The horizontal effect of social rights of the Charter of Fundamental Rights of the EU

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Summary (Seifert)
The question of whether the social rights of the European Charter of Fundamental Rights (ECFR) produce a horizontal effect among individuals, is one of the controversial questions in the application of the Charter. One recent example is the doctrinal debate, which has been caused by the judgment of the CJEU of 22 January 2019 (Stadt Wuppertal v Bauer et alii) entitling employees to rely on the right to paid leave under Article 31(2) ECFR in disputes between them and their employer in a field covered by EU. The purpose of the following pages is to examine this not yet satisfactorily answered question. In a first step, the author analyses whether Article 51(1) ECFR, defining “the field of application” of the Charter, addresses the question of a horizontal effect of Charter rights. In a second step, the evolution of the Court of Justice’s case law on this question is briefly outlined. And in a third and main step, the author examines, whether the social rights, enshrined in the Charter, can be directly applicable in the employment relationship (direct horizontal effect) or only have indirect effects among individuals. The argument of the author is that the ECFR is not underlying a general concept on the horizontality of its social rights. For a conceptualization, the widely recognised distinction between a direct applicability of the ECFR among individuals and its indirect effects should be the point of departure. He poses that the better arguments speak in favour of an indirect horizontal effect through the interpretation of national law and through the transposition of positive obligations resulting from the Charter rights.

INTRODUCTION
Fundamental rights first and foremost have the objective to limit State power vis-à-vis the individual and by this to “domesticate the Leviathan”.1 In this sense, they prevent the State from undue interferences in the sphere of individual freedom. This original understanding of fundamental rights goes back to the eighteenth century and has been underlying the US-American Bill of Rights of 1789, the French Déclaration des droits de l’homme et du citoyen of 26 August 1789 and other Bill of rights that have been proclaimed over the nineteenth century. Under this paradigm of human rights law, the individual is only in a relationship with the State that may be characterised as negative.2 Also, the Charter of Fun-

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1 The “domesticated Leviathan” is the title of a book of the German constitutionalist Erhard Denninger, Der gebändigte Leviathan, Baden-Baden 1990.
2 Georg Jellinek has characterised this “negative” relationship between the individual and the State as status libertatis. Cf. Georg Jellinek, System der subjektiven öffentlichen Rechte, Freiburg im Breisgau 1891, pp. 89 et seq.

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damental Rights of the EU (ECFR) mirrors this understanding when guaranteeing in its Chapter II (Freedoms) classic fundamental rights such as the right to liberty and security, freedom of thought, conscience and religion or freedom of expression and information.  

However, fundamental rights law has gone further than ensuring a sphere of freedom from State intervention when also recognizing social rights that enable the individual to exercise his or her freedom. The rise of this new generation of fundamental rights has been embedded in the transformation of private law during the twentieth century: from a formal paradigm, presupposing a balance of power between the contracting partners and their capacity to defend their own interests by negotiating a contract, to a more social approach of contract law taking into account the factual conditions for the exercise of freedom of contract and considering the protection of the weaker party in a contractual relationship as one of the core objectives of contract law.

The doctrine of horizontal effect of fundamental rights which has been recognized in various jurisdictions in the decades after the Second World War, appears under different forms and varies from country to country. As far as the purpose of such horizontal application of fundamental rights among individuals is concerned, there is a broad consensus: It is a legal mechanism enabling judges to protect the weaker party in a contractual relationship. By this, even classic fundamental rights such as religious freedom, freedom of conscience, freedom of speech or freedom of association obtain a social dimension and become social rights: applied to contractual relationships, they limit freedom of contract of the stronger party and strengthen the protection of the weaker party. As a result, the free play of forces on the markets is limited in favour of those who are not able to effectively defend their own interests when “negotiating” an employment contract or a tenancy agreement.

In light of these national developments, it is not surprising that the question of a horizontal effect of the fundamental rights enshrined by the ECFR has become object of discussions, only shortly after the proclamation of the Charter in 2000. The focus of this debate has been and still is on the employment contract. As far as the content of the rights is concerned whose application within the employment relationship is discussed, the debate is clearly centred on various of the social rights of the Charter such as the prohibition of discrimination and the right to paid annual leave; there seems to be a tendency in the recent case law of Court of Justice of the EU to open up to the idea that these social rights are directly invokable by workers vis-à-vis their employer to a certain extent in order to effectively protect the worker as the weaker party in the employment relationship. For the purpose of this Article, fundamental rights are considered social rights which protect the individual from specific risks for their freedom resulting from the social or economic sphere and which thereby ensure his or her effective freedom vis-

