in which it held that the entitlement of every worker to paid annual leave was a "particularly important principle of European Union social law", by emphasising that paid leave is not only a provision enshrined in the Charter, but also an "essential principle of EU social law".⁶²

The CJEU stated that the worker should be made aware of how to use the right to leave. This right can be derived exclusively from the provision of the Charter, from the meaning it assumes, and which has been attributed by jurisprudence.⁶³ It is clearly evident that the direct effect can be ascribed to the norm of the Charter by attributing to the provisions of primary law all the processing elaborated by the jurisprudence of the Court of Justice on the basis of the more detailed provisions of secondary law (in *Bauer*,

⁵⁶ Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871.

⁵⁷ Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874.

⁵⁸ E Frantziou, '(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.*' (2019) *EuConst* 306 ff.

⁵⁹ D Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*' (8 November 2019) *Despite our differences despiteourdifferencesblog.wordpress.com*.

⁶⁰ Case C-214/10 *KHS* ECLI:EU:C:2011:761.

⁶¹ Case C-282/10 *Dominguez* ECLI:EU:C:2012:33.

⁶² *Bauer* cit. para. 58.

⁶³ M Condinanzi, 'Le direttive in materia sociale e la Carta dei diritti fondamentale dell'Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti dell'effetto diretto. Il caso della giurisprudenza "sulle ferie"' (22 May 2019) *Federalismi.it* www.federalismi.it 8.

art. 7 of Directive 2003/88), which however has the limit, according to traditional teaching, of not being able to be invoked directly in horizontal disputes.⁶⁴

The Court held that the right to annual leave was not established by the Directive 2003/88 but, rather, is based on earlier instruments drawn up by the Member States, such as the Community Charter of Fundamental Social Rights of Workers, the European Social Charter and ILO Convention n. 132.⁶⁵ The right of annual paid leave is, first of all, an essential principle of EU social law, then reflected, affirmed and strengthened by art. 31 of the Charter.⁶⁶

In particular, the Court affirmed that

“by providing in mandatory terms that ‘every worker’ has ‘the right’ ‘to an annual period of paid leave’ without referring in particular in that regard — like, for example, Article 27 of the Charter [...] — to the ‘cases’ and ‘conditions provided for by Union law and national laws and practices’, Article 31(2) of the Charter, reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave”.⁶⁷

This right “is thus, as regards its very existence, both mandatory and unconditional in nature [...]. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter”.⁶⁸

The other relevant case is the *Max Planck* ruling which deals with an employee that had accumulated 51 days of annual leave over a two-years period and requested to be paid for the leave not taken when his employment ended. The German Courts referred the issue to the CJEU and asked the question whether an employee who fails to take annual leave is entitled to be paid in *lieu* of that leave.⁶⁹

The worker could not rely on the Directive 2003/88 alone, since “Max Planck had to be considered an individual”,⁷⁰ and directives do not have horizontal direct effect. The Court thus turned to Article 31(2) of the Charter and affirmed again that the right to a

⁶⁴ *Ibid.*

⁶⁵ *Bauer* cit. para. 81. The ruling recalls the opinion of AG Tizzano in *BECTU*, who attributed the source of art. 7 of Directive 2003/88 to different human rights instruments, including the Universal Declaration of Human Rights, the European Social Charter, and the UN Charter of 1966 on economic, social and cultural rights. See Case C-173/99 *BECTU* ECLI:EU:C:2001:81, opinion of AG Tizzano, paras 23-28.

⁶⁶ R Palladino, ‘Diritti, principi ed effetto orizzontale delle disposizioni (in materia sociale) della Carta dei diritti fondamentali dell’Unione europea’ (2019) *Il Diritto dell’Unione europea* 175, 190.

⁶⁷ *Bauer* cit. para. 84.

⁶⁸ *Ibid.* para. 85.

⁶⁹ SA de Vries, ‘The Bauer et al. and Max-Planck Judgments and EU Citizens’ Fundamental Rights: An Outlook for Harmony’ (2019) *European Equality Law Review* 16, 17-20.

⁷⁰ *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* cit. para. 65.

period of paid annual leave is mandatory and unconditional in nature and the provision “is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter”.⁷¹ The Court also stressed again that the right to paid annual leave constitutes an essential principle of EU social law, derived both from instruments drawn up by the Member States at EU level and from international instruments on which the Member States have cooperated or to which they are party.⁷² For those reasons the national court must disapply national legislation contrary to that principle.

