E-LEARNING NATIONAL ACTIVE CHARTER TRAINING

SOCIAL AND NON-DISCRIMINATION PROVISIONS IN THE EMPLOYMENT FIELD IN THE CHARTER

MARCH 2019 VERSION

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Foreword

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This handbook has been created for the purposes of the e-NACT project. It consists of three parts: a state of play, a selection of case law relating to the EU Charter of Fundamental Rights and the social rights it contains, and a set of hypotheticals that were discussed during the e-NACT workshop on social rights held on 4-5 October 2018 at the Institut d'Études Européennes of the Université Libre de Bruxelles. The workshop was an occasion to comment on and amend a draft version of the handbook.

This handbook does not claim to amount to a scientific paper but instead serves a pedagogic purpose. A selected bibliography of pertinent sources pertaining to the different subjects broached can be found at the beginning of the handbook.

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Table of contents

Selected bibliography

On EU employment law and social rights:

- C. Barnard, *EU Employment Law*, 4th ed. (Oxford, Oxford University Press 2012).
- B. Bercusson, *European Labour Law*, 2nd ed. (Cambridge, CUP 2009).
- R. Blanpain, *European Labour Law,* 14th ed. (Alphen aan den Rijn, Kluwers Law International 2014).
- B. De Witte and G. De Búrca (eds), *Social Rights in Europe* (Oxford, Oxford University Press 2005).
- R. J. Goebel, "Employee Rights in the European Community: A Panorama from the 1974 Social Action Program to the Social Charter of 1989," (1993) *International and Comparative Law Review* 1, pp. 1-96.
- K. Lenaerts and P. Foubert, "Social Rights in the Case-Law of the European Court of Justice," (2001) *Legal Issues of Economic Integration* 3, pp. 267-296.

On the Charter of Fundamental Rights:

- G. Amato *et al.* (eds), *Genesis and Destiny of the European Constitution* (Brussels, Bruylant, 2007).
- A. Bailleux, "La Cour de justice, la Charte des droits fondamentaux et l'intensité normative des droits sociaux" (2014) *Revue de droit social* 3, pp. 287-308.
- G. Braibant, *La Charte des droits fondamentaux de l'Union européenne. Témoignage et commentaires* (Paris, Seuil 2001).
- E. Bribosia and O. De Schutter, "La Charte des droits fondamentaux de l'Union européenne" (2001) 12 *Journal des Tribunaux* 6005, pp. 281-293.
- J. Kenner and T. Hervey (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart Publishing 2003).
- 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) 11 *European Constitutional Law Review* 2, pp. 321-356.
- S. Peers, "The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights" (2012) *Human Rights Law Review* 2, pp. 375-389.
- S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Oxford, Hart Publishing, 2014).
- F. Picod and S. van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union Européenne. Commentaire article par article* (Brussels, Bruylant, 2017).

On judicial interaction with other legal orders

- J.-M. Belorgey, "La Charte Sociale du Conseil de l'Europe et son Organe de Régulation (1961-2011), le Comité Européen des Droits Sociaux: Esquisse d'un Bilan" (2011) *Revue Trimestrielle des Droits de l'homme* 88, pp. 787-806.

- E. Brems and E. Desmet, (eds), *Integrated human rights in practice: rewriting human rights decisions* (Cheltenham/Northampton, Edward Elgar, 2017).
- L. Burgorgue-Larsen, *The Charter of Fundamental Rights as Apprehended by Judges in Europe* (Paris, Editions Pedone, 2017).
- O. De Schutter, "L'Adhésion de l'Union Européenne à la Charte Sociale Européenne" (2015) *Revue Trimestrielle des Droits de L'homme* 102, pp. 259-316.
- C. Nivard, *La justiciabilité des droits sociaux* (Bruxelles, Bruylant, 2012).
- P. Stangos, "Les Rapports entre la Charte Sociale Européenne et le Droit de l'Union Européenne - Le Rôle Singulier du Comité Européen des Droits Sociaux et de sa Jurisprudence" (2013) *Cahiers de Droit Européen* 2, pp. 319-393.

Part I: State of play

I. Introduction

Over the course of the several decades of the European Union's (EU) existence, social rights have come a long way. Despite their initial non-existence in the Treaties and their Cinderella treatment in comparison with civil and political rights, they now have made a place for themselves among other fundamental rights. The culminating point of this evolution is naturally the Charter of Fundamental Rights, which consecrates an entire chapter, Title IV: Solidarity, to social rights. However, the Charter also created much confusion concerning the actual status and strength of social rights in the EU legal order.

This first part of this handbook will look at social rights in the EU from a historical perspective so as to better understand their current role and position. The second part analyses the social rights contained in the Charter and their status. Third, the handbook considers EU judicial interaction with other legal orders. As the EU does not operate in a bubble, an integrated approach to human rights is very valuable.

Given its important impact on social rights and as it was a catalyst for many profound changes in the European landscape, we accord special attention to the 2008 financial and economic crisis.

II. A brief history of fundamental social rights in the EU

A. From the Treaty of Rome to the Single European Act (1985)

In the early stages of European construction, the founding Member States were not particularly concerned with social rights. Their first and foremost priority was the establishment of a common market with free movement of goods, workers, capital and services. On the one hand, they considered other international institutions to be best placed to ensure respect for fundamental rights. On the other hand, they assumed that good working conditions would automatically ensue from free movement, economic progress and growth. The Ohlin (written by a group of experts from the International Labour Organisation – ILO) and Spaak (written by the foreign ministers of the future European Economic Community – EEC) reports, which preceded the signing of the Treaty of Rome, greatly influenced this view. Both these reports rejected the necessity of a general harmonisation of labour standards prior to establishing the Community.[1] High and harmonious labour standards would spontaneously be achieved by the progressive creation of the common market. Furthermore, there was a certain element of guardedness on the part of the Member States: social policy and labour law were viewed as core sovereign competences and paramount to national identity.

Nevertheless, the EEC Treaty did contain social provisions in the Title dedicated to social policy. This was the fruit of a compromise between French and German demands: the French had an elaborate

[1] International Labour Organisation (ILO), "Social Aspects of European Economic Co-operation. Report by a Group of Experts (summary)," (1956) *International Labour Review* 74, pp. 105 *in fine* and seq.

set of labour laws favourable to workers and feared this would lead to a less attractive market position. They therefore argued that social legislation should be harmonised in order to ensure an equal position for all, whereas the Germans preferred as little interference as possible. The provisions in the social title related on the one hand to the European Social Fund[2] and on the other to working conditions.[3] Article 117 EEC provided that

> *Member States hereby agree upon the necessity to promote improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction. They consider that such a development will result not only from the functioning of the Common Market, which will favour the harmonisation of social systems, but also from the procedures provided for under this Treaty and from the approximation of legislative and administrative provisions*.[4]

The Treaty already foreshadowed the possibility of harmonisation in the social field. However, there was at this stage no competence given to the Community to legislate, and the provisions following Article 117 were mere declarations of principle intended to *"chaperone the establishment of the common market"* rather than hard law. An exception can be found in Article 119, which enshrined the principle of equal remuneration for equal work for men and women workers, even if initially it was only addressed to Member States.[5]

Until the beginning of the 1970s, the labour law field was marked by practically complete inaction, save for the coordination of social security systems for migrant workers and the launching of the European Social Fund. However, several factors upset the *status quo*. From a socio-economical point of view, the economic recession following the oil and energy crises caused great social unrest, marked by high unemployment numbers. From a political point of view, trade unions gained in strength and the events of May 1968 shook Western Europe. Both developments led to a disillusionment with the common market as a vector for social progress. In response, the Commission delivered a Social Action Programme, which was adopted by the Council in 1974. This programme contained several measures to achieve fuller and better employment, improve working conditions and increase worker involvement. Although it had only been partly implemented by its expiry date in 1976, the Action Programme gave way to the first legislative arsenal in the labour law field, ranging from workers' health and safety to mass redundancies.

In the same period, the Court of Justice of the European Union (CJEU) kicked into higher gear and delivered important judgments on the protection of fundamental rights as such with the *Stauder*[6] and

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[2] Articles 123 – 128 EEC (now Articles 162-164 TFEU).
[3] Articles 117 – 122 EEC (now Articles 151-161 TFEU).
[4] Emphasis added.
[5] "Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.
For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.
Equal remuneration without discrimination based on sex means:
(a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and
(b) that remuneration for work at time-rates shall be the same for the same job."
[6] Judgment of the Court of 12 November 1969, *Stauder v City of Ulm*, 29/69, EU:C:1969:57.

Internationale Handelsgesellschaft[7] cases, making the recognition of fundamental rights an integral part of the general principles of EC law protected by the Court. Concerning fundamental social rights more specifically, the Belgian *Defrenne v. Sabena* saga on sex equality, which would span almost a decade and have three instalments before the Court of Justice, is to this day a landmark case.[8] At that time, Belgian legislation required female flight attendants to retire at the age of forty, which was not required of male flight attendants. Gabrielle Defrenne, who was a flight attendant for the airline company Sabena and who had been forced to retire, brought actions before the Belgian labour courts and the Belgian Supreme Court based on article 119 EEC. She considered she suffered discrimination based on her sex both regarding her remuneration, which was lower than her male counterparts', and her pension, which would also be lower due to a discriminatory measure provided for in Belgian law. In the subsequent preliminary rulings (especially the second and third instalments), the Court of Justice produced ground-breaking judgments in two respects: first, by applying the *Van Gend & Loos* criteria the Court considered that Article 119 had direct horizontal effect; furthermore, it considered that the elimination of discrimination based on sex was part of the fundamental rights protected by the EU. In this regard, for the first time it cited the then very young European Social Charter, the social and economic rights catalogue of the Council of Europe adopted in 1961 (see *infra*). The Court did not, however, extend the scope of application of Article 119 beyond equal pay to other working conditions.

The *Defrenne* case constituted a small revolution, and the recognition of a direct horizontal effect of Article 119 EEC gave rise to an important number of cases regarding sex equality in the workplace which allowed the CJEU to establish an extensive body of case law. This did not, however, lead to the recognition of other fundamental social rights, and the concept remained practically inexistent until the end of the eighties. The CJEU played (and continues to play) a very important and proactive role in the proliferation and consecration of social advantages and social protection through negative integration, eliminating national barriers to the free movement of workers, and extensive interpretation,[9] However the language used by the CJEU and the European legislator was not that of fundamental social rights. The overwhelming majority of social legislation at that time was considered necessary as it would benefit the market, rather than pursuing a social aim in its own right.

The wave of legislation initiated by the Social Action Programme was halted in 1979 with the arrival of Margaret Thatcher at the head of the British government, who instigated a strict neo-liberal ideology. Since the Treaty required unanimity within the Council for social-policy-related directives, she shot down several directive proposals, calling instead for deregulation of the labour market. Legislative activity stagnated again and the 1984 Social Action Programme was significantly less ambitious than its predecessor.

This period of stagnation ended with the arrival of former French socialist Minister of Economy and Finance Jacques Delors at the head of the Commission in 1985. Delors was eager to reinvigorate the

[7] Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114.

[8] Judgment of the Court of 25 May 1971, *Gabrielle Defrenne v Belgian State*, 80/70, ECLI:EU:C:1971:55; Judgment of the Court of 8 April 1976, *Defrenne v Sabena*, 43/75, EU:C:1976:56; Judgment of the Court of 15 June 1978, *Defrenne v Sabena*, 149/77, EU:C:1978:130.

[9] *E.g.* Judgment of the Court of 19 March 1964, *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, 75/63, EU:C:1964:19; Judgment of the Court of 23 March 1982, *Levin v Staatssecretaris van Justitie*, 53/81, EU:C:1982:105.

common market and the community. That same year, the Commission presented a White Paper on completing the internal market.[10] A year later, the Single European Act extended qualified majority voting to measures regarding the health and safety of workers.[11] Some major directives were adopted on this basis, such as the Working Time Directive[12] and the Directive on Pregnant Workers.[13] The Single Act upheld, however, the possibility of using a veto on *"matters relating to the rights and interests of employed persons."*[14]

The Single Act also introduced into the Treaty of Rome a new Article 118B,[15] which would mark the emergence of a European social dialogue. Particularly the Commission and the Parliament advocated for inputs from social partners in European decision-making. This article encouraged the three major European social partners, the *Conseil des Fédérations Industrielles d'Europe* (CIFE) and the *Union des Industries de la Communauté Européenne* (UNICE) – now the Confederation of European Business, known as BusinessEurope – on the employers' side and the European Trade Union Confederation (ETUC) on the workers' side to meet in Brussels and to agree to engage in further social dialogue. This process is commonly called the Dialogue of Val Duchesse (as it took place in the Val Duchesse Castle located in Brussels). During the second half of the 1980s, the social partners met regularly, constituted working groups and produced several joint opinions (e.g. on the transferability of qualifications and diplomas in Europe and on informing and consulting workers).

B. *The Community Charter on the Fundamental Social Rights of Workers*

Despite the advances made in the field of health and safety, many found that the White Paper and the Single Act only focused on liberalism and economic policy but provided very little social policy. While the Single European Act symbolically acquiesced on the importance of social matters, there were no concrete measures taken to achieve a social common market. Led by the French socialists, voices grew louder for a social dimension of the European Union, fearing that the ever-growing competition between Member States would give rise to a race to the bottom with respect to labour protection. To this end, in 1988 Jacques Delors presented the Community Charter of Fundamental Social Rights of Workers (the Community Charter). This Charter, greatly inspired by the European Social Charter of the Council of Europe (see *infra*), was intended to be a body of minimum social provisions to meet the objectives of the social dimension for the 1992 programme. The final text of the Charter was formally adopted in 1989 during the Strasbourg European Council, but not as a binding instrument: "*This Charter reflects [the Member States'] sincere attachment to a model of social relations based on common traditions and practices. It will serve them as a reference point for taking fuller account in future of the social dimension in the development of the Community.*"[16]

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[10] Commission, "Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985)," *COM (85) 310 final*.
[11] Article 21 of the Single European Act adding an article 118A to the EEC Treaty.
[12] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.
[13] Directive 92/85/EEC of the European Parliament and of the Council of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1.
[14] Article 18 of the Single European Act adding an article 100A(2) to the EEC Treaty. Emphasis added.
[15] "The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement."
[16] Strasbourg European Council, Conclusions of the Presidency, Social Dimension, 8-9 December 1989.