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3 See Articles 6, 10, 11 ECFR.
4 This conception of freedom of contract is formal since it presumes that the contracting parties are entering into a contract with equal economic and social power.
5 For a fuller analysis of this transformation process which private law has undergone during the twentieth century, see from a German perspective Franz Wieacker, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft, Vortrag gehalten vor der Juristischen Stu diengesellschaft in Karlsruhe am 12. Dezember 1952, Karlsruhe 1953. From a French perspective, cf. e.g. René Savatier, Du droit civil au droit public à travers les personnes, les biens et la responsabilité civile, Paris 1950. For the British context, see the seminal study of P.S. Atiyah, The Rise and Fall of Freedom of Contract, Oxford 1979 (OUP).
6 For an overview on different national models in Europe see Achim Seifert, L’effet horizontal des droits fondamentaux: quelques réflexions de droit européen et de droit comparé, in: Revue trimestrielle de droit européen (RTDEur) 2012, pp. 801 et seq with further references.
7 See the references infra 3.

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à-vis other individuals: this does not only encompasses the social rights enshrined in Title IV “Solidarity” of the ECFR but also other fundamental rights such as the principle of non-discrimination under Article 21 ECFR, the equality between men and women in all areas, including employment, work and pay (Article 23 ECFR), the rights of the elderly to participate in social and cultural life (Article 25 ECFR) and the right of persons with disabilities under Article 26 ECFR.

The aim of this paper is to examine this important and still controversial question of whether the social rights of the ECFR have a horizontal effect among individuals and in particular between workers and their employers. In analysing it, emphasis will be laid on the different types of horizontality of the social rights of the Charter but not to the concrete content of rights (e.g. the right to paid annual leave under Article 31(2) ECFR) which they have in the employment relationship. In a first part, it shall be analysed whether Article 51(1) ECFR, the provision defining “the field of application” of the Charter, gives an answer to the question of whether social rights of the Charter are vested of a horizontal applicability in the individual employment relationship (1). Secondly, the evolution of the Court of Justice’s case law on this question shall be briefly outlined (2). The third and main part shall deal with the two types of horizontality the social rights of the Charter may have and will ask whether they have a direct horizontal effect between worker and employer or whether their horizontality is limited to an indirect effect (3).

1. ARTICLE 51(1) ECFR AS LEGAL BASIS FOR A HORIZONTAL EFFECT?

It is interesting to note that the ECFR does not explicitly address the question of a horizontal effect of its rights among individuals. As far as “the field of application” of the Charter is concerned, Article 51(1) ECFR only poses that its “provisions are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. Individuals and particularly employers are therefore not directly bound by this provision of the ECFR and accordingly, workers may only invoke fundamental rights vis-à-vis the State or the Union. Unlike few national constitutions (e.g. Portugal), the Charter does not seem to address this question.

This first reading of Article 51(1) ECFR is confirmed by the explanations relating to the ECFR. These explanations which were written by the Bureau of the European Convention that drafted the ECFR shall be given due regard by the courts of the Union and of the Member States when interpreting the Charter. As far as Article 51 ECFR is concerned, the explanations to the ECFR do not mention at all the question of an application of Charter rights between individuals and more precisely their application in the employment relationship. They entirely remain silent on this important point.

Also, a closer look to the travaux préparatoires of the Charter – i.e. the Protocols of the sessions of the European Convention – does not shed more light on this question. As a matter of fact, the horizontal application of the Charter rights is not mentioned at all in them. Especially the Protocols of the sessions in which today’s Article 51 ECFR was discussed do not make any reference to this question. Instead,
the debates in the European Convention had been concentrating on the extent to which the Member States shall be bound by the ECFR, on the limitation of its field of application to the competences of the Union and to the relationship between the Charter and the ECHR. This silence of the Charter on the horizontality of its rights is all the more surprising as this question has been addressed by a number of national laws of the Member States (e.g. Portugal) or by European States that are not members of the EU but closely linked to it (e.g. Switzerland). There is no doubt that the question of an application of fundamental rights among individuals may be considered as one of the important questions of the protection of fundamental rights as developed since the 1950s; given the fact that the horizontality of fundamental rights has become an Acquis of almost all national legal orders of the Member States, one would have expected that this question is addressed by a Charter of Fundamental Rights adopted in the year 2000.

In view of the high relevance which the doctrine of horizontal effect of fundamental rights at national level has, it is very unlikely that the Members of the European Convention did not have in mind this question. But what conclusion can be drawn from this silence of the Charter and the European Convention when drafting it? The silence of Article 51(1) ECFR, dealing with the Charter’s “field of application”, has to be interpreted in that way that this provision does not address the question of a horizontal effect of the Charter rights: the Convention has left open this question and has therefore delegated its solution to the courts; also the Court of Justice reads Article 51(1) ECFR in this sense and has used developed its own position on the question of an applicability of the Charter rights among individuals.