As far as direct applicability of art. 31(2) of the Charter in disputes between private parties is concerned, the Court refers to *Egenberger* by affirming that art. 51(1) of the Charter does not address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.⁷³ Moreover, as regards, Art. 31(2) more specifically, the Court emphasised that “the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer”.⁷⁴

The *Bauer* and *Max-Planck* judgements identify three conditions that have to be satisfied in order to recognise horizontal effects of the Charter’s articles, thereby making different qualification of rights and principles almost irrelevant: they must be mandatory in nature, they must be unconditional and they must fall within the scope of the EU law.

Art. 31(2) can be considered mandatory. First, as to the origins of that right, the CJEU stressed the fact that the right to annual leave is now expressly conceived as a fundamental social right grounded in international human rights instruments. They include the European Social Charter which AG Bot saw as an important factor supporting the direct effect of art. 31(2).⁷⁵ Second, as an essential principle of EU social law, the right to paid leave is mandatory in nature and the adoption of an act of secondary law “is not necessary in order for that provision directly to produce its effects in disputes which must be resolved by national courts”.⁷⁶

The right to paid leave is also unconditional, so that it does not need “to be given concrete expression by the provisions of EU or national law, which are only required to

⁷¹ *Ibid.* para. 74.

⁷² *Ibid.* para. 70.

⁷³ *Ibid.* para. 76.

⁷⁴ *Ibid.* para. 79; *Bauer* cit. para. 90.

⁷⁵ Joined cases C-569/16 and C-570/16, *Bauer et al.* ECLI:EU:C:2018:337, opinion of AG Bot, para. 94. See M Ford, ‘The EU Charter of Fundamental Rights and Working Time: Bauer, Kreuziger and Shimizu before the Grand Chamber’ (2019) *International Labor Rights Case Law* 242 ff.

⁷⁶ *Bauer* cit. para. 83; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* cit. para. 72. See K Lenaerts, Limits on Limitations: The Essence of Fundamental Rights in the EU (2019) *German Law Journal* 779, 791-792.

specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right".⁷⁷

In relation to the third requirement, the recent CJEU case-law shows that when certain rights contained in the Charter are based on and materialised by directives, it is by means of the same directives that the specific legal situation falls within the scope of application of EU law. As it is known, the Charter cannot confer horizontal direct effects to directives, but a directive can draw on the horizontality of legal situations within the scope of the Charter.⁷⁸

The analysed cases could raise the question of whether the Court altered the division of competences in limiting the discretion of the national legislator by creating a new competence of the European Union in the social field. But *Bauer* and *Max Planck* did not recognize the Charter as an independent source of private's rights to be activated in horizontal disputes when private conduct falls within the scope of EU law.⁷⁹ The Court declared that only Charter provisions which are unconditional and have a mandatory nature are horizontal applicable as such and can create duties for private parties.

It is possible to say that the Court has finally extended the approach followed for the principle of non-discrimination to another economic and social right, the right to paid leave, thus opening a new arena in the enforcement of economic and social rights in the internal market.⁸⁰

IV. SHAPING THE FUTURE OF THE EUROPEAN UNION THROUGH ENFORCEABILITY OF THE CHARTER'S ECONOMIC AND SOCIAL RIGHTS

The aim of this *Article* has been to ascertain the role of the Charter of Fundamental Rights in promoting economic and social rights within the internal market through an analysis of its applicability in horizontal disputes.

As mentioned above, the European Pillar of Social Rights could lead to some strengthening of the EU social dimension, but it mostly depends on good will of governments and public authorities. For this reason, it was decided to scrutinise the potential of the economic and social rights enshrined in the Charter and how the Court of Justice uses and interprets these rights by developing the applicability of horizontal direct.

⁷⁷ *Bauer* cit. para. 85; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* cit. para. 74.

⁷⁸ LS Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' cit.

⁷⁹ D Leczykiewicz, 'The Judgment in *Bauer* and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations' (2020) *European Review of Contract Law* 323 ff.

⁸⁰ E Frantziou, '(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*' cit. 323.

The importance of the judgments on annual leave is that the Court has taken a first and important step in recognising that fundamental social rights differently to non-discrimination produce horizontal direct effect.⁸¹

Bauer and *Max-Planck* were delivered in the context of employment litigation. It thus seemed possible for individual, to rely in a horizontal dispute, on the Charter's social rights, as given expression by the relevant EU directives. In both cases the CJEU considered the Charter a legal basis of EU fundamental social rights capable of independent legal effects within national systems. A new path is now opened up and other Charter's social rights, if materialised and specified by secondary law, would have direct effects in horizontal relations.⁸²