Furthermore, the United Kingdom refrained from adopting the Charter, although the other Member States refused to let this opposition 'torpedo' the effort.

While viewed as a failure for these two reasons, this Community Charter was neither useless nor insignificant. First, at a symbolic level it firmly installed the idea of fundamental social rights in the EU conscience, which was until then very discreet both in EU written law and in case law. Second, despite the non-binding nature of the Community Charter, its goal was to have its various provisions translated into EU law. Its soft legal status did not hinder the adoption of several important and progressive directives reinforcing their legal foundation. Finally, it was an important source of inspiration for the social chapter in the future EU Charter of Fundamental Rights.

On the basis of the Community Charter, the Commission issued a Social Charter Action Programme, and together the charter and the programme represented the future social agenda for Europe. The programme called for the adoption of 47 different instruments, to be submitted by the Commission by 1993. While both the charter and the programme were devoid of legal status and were not binding on the United Kingdom, the measures envisaged were to be taken on the basis of the different legal provisions in the Treaty and would therefore be binding on all the Member States, including the United Kingdom.

The Community Charter and the Action Programme did not themselves revolutionise the European legal landscape in matters of social policy and social rights; the realisation of the 47 instruments was hindered by an absence of competence in the Treaties. They did, however, introduce the idea of a social Europe in public discourse as an integral part of the future EU, and lay at the foundation of the vast changes that the following Treaties would introduce in social policy.

C. *The nineties: The Maastricht and Amsterdam Treaties*

During the early nineties, the social partners continued meeting in the framework of the Val Duchesse dialogue. On 31 October 1991, on the eve and in the shadow of the Maastricht Intergovernmental Conference (IGC), the social partners came to what would be called the Social Policy Agreement under an impulse from Jacques Delors. The agreement proposed a modification of various provisions in the Treaty of Rome, on the one hand extending the competences of the Community in social matters and on the other hand introducing the possibility of concluding collective bargaining agreements at the European level.

The negotiations at Maastricht gave rise to the new Maastricht Treaty, and to a profound reform of the Treaty of Rome in general and social policy in the EU in particular. The Social Policy Agreement was accepted practically as such, with only minor modifications. It was, however, not integrated in the Treaty itself but in a protocol annexed to it, due to opposition by the UK, which furthermore conditioned its acceptance of the Treaty on an opt-out from the protocol. The agreement and the protocol, together called the Social Chapter, broadened the scope of qualified majority voting to measures regarding workers' health and safety, informing and consulting workers, equality between men and women and the integration of people excluded from the labour market. Particularly regarding sex equality, the protocol introduced affirmative action, going beyond the initial ban on discrimination.

Unanimity was maintained on matters of social security, individual dismissals and the collective representation and defence of workers and employers. Pay, the right to association and the right to strike or impose lock-outs were specifically excluded from the scope of the treaty.

The introduction of Economic and Monetary Union (EMU) was a more indirect, yet very significant, change that the Maastricht Treaty brought about. Although at first sight it would not seem to have a great impact on social rights, the EMU would prove to be an important vector in social and employment policy (see *infra*).

After the Maastricht Treaty entered into force, the Commission issued green and white papers on social policy, but the absence of the UK weighed on the legislative motivation and only four directives were adopted in the years to come. In 1997, however, a progressive Labour government replaced the Conservatives and vowed to opt into the Social Chapter. At the Amsterdam ICG, several changes were made to the treaty regarding social policy: the Social Policy Agreement was integrated into the treaty and became fully binding on all Member States and the wording of the Social Chapter itself was amended to expressly refer to fundamental social rights as laid down in the European Social Charter and the 1989 Community Charter. Important modifications were made regarding sex equality too: the provision on equal remuneration was modified and provided a legal basis for the adoption of measures to ensure sex equality in employment.[17] Finally, a mainstreaming clause was inserted at the symbolically loaded place of Article 2 of the EC Treaty, striving to ensure equality among men and women and high levels of employment and social protection in all areas of EU policy.

Another very important development in Amsterdam was the creation of a title on employment in the Treaty. This was the result of an ongoing strategy of the Member States and the social partners to converge national employment policies in order to battle high levels of unemployment which was catapulted to the top of the EU agenda in the mid-nineties. At this point, we can see the first shifts between social and economic policy: whereas employment policies are usually closely interlinked with social policies, the employment title made express references to the guidelines developed in the framework of the EMU. Under pressure from the newly acceded Scandinavian countries, which had very effective national employment policies, the title did not provide a legal basis for the Union to take legislative measures but introduced a coordination mechanism which took the form of annual cycles: the European Employment Strategy (EES).

The Community Charter and the subsequent treaty changes allowed the CJEU to be significantly bolder with regard to the identification of fundamental social rights. During the nineties and the early 2000s, it recognised trade union rights[18] and the right to collective bargaining[19] as general principles of EU law and furthermore introduced the concept of *"particularly important principles of EU social*

[17] *"The Council, acting in accordance with the procedure referred to in Article 189b, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value."*

[18] Judgment of the Court of 18 January 1990, *Henri Maurissen and European Public Service Union v Court of Auditors of the European Communities*, joined cases C-193/87 and C-194/87, EU:C:1990:18.

[19] Judgment of the General Court of 17 June 1998, *UEAPME v Council of the European Union*, T-135/96, EU:T:1998:128

law,"[20] which covered the right to annual paid leave, among other things. While this more ambiguous formula was preferred to the concept of fundamental rights, the CJEU now systematically accorded great importance to the recitals and the fundamental rights sources from which they stemmed.

D. *From the drafting of the Charter of Fundamental Rights to the Treaty of Lisbon*

1. The Charter of Fundamental Rights

The legal and jurisprudential developments of the last decade of the 20th century instilled an idea of a more inclusive fundamental rights-oriented union. On 3 and 4 June 1999, the European Council gathered in Cologne and decided to establish a comprehensive fundamental rights catalogue. The idea was not to create a new set of rights but rather to take stock of existing fundamental rights texts and the evolution of the CJEU's case law.[21] The charter not only had to contain fundamental rights derived from the European Convention on Human Rights (ECHR) and from EU citizenship but also fundamental social and economic rights *"insofar as they do not merely establish objectives for action by the Union."* Both the principle of the inclusion of social rights and the mandate given to the drafters of the charter aroused controversy at the time.

Besides the traditional political dissent between left and right, the controversy was fuelled by a number of elements. First was the varying constitutional approaches towards social rights by the Member States: some national constitutions formulate social rights as subjective rights, others limit the justiciability of such rights and some do not consider social rights at all. This naturally echoes the international practice of separating between rights of the first and second generations, respectively civil and political rights on the one hand and social, economic and cultural rights on the other. Furthermore, the Member States were very wary of the possibility that social rights would extend the competences of the Union. While civil and political rights are usually expressed in terms of negative obligations incumbent on the state, social rights often require positive action on the part of the state in order to be fully efficient. Finally, the mandate given to the drafters – the inclusion of social and economic rights "*insofar as they do not merely establish objectives for the action of the Union*" – was understood at the time to exclude *'policy aspirations'* in opposition to *'subjective social rights'* from the scope of the Charter.

Once more, the United Kingdom fought hard against the inclusion of social rights in the Charter. It was concerned about the heavy financial implications and even considered the inclusion of social rights to be damaging to the economy. The French, on the other hand, refused to ratify a Charter not including any social provisions. The final text was the result of a compromise between the proponents and opponents of the inclusion of social rights and gave way to the distinction between *'rights'* and *'principles'* in article 51(1) of the Charter (see *infra*).

[20] Judgment of the Court of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356.
[21] Cologne European Council, Conclusions of the Presidency, Annex IV: European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union, 3-4 June 1999.

2. The Nice and Lisbon Treaties

The Charter was solemnly proclaimed at the Nice summit in 2000. While the institutions committed themselves to respect the Charter when proposing or adopting legislation, it lacked any binding power at that time.

The Nice Treaty also marked a new direction for the EU. After the completion of the internal market and the launch of the eurozone, the Union embarked on a new 10-year project, the Lisbon Strategy, which had an important social aspect. The strategy was innovative on two grounds: whereas social policy usually focused on job *protection*, the Strategy resolutely focused on job *creation*, aiming for 70% employment by 2010. The other innovation was the launch of the Open Method of Coordination (OMC), which was an extension and a generalisation of the EES launched at Amsterdam. The OMC was a voluntary self-evaluation process for Member States allowing them to coordinate processes that support social cohesion and solidarity within the EU and was overviewed by the Commission or the Council. Being essentially a tool of soft law, the OMC relied on codes of conduct, benchmarking and sharing good practices. It was especially developed in social matters, drawing on the EES. In 2005, at the mid-term evaluation of the Lisbon Strategy, the Commission realised the Lisbon goals were too ambitious and would certainly not be met by 2010. It therefore proposed for the Lisbon Agenda to be refocused on sustainable growth and employment. Furthermore, an enhanced single social OMC was put forward, concentrating efforts in areas of social inclusion, health and pensions. Since 2010, the Lisbon Strategy has been replaced by the Europe 2020 Strategy. This strategy emphasises smart, sustainable and inclusive growth as a way to overcome the structural weaknesses in Europe's economy, improve its competitiveness and productivity and underpin a sustainable social market economy. The strategy not only targets a high level of employment but also of education, and tackles the risk of poverty and social exclusion, aiming for 20 million fewer people to be at risk of poverty or social exclusion.

Along with this shift in regulatory techniques, Jacques Delors's activism was followed by much more passive Commission presidents, which enabled the employers' representatives – mainly BusinessEurope, which was always more reluctant to conclude collective bargaining agreements – to leave the negotiating table. Furthermore, the EU proceeded to its most significant enlargement to date, and twelve new Member States, primarily Eastern European countries which did not necessarily share the same social traditions as the West, joined the Union in 2004. All these circumstances led to a practically complete halt in traditional social legislation (save for some recasts[22] and the Equality Directive).[23] However, soft law proliferated.

[22] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23; Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (consolidated) [2009] OJ L 284/1; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (consolidated) [1998] OJ L 225.

[23] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

Shortly after Nice, a second convention was set up to once more vastly rethink the constitutional framework of the EU, and the idea of a European Constitution including the Charter quickly emerged. The inclusion of the Charter was challenged once more by the UK, which relented after inserting a new Article 52(5) in the Charter further clarifying the dichotomy between rights and principles (see *infra*, section III).

The Charter entered into force as a legally binding instrument with the Lisbon Treaty, having the same value as the Treaties according to Art. 6 TEU: "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties."* This was again the fruit of compromise, as ratification of the Lisbon Treaty by the United Kingdom and Poland (and later the Czech Republic) was made conditional on the existence of a protocol clarifying the position of both Member States vis-à-vis the Charter, especially, in the case of the UK, Title IV (Solidarity), containing social rights. This condition was met in Protocol 30 to the Treaties. The UK's unwavering opposition to the introduction of social rights in the Charter is reflected in Article 1(2) of the Protocol: "*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 their national law.*"[24] Poland made clear it would respect the provisions in Title IV. It was more concerned about matters relating to family law and ethics, such as the rights of same-sex couples, abortion and ART.

Even if this protocol is commonly called an *'opt-out,'* it can hardly be considered as such. It merely reflects and highlights the limited scope of the Charter set out in Article 51. The content of the Charter explicitly builds on the case law of the CJEU related to the protection of fundamental rights: when the Member States implement Union law, they have to respect the rights guaranteed by the Charter. This obligation ensues, moreover, from the principle of primacy of Union law. Furthermore, if the Charter does not *extend* the ability of the Court, it does not *restrain* it either. This view was confirmed by the Court of justice in the *N.S. v. Secretary of State* case:

> *In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions*.[25]

3. Effects of the Charter of Fundamental Rights on the CJEU's case law

Even before its entry into force, one of the main questions (and concerns, for some Member States) was the impact the Charter of Fundamental Rights would have on the rulings of the CJEU, especially in the social field. The CJEU had, after all, used the 1989 Community Charter as an interpretative tool in the past. Indeed, very soon after the Nice summit the Charter became part of the judicial discourse, mainly in the Advocate Generals' opinions. In *BECTU*, the first labour-related case *post*-Charter, Advocate General Tizzano considered the proclamation of the Charter meant it could not be

[24] Emphasis added.
[25] Judgment of 21 December 2011, *N.S. v. Secretary of State e.a.,* joined cases C-411/10 and C-493/10, EU:C:2011:865, para. 120.

ignored and that it constituted a point of reference and the most reliable source for the identification of a fundamental right (*in casu*, the right to annual paid leave).[26] The CJEU itself, however, did not refer to the Charter in social cases until after the Lisbon Treaty was signed (but before its entry into force) and it did so for the first time in the much discussed *Laval un Partneri* case.[27] Commenters pointed out that the Court did not seize the opportunity to give full effect to Article 6 TEU, citing the Charter as *one* of the sources of fundamental social rights, alongside the European Social Charter and the 1989 Community Charter. The Court continued to do so even after the entry into force of the Treaty.[28] While a comprehensive approach to fundamental rights sources is naturally to be preferred, it is striking that the CJEU, which has otherwise been bold and innovative, acts in a rather restrained way when it comes to the Charter in the field of social rights.