2. THE CASE-LAW OF THE CJEU ON THE HORIZONTAL EFFECT OF CHARTER RIGHTS

During almost one and a half decade of application of the ECFR, the Court of Justice of the EU has been rather cautious when it has come to the question of whether the fundamental rights of the Charter have a horizontal effect.

Regarding the principle of non-discrimination under Article 21(1) ECFR, the Court has developed a concept which may be characterized as concept of a “negative horizontal effect”. It goes back to the Grand Chamber’s decision in Mangold v Helms referring to the prohibition of discriminations on grounds of age and imposes to national courts, when hearing a dispute between individuals, not to apply rules of national law that are contrary to the principle of equal treatment under EU law, where it is not possible to interpret the applicable national law in conformity with EU law. This negative effect, leading to an elimination of national provisions that do not comply with EU law, may be understood as a consequence of the principle of primacy of EU law vis-à-vis the national laws of the Member States: it ensures that the principle of equal treatment prevails over national rules which infringe this principle of EU law. The Mangold judgment did not primarily refer to Article 21(1) ECFR—the Charter only became binding with the coming into force of the Lisbon Treaty on the first of December 2009—but recognized

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see Angela Schwerdfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der EU, 5th edition (2019, Article 51, paras. 6-23 with further references.


14 Cf. Seifert, RTDEur 2012, pp. 801 (802 et seq) with further references.

15 CJEU [Grand Chamber], judgment of 6 November 2018, Case C-59/16 and C-570/16 (Stadt Wuppertal v Maria Elisabeth Bauer, Volker Willmeroth and Martina Broffin), ECLI:EU:C:2018:871, para 87.

16 ECJ (Grand Chamber), judgment of 22 November 2005, C-144/04 (Werner Mangold v Rüdiger Helm), ECLI:EU:C:2005:709.

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the prohibition of all discrimination on grounds of age as a general principle of EU law.\(^\text{17}\) In *Kücükdeveci*, the Grand Chamber confirmed this case law but used Article 21(1) ECFR as a legal basis for the prohibition of discriminations on grounds of age.\(^\text{18}\) In a later decision, it has extended this concept to discriminations on other grounds, namely on grounds of religion and belief, as the judgment in *IR v JQ*\(^\text{19}\) show. In the already mentioned judgment *Association médiation sociale*, it has however refused to apply this principle to the right to information and consultation within the undertaking set out in Article 27 ECFR and has rejected the idea that a national provision infringing Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, interpreted in the light of Article 27 ECFR, may be invoked by individuals since this Charter provision is not sufficient in itself to confer individuals an individual right.\(^\text{20}\)

By this settled case-law, the CJEU has given an effect of primary law to the principle of equal treatment as concretized by Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and has enabled workers to invoke it before the national courts. In many cases, this negative effect – the non-application of a rule of national law – leads to a full equal treatment of the victims with other workers: the *Kücükdeveci* judgment may well demonstrate this effect.\(^\text{21}\) As the provisions of Directive 2000/78/EC may only have, in contrast to regulations, indirect effects on relationships between individuals\(^\text{22}\) since a Directive “cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual”,\(^\text{23}\) this case-law has as a side-effect that it gives a limited (negative) direct effect to those Directive provisions which are part of the guarantee of Article 21(1) ECFR. Thus, it may increase the effect of a Directive as far as its rules are part of the guarantee of a fundamental right.

For years, the Court has hesitated to extend this concept to other social rights such as the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave under Article 31(2) ECFR. However, in *Association de médiation sociale*\(^\text{24}\) – preliminary ruling that dealt with the right to information and consultation within the undertaking – the Grand Chamber adumbrated in an *obiter dictum* that the prohibition of all discrimination as guaranteed by Article 21(1) ECFR, “is sufficient in itself to confer on individuals an individual right which they may invoke as such”. Since then, a recognition of a direct horizontal effect of Article 21(1) ECFR appeared possible.

In *Egenberger* the Court’s Grand Chamber seems to have gone beyond its position in a preliminary ruling concerning the prohibition of all discrimination on grounds of religion or belief under Article 21(1) ECFR when considering that this general principle of EU law “is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU

\(^\text{17}\) Now Article 6(3) TEU.
\(^\text{18}\) ECIJ (Grand Chamber), Judgment of 19 January 2010, Case C-555/07, (*Seda Kücükdeveci gegen Swedex GmbH & Co. KG*), ECLI:EU:C:2010:21.
\(^\text{19}\) Judgment of 11 September 2019, Case C-68/17, ECLI:EU:C:2018:696 (para. 68).
\(^\text{20}\) ECIJ (Grand Chamber), judgment of 15 January 2014, Case C-176/12 (*Association de médiation sociale v Union locale des syndicats CGT et alii*), ECLI:EU:C:2014:2, para 47.
\(^\text{21}\) ECIJ (Grand Chamber), judgment of 2011, Case C-555/07, (*Seda Kücükdeveci gegen Swedex GmbH & Co. KG*), para. 46. In this case, the non-application of the discriminating German notice period for workers regarding their employment periods before they have turned 25 years old (sect. 622(2) BGB) entails equal treatment with all the other workers who are not affected by this provision.
\(^\text{22}\) Cf. Article 288(3) TFEU.
\(^\text{23}\) ECIJ (Grand Chamber), judgment of 2011, Case C-555/07, (*Seda Kücükdeveci gegen Swedex GmbH & Co. KG*), para. 46.
\(^\text{24}\) CJEU [Grand Chamber], Judgment of 15 January 2014, Case C-176/12 (para. 47).
law”. However, this preliminary ruling has only been dealing with the interpretation of Article 4(2) Directive 2000/78/EC and by consequence with an exception from the principle of equal treatment on religion or belief in employment relationships with a Church: the non-application of the German provision at stake (section 9(1) General Act on Equal Treatment) would have been sufficient to ensure an equal treatment of the victim in accordance with Directive 2000/78/EC. It has been in Cresco Investi-
gation GmbH v Markus Achatzki – another case referring to discrimination on grounds of religion or belief – that the Grand Chamber has confirmed its judgment in the Egenberger case and has recognized that Article 21(1) ECFR may entitle a victim to claim the same right as others privileged by a national provision.26 In Stadt Wuppertal v Bauer et alii,27 the Grand Chamber has even transferred this new case law on discriminations on religion or belief to the right to paid annual holidays (Article 31(2) ECFR), mainly arguing that it “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”. Article 31(2) ECFR can therefore be directly invoked by workers vis-à-vis their employer. The Court justifies this by the mandatory and unconditional nature of the right to paid annual holidays (“every worker”). The only limit of this direct effect in the employment relationship is that the situation falls under the scope of Union law.28

As a result of this recent case law of the CJEU, in particular the prohibition of discriminations under Article 21(1) ECFR and the right to paid leave according to Article 31(2) ECFR are now vested with a direct effect in individual employment relationships. Workers may invoke these fundamental rights before the national judge in order to enforce performance. It may be presumed that the Court will extend this case law also to other social rights of the ECFR. The only requirement for such direct application of these rights in the employment relationship seems that it is sufficiently precise to be applied in employment relationships.

3. DIFFERENT TYPES OF HORIZONTALITY

These recent judgments of the Court of Justice, vesting Article 21(1) and certain aspects of Article 31(2) ECFR of a direct applicability within the individual employment relationship, do not do develop a reasoned concept which may justify this step. They mainly emphasize on that Article 51(1) ECFR does not exclude a horizontal effect of the Charter29 without giving arguments in favour of a direct horizontal effect of these rights. It is therefore not useless to inquire the possible ways through which the Charter and more specifically its social rights may have effects on the individual employment relationship. As far as the legal mechanisms involved are concerned, it is convenient to distinguish between direct and indirect effects which social rights of the Charter may have on the individual relationship between worker and employer.30 We start with the different forms of indirect horizontality and discuss only

25 CJEU [Grand Chamber], judgment of 17 April 2018, Case C-414/16 (Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV), ECLI:EU:C:2018:257, (para. 76).
26 CJEU [Grand Chamber], judgment of 22 January 2019, Case C-193/17, ECLI:EU:C:2019:43 (para. 76). The judgment deals with an Austrian legal provision which confers the right to a paid holiday on Good Friday only to members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church.
27 CJEU [Grand Chamber], judgment of 6 November 2018, Case C-569/16 and C-570/16, ECLI:EU:C:2018:871 (paras. 87 et seq.).
28 Cf. Article 51(1) ECFR.
29 See CJEU [Grand Chamber], judgment of 6 November 2018, Case C-569/16 and C-570/16, ECLI:EU:C:2018:871 (paras. 87-88).
30 This distinction is used by a considerable part of the doctrine: see e.g. Aristea Koukiadaki, Application (Article 51) and limitations (Article 52(1)), in: Filip Dorssemont, Klaus Löcher, Stefan Clauwaert & Mélanie Schmitt (Eds), The Charter of Fundamental Rights of the European Union and the Employment Relation, Oxford et al. 2019 (Hart Publishing), pp. 116 et seq. See also Jarass, Charta der Grundrechte der EU, 3rd edition (2016), Art. 51, paras. 36 et seq.; Angela Schwerdtfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der EU, 5th edition (2019), Art. 51, paras. 57 et seq.; Claudia Schubert, in: Martin

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thereafter the question of whether social rights may be directly invokable by the worker vis-à-vis his or her employer (direct horizontal effect).