The case law on paid annual leave hints that the distinction between rights and principles is no longer determinative, since the decisive question under EU law is not whether a provision confers a right on an individual, but whether it has a direct effect. Therefore, the justiciability of a social right would only depend on whether the provision is sufficiently clear, precise and unconditional. If a right is too generic, then the Court cannot apply it without further legislative instruments. Instead, if a principle has been implemented (through for instance directives) it becomes justiciable.⁸³

However, limitations still remain. The analysis of CJEU case law shows that a certain lack of coherence of direct effects of EU fundamental rights beyond the Solidarity chapter. The Court distinguishes art. 27 of the Charter on workers' consultation (at issue in *AMS*) from art. 31(2) on annual leave, because art. 27 refers to "the cases and conditions provided for by Union law and national laws and practices", whereas art. 31 mandates that "every worker" has "the right" "to an annual period of paid leave".⁸⁴

Some authors have suggested that the reference to the conditions laid down by EU and national law could be a decisive criterion for determining which provisions of the Charter contain principles within the meaning of art. 52(5).⁸⁵ However, it is worth noting that if references to national laws and practices were taken to be the determining criterion for whether Charter provisions can have horizontal direct effect, some fundamental rights could be rendered ineffective in horizontal disputes with the consequence of a different protection in cases related to a number of provisions across different parts of the Charter. Most of them, e.g. arts 16 (the freedom to conduct a business) and 9 (the right to marry and found a family) would, therefore, be unsuited to supporting a direct claim for positive action by the European Union or by the Member States.⁸⁶

⁸¹ D Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*' cit.

⁸² *Ibid.*

⁸³ T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) CMLRev 1202, 1224.

⁸⁴ C Barnard, 'Are Social 'Rights' Rights?' (2020) European Labour Law Journal 351 ff.

⁸⁵ S Peers and S Prechal, 'Article 52– Scope and Interpretation of Rights and Principles' cit.; A Kornezov, 'Social Rights, the Charter, and the ECHR: Caveats, Austerity, and other Disasters' cit. 424.

⁸⁶ E Frantziou, '(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*' cit. 321.

Even if *Bauer* and *Max Planck* rulings has not provided a general test of horizontal enforceability of Charter provisions, they can be considered relevant for enhancing the protection of economic and social rights different from non-discrimination and to assure the full effectiveness of EU law.

Moreover, the two cases do not give any solution related to national judges called on to strike a balance between different fundamental rights. The lack of clarity regarding the application of the EU Charter and its horizontal direct effects leads to legal uncertainty about when exactly citizens can invoke it.⁸⁷ To overcome this obstacle, some authors⁸⁸ suggest a hierarchy for the Charter's articles, to guarantee uniform protection of fundamental rights by the national courts. But if one recognizes fundamental rights as inter-related, indivisible and having equal status, a hierarchy among fundamental rights shall not be seen as an adequate option. Therefore, the method of balancing competing rights is currently a proper solution to be followed by national judges.⁸⁹ The balance of Charter articles may be referred to the general principle of proportionality and reinforced through the adoption of secondary legislation in areas where the EU legislator has competence. Once the EU has adopted legislation that materialises certain fundamental rights, the EU Charter can be easily used in disputes between citizens and domestic public or private actors.⁹⁰

As I have highlighted above, in recent case law, the Court has recognised the relevant role of the economic and social rights enshrined in the EU Charter and has aligned the right of annual paid leave with other rights, such as the right to equal treatment and non-discrimination, opening a new path to the recognition of horizontal effects of other Charter's provisions. These improvements can contribute to shaping the future of the European Union through reiteration of its social values and objectives, particularly of solidarity, which according to art. 2 TEU is one of the EU's foundational values.⁹¹ This approach may favour the achievement of a social market economy formulated in the objectives of the Treaty (art. 3(3) TEU) and to the enhancement of the economic and social rights within the internal market.

⁸⁷ See B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) European Papers www.europeanpapers.eu 133 ff., where the author elaborates a particularly comprehensive typology of situations in which the Member States are bound by EU fundamental rights.

⁸⁸ J Ziller, 'Hierarchy of Norms, Hierarchy of Sources and General Principles in European Union Law' in U Becker, A Hatje, M Potacs and N Wunderlich (eds), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014) 334 ff.; SA De Vries, 'The Bauer et al. and Max-Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony' cit. 28-29.

⁸⁹ E Gualco and L Lourenço, "'Clash of Titans". General Principles of EU Law: Balancing and Horizontal Direct Effect' European Papers (European Forum Insight of 8 August 2016) www.europeanpapers.eu 643 ff.

⁹⁰ SA de Vries, 'The Bauer et al. and Max-Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony' cit. 28.

⁹¹ *Ibid.* 29.