When the Charter came fully into force in 2009 after the ratification of the Lisbon Treaty by all the Member States, the most substantive question concerned the potential new equilibrium of social and economic rights. Since the Charter has the same legal value as the Treaties, would fundamental social rights have the same force as the four freedoms? The question was especially pertinent after the *Laval un Partneri* and *Viking Line* cases.[29] The cases, preceding the entry into force of the Charter, concerned collective actions in the form of strikes, boycotts and blockades against companies in Sweden and Finland respectively which used posted workers whose wages were lower than the wages in the countries where they were stationed. The Court made the same reasoning in both cases:

> *(…) the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law, the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices*.[30]

In this paragraph, it seems that the fundamental right recognised by the Charter is the rule and that it can be subject to restrictions like any other freedom. In the following paragraphs, however, the Court turned this reasoning completely around:

> *In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods or freedom to provide services*.[31]

The right to collective action is suddenly no longer the rule but an eventually justifiable restriction on the freedom of establishment or to provide services. In *Viking Line*, the Court left the task of determining whether the restriction was justified up to the national courts. However, in *Laval un*

[26] Opinion of A.G. Tizzano of 8 February 2001, *BECTU*, C-173/99, EU:C:2001:81, paras. 26-28.
[27] Judgment of the Court of 18 December 2007, *Laval un Partneri Ltd* (*Laval* case), C-341/05, EU:C:2007:809.
[28] Judgment of the Court of 15 July 2010, *Commission v. Germany*, C-271/08, EU:C:2010:426.
[29] Judgment of the Court of 11 December 2007, *International Transport Workers' Federation v Viking Line ABP* (*Viking* case), C-438/05, EU:C:2007:772.
[30] Judgment of the Court of 18 December 2007, *Laval, op. cit., para.* 44.
[31] Judgment of the Court of 18 December 2007, *Laval, op. cit., para.* 93.

Partneri, the Court said that the actions undertaken by the unions, while pursuing a legitimate aim, were not justified because of a lack of clear legislative provisions on pay. Particularly *Laval un Partneri* was harshly criticised, since the Court not only gave more substantive weight to an economic freedom over a fundamental social right but also because it disregarded a fundamental principle in the Swedish social tradition, which is the possibility for unions to negotiate pay by sector. Furthermore, the case law of the European Court of Human Rights (ECtHR) on the right to strike was not addressed, despite an obligation for the Court of justice to do so under Article 52(3) of the Charter (see *infra*).

In a case also concerning posted workers that followed the entry into force of the Charter, Advocate General Cruz Villalón gave a direct response to *Laval un Partneri*:

> *As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case law. (...) This analysis must be performed in an individualised manner, examining every measure concerned separately and in the light of a standard of review which, in accordance with the Treaty, is to be particularly sensitive to the social protection of workers*.[32]

This stance was, unfortunately, never followed by the CJEU. Despite heavy criticism, the Court confirmed the subordination of the supposedly fundamental right to collective bargaining and action to the freedom to conduct business in the *Commission v. Germany*[33] and *Alemo-Herron*[34] cases. This restrained position stands in stark contrast with the high level of protection that the CJEU accorded to *'individual'* social rights, especially the right to annual paid leave guaranteed under Article 31(2) of the Charter, which the Court said was a particularly important principle of EU social law that could not be interpreted restrictively.[35]

E. *The financial crisis and the European Pillar of Social Rights*

The financial crisis erupted and hit the Union hard in 2009, with first Greece but soon afterwards other Member States announcing important budget deficits and banking crises. The European institutions and the Member States had to demonstrate their ingenuity by finding solutions and creating mechanisms that would offset the consequences of the crisis and prevent a spill-over effect.[36]

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[32] Opinion of A.G. Cruz Villalón of 5 May 2010, *Santos Palhota and others*, C-515/08, EU:C:2010:245.
[33] Judgment of the Court of 15 July 2010, *Commission v. Germany*, *op. cit.*
[34] Judgment of the Court of 18 July 2013, *Alemo-Herron e.a. v. Parkwood*, C-426/11, EU:C:2013:521.
[35] Judgment of the Court of 8 November 2012, *Heimann and Toltschin v. Kaiser*, joined cases C-229/11 and C-230/11, EU:C:2012:693.
[36] Selective bibliography on reform of the economic governance framework of the EU: F. Martucci, *L'ordre économique et monétaire de l'Union européenne* (Bruxelles, Bruylant 2015); M. Adams *e.a.* (eds), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart Publishing 2014); F. Fabbrini, "The new architecture of EMU and the role of The Courts: lessons from the crisis," *in* S. De La Rosa *e.a.* (eds)*, L'Union européenne et le fédéralisme économique* (Brussels, Bruylant 2015), pp. 291-312; E. Balamoti, "Evaluating the New Rules of EU Economic Governance in Times of Crisis" (2014) *E.L.L.J* 1, pp. 95-109; A. Poulou, "Financial assistance conditionality and human rights protection: What

In order to provide an effective response to the crisis, various European institutional reforms have been implemented since 2010, with financial assistance reforms occupying a central role. The euro area Member States had to set up a *'rescue umbrella'*[37] in the form of the European Stability Mechanism (ESM).[38] Several Member States were granted financial aid conditional on them implementing vast reforms, especially in the social field, that were detailed in a Memorandum of Understanding (MoU).[39] This led to austerity policies, which in turn led to a general degradation of the enjoyment of social protection by a significant part of the populations in those Member States,[40] resulting in a veritable social crisis. The blame for this social crisis can partly be put on the design of the economic governance framework, since the austerity policies were mostly the result of decisions made out of budgetary concerns. In this regard, the Charter and the social rights it contains were not effective in preventing a social crisis for two main reasons: the limited scope of applicability of the Charter and the weak enforceability of the social rights it contains.

First, the ESM was a new international organisation that fell outside the EU legal order. Article 51(1) of the Charter limits its application to Member States when they are implementing EU law. Since the acts adopted by the ESM, including the conditionality of financial assistance, are international law, the Member States are technically not implementing EU law. In *Pringle*, the Court therefore decided that Member States are not bound by the Charter when they are acting under the ESM.[41] However, this assertion should be nuanced since the ESM has significant institutional and substantive connections to the EU legal order. The ESM relies on the EU institutional framework, since the ESM Treaty entrusts tasks to the Commission and the European Central Bank: they are involved in the negotiation, the signing and the monitoring of MoUs. Furthermore, its limited scope of application as set out in Article 51(1) of the Charter only applies to Member States and not to the EU institutions, which are bound by the Charter at all times. When the Commission is performing its tasks under the ESM, it has to ensure that the MoUs are compatible with EU law.[42] The Court of Justice confirmed this view in *Ledra Advertising*: the Commission, which plays a monitoring role in the ESM, as the guardian of the Treaties is bound by the Charter at all times and has to ensure its respect, even outside the framework of the EU.[43] If it signs a MoU contrary to EU law, the Commission can engage the EU in liability.

In connection with this are problems related to the applicability of the Charter to the national reforms adopted to conform with the MoU. Between 2011 and 2014, many labour and social security reforms

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is the role of the EU Charter of Fundamental Rights?" (2017) *Common Market Law Review* 4, pp. 991-1025; K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge, CUP 2014).

[37] K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge, CUP 2014), p. 90.

[38] European assistance can be granted to non-eurozone Member States through a facility providing for medium-term financial assistance for Member States' balances of payments: see Council Regulation (EC) No. 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] OJ L 53/1.

[39] F. Fines, "L'atteinte aux droits fondamentaux était-elle le prix du sauvetage de la zone euro?" *in* R. Tinière and C. Vial (eds.), *Protection des droits fondamentaux dans l'Union européenne* (Brussels, Bruylant, 2015), p. 195.

[40] For a comprehensive analysis of the impact of the crisis on social rights, see the special edition of the (2014) *European Journal of Social Law*.

[41] Judgment of 27 November 2012, *Pringle v. Ireland*, C-370/12, EU:C:2012:756, para. 180.

[42] Regulation (EU) No. 472/2013 of the European Parliament and the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; ESM Treaty.

[43] Judgment of the Court of 20 September 2016, *Ledra Advertising Ltd. e.a. v. European Commission and ECB,* C-8/15 P to C-10/15 P, EU:C:2016:701, para. 67.

in Greece, Portugal and Romania were challenged before the Court by means of preliminary rulings.[44] Since the MoUs were drawn up in the framework of the ESM, the Court initially considered that the reform laws were not implementing EU law. However, since the beginning of the crisis, the main conditions attached to the financial assistance laid down in the MoUs are anchored in EU law through a Council decision.[45] This means that when a Member State is implementing the MoU, it is legally implementing EU law. In *Florescu*, the Court of justice departed from its case law and at long last considered that national legislation executing MoUs is an implementation of EU law within the meaning of Article 51(1), and proceeded to measure the national legislation against the Charter.[46] This case law shows how cautious the Court is when delicate political compromise is at the heart of a case. However, it also entailed that there was at first no judicial assessment, and therefore no effective protection, of fundamental human and social rights.[47]

A second reason is the difficulty in enforcing or the lack of enforceability of the social rights and principles in the Charter (see *infra* for more detail, section III). Many claimants challenging national reforms therefore rely on the right to peaceful enjoyment of property contained in Article 17 rather than the social provisions, such as the right to social security or the right to fair and just working conditions. This approach is in line with the case law of the ECtHR concerning Article 1 of Protocol 1 to the ECHR,[48] which the ECtHR decided applies to wages and welfare benefits, although social rights would provide a wider and more appropriate lens through which to assess social reforms. While the Court now agrees to test national legislation against the Charter, it has yet to conclude a violation of the right to peaceful enjoyment of property in the context of the crisis. The Court accords a very large margin of appreciation in matters of economic and financial policy and therefore considers that national reforms pursue a legitimate aim and are proportionate. Given the very large margin of appreciation, it is difficult to prove a manifest error of appreciation.

Despite the recent progress made by the CJEU, the financial crisis and the subsequent social crisis laid bare the inadequacies of the European social model and the need emerged for a veritable effective social Europe. Since the entry into function of the Juncker Commission in November 2014, there has been a shift in priorities, at least at the discursive level. In the Five Presidents Report, Jean-Claude Juncker stressed the need to achieve a *"social triple A rating."*[49] At the very least, the unrest the looming Brexit had triggered pushed the Commission to pursue this issue swiftly. In April 2017, after

[44] Order of the General Court of 27 November 2012, *ADEDY v. Council and Commission*, T-215/11, EU:T:2011:558; Order of the General Court of 27 November 2012, *ADEDY v. Council and Commission*, T-541/10, EU:T:2012:626; Order of the Court of 14 December 2011, *Victor Cozman c/ Teatrul Municipal Târgovişte*, C-462/11, EU:C:2011:831; Order of the Court of 14 December 2011, *Corpul Naţional al Poliţiştilor*, C-434/11, EU:C:2011:830; Order of the Court of 10 May 2012, *Corpul Naţional al Poliţiştilor*, C-134/12, EU:C:2012:288; Order of the Court of 7 March 2013, *Sindicato dos Bancários do Norte*, C-128/12, EU:C:2013:149; Order of the Court of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, EU:C:2014:2036; Order of the Court of 21 October 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-665/13, EU:C:2014:2327; Order of the Court of 21 October 2014, *Jorge Italo Assis dos Santos c/ Banco de Portugal*, C-566/13, EU:C:2014:209.

[45] First, on the legal basis of the excessive deficit procedure (Article 126, paras 6 and 9). Since 2013, this has been an obligation imposed by Regulation 472/2013, Article 7.

[46] Judgment of the Court, 13 June 2017, *Florescu e.a.*, C-258/14, EU:C:2017:448.

[47] See L. Fromont, "L'application problématique de la Charte des droits fondamentaux aux mesures d'austérité: vers une immunité juridictionnelle" (2016) *Journal européen des droits de l'homme* 4, pp. 469-495.

[48] See, among others, ECtHR, 7 May 2013, *Koufaki and ADEDY v. Greece*, nos. 57665/12 and 57657/12; ECtHR (GC), 13 December 2016; *Belané Nagy v. Hungary*, no. 53080/13; ECtHR, 7 March 2017; *Baczy v. Hungary*, no. 8263/15; ECtHR, 4 July 2017; *Danuté Mockiene v. Lithuania*, no. 75916/13.

[49] J.-C. Juncker *e.a.*, *Completing Europe's Economic and Monetary Union* (Brussels June 2015).

an extensive public consultation involving both civil society and national authorities, the Commission published a Recommendation on a European Pillar of Social Rights.[50] The Pillar was proclaimed jointly by the European Commission, the European Parliament and the Council, and the initiative was unanimously endorsed by all the Member States in November 2017.

The European Pillar of Social Rights is a set of 20 non-binding principles, each covering a policy and organized in three chapters: equal opportunities and access to the labour market, fair working conditions, and adequate and sustainable social protection. It builds on the social *acquis* of the Union and the Charter of Fundamental Rights but it is not a simple recast. The results will be monitored in the framework of the Semester – the annual cycle of coordination of budgetary, economic and structural policies of Member States. However, the ambition is for the Pillar's principles to be mainstreamed in every area of EU policy, impacting all EU citizens for the better.

The Social Protection Committee claimed that the Pillar represents an opportunity to strengthen the operationalisation of the EU social *acquis*. Its main goal is indeed to

> *become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area*.[51]

At the Gothenburg Summit, many (older) ambitions were put forward to be realised through the Pillar: kickstarting social dialogue at the EU level once more; progressing rapidly on pending social files at the EU level, such as Posted Workers, Social Security Coordination, Work-Life Balance and Transparent and Predictable Working Conditions; and tackling the gender pay gap by 2019. On 13 March 2018 in the margin of its communication on the implementation of the Pillar,[52] the Commission presented a new Social Fairness Package. This package entails the establishment of a European Labour Authority (which had been presented in Juncker's State of the Union in September 2017), a Council Recommendation on access to social protection for workers and the self-employed, and a European Social Security Number. The Commission also presented a new EU social scoreboard. It now comprises 35 social, educational and employment indicators, and monitors Member States' activities against these criteria. These analyses should feed the annual country-specific reports in the framework of the European Semester.