### 3.1. Forms of an indirect horizontal effect

Social rights of the ECFR may have first and foremost indirect horizontal effects on individual employment relationships. Two types of an indirect application of these rights shall be distinguished: the interpretation of national law in the light of the ECFR (3.1.1.) and the positive obligations that the provisions of the ECFR impose on the Member States (3.1.2.).

#### 3.1.1. Horizontal effect through the interpretation of national law

The first type of an indirect horizontal effect of social rights of the Charter consists in an interpretation of EU law or of the national laws of the Member States in the light of the ECFR. By this, judges may ensure an interpretation of secondary EU law or of national law in accordance with the fundamental rights of the Charter and may maximize their effect. In both cases of an interpretation in light of the Charter, its provisions may have an indirect effect on individual employment relationships: in the case of an interpretation of national law by national courts in conformity with the Charter, concrete duties and rights of the parties to an employment contract arise whereas the interpretation of a Directive in accordance with the ECFR requires a further implementation act on national level (e.g. a court decision or a legislative act) in order to create concrete rights and duties for workers and employers.

As the rights set out in the ECFR shall have the same legal value as the Treaties, it is perfectly clear that EU Directives or Regulations may be interpreted in light of the fundamental rights of the Charter. Furthermore, it is settled case-law of the Court of Justice that national law shall be interpreted in conformity with EU law. This principle also applies to the fundamental rights of the ECFR. The Court of Justice emphasizes “that it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision can be interpreted in conformity” with the rights of the ECFR. This even includes the obligation for national courts to change their established case-law in order to align national law with EU law. In interpreting national law in conformity with EU law, national courts shall apply the interpretative methods recognised by their domestic law. It depends therefore on the national traditions of legal methodology to which extent such alignment of national law by the national courts with the fundamental rights of the Charter is possible. These limits may vary from Member State to Member State since there are no uniform rules of the Union on the interpretation of legal acts. The CJEU only emphasizes that the duty to interpret provisions of national law in the light of Union law does not go as far as to require national courts to interpret their national law contra legem.

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One recent example referring to the workers’ right to paid leave under Article 31(2) ECFR will suffice in the present context. In Shimizu, the Grand Chamber of the Court of Justice has recognized that Article 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time and of Article 31(2) ECFR guarantee to the worker, who has not taken his paid leave during the calendar year, the right that he “cannot be deprived of his acquired rights to paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid” when “the employer is not able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law”.\(^{36}\) In implementing this judgment of the Court of Justice, the German Federal Labour Court [Bundesarbeitsgericht (BAG)]\(^{37}\) now interprets Section 7(3) of Germany’s Federal Act on paid leave [Bundesurlaubsgesetz (BUrlG)], according to which there is a carry-over period for paid leave only of three months in the event of an operational requirement or a reason lying in the person of the worker, in light of the Grand Chamber’s understanding of Article 7 Directive 2003/88/EC and Article 31(2) ECFR: accordingly, the worker only loses his statutory right to paid annual leave if the employer is not able to show that he had enabled the worker to exercise his right to paid annual leave by informing him, in particular through the provision of sufficient information on his acquired paid annual leave and his right to an allowance in lieu of the leave in the event of a termination of the employment relationship. In this case, the interpretation of Article 31(2) ECFR has strengthened the protection of workers and is directly invokeable by workers before the national labour courts.

Not only fundamental rights in the strict sense of the term but also principles according to Article 51(1), 2\(^{nd}\) sentence ECFR may have an attenuated horizontal effect on individual employment relationships by guiding the interpretation of Union law or national law. Although they require an implementation by legislative or executive acts taken by the Union and by acts of Member States when they are implementing Union law, they shall be considered by the judge when interpreting such implementation acts. Thus, the right to information and consultation within the undertaking under Article 27 ECFR which has been implemented by various EU Directives and transposition acts of Member States shall be interpreted also in light of this Charter provision. This understanding is underlying the Grand Chamber’s judgment in Association de médiation sociale\(^{38}\) referring to Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community.\(^{39}\)

In the event that the national law of a Member State does not allow such interpretation in accordance with the Charter, the national provision which infringes the Charter shall remain disapplied by the national Courts; this effect results from the principle of primacy of EU law.\(^{40}\)

### 3.1.2. Positive obligations

Beyond this indirect horizontal effect through interpretation, the fundamental rights of the ECFR may also lead to an indirect application of Charter rights due to positive obligations which result from them and which are incumbent on Union and on the Member States. In this event, the ECFR, similar to a Directive, is binding “as to the result to be achieved […] but shall leave to the national authorities the choice of form and methods”.\(^{41}\) Applied to the employment relationship, this means that the EU and its

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36 CJEU [Grand Chamber], judgment of 6 November 2018, Case C-684/16 (Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu), ECLI:EU:C:2018:874 (paras. 62 et seq.).