Some doubts still remain. First of all is of course the political and non-binding nature of the Pillar. There is no set obligation to translate the principles into hard law in a certain period of time and there are no sanction mechanisms for Member States failing to prioritise the principles. Furthermore, the EU lacks competence in many areas covered by the Pillar. It is therefore unclear what some of these principles will lead to, since hard law is not an option. From these two points the question arises of what the added value is of another interpretative tool.[53]

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[50] Commission, "Recommendation on the European Pillar of Social Rights," *C(2017) 2600 final.*
[51] Commission, "Launching a consultation on a European Pillar of Social Rights," *COM(2016) 127 final.*
[52] Commission, "Monitoring the implementation of the European Pillar of Social Rights," *COM(2018) 130 final.*
[53] For a comprehensive overview of points of criticism, see O. Parker and R. Pye, "Mobilising Social Rights in EU Economic Governance: A Pragmatic Challenge to Neoliberal Europe" (2018) *Comparative European Politics* 5, pp. 805-824.

Second, the Pillar draws on the social *acquis* of the EU. However, all the Member States have international obligations in social rights matters (International Covenant on Economic, Social and Cultural Rights, European Social Charter). The Pillar should take these obligations into account to fully reflect the extent to which respect for social rights is fundamental.

The question also arises of how the Pillar differs from the Charter. The European Commission explained that the Charter is a legal instrument and that its provisions are addressed to the institutions and other bodies of the Union, and to the Member States only when they are implementing Union law. The Pillar, on the other hand, is a political instrument aimed at rendering the principles and rights contained in binding provisions of Union law more visible, more understandable and more explicit for citizens and for players at all levels. The Pillar sometimes adds new elements to the existing *acquis*, or sometimes goes beyond what is in the Charter (namely on education, placement services, informing and consulting workers and healthcare).

III. Overview and analysis of the social rights in the Charter: distinction between rights and principles, social rights, horizontal application and general principles of EU law

A. Introduction

As previously mentioned, the inclusion of social rights in the Charter was the fruit of compromise and was made possible by the introduction of the distinction between *'rights'* and *'principles.'* This distinction drew on French and Spanish constitutional traditions: in the French system, social rights have constitutional value, but limited justiciability, i.e. they have an interpretative value and serve as a validity test for normative acts. The Spanish Constitution contains a chapter on *"principles governing economic and social policy,"* which need to be implemented before being able to be invoked before ordinary courts.

The Explanations relating to Article 51(5) of the Charter, in which the distinction is enshrined, stress what it entails:

> *Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (...) and with the approach of the Member States' constitutional systems to 'principles,' particularly in the field of social law. For illustration, examples of principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.*[54]

Scholarly ink has extensively flown regarding this subject, generally boiling the distinction down to the criterion of direct effect. Theoretically, the difference between the two may seem clear: rights can be invoked before courts in and of themselves, while principles need to be materialised and given substance in secondary legislation. However, this distinction does not give any indication of the value of principles, whether it is regarding their invocability against acts that give them substance or in the interpretation of other acts. Furthermore, the Explanations fail to give a comprehensive overview of which provision relates to which category, since the Member States could not reach an agreement and decided to leave that task up to the CJEU. This of course fully defeated the purpose of the exercise and has given rise to

[54] Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303

many confusing and disappointing Court decisions, unsurprisingly almost exclusively in the labour field.

To complicate matters, the principles referred to in the Charter are neither the *"founding principles of the EU"* nor the *"general principles of EU law"*[55] nor the *"particularly important principles of EU social law,"*[56] which are still abundantly and sometimes simultaneously used by the CJEU.

Even though the question of the distinction between rights and principles is transversal, it is quintessential to the understanding of the functioning and the value of social rights in the Charter. We will give an overview and analysis of the case law relating to labour matters to date to try to shed light.[57]

B. Case law of the CJEU relating to the distinction between rights and principles

As a preliminary note, two controversial cases should be noted here: *Mangold*[58] and *Kücükdeveci,*[59] both concerning private disputes between an employer and an employee. At the heart of both disputes were two pieces of (albeit different) German legislation which were in essence contrary to the dispositions of directive 2000/78 establishing a general framework for equal treatment in the field of employment and occupation, namely regarding the prohibition of discrimination on grounds of age. Notwithstanding certain temporal elements,[60] the Court circumvented its long-standing case law on the impossibility of invoking the direct effect of a directive *contra legem,*[61] particularly horizontally,[62] in a curious fashion:

> *(...) above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation' (...). The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law*.[63]

[55] Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, para. 4.
[56] Judgment of the Court of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, para. 43.
[57] For a more comprehensive and transversal overview of the rules relating to the scope of the Charter, we refer to the e-NACT e-booklet specifically written on this subject within this project.
[58] Judgment of the Court of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709.
[59] Judgment of the Court of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21.
[60] At the time of *Mangold*, the transposition period for implementing the directive into national law had not yet expired.
[61] Judgment of the Court of 8 October 1987, *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431; Judgment of the Court of 23 April 2009, *Karampousanos and Michopoulos*, C-380/07, EU:C:2007:675; Judgment of the Court of 16 July 2009, *Mono Car Styling*, C-12/08, EU:C:2009:466.
[62] Judgment of the Court of 26 February 1986, *Marshall*, C-152/84, EU:C:1986:84; Judgment of the Court of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292; Judgment of the Court of 5 October 2004, *Pfeiffer*, C-397/01, EU:C:2004:584.
[63] Paras 74 to 76 of *Mangold*. Emphasis added.

At the time of *Kücükdeveci,* the Charter had entered into force, and yet the Court confirmed this controversial reasoning, simply superposing a reference to the Charter.[64]

While the Court had already expressed a similar reasoning in *Defrenne* (see *supra*), this judgment was criticized as, unlike discrimination on grounds of sex, age discrimination was not enshrined in the Treaties but relied (at least in *Kücükdeveci*) on a confusing double foundation on both the Charter and the general principle of prohibition of discrimination on grounds of age, and furthermore it disrupted some very clearly established jurisprudential rules.

After these judgments, the question quickly arose of whether this line of reasoning could be extended to other social rights contained in the Charter. The Court, however, was careful not to be too generous, especially regarding social rights, after having been criticised for doing the exact thing the Charter wanted to prevent: extending the competences of the Union. At the same time, the Court made several decisions with complete silence on the distinction between rights and principles, contrary to the various Advocates Generals, who made substantive arguments on both the general distinction and the classification of the Charter's social provisions.

A first occasion for the Court to address the question arose with the *Dominguez* case.[65] Mrs. Dominguez had claimed 22.5 days of annual leave relating to a reference period spanning a little over a year, during which she was absent from work following an accident at work. The French legislation, however, imposed a month's worth of work to make a claim for leave, and precluded paid leave in the case of absence of over a year, even following a work-related accident. The French *Cour de Cassation* doubted the conformity of this legislation with Article 7 of Directive 2003/88 concerning certain aspects of the organisation of working time (Working Time Directive), which laid down the right to paid annual leave. The question did not so much concern whether the Directive precluded legislation like the French but how the Court would approach the question of *contra legem* legislation in the *post-Kücükdeveci* era, and whether the entry into force of the Charter would lead the Court to reformulate its decade-old formula first expressed in *BECTU*: "*a particularly important principle of Community social law from which there can be no derogations.*"[66]

Advocate General Trstenjak dedicated an important part of her opinion[67] to the distinction between rights and principles in the Charter. First, she qualified the right to annual leave enshrined in Article 31(2) of the Charter as a right – not a principle – by relying on the wording of the provision, which literally uses the expression "*Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave,*" the case law of the Court, the Explanations of the Charter and literature pointing in that direction. She mentioned in passing that, according to her, Articles 28 (Right to collective bargaining and action) and 29 (Right of access to placement services) are also rights. She

[64] Para. 22 of *Kücükdeveci*.
[65] Judgment of the Court of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33.
[66] Judgment of the Court of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, para. 43.
[67] Opinion of Advocate General Trstenjak of 8 September 2011 in *Dominguez*, *op. cit.*

proceeded by explaining the lack of horizontal effect of Article 31, since the Charter only addresses Member States and EU institutions, and furthermore because "*private individuals cannot satisfy the legislative proviso contained in Article 52(1) of the Charter.*"[68]

Finally, the Advocate General examined whether a horizontal effect can arise by qualifying the right to paid annual leave as a general principle of EU law. She explained that general principles of EU law "*include the fundamental provisions of unwritten primary EU law which are inherent in the legal order of the European Union itself or are common to the legal orders of the Member States,*"[69] such as the values sanctioned by Article 7 TEU, principles based on the rule of law and fundamental rights. As for the right to paid annual leave, she established that it had systematically been considered a particularly important principle in EU social law, that many Member States grant it constitutional value and that therefore it can be recognized as a general principle. She considered, however, that the right to paid annual leave cannot be applied horizontally, even if considered a general principle, and even if it grants a subjective right to an employee *vis-à-vis* an employer, so the conditions of precision and unconditionality were not fulfilled.

The Advocate General came full circle by trying to establish if it would be possible to apply the *Kücükdeveci* reasoning as a horizontal application of the general principle *as given specific expression in the directive*. She concluded it would not:

> *There is here a significant difference compared to the prohibitions on discrimination for which the approach applied in Kücükdeveci was developed. The distinctive feature of prohibitions on discrimination is that their substantive core is essentially identical at both primary and secondary-law levels. It is also possible to ascertain what discrimination is by interpreting prohibitions on discrimination under primary law. The rules in directives in this respect are no more than detailed formulations of primary-law principles. Only where directives regulate personal and material scope and legal consequences and procedures do they make rules whose content cannot immediately derive directly from primary law. The situation with regard to employees' fundamental rights under Article 27 et seq. of the Charter is different as they are designed to be given specific expression by the legislature from the start.*[70]

While this 143-paragraph-long solution does not allow a horizontal application of what the Advocate General herself considered a subjective right, and while the differentiation between this solution and that applied in *Kücükdeveci* is somewhat arbitrary – after all, Article 6 of Directive 2000/78 allows duly specified justifications of differences of treatment on the grounds of age that are not covered by the general principle or Article 21 of the Charter – it has

[68] *Ibid*., para. 83.
[69] *Ibid.*, para. 94.
[70] *Ibid*., para. 162.

the merit of being consistent and comprehensive. This stands in stark contrast with the very short ruling of the Court, which does not mention the Charter once or the distinction between rights and principles, but simply holds on to the classic formula mentioned above, considering the right to paid annual leave as a particularly important principle of EU social law. It is highly ironic that *Kücükdeveci* was cited twice as an illustration of the Court's long-standing case law on the obligation of consistent interpretation and the prohibition of horizontal application of directives.

Until very recently, subsequent case law on Article 31(2) had been treated in the same vein, with the notable exception that the Charter is now systematically mentioned. In the recent *King* case,[71] Advocate General Tanchev reiterated the debate on principles and rights and was significantly bolder in his claims than A.G. Trstenjak. He not only claimed that Article 31(2) should be understood as a right but that it was *the* most fundamental labour right in the Charter. He also expressly claimed that Article 7 of Directive 2003/88, as interpreted in the light of Article 31(2) of the Charter, creates positive obligations on the employer, and that such *Drittwirkung* was fully consistent with the *effet utile* of the directive.

While the Court held on to its classic case law in *King*, the opinion of the Advocate General put pressure on it to move away from it. In a series of cases ruled in Grand Chamber formation on 6 November 2018, the Court turned its reasoning around.[72] All the cases concerned German employees (both public- and private-sector workers) or their heirs seeking payment of an allowance in lieu of annual leave for leave days that had not been taken. German law provided that the right to paid annual leave automatically lapsed if remaining days were not taken during the year for which they were granted. The German courts were uncertain whether this provision was consistent with Article 7 of the Working Time Directive and Article 31(2) of the Charter.

The Court considered that the rationale of Article 7 was to ensure that workers are entitled to effective rest periods, and that an allowance in lieu of leave is only allowed when it is no longer possible to take remaining leave days. However, in providing that a failure to request paid leave during a certain reference period results in automatic loss of the right, the German law went beyond the limits of Article 7. Workers are the weaker party in the contract. Therefore, the burden of proof of the exercise of the right to paid annual leave cannot fully rest on the worker. Only in the case that the employer demonstrates that it has been fully transparent, that the worker was in a position to take his/her leave, and that he/she deliberately and in full knowledge of the consequences did not take the leave even when given the opportunity to exercise this right to leave, only then does Article 7 not preclude a loss of the right to paid annual leave.

In two of the four cases,[73] the employer was the State. In these cases Article 7 of the Directive, which according to the Court is unconditional and sufficiently precise, was relied on vertically.

[71] Opinion of Advocate General Tanchev of 8 June 2017, *King*, C-214/16, EU:C:2017:439.
[72] Judgments of the Court of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874; *Kreuziger v Land Berlin*, C-619/16, EU:C:2018:872; *Wuppertal v Bauer* and *Willmeroth v Broßonn*, joined cases C-569/16 and C-570/16, EU:C:2018:871.
[73] *Kreuziger* and *Wuppertal v Bauer*.

In the other cases, the Court recalled its classic case law on the impossibility of applying a directive horizontally and the duty of consistent interpretation. Up to this point, this would be the end of the Court's reasoning in line with its reasoning in *Dominguez*. However, the Court paid closer attention to Article 31(2) of the Charter this time. The Court considered that this was a situation governed by EU law within the framework of the Working Time Directive. Furthermore, according to the Explanations relating to the Charter, Article 31 is based on Directive 93/104, which was codified in the current Working Time Directive. Therefore, Article 7 must be read in the light of the Charter, and any limitations must be in line with Article 52(1) of the Charter. The Court recalled that the right to paid annual leave expressed in Article 7 and the Charter was not established by the Directive itself but was derived from other Member State or international instruments. Paid annual leave is an essential principle of EU social law, and this is also reflected in the Charter, which provides in mandatory terms that "every worker has the right to paid annual leave" without referring to Union law or national practices for further elaboration. Therefore, the right to paid annual leave as written in the Charter is, with regard to its existence, mandatory and unconditional in nature and does not need to be given concrete expression in EU law or national law. Concrete expression is only needed for the duration of the leave and the conditions for the exercise of the right, but not the existence of the right. This meant that individuals can rely on Article 31(2) of the Charter in horizontal disputes. Faced with the impossibility of reconciling national legislation with Article 31(2), the referring Court should take all necessary measures for Article 31(2) to be respected, disapplying national legislation if necessary.

This was the first time the Court had recognised a direct horizontal effect of a social provision in the Solidarity Chapter, but more importantly it subtly introduced a categorisation of rights in the Charter that can be relied on directly in a horizontal dispute, the key element being an absence of reference to EU law or national practices. Article 31(2) is the only provision in the Solidarity Chapter that does not contain this reference. Therefore, according to the Court it is unconditional and sufficiently precise. This is certainly one way of clarifying the question. However, the Court had already established in *Viking Line* that the right to collective bargaining and action, which can be found in Article 28, can be used in horizontal disputes, and that provision does refer to national law or EU practices. Further case law must determine whether the Court will now systematically use this reference framework. In any case, this decision of the Court is certainly a great step forward in the recognition and the effectiveness of fundamental social rights.

These judgments stand in stark contrast with another, albeit earlier, *post*-Charter landmark decision, *Association de Médiation Sociale* (AMS), which caused a significant stir among scholars.[74] The French *Code du travail* provides on the one hand that a contract providing the right to be represented (an accompanied-employment contract) must be qualified as an employment contract (*contrat de travail*), and on the other hand that employers must recognise a trade union representation and must organise elections for the establishment of a works council (*comité d'entreprise*) if a 50-employee threshold is reached.

[74] Judgment of the Court of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.

However, contrary to Directive 2002/14 establishing a general framework for informing and consulting employees, the French Labour Code excludes accompanied employment contracts from the calculation. A dispute arose when trade unions appointed a permanent worker as their representative at the *Association de Médiation Sociale*, taking into account that there were more than a hundred accompanied employees and not only the 8 members of permanent staff.

The Court, in Grand Chamber formation, again applied its classic case law on the prohibition of a horizontal direct effect of directives and the obligation to conform interpretation unless it leads to *contra legem* interpretation. However, the French *Cour de Cassation,* which referred the question, explicitly asked whether Article 27 of the Charter enshrining workers' right to information and consultation could be applied between private individuals in order to assess the compliance with European Union law of a national measure implementing a directive. The Court explicitly rejected this possibility:

> *It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law. (…) In this connection, the facts of the case may be distinguished from those which gave rise to Kücükdeveci in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such. Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied. That finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive.*[75]

The judgment came as a surprise after the very thorough and meticulous reasoning by Advocate General Cruz Villalón, whose conclusion was diametrically opposed to the Court's.[76] The Advocate General first considered the theory that Articles 51 and 52 should be understood as precluding a horizontal applicability of the Charter because they only address the EU institutions and the Member States. However, he rejected this idea since horizontal application of fundamental rights was already possible in the EU legal order before the Charter, and also because certain fundamental rights, such as for workers to be informed and consulted, are undeniably governed by private law. He then verified whether Article 27 should be considered a right or a principle. He considered it was more likely to be a principle since the wording of

[75] *Ibid*., paras. 45-49. Emphasis added.
[76] Opinion of Advocate General Cruz Villalón of 18 July 2013 in *Association de médiation sociale*, *op. cit.*

the provision is vague and because of the strong presumption that rights under the Solidarity title in the Charter are usually considered principles.

Regarding principles, he determined the exact meaning and scope of Article 52(5). According to the Advocate General, implementing acts "*must be understood as acts necessary to give specific legislative expression to a 'principle' and having no other purpose than that of providing it with sufficient substance for it to attain substantive independence and, ultimately, become a judicially cognisable right.*"[77] If not, the implementation of a principle would apply to the entire branch of social law. In the case at hand, he considered Article 3(1) of Directive 2002/4 to be an act giving specific, substantive and direct expression to a principle. More generally, the Directive

> *has the objective of 'establishing a general framework for informing and consulting employees in the European Community,' which coincides exactly with that of Article 27 of the Charter.*[78]

The Advocate General next considered the invocability of a principle and the role of implementing acts. While it was clear that it was impossible to directly rely on a principle for the exercise of an individual right, he considered that

> *the scope of the acts whose interpretation and review are allowed by the second sentence of Article 52(5) differs from and is broader than that of the legislative acts giving specific expression to a principle. (...) Otherwise, both Article 27 and its judicial guarantee in the second sentence of Article 52(5) of the Charter would be rendered ineffective.*[79]

He considered that the French Labour Code provision at hand was a prime example of acts subject to a review of their legality.

Finally, the Advocate General considered the fact that the implementing act is a directive, which classically cannot be invoked in horizontal disputes. He believed there was no reason that a directive would render his logic ineffective:

> (…) *the specific substantive and direct expression of a provision of the Charter is a function that should be seen as ad hoc and in any case individually identifiable. In any event, quantitatively the provisions of a directive which perform that function will be very limited, so that the settled case law on that delicate matter should be able to remain intact with respect to almost all of the provisions of present and future directives.*[80]

In any case, he considered this reasoning in line with *Kücükdeveci* and *Mangold*.

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[77] *Ibid*., para. 62.
[78] *Ibid*., para. 65.
[79] *Ibid*., para. 70.
[80] *Ibid*., para. 76.

The Court did not mention the distinction between rights and principles that Advocate General Cruz Villalón provided, but it later took up the same reasoning in *Glatzel*, concerning Article 26 of the Charter relating to the integration of persons with disabilities.[81]

The abovementioned decisions leave certain questions unanswered, but it seemed that the *AMS* case – and the *Glatzel* case, insofar as it followed the reasoning of the opinion in *AMS* – settled the definite, albeit still somewhat confusing, answer with regard to rights and principles. However, the *Max-Planck* case opened a small leeway in the question of the horizontal applicability of directives, and in turn, especially with the adoption of the European Pillar of Social Rights, we are hopeful that this might lead to a more flexible and satisfying approach by the Court of Justice to the other social rights contained in the Charter. At the very least, the distinction applied by the Court between the provisions of the Charter that refer to EU law or national practices and those that do not is quantifiable and objective, and it allows for an easier understanding of which Charter provisions can be relied on directly and which cannot.

[81] Judgment of the Court of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350.

Article	Text	EU secondary legislation	Right / principle (plus source: case law or explanations)	Source of right or principle
Article 27: workers' right to information and consultation within the undertaking	Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.	- Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies - Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses - Directive 2004/25/EC of 21 April 2004 on takeover bids - Directive 2011/35/EU of 5 April 2011 on mergers of public limited liability companies - Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society (Council Regulation (EC) No 1435/2003) with regard to the involvement of employees - Directive 2005/56/ of 26 October 2005 on cross-border mergers of limited liability companies	**PRINCIPLE: Cannot be invoked as such between private parties**	Judgment of the Court of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.
Article 28: Right of collective bargaining and action	Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.	- Directive 2009/38/EC on the introduction of European Works Councils	**RIGHT/GENERAL PRINCIPLE OF EU LAW: Can be invoked as such between private parties**	Judgment of the Court of 11 December 2007, *International Transport Workers' Federation v Viking Line*, C-438/05, EU:C:2007:772.
Article 29: Right of access to placement services	Everyone has the right of access to a free placement service.		**Unknown. RIGHT?**	
Article 30: Protection in the	Every worker has the right to protection against unjustified dismissal, in accordance with		**Unknown. PRINCIPLE?**	

event of unjustified dismissal	Community law and national laws and practices.			
Article 31: Fair and just working conditions	1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.	- The European Framework Directive on Safety and Health at Work (Directive 89/391 EEC), *which would in turn be the source of many sector-specific directives* - Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) - Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time - Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance)	**RIGHT: can be invoked as such in a dispute between private parties**	Judgment of the Court of 6 November 2018, *Max-Planck v. Shimizu*, C-684/16, EU:C:2018:874.
Article 33: Family and professional life	1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.		**Unknown. PRINCIPLE?**	
Article 34: Social security and social assistance	1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices. 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance	- Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems - Regulation (EC) No 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems	**elements of both right and principle**	Explanations relating to Article 52 of the Charter

	with Community law and national laws and practices. 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.			
Article 21: Equality and non-discrimination	1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.	- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin - Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	**RIGHT/GENERAL PRINCIPLE OF EU LAW: Can be invoked as such in a dispute between private parties**	Judgment of the Court of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21. Judgment of the Court of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.
Article 23: Equality between men and women	Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.	- Directive 2006/54/ of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)	**RIGHT/ GENERAL PRINCIPLE OF EU LAW**: **Can be invoked as such between private parties because it is an expression of the general principle of EU law of equality**	Judgment of the Court of 25 May 1971, *Gabrielle Defrenne v Belgian State*, 80/70, ECLI:EU:C:1971:55; Judgment of the Court of 8 April 1976, *Defrenne v Sabena*, 43/75, EU:C:1976:56; Judgment of the Court of 15 June 1978, *Defrenne v Sabena*, 149/77, EU:C:1978:130.

IV. Judicial interaction on matters of social rights

Social legislation and the related case law have undergone a remarkable evolution in the EU, yet they have not done so in a vacuum. EU policymakers and judges have indeed drawn inspiration not only from national legislation and cases, of which the latter are most often the basis for jurisprudential evolution through the mechanism of preliminary rulings, but also from other regional and international organisations. Regarding social rights specifically, the most important sources of inspiration are naturally the International Labour Organization conventions at the level of the United Nations, and the European Social Charter of the Council of Europe at the regional level. Despite the absence of social rights in the European Convention on Human Rights, the ECtHR has also contributed to the evolution of the understanding of social rights through an integrated approach to human rights.

In this section, we analyse judicial interaction at two levels: on the one hand between the CJEU and the European Committee of Social Rights (ECSR), while also according importance to the role of the European Social Charter in the framework of EU legislation, and on the other the role of social rights in the case law of the ECtHR.

A. Relations between the European Social Charter (CoE) system and the EU framework

While fundamental rights are often linked to the ECHR, fundamental social rights do not figure as such in this instrument. They can be found in the European Social Charter, the lesser known little brother of the ECHR, a Council of Europe (CoE) treaty regarding the protection of social rights in their largest sense. It is often considered one of the most comprehensive and rigorous social right protection tools accepted by a large number of states. Respect for the European Social Charter is ensured by the European Committee of Social Rights, which has two roles. First, it examines states' reports on the execution of their commitment. Second, for those Member States that have ratified the Additional Protocol introducing the collective complaints procedure, it can receive collective complaints against Member States based on alleged violations of the Social Charter. The particularity of this procedure is that it is not individuals who bring these actions but social actors, whether they be social partners or national or international NGOs. Insofar as they refer to binding legal provisions and are adopted by a monitoring body established by the Charter and the Protocol providing for the system of complaints, decisions of the European Committee of Social Rights must be respected by the states concerned. However, they are not enforceable in domestic legal systems.

While the Social Charter is not part of the Union's legal order, all the Member States have ratified it, be it in its original or revised version. Given the fact that the EU is first and foremost a free-trade market and an economic Union, it is readily apparent that conflicts can arise

between the two legal orders. To verify whether this risk exists, it is necessary to check how the European Social Charter is received in the EU legal order.

From a textual point of view, the European Social Charter is mentioned a few times in EU primary law: in the preamble to the TEU, Article 151 TFEU and in the Preamble to the Charter. These mentions, however, are purely symbolic proclamations and do not impose any obligations on the Member States or on the Union, as is the case of the ECHR in Articles 6 TFEU and 52 of the EU Charter. Article 153 TFEU, which establishes the Union's competence to adopt minimum harmonization directives in social matters does not mention it. In any case, the protection offered by the European Social Charter vastly exceeds the powers attributed to the European legislator. The Social Charter, however, played an important role in the elaboration of the EU Charter and the European Pillar of Social Rights. Despite the lack of references to the Social Charter in the body of the EU Charter, this role is made very clear in the Explanations of the Charter. All of the provisions in the chapter relating to Solidarity were inspired by the Social Charter. Without exaggerating the importance of the Explanations, the reference to the Social Charter is not completely insignificant. Article 6(1) TEU provides that the Charter *"shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations."* Koen Lenaerts, President of the Court of Justice, considered that in order to respect this provision the CJEU must interpret the provisions of the EU Charter in the light of the European Social Charter.[82]

The importance of the European Social Charter can more adequately be measured in the case law of the CJEU. Somewhat early in the European construction, a first reference was made to the European Social Charter in the third instalment of the *Defrenne* case:

> *The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights. Moreover, the same concepts are recognized by the European Social Charter of 18 November 1961 (...).*[83]

When the Court delivered this judgment, scholars were eager to interpret this reference as the Court intending to develop the European Social Charter as an interpretation tool. However, references to the European Social Charter are sparse and the CJEU has always refused to use it as a proper autonomous interpretation tool. Furthermore, the CJEU has never made a single reference to the case law of the Committee. This is also reflected in Art. 52 of the EU Charter,

[82] Loosely translated from "la Cour de justice de l'Union européenne (la 'Cour de justice') est tenue d'interpréter les articles de la Charte mentionnés ci-dessus à la lumière de la Charte sociale européenne" *in* K. Lenaerts, 'Le droit social de l'Union européenne et du Conseil de l'Europe: l'intertextualité et le dialogue entre les deux Cours,' *Ateliers de droit social*, 6 July 2014, p. 3, available at http://atelierdroitsocial.be/wp-content/uploads/2014/07/Lenaerts_Le_droit_social_de_l_Union_Europenne_et_du_Conseil_de_l_Europe.pdf.
[83] Judgement of the Court of 15 June 1978, *Defrenne III*, C-149/77, EU:C:1978:130, paras. 26-28.

in which the CJEU is bound by the ECHR and the ECtHR's case law, but not by the Social Charter or the Committee's case law.

The relations of the CJEU with the ECSR are far more rocky than with the ECtHR. The complicity and the benevolence the ECtHR and the EU often express towards each other is not shared with or by the ECSR.