38 CJEU [Grand Chamber], judgment of 15 January 2014, Case C-176/12, ECLI:EU:C:2014:2.


40 Cf. ECJ, judgment of 15 July 1964, Case C-6/64 (Flaminio Costa v E.N.E.L.), ECLI:EU:C:1964:66.

41 Cf. Article 288(3) TFEU.

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institutions shall adopt rules which sufficiently protect the individual in the scope of the fundamental right concerned. As far as the Member States are concerned, they shall transpose the requirements of the ECFR in their national laws by aligning their labour law provisions to the minimum required by Charter rights. Thus, positive obligations require legislative activities or interventions of the Courts of the Union and its Member States in order to ensure the effective protection of a fundamental right.

The ECFR does not explicitly impose such positive obligations on the Union and the Member States. The Charter only implicitly addresses the question and this with limited scope. As a matter of fact, Article 52(3) ECFR provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.” The explanations relating to the ECFR, to which due regard shall be given by the courts of the Union and of the Member States, comprises a list of Charter rights that may be regarded as corresponding to rights in the ECHR. Thus, the right to private and family life under Article 7 ECHR has been inspired by Article 8 ECHR, freedom of assembly and association under Article 12 ECHR corresponds to Article 11 ECHR and religious freedom under Article 10 ECHR corresponds to Article 9 ECHR. According to the explanations to Article 52(3) ECFR, “the meaning and the scope of the guaranteed rights are determined […] also by the case-law of the ECtHR […]”. The Charter provision shall therefore be interpreted in the sense that it also makes reference to the concept of positive obligations, the ECtHR in Strasbourg has developed in its case-law on the duty of the Contracting Parties to give full effect of the fundamental rights of the Convention by their activities, including the employment context. Hence, in the frame of its scope of application, Article 52(3) ECFR speaks in favour of an indirect horizontal effect of fundamental rights.

As is well known, the ECtHR extensively uses the concept positive obligations in order to impose to the Contracting Parties of the ECHR concrete duties to intervene in contractual relationships. This is particularly true for the employment context. Thus, it has been recognized by the ECtHR that freedom of speech under Article 8 ECHR as well as religious freedom under Article 9 ECHR contain positive obligations on the Contracting Parties to protect employees from unfair dismissals based on the exercise of these fundamental rights. Another example is the recent judgment in Barbulescu v Romania, strengthening worker data protection in the case of surveillance of E-mails exchanges employees have through their workplace account (Article 9 ECHR). The ECtHR has always recognized a wide margin of appreciation of the Contracting parties as to how it fulfils its positive obligations: in this respect, the positive obligation incumbent on the Contracting Parties resembles very much to an obligation de résultat and leaves it to them by which legal means of their national laws they reach the result required by the ECHR.

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42 Cf. Article 6(1), subparagraph (2) TEU and Article 52(7) ECFR.
43 Cf. O.J.E.U. 207 C 303, pp. 17 et seq.
44 For a summary of the Court’s case law on positive obligations of the Contracting Parties see e.g. Jacobs, White & Ovey, The European Convention of Human Rights, 5th edition (2010), pp. 99 et seq.
45 See also Schwertfeger, in: Meyer/Hölscheidt, Article 52, para. 60.
47 Cf. ECtHR (Grand Chamber), judgment of 5 September 2017, Application No 61496/08 (Barbulescu v Romania). For a critical assessment of this judgment, see the case note by Achim Seifert, Europäische Zeitschrift für Arbeitsrecht (EuzZA) 2018, pp. 502-510.

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Article 52(3) ECFR only refers to those rights of the Charter that have been inspired by the ECHR. This Charter provision does therefore not apply to the vast majority of the social rights, in particular those enshrined in the solidarity Title, since the ECHR has guaranteed social rights only to a limited extent.\textsuperscript{49} Several of these social rights have been inspired by the (Revised) European Social Charter (ESC). In particular, this is the case for the right to information and consultation within the undertaking under Article 27 ECFR, the right of collective bargaining and action (Article 28 ECFR) as well as the right to protection in the event of unjustified dismissal (Article 30 ECFR).\textsuperscript{50} Also the ESC parts from the idea that its social rights need to be implemented by the Contracting States imposing on them positive obligations to be fulfilled by their national law.\textsuperscript{51} This should not be without consequence for the interpretation of the social rights of the ECFR. Since these provisions of the ECFR have been (highly) influenced by the ESC, it is appropriate to interpret these fundamental rights in the same sense as the ESC and therefore to impose on the institutions of the EU and to its Member States the duty to transpose them into secondary EU-Law or national law.