EU law has in some instances contributed to the interpretation of the Social Charter, and in some cases even inspired amendments to the Revised Charter, for instance: the changes in women's rights so as to ensure full equality between women and men (with the sole exception of maternity protection measures), which draw directly on EU law; the minimum age for employment in certain occupations regarded as dangerous or unhealthy, which was not specified in the 1961 Charter but was set at 18 years of age in the Revised Charter based on Directive 94/33 of 22 June 1994 on the protection of young people at work (Article 7(2) of the Charter); Article 29 providing that states must impose on employers an obligation to inform and consult employee representatives in collective redundancy procedures, which is inspired *inter alia* by Directive 92/56/EEC of 24 June 1992 on the approximation of the laws of the Member States relating to collective redundancies.

The ECSR has, however, very clearly excluded acts implementing EU law from inherently conforming to the Social Charter. In *CGT v. France* and *Laval un Partneri* – the second of which examined legislative changes in Sweden in order to conform with a CJEU judgment – it was argued before the Committee that an equivalent of the *Bosphorus* presumption (see *infra*, section B) of conformity with the European Social Charter should be established. The Committee, however, decided that

> *neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter. (…) It will review its assessment on a possible presumption of conformity when it considers that the existence of the factors which the European Court of Human Rights identified as warranting the existence of such a presumption in respect of the Convention, which are currently missing insofar as the European Social Charter is concerned, have materialized.*[84]

The Committee found Sweden in breach of the right to collective bargaining and action in the *Laval* case, directly defying the earlier CJEU judgment.

The Committee has also not shied away from reviewing national legislation implementing EU law. In the context of the financial crisis, several Greek unions introduced collective complaints

[84] Decision of the European Committee of Social Rights (ECSR), 3 July 2013, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, para. 74.

regarding the various austerity measures Greece had to adopt in order to receive financial aid, alleging violations of the right to social security[85] (in five of the complaints), to fair remuneration[86] and young people's right to protection.[87] In all the cases, the Committee found Greece in violation of the rights invoked. Especially in the five cases that concerned the right to social security, the Committee was very clear regarding the Greek government's argument trying to justify the budgetary cuts by claiming it was bound by EU obligations: *"(...) the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter.*"[88]

In October 2014, the Council of Europe launched the Turin Process, a conference on the future of the protection of social rights in Europe. The two-day conference was organised against the background of the 2014-2019 mandate of the Secretary General, who had put reinforcement of the Social Charter among his top priorities. It was co-organised by the Council of the European Union and stressed in particular a reinforcement of relations between the EU and the legal order of the Social Charter. Among the solutions envisaged to achieve this reinforcement was an accession by the EU to the Social Charter in the same way that accession to the ECHR was considered.[89] However, this solution was not perfect as the Treaty only provided for an accession to the ECHR but not to the Charter, and furthermore the Court of justice shot down all current possibilities to accede to the Convention in its Opinion 2/13.[90] A possible forum for strengthened links could be the European Pillar for Social Rights, but it is too soon to tell.

B. Relations between the European Convention on Human Rights (CoE) system and the EU framework in social rights matters

In this section, we consider the mutual impact of the case laws of the ECtHR and the CJEU on each other in matters of social rights. First, however, it is important to understand that the

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[85] Decisions of the ECSR, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners v. Greece*, Complaint No. 77/2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, Complaint No. 78/2012; *Panhellenic Federation of pensioners of the public electricity corporation (PAS-DEI) v. Greece*, Complaint No. 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint No. 80/2012. The decisions on the merits of all five complaints were adopted on 7 December 2012.

[86] European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011, decision on the merits of 23 May 2012.

[87] *Ibid*.

[88] Decision of the ECSR, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, *op. cit*., paras 50-51.

[89] ECSR, *The relationship between European Union law and the European Social Charter*, Working document in the framework of the Turin Process, 15 July 2014, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806544ec. See also the study carried out by Olivier De Schutter for the AFCO Committee of the EU Parliament, *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights*, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU%282016%29536488_EN.pdf.

[90] Opinions of the Court of 18 December 2014, *Avis 2/13 on the accession of the EU to the ECHR*, EU:C:2014:2454.

ECHR – even if it mainly aims to protect civil and political rights – also includes the protection of social rights.

1. Social rights in the system of the European Convention on Human Rights

While the ECHR does not contain any social rights in itself, and the ECtHR can only consider claims based on the rights contained in the Convention, the protection of social rights is not excluded *per se* from the scope of competence of the ECtHR. As a matter of principle, in *Airey v. Ireland* the Court refused to consider civil and political rights on the one hand and social and economic rights on the other as two completely separated entities:

> *Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.*[91]

Most if not all the provisions in the Convention can be applied to labour situations, as the Convention does not exclude workers from its *ratione personae* scope and neither does it exclude labour situations from its *ratione materiae* scope. There are, however, also direct overlaps between the rights protected by the Convention and social rights typically protected by the Social Charter, notably under Article 4 (prohibition of forced labour) and Article 11 (freedom of association and to join a trade union).[92] Especially the latter has undergone a remarkable evolution. We will also consider how Article 1 of Additional Protocol 1 (right to peaceful enjoyment of possessions) has been mobilised with regard to social protection, especially in the context of the 2008 financial crisis.

2. Evolution of Article 11 of the European Convention on Human Rights

Initially, the Court shaped the freedom of association and to join a trade union solely around the positive freedom of association, i.e. the liberty to create a union and to join it; the liberty *not* to join a union was at first not guaranteed as such.[93] In *Young, James and Webster v. United Kingdom*, three men were dismissed from British Rail because they would not adhere to a designated union for political reasons under a closed shop agreement between British Rail and

[91] ECtHR, 9 October 1979, *Airey v. Ireland*, no. 6289/73, para. 26.
[92] For a full overview of indirect situations, see C. Nivard, *La justiciabilité des droits sociaux* (Bruxelles, Bruylant, 2012), pp. 202-236; V. Hamlyn, "The Indivisibility of Human Rights: Economic, Social and Cultural Rights and the European Convention on Human Rights" (2008) 40 *Bracton Law Journal*, pp. 13–26.
[93] ECtHR, 13 August 1981, *Young, James and Webster v. United Kingdom*, nos. 7601/76 and 7806/77.

three designated unions. British law only accepted exemptions to closed shop agreements for religious reasons. While the Court did not condemn closed shop arrangements or introduce a negative freedom of association into Article 11, it considered that a threat of dismissal resulting in the loss of means of subsistence for a person was a form of compulsion too serious and therefore not proportionate.[94] In *Sigurdur A. Sigurjonsson v. Iceland*, the Court confirmed the existence of a negative freedom of association, taking stock of its inclusion in the European Social Charter and the 1989 Community Charter. It did not, however, overturn its *Young, James and Webster* judgment, as it considered the facts of the case were vastly different.[95]

Under the influence of the European Social Charter and the case law of the Committee, the Court also developed its case law regarding the exercise of freedom of association, and most importantly the right to collective bargaining and action, despite neither of these elements being part of Article 11. In *Demir and Baykara v. Turkey*, concerning civil servants, the Court stated that while it was true that it did not previously consider the right to collective bargaining to be inherent to Article 11, this had to be reconsidered in the light of evolutions in European and international law and the practices of the Member States, which widely recognise the possibility for civil servants to enter into collective agreements. In this case, the Court also stressed the importance of an integrated approach to human rights and a need to verify and mobilise a variety of different international human rights sources.[96]

With regard to the right to collective action, the Court initially did not consider the right to strike to be protected by Article 11, but instead to be one of the possible means of action the state can allow unions to engage in.[97] Later on, however, the Court considered that taking part in a strike is a manifestation of the freedom of peaceful assembly,[98] before deciding in *Enerji Yapi-Yol Sen v. Turkey* that strikes allow trade unions to make their voices heard and are an important tool for trade unions to defend their interests.[99] It does not seem out of character that the Court affirmed the intrinsic relation between Article 11 and the right to strike with slightly less gusto than in *Demir and Baykara*. After all, the right to strike is still very much debated at national and international levels.

3. The European Court of Human Rights and the Financial Crisis

Like every supranational European forum, during the financial crisis the ECtHR was called upon by civil servants and workers whose remuneration, benefits, bonuses or retirement pensions were reduced due to budgetary reforms.[100] These claims were based on violations of Article 1 of Additional Protocol No. 1 guaranteeing the right to peaceful enjoyment of

[94] *Ibid., para.* 55.
[95] ECtHR, 30 June 1993, *Sigurdur A. Sigurjónsson v. Iceland*, no. 16130/90, paras 33-38.
[96] ECtHR, 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97. See casesheet no. 4 for more details.
[97] ECtHR, 6 February 1976, *Schmidt and Dahlström v. Sweden*, no. 5589/72, para. 36.
[98] ECtHR, 27 March 2007, *KaraÇay v. Turkey*, no. 6615/03.
[99] ECtHR, 21 April 2009, *Enerji Yapi-Yol Sen v. Turkey***,** no. 68959/01.
[100] See, among others: ECtHR, 7 May 2013, *Koufaki and ADEDY v. Greece*, nos. 57665/12 and 57657/12; ECtHR (GC), 13 December 2016, *Belané Nagy v. Hungary*, no. 53080/13; ECtHR, 7 March 2017, *Baczy v. Hungary*, no. 8263/15; ECtHR, 4 July 2017, *Danuté Mockiene v. Lithuania*, no. 75916/13.

possessions. In its assessment, the Court took several different criteria into account: cuts made in order to offset the effects of the crisis could be considered an infringement of the right to property, but preserving public finances was a legitimate aim and the state has a wide margin of appreciation in implementing social and economic policies. The reductions should be proportionate, not consist in a complete deprivation and should not expose the plaintiffs to a risk of subsistence difficulties.

We wholeheartedly agree with Olivier De Schutter and Paul Dermine in assessing that "*interference with the 'peaceful enjoyment of possessions' is a rather poor lens through which the compatibility of fiscal consolidation measures with human rights can be assessed.*"[101] However, it was a perfectly bold move by the Court to not dismiss the claims *ratione materiae*, as it toyed with the limits of the division between civil and social rights and reinterpreted the right to social security and social protection in a light that is compatible with an assessment using the Convention.

4. Judicial dialogue between the CJEU **and** the ECtHR in social cases

Unlike the relations between the European Committee of Social Rights and the CJEU, the systems of the Convention and of the EU nurture a privileged relationship with each other. On the side of the EU, Article 6 TEU imposes an accession of the EU to the ECHR (but which is not foreseen for the immediate future after a negative opinion of the CJEU on the project),[102] and Article 52(3) of the EU Charter imposes an interpretation of the fundamental rights it contains that is consistent with the ECHR. On the side of the ECtHR, there is the *Bosphorus* presumption: the ECtHR considers that the EU protects and observes human rights in a manner which can be considered at least equivalent to that for which the Convention provides. Unless it is evident from facts that the protection of the rights in the Convention has been seriously deficient, there is a presumption of conformity of EU law with the Convention.[103]

This relationship has led to a mutual influence on each other's case law. However, it is barely reflected in case law regarding social rights, perhaps because the ECHR is not primarily concerned with social rights. The important developments in matters regarding the right to collective bargaining and action before the ECtHR have not once been reflected in the case law of the CJEU, even in cases that post-date *Demir and Baykara* and *Enerji Yapi-Yol Sen*.
In *Florescu*, however, the Court of Justice drew extensively on the ECtHR's reasoning in its various cases around social security reforms and the right to the peaceful enjoyment of possessions (see *supra*).

[101] O. De Schutter, P. Dermine, "The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union" (2017) *Journal européen des droits de l'homme* 2, p. 135.
[102] Opinion of the Court of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/13, EU:C:2014:2454.
[103] ECtHR, 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98.

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In conclusion to this first part, it can easily be said that fundamental social rights have gained a definite position in the EU legal framework. However, this position is not static. Its strength, visibility and priority continually fluctuate, interact and change according to the EU political weather. This is made abundantly clear by the vast differences in the case laws of the Court of Justice, of national jurisdictions and supra-national jurisdictions, which will be analysed in the following part of this handbook.

Part II: Selection of cases

Introductory remarks

The casesheets that follow are based on cases that have been provided by the national experts who participated in the e-NACT working group on social rights. They address interesting recent cases where the use of the EU Charter, of judicial dialogue techniques and of specific remedies may provide interesting insights into further developments of jurisprudence at the national level. Each group of cases is accompanied by one or more '***connex cases***,' which are landmark cases on the topic. They are not the direct object of the casesheets, but reading them in connection with the cases commented on will help understanding of the reasoning in many decisions.

The selection has been made in line with the following criteria:

1. **Problem-based:** as far as possible the national jurisprudence reflects the problems, questions and ambiguities that national judiciaries face in relation to the use of the Charter in the field of social rights.
2. **EU relevance:** as far as possible the national jurisprudence identifies issues of EU-wide relevance that touch on the application (or omission of application) of the Charter in connection with the application of EU primary and secondary sources in the field of social rights.
3. **The EU Charter of Fundamental Rights:** Priority is given to cases that cite the EU Charter of Fundamental rights. Additionally, cases that may have cited the Charter but omitted to do so (i.e. where the Charter was applicable) and the possible motives for doing or not doing so may be highlighted.
4. **The EU Charter of Fundamental Rights and the level of protection:** particular attention is paid to national jurisprudence where the EU Charter was used to broaden the scope of protection compared to the protection ensured by EU secondary legislation.
5. **Judicial Dialogue:** a special emphasis is placed on national jurisprudence that used one or more of the following judicial interaction techniques: the preliminary reference procedure under Art. 267 TFEU, direct reference to the case law of the CJEU or ECtHR, references to the jurisprudence of foreign national courts and disapplication of national legislation implementing EU secondary legislation.
6. **Divergent positions of the national judiciary:** national jurisprudence highlighting divergent positions of national courts is considered: lower level courts vs. high courts/constitutional courts/other specialised national courts.
7. **CJEU case law connection:** national case law highlighting a different or common approach to legal issues also faced by the CJEU.

Selection of cases

THE SOCIAL RIGHTS IN THE CHARTER IN RELATION TO NATIONAL CONSTITUTIONS
Casesheet No. 1: The Spanish Constitution
Casesheet No. 2: The Romanian Constitution

ARTICULATION BETWEEN THE RIGHT TO COLLECTIVE BARGAINING AND OTHER RIGHTS
Casesheet No. 3: ECSR, *Lex Laval*
Casesheet No. 4: ECtHR, *Demir and Baykara*
Casesheet No. 5: CJEU, *Alemo-Herron v. Parkwood*

INDIVIDUAL DISMISSALS
Casesheets Nos. 6-9: Hungarian Act No. LVIII of 2010 on the status of public servants

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION IN THE WORKPLACE
Casesheet No. 10: CJEU, *Achbita v. G4S Secure Solutions*
Casesheet No. 11: CJEU, *Bougnaoui v. Micropole SA*
Casesheet No. 12: CJEU, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*
Casesheet No. 13: Labour Court (Spain), *Daniela v. Acciona Airport Services*
Casesheet No. 14: Labour Tribunal (Belgium), *G. and A. v. asbl PSE*

PROTECTION OF SOCIAL RIGHTS IN TIMES OF FINANCIAL CRISIS
Casesheet No. 15: CJEU, *Florescu*
Casesheet No. 16: ECtHR, *Koufaki and ADEDY*
Casesheet No. 17: ECSR, *IKA-ETAM v. Greece*

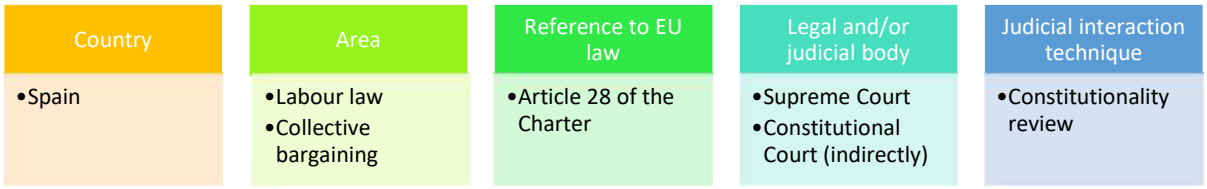
The social rights in the Charter in relation to national constitutions

Core issues
What is the value of the social provisions in the Charter of Fundamental Rights vis-à-vis national constitutions?
Connex case
CJEU, 3 March 2011, *David Claes e.a. v. Landsbanki Luxembourg S.A.*, joined cases C-235/2010 to C-239/2010, EU:C:2011:119

Casesheet No. 1: The Spanish Constitution

Reference: Spain, Supreme Court, ES:TS:2014:4485, 15 October 2014[104]

At a glance



Case description

a. Facts

Against the background of the 2008 financial crisis, the Spanish Government passed Decree Law 20/2012, which foresaw a unilateral modification of public employees' labour conditions allowing for a suspension of the existing collective bargaining agreements. This Decree Law affected both civil servants and public employees in every public administration *sensu lato*. In this case the claimants were the trade union representatives of a regional public mass medium. Decree Law 20/2012 had already been unsuccessfully challenged before the Spanish Constitutional Court. Therefore, the trade unions challenged the measures applied by the Decree, such as the unilateral suspension of collective bargaining agreements, on the basis of trade union freedom before the domestic courts. In their view, such a suspension violated both the Spanish Constitution provision on the right to collective bargaining and action and Article 28 of the Charter.

b. Reasoning of the Court

Regarding the alleged violation of the Spanish Constitution, the Supreme Court stated that the Constitution had not been violated since the Constitutional Court had declared the Decree Law

[104] Case sheet drafted on the basis of a template provided by Maribel González Pascual.

constitutional because it considered that affecting a specific regulation established in a collective agreement is not equivalent to affecting the right to collective bargaining, and therefore freedom of association. Considering Article 28 of the EU Charter, the Supreme Court considered that it did not prevail over the Spanish Constitution, given its wording indicating little legal force. Therefore, since the suspension did not violate the Constitution, it could not violate Article 28 of the Charter, given its inferior rank in the hierarchy of norms. Last but not least, the Supreme Court refused to raise a requested preliminary ruling regarding the legal force of Article 28 of the Charter because there was no doubt whatsoever regarding its scarce legal force.

Analysis: role of the Charter and judicial dialogue

The Supreme Court built its arguments extensively on the decision of the Constitutional Court, without having regard to the case law of the CJEU on the primacy of EU law over national legislation, including the Constitution.[105] This is particularly peculiar, as the parties' request that a reference for a preliminary ruling be made to the CJEU was made precisely on the value of the Charter over national law. The Spanish Supreme Court not only missed a chance to address the question of the primacy of a principle of the Charter over a constitutional provision and to have a possibly very important landmark case, but also made a wrong assessment on the value of the Charter, contrary to Article 6 TEU, allocating to the Charter the same value as the Treaties.[106] It is also disappointing that the Court did not further make explicit the argument that Article 28 does not prevail over the Constitution given its wording, and neither did it test Article 28 against the Spanish Constitutional equivalent, unlike the Romanian Constitutional Court (see Casesheet No. 2).

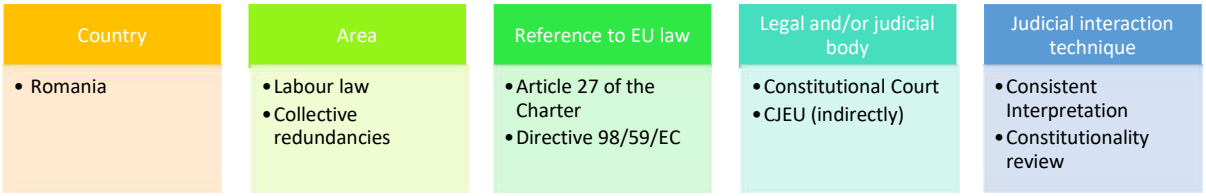
[105] Judgment of the Court of 15 July 1964, *Flaminia Costa v. E.N.E.L.*, case 6/64, EU:C:1964:66; Judgment of the Court of 9 March 1974, *Simmenthal*, C-106/77, EU:C:1978:49.

[106] According to the Court of Justice, "national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised," Judgment of the Court of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para. 60.

Casesheet No. 2: The Romanian Constitution

Reference: Romania, Constitutional Court, RO:CC:2015:64, 24 February 2015[107]

At a glance



Case description

a. Facts

In a number of collective redundancy cases[108] in which workers were defended by their trade union representatives, unconstitutionality claims were raised against the provisions in Article 86 (6) of Law No. 85/2006 on the insolvency procedure, which removes, in the case of the insolvency of an employer, the right of employees to consultation and information in the case of collective redundancies. This is a generally recognised and expressly regulated in Article 69 *et seq*. of the Romanian Labour Code and Article 27 of the Charter. The contested law also establishes an exception to the notice period to be observed in this case, which is 15 days instead of 20 days. In the context of these unconstitutionality claims, questions were referred by two of the referring Courts, the Bucharest Court of Appeal and the Bucharest Labour Court, to the Romanian Constitutional Court.

b. Reasoning of the Constitutional Court

First, the Constitutional Court stated that the constitutionality of the contested provisions should be examined separately regarding on the one hand informing and consulting employees and on the other hand the duration of the notice, since these two elements cover two distinct aspects covered by two separate provisions in the Labour Code.

In order to consider the constitutionality of the provision removing the right to consultation and information, the Constitutional Court had to first assess whether it fell under Article 41(2) of the Constitution enshrining the right of employees to social protection measures. Article

[107] Casesheet drafted on the basis of a template provided by Isabela Delia Popa.
[108] Rulings dated September 5th, 2014, September 15th, 2014, September 26th, 2014, September 30th, 2014, October 6th, 2014, November 13th, 2014, November 17th, 2014, November 20th, 2014, November 24th, 2014 and December 2nd, 2014, issued in case files no. 31.699/3/2013, no. 31.693/3/2013 (4.103/2014), no. 31.694/3/2013 (3.063/2014), no. 31.697/3/2013 (3.064/2014), no. 16.164/3/2014, no. 16.165/3/2014, no. 16.166/3/2014, no. 16.167/3/2014, no. 16.169/3/2014, no. 16.183/3/2014, no. 26.031/3/2013, no. 9.824/3/2013 (4.463/2014), no. 24.570/3/2013, no. 24.581/3/2013, no. 26.074/3/2013, no. 26.029/3/2013, no. 32.995/3/2014, no. 32.996/3/2014, no. 33.004/3/2014, no. 31.696/3/2013 (3.060/2014), no. 9.879/3/2013 (5.543/2014), no. 17.819/3/2014 and no. 17.817/3/2014.

41(2) lists the elements of this right, namely employee safety and health; the employment of women and young people; a minimum national gross salary; a weekly rest period; paid leave; special working conditions; professional training and "*other specific situations laid down by law.*" The Constitutional Court found that this latter specification reflected the constitutional legislature's intention to allow the configuration and structuring of the scope of the right in a dynamic way, allowing for its adaptation to new economic or social realities intervening in the evolution of society.

In order to verify whether workers' right to consultation and information is a constitutional right under Article 41(2), the Court referred to Articles 11 and 20 of the Constitution dealing with the adhesion of Romania to international treaties and its obligation to interpret citizens' rights and freedoms according to these treaties. The Court considered that the right to information and consultation was covered by the European Social Charter and the Romanian Labour Code and is therefore a constitutional right.

Concerning the Charter of Fundamental Rights, the Constitutional Court had already ruled that it has a different nature to other international treaties referred to in Article 20 of the Constitution, and the applicable constitutional provision is Article 148 of the Constitution, entitled 'Integration in the European Union.' As regards the application of the mandatory provisions of the European Union in the constitutional review, in its case law the Court held that

> *using a rule of European law in the constitutional review as the reference standard involves, under Article 148 para. (2) and (4) of the Constitution, two cumulative requirements: on the one hand, that the rule must be sufficiently clear, precise and unequivocal itself or its meaning must be clearly established, precise and unambiguous, on the other hand the rule must have a certain level of constitutional relevance, so that it can be used to find a violation of the Constitution by national law – the Constitution being the only direct reference in the constitutionality review*.

The Court contended that the first condition was fulfilled because Articles 153 (1) TFEU, 27 of the Charter and 2 and 3 of Directive 98/59/EC on collective redundancies[109] have sufficiently clear, precise and unambiguous content, especially in terms of the interpretation given by the CJEU in the *Claes and others* case, in which the Court considered that an employer's obligations to consult and inform workers must be carried out by the management where it is still in place, even with limited powers, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator. [110]

[109] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225.
[110] CJEU, 3 March 2011, *David Claes e.a. v. Landsbanki Luxembourg S.A.*, joined cases C-235/2010 to C-239/2010, EU:C:2011:119, para. 58.

Regarding the second condition, the Court found that by their normative content the acts of the European Union protect the right of workers to information and consultation, supporting and completing the action of the Member States, thus directly aiming at the fundamental right to social protection of labour provided by Article 41 (2) of the Constitution as it was interpreted in the present decision: a constitutional text that ensures a protection standard equal to that consequent from acts of the European Union. Therefore, it followed that the European Treaties, the Charter and the Directive 98/59/EC obviously have a constitutional relevance, which means they include and fall under Article 41 (2) of the Constitution by fulfilling the above-mentioned double conditions without breaking the constitutional national identity.

Given that the conditions under Articles 148 and 41 of the Constitution on the right to information and consultation as understood by EU law take precedence over national law, the provisions regarding informing and consulting workers of Article 86 (6) of Law No. 85/2006 on the insolvency procedure were unconstitutional as they were not compliant with the right to information and consultation as understood by EU law. Furthermore, the Court dismissed as ungrounded the exception of unconstitutionality raised and contended that the provisions regarding the exception to the notice period were constitutional.

Analysis: role of the Charter and judicial dialogue

The Romanian Constitutional Court gave a great deal of importance to EU law and especially the Charter in its constitutional review. It is particularly progressive that the Court integrated fundamental social rights as understood from the Charter and their more specific expression in a directive into the constitutional framework. It is interesting to note that the Court considered the Treaty, the Charter and the Directive cumulatively in order to assess whether the two conditions, essentially amounting to the criteria for direct effect, were fulfilled. This was both bolder yet more nuanced than the stance of the Court of Justice in *Association de mediation sociale* (subsequent to this case. See part I, section III.B), as the Romanian Constitutional Court comprehensively took stock of the *acquis* regarding informing and consulting workers, yet it did not exactly take into account all the specificities surrounding the Charter, namely regarding the limited scope of application and the distinction between rights and principles.

Articulation between the right to collective bargaining and other considerations

Core issues

Does the right to collective bargaining, internationally recognised as inherent in the freedom to join a trade union, hold up against economic rights? Is collective bargaining possible for workers in the public sector?

Connex cases

CJEU, 9 March 2006, *Werhof*, C-499/04, EU:C:2006:168

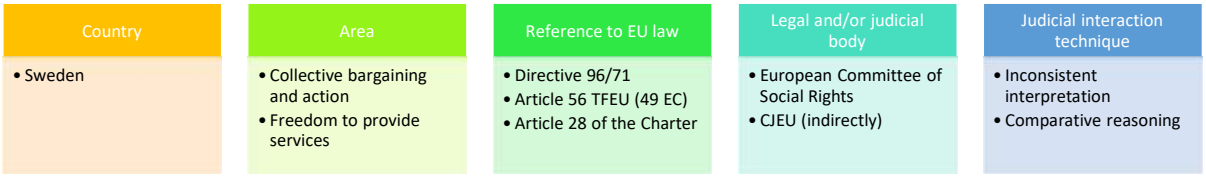
CJEU, 11 December 2007, *International Transport Workers Federation v Viking Line*, C-438/05, EU:C:2007:772

CJEU, 18 December 2007, *Laval un Partneri*, C-341/05 EU:C:2007:809

Casesheet No. 3: Lex Laval

Reference: ECSR, 3 July 2013, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012.