It is interesting to note that, in sharp contrast to the ECHR, the Court of Justice of the EU has only rarely used the concept of positive obligations in order to justify an indirect horizontal effect of fundamental rights of the Charter in the employment context. The reasons for this have not been clarified by the Court of Justice itself. One explanation for this judicial behaviour may be that the Court of Justice has expressed a strong reticence to bind itself to the dynamic case law of the ECtHR and to maintain the autonomy of Union law. As a matter of fact, the Full Court has reaffirmed, in its 2014 opinion concerning the accession of the EU to the ECHR, the view that “any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law”.\textsuperscript{52}

\subsection*{3.2. Direct horizontal effect of social rights?}

Much more difficult and controversial is the question of whether the fundamental rights of the ECFR in general and its social rights in particular may have a direct horizontal effect among individuals and may be invoked by individuals (e.g. the worker) vis-à-vis other individuals (e.g. the employer) before the national courts of the Member States. As has already been pointed out,\textsuperscript{53} the Court of Justice of the EU, in its recent case law on Article 21(1) ECFR and on the right to paid leave under Article 31(2) ECFR, seems to have a preference for this path. However, the Court has not given yet convincing arguments in favour of a direct horizontal effect of these fundamental rights.

If one carefully reads the wording of Charter, he or she will quickly discover some provisions whose essential objective seems to be to primarily apply to relationships among individuals under private law. Thus, Article 5 ECFR, guaranteeing the prohibition of human trafficking, for instance, only addresses sales contracts whose “good” are human beings and other related contracts in this context (e.g. agents, broker etc.). Closely related to this prohibition, is the prohibition of slavery and forced labour under Article 5 ECFR. Furthermore, Article 24 ECFR not only protects children vis-à-vis State interventions

\textsuperscript{49} This does not mean, however, that the ECHR does not guarantee any social right. For an overview, see Achim Seifert, The social dimension of the European Convention on Human Rights, in: Bernard Johan Mulder, Marianne Jenum Hotvedt, Marie Nesvik and Tron Løkken Sundet (Eds), Sui generis social dimension of the European Convention on Human Rights, in: Bernard Johan Mulder, Marianne Jenum Hotvedt, Marie Nesvik and Tron Løkken Sundet (Eds), Sui generis

\textsuperscript{50} See the explanations relating to Article 27, 28 and 30 ECFR.


\textsuperscript{52} CJEU [Full Court], opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454 (para. 184) with further references.

\textsuperscript{53} Cf. supra 3 with further references.
but also entitles them vis-à-vis their parents. However, these provisions of the Charter do not require their direct application among individuals. Also, the prohibition of human trafficking as well as the prohibition of slavery and forced labour require activities of the EU and in particular of the Member States in order to ensure an effective implementation of these two fundamental rights. Thus, the contract laws of the Member States order the voidness of contracts violating these provisions\textsuperscript{54} and secondary EU law or the national laws of the Member States ensure that violations of these rights are punishable.\textsuperscript{55} More importantly, the Member States shall establish the necessary administrative infrastructure in order to prevent violations of these rights and to ensure their effective prosecution.\textsuperscript{56}

But there are other strong arguments against such a direct horizontal effect of the Charter. As has already been pointed out, a direct application of Charter rights, in applying the doctrine of positive obligations, allows to ensure the full protection of a fundamental right of workers by those institutions which are closer to the problem: if legislature effectuates this adaptation and concretization, the necessary striking of a balance between the conflicting interests of the worker and the employer in the employment relationship will be effectuated in a democratic legislative process; a transposition of such positive obligations by national courts, in the absence of a legislative process, has the advantage that national judges, and particularly labour judges, are closer to the sphere of freedom addressed by the rights of the ECFR and may therefore strike the balance of the conflicting interests in an appropriate way too. This solution also corresponds to the principle of subsidiarity, underlying EU law.\textsuperscript{57}

Furthermore, it is difficult to understand that the mostly first-generation fundamental rights of the Charter which correspond to rights set out in the ECHR only have an indirect effect on the individual employment relationship through the fulfilment of positive obligations\textsuperscript{58} whereas the social rights of the Charter shall develop a stronger legal effect on the individual employment relationship by a direct application to the contract. Finally, it should be borne in mind that the recognition of a direct horizontal effect of fundamental rights is a rare exception also in the legal orders of the Member States.\textsuperscript{59}

However, there is one exception from this rule. A direct application of rights set out in the Charter may be appropriate when the Union or a Member State has failed to comply with a positive obligation following from one of the social rights in the ECFR. In this case, it is necessary to give to the victim a direct remedy and to directly apply the fundamental right in his or her individual employment relationship. As a result, there is a subsidiary direct application of the Charter. The Union or the Member State which have not exercised their freedom to establish a rule striking the balance between the conflicting interests by legislature or by case-law must accept then that the Charter right applies tel quel. By this, an effective protection of the individual is guaranteed. Another, perhaps less effective solution could be to entitle the individual whose right has been infringed to claim damages, include moral damages. In

\textsuperscript{54} Cf. e.g. sec 134 German Civil Code (« gesetzliche Verbote »), Article 6 French Civil Code (« ordre public ») and contract clauses which are contrary to public policy in the Common law.

\textsuperscript{55} Cf. Art. 4(1) Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (O.J.E.U. 2011 L 101/1), for instance, requires from the Member States to “take the necessary measures to ensure that an offence [concerning trafficking in human beings] is punishable by a maximum penalty of at least five years of imprisonment”.

\textsuperscript{56} See e.g. Martin Borowsky, in: Meyer/Hölscheidt, Charta der Grundrechte der EU, Art. 5, para. 37-38.

\textsuperscript{57} Cf. Article 5(1) TEU. Also Article 51(1) ECFR recognizes the idea that its rights “are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity [...]”. Although Article 51(1) ECFR does not address the horizontality of the Charter rights (see supra 2), the reference of this provision to the principle of subsidiarity mirrors that according to the concept of the Charter, also the implementation of its fundamental rights shall respect this general principle of EU law.

\textsuperscript{58} Article 52(3) ECFR; see supra 4.1.2.

\textsuperscript{59} For an overview, see Seifert, RTDE 2012, pp. 801 (805).
this context, it would be appropriate to transfer the settled case-law of the CJEU on the liability of the Member States in the event that an EU Directive has not been or has been incompletely transposed. But it is clear that the recourse to damages only is a second-best solution of the problem.

CONCLUDING REMARKS

The foregoing observations have shown that the ECFR does not provide a general concept on the horizontality of the social rights of the ECFR. In particular, Article 51(1) ECFR, often mentioned in this context, remains silent on this point. Its travaux préparatoires seem to confirm the interpretation that this provision of the Charter does not address the question of a horizontal effect of its rights at all and delegates the answer to the courts.

The Court of Justice seems to increasingly recognize a horizontal effect of social rights of the Charter, namely the principle of non-discrimination under Article 21(1) ECFR and of the right to paid annual holidays resulting from Article 31(2) ECFR. Once again, the Court of Justice seems to become a “motor of European integration” as it has been the case in the sixties and seventies of last century. It is only a question of time that also other social rights of the Charter such as the right to protection in the event of unjustified dismissals (Article 30 ECFR) or the right to protection of young people at work under Article 32 ECFR will be vested of a (limited) direct horizontal effect within the employment relationship. For the time being, however, the case law of the Court of Justice has rather fragmentary character and lacks a real concept.

Starting point for a conceptual framework should be the widely recognized distinction between direct and indirect horizontal effects of the Charter. An application of the Charter’s social rights among individuals will mainly be achieved in an indirect way, i.e. through a transposition of its protective content into the national laws of the Member States. They have an indirect effect through the interpretation of provisions of national law in light of the ECFR. A second type of indirect horizontal effect of the Charter’s social rights may follow from positive obligations incumbent on the EU and the Member States requiring them to give full effect to these fundamental rights. This second type of an indirect horizontal effect does not only correspond to the convergence rule of Article 52(3) ECFR but reflects also the spirit of the ESC which has inspired various of the social rights of the Charter. The advantage of the doctrine of positive obligations is that it delegates the striking of a balance between the conflicting interests in the employment relationship to Union legislature or to the national level and may thereby facilitate smoother solutions which are better integrated into the legal orders of the Member States and which correspond with the principle of subsidiarity. National legislature but also the national courts are both closer to the problems at stake than the CJEU.

In view of these arguments, a direct application of social rights of the Charter as the Court of Justice seems to recognize since recently should not be the way to follow. An indirect horizontal effect through the interpretation of national law and through the transposition of positive obligations gives to the institutions of the Union but also to the Member States the opportunity to strike the balance between the conflicting interests in a more appropriate way; in the case that positive obligations are incumbent on the Member States, this solution also corresponds to the principle of subsidiarity. Only in cases where the Union or Member States do not fulfil their positive obligations resulting from the Charter a (subsidiary) direct horizontal effect of its rights seems to be appropriate in order to ensure the effective protection of the individual who may claim the right in his or her favour.

60 ECJ, judgment of 19 November 1991, Case C-6/90 and C-9/90 (Andrea Francovich and Danila Bonifaci and others v Italian Republic), ECLI:EU:C:1991:428 (pars 28 et seq.).

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