At a glance



Case description

a. Facts and antecedents of the case

A Latvian company, Laval un Partneri Ltd, won a public tender from the Swedish government to renovate schools. Laval Ltd posted Latvian workers to Sweden to work on site. These workers earned much less than comparable Swedish workers. The Swedish Building Workers' Union (*Svenska Byggnadsarbetareforbundet*) asked Laval Ltd to sign its collective agreement. This collective agreement was more favourable than the terms required to protect posted workers under Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) and it also contained a clause on setting pay that would not allow Laval Ltd to determine in advance what the pay would be. Laval Ltd refused to sign the collective agreement. The Swedish Builders Union, supported by the Electricians Union, called a strike to blockade all Laval Ltd's building sites. As a result, Laval Ltd could not do business in Sweden and had to declare bankruptcy. Laval brought proceedings before the Swedish Labour Court (*Sw. Arbetsdomstolen*) requesting a declaration that collective action was unlawful and compensation for the damage suffered. For this reason, the

Swedish Court asked the EU Court of Justice if EU law precluded trade unions from taking collective action in the form of a blockade to force a foreign provider of services to sign a collective agreement.[111]

NB: Art. 3 of the Posted Workers Directive[112] provides that detached workers benefit from the terms and conditions of employment of the Member State where the work is carried out and lists a ***set of core rights*** *in force in the* ***host Member State****. As in every employment directive, this is a minimal harmonisation and Member States can provide a higher standard of protection.*

The Court of Justice considered the blockades contrary to the freedom to provide services (see part I, section II.D.3). After the judgment, Sweden modified its legislation (dubbed *Lex Laval*) to comply with the ruling. Two Swedish trade union confederations, *Landsorganisationen i Sverige* (LO) and *Tjänstemännens Centralorganisation* (TCO), filed a complaint before the European Committee of Social Rights (Council of Europe) criticising the legislation introduced in response to the Laval judgment of the Court of Justice in the light of Article 6 of the Social Charter (right to collective bargaining) and Article 19 (rights of migrant workers).

b. The Reasoning of the Committee

The Committee started by addressing the relationship between the European Social Charter and EU law, and recalled that the fact that national provisions are based on EU law does not remove them from the ambit of the Social Charter. Furthermore, the Committee considered that the state of EU law with regard to respect for social rights did not justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter, as is the case of the ECHR (see part I, section IV.A).

When assessing the alleged violation of the Social Charter, the Committee considered that its task was not to judge the conformity with the Social Charter of the CJEU's preliminary ruling in the *Laval* case, but of the Swedish law adopted in its aftermath. The Committee did, however, make an allusion to the EU law framework:

> *the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers. In addition, any restrictions that are*

[111] CJEU, 18 December 2007, *Laval un Partneri*, C-341/05 EU:C:2007:809.
[112] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18.

> *imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality.*[113]

Considering the restriction placed on the right to collective bargaining disproportionate, the Committee found that the Swedish legislation in question violated the European Social Charter in four key areas, namely: Article 6(2), as it did not promote the regulation of terms and conditions of employment by means of collective agreements; Article 6(4), as it constituted a disproportionate restriction on the free enjoyment of the right of trade unions to engage in collective action; Article 19(4)*a*, in respect of remuneration and other working conditions, as it did not secure the same treatment for posted workers as that guaranteed to other workers with permanent employment contracts; and Article 19(4)*b*, as it did not guarantee foreign workers the same benefits of collective bargaining as it did Swedish workers.

Analysis: role of the Charter and judicial dialogue

In this judgment, the Committee naturally paid special attention to the relationship between the European Social Charter and EU law. Regarding the role of the EU Charter, the Committee considered among the applicable law not only the text of Article 28 but also its Explanations, which the CJEU itself rarely does. The Swedish Government actually used the entry into force of the EU Charter as a way to sustain its argument to conclude a presumption of conformity. However, the Committee only confirmed it would *"carefully follow developments resulting from the gradual implementation of the reform of the functioning of the EU following the entry into force of the Treaty of Lisbon, including the Charter of Fundamental Rights."*[114] So far, the Committee has not revised its position.

Regarding judicial dialogue, this is a clear example of a dialogue of the deaf. The Court of Justice did not take into account the legal order of the Social Charter, which coexists with the EU legal order and sometimes overlaps. The Court of Justice is not bound to do this directly[115] since the EU is not Party to the European Social Charter. The Committee, in turn, refused to give weight to the specificities of the EU legal order, which is not solely consecrated to the protection of social rights but pursues first and foremost the goal of a common market. All the EU Member States are, however, parties to the European Social Charter, and the absence of constructive judicial dialogue between the two legal orders can and will lead to the Member States facing two sets of contradictory obligations. The Committee made a very political statement with this decision, defying both the CJEU and the Member States, which tend to overlook the Social Charter in favour of other rules. This specific case fuelled the need to strengthen relationships between the CJEU and the Committee in the framework of the Turin process (see part I, section IV.A).

[113] Para. 122.
[114] Para. 74.
[115] An indirect obligation exists, as Article 6 TEU provides that the Charter must be interpreted in conformity with the Explanations of the Charter, and the Explanations refer to the European Social Charter.

In 2014 there was a change of government in Sweden to one led by the Social Democrats and the Green Party. While the decisions of the Committee have scarce legal force (see part I, section IV.A) and did not necessarily entail sanctions for Sweden, the new progressive government wanted to change the law, and after an official inquiry the law was repealed in April 2017.[116]

[116] M. Danielsson and A. Gustaffson, "Sweden: The Repeal of Lex Laval," *Eurofound*, 14 July 2017, available at https://www.eurofound.europa.eu/publications/article/2017/sweden-the-repeal-of-lex-laval.

Casesheet No. 4: Demir and Baykara

Reference: ECtHR (Grand Chamber), 12 November 2008, *Demir and Baykara v. Turkey*, No. 34503/97

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial interaction technique
•Turkey	• Freedom of association • Right to collective bargaining	•Charter of Fundamental Rights	• ECtHR	•Comparative reasoning •Proportionality test

Case description

a. Facts and antecedents of the case

Mr Vemal Demir was a member and Mrs Vicdan Baykara was the president of the Turkish trade union for civil servants, Tüm Bel Sen. The union signed a two-year collective agreement in 1993, but the employer, the Gaziantep Municipal Council, did not comply with its provisions. Demir and Baykara brought proceedings in the District Court and won their claim. However, on appeal the Court of Cassation quashed the decision. This Court held that there was a right to join a union but the union itself had *"no authority to enter into collective agreements as the law stood."* The matter was then remitted to the District Court, which in defiance restated its view that Demir and Baykara did have a right to a collective agreement because it accorded with International Labour Organisation Conventions ratified by Turkey. However, the Court of Cassation again overturned the District Court's decision and rendered null and void all the activities and actions of Tüm Bel Sen between 1991 and 1993.

Furthermore, a separate claim had been brought before the Audit Court, which found that civil servants had no authority to engage in a collective agreement, and so the civil servants had to get the union to repay the extra benefits that it had obtained under the *"defunct"* collective agreement.

After these domestic avenues were exhausted, the union made an application to the European Court of Human Rights, alleging a breach of freedom of association under article 11 ECHR and protection against discrimination under article 14 ECHR. The case was heard by seven judges from the second section. It was held that article 11 had been violated, and there was no need to examine article 14. The Turkish Government then requested that the matter be referred to the Grand Chamber.

b. Reasoning of the Grand Chamber

On a preliminary note, the Turkish government claimed the Court could not reinterpret and recreate obligations that are not provided for in the Convention, and that it could not rely on international treaties to which Turkey is not a party in order to interpret the Convention, namely the European Social Charter and the Charter of Fundamental Rights. The Court, however, considered that the Convention was not a static stand-alone instrument of protection of human rights but that it had a living nature and must always be interpreted in the light of present-day conditions, taking into account evolving norms of national and international law. These norms can stem from international conventions and also from non-binding instruments. These evolving norms and their acceptance by a vast majority of states reflect the common international, regional or domestic standard, and when searching for this common standard, it does not matter whether the respondent state has signed or ratified it or not.

When assessing the question of whether civil servants are covered by Article 11, the Turkish government considered Article 11 was not applicable to *"members of the administration of the State."* However, the Court recalled that this restriction should not be interpreted strictly. By relying on international instruments, the EU Charter and the practices of other contracting states among others, the Court established that the principle that civil servants enjoy the fundamental right of association had been very widely accepted by the Member States. The Court considered that the judgment of the Court of Cassation not only had a retrospective effect of rendering null and void *ab initio* all the activities and actions of the union but also that it was very likely that it would have a prospective effect of seriously restricting the union's activities due to a reluctance on the part of the heads of local authorities to enter into negotiations.

The Court considered that the absolute prohibition on forming trade unions imposed on civil servants was disproportionate as it was not necessary in a democratic society, and concluded unanimously on a violation of Article 11.

The Court examined separately the annulment of the collective agreement the trade union had negotiated with the public authority. The Turkish government relied on the Court's case law to claim that trade union rights could be implemented in a number of different forms and it argued that the State was free to select those that were to be used by trade unions. It considered furthermore that there was no common European practice regarding the right of civil servants to enter into collective agreements. The Court reassessed its case law in matters of collective bargaining (see part I, section IV.B) relying once more on external instruments – noting that the EU Charter was the most recent European instrument to date – and coming to the conclusion that this case law should be reconsidered. While the Court formerly held that the right to collective bargaining did not constitute an inherent element of Article 11, it now argued that the right to collective bargaining was an essential element of the right to join trade unions, taking into account the evolutions in the matter. Once more, the Court considered that the interference was not justified.

Analysis: role of the Charter and judicial dialogue

The EU Charter did not play a singular role in this case. However, the reasoning of the Court, which relied extensively on the evolution of the perception of human rights in different societies, was reminiscent of one of the *raisons d'être* of the Charter. Like the Court, the writers of the Charter took stock of the evolution of case law, of different international instruments and of the practices of Member States and created a living human rights instrument that can always be interpreted in the function of the latest common ground on a subject. Furthermore, the Court mentioned several times that the Charter was one of the latest instruments to date, which indicates a certain feeling of a *"cemented"* common ground. Even if legally the Charter cannot be mobilised by the ECtHR, especially since this case concerned a state party which is not a member of the EU, it permitted an important overturn in a long-standing case law.

On a more general note, this decision is a very good example of the mutual influence between the ECHR and the EU legal order: the Charter has become a reference framework outside the EU borders, even if the social provisions it contains are mere principles. This also entails that through an evolving interpretation of the ECHR provisions EU social standards can be applied to states that are not part of the EU.

Casesheet No. 5: Alemo-Herron v. Parkwood

Reference: CJEU, 18 July 2013, *Alemo-Herron e.a. v. Parkwood Leisure Ltd*, C-426/11, EU:C:2013:521

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial interaction technique
•United Kingdom	•Collective bargaining	•Article 16 Charter •Directive 2001/23	•CJEU	•Preliminary ruling

Case description

a. Facts and antecedents of the case

Lewisham Borough, London, decided to privatise one of its leisure services. All the workers formerly employed by the public sector were transferred to a private company, as were the entirety of their contracts, according to Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in transfers of undertakings, businesses or parts of undertakings or businesses (Transfer of Undertakings Directive).[117] In their contracts there was a *'dynamic clause'* which allowed the contract and working conditions to be governed by collective bargaining agreements, and which automatically took into account the evolution of such collective agreements. This was an additional protection of the workers as is made possible by Article 8 of the Transfer of Undertakings Directive and a longstanding labour tradition in the UK.

Formerly, the contract was governed by a collective agreement with the public sector, and it was updated (with a slight pay increase) after the takeover. The new employer refused to comply with the increase, since it could not and did not take part in the negotiation as it was not in the public sector. Both the employment tribunal and the Court of Appeal dismissed the cases brought before them by the employees based on the findings of the CJEU in *Werhof*.[118] The case went to the Supreme Court, which referred a preliminary ruling to the CJEU on whether this kind of clause conformed with the Directive.

b. Reasoning of the Court

[117] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82.

[118] The CJEU held that where a contract of employment refers to a collective agreement that is binding on a transferor, the transferee, which is not party to it, is not bound by collective agreements subsequent to the one in force at the time of the transfer. It noted that freedom of contract implies that two parties cannot impose obligations on third parties without their consent.

The Court stated in a very short judgment (17 paras.) that, first, the Transfer of Undertakings Directive does not aim solely to safeguard the interests of employees in the event of the transfer of an undertaking, but seeks to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other and, second, that EU directives must be interpreted in a manner consistent with the Charter: this kind of clause was contrary to the freedom to conduct business contained in Article 16. Article 8 of the Directive could not be interpreted in a manner that would be liable to adversely affect the very essence of the transferee's freedom to conduct a business.

Analysis: role of the Charter and judicial dialogue

The reasoning regarding the Charter in this case is doubly problematic. First, the Court only weighed Article 16 of the Charter in the balance of interests as a fundamental right, disregarding Articles 27 and 28, which were both relevant to this case. The employees had been transferred with the understanding that all relevant collective bargaining agreements would still apply, and the unions negotiated respecting their social traditions.

Second, the Court had recalled in *Melloni* that according to Article 53 of the Charter,

> *where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*[119]

Melloni must, however, be put in context, as it concerned a directive pursuing full harmonisation regarding the European arrest warrant. However, in the social field, Article 153 TFEU excludes the adoption of directives for full harmonisation, and only prescribes minimum requirements. A higher standard of protection in the social field can *de facto* not compromise the primacy, unity or effectiveness of EU law. The Court, however, through its interpretation of Article 8 and of the aim pursued by the Directive, extended the application of Article 53 to national law implementing minimum requirements.

Finally, the Court simply assessed the conformity of the clause with Article 16 considering a directive and completely disregarding all notions of principles, Article 51 or the horizontal application of directives *contra legem* (see part II of this handbook). While it would be preferable to not have to jump through these legal hoops, the fact that the Court only applied rigorous application standards to social rights but not to this economic right – which, by its wording, can hardly be recognised as a right ("*The freedom to conduct a business in accordance with Community law and national laws and practices is recognized*") – is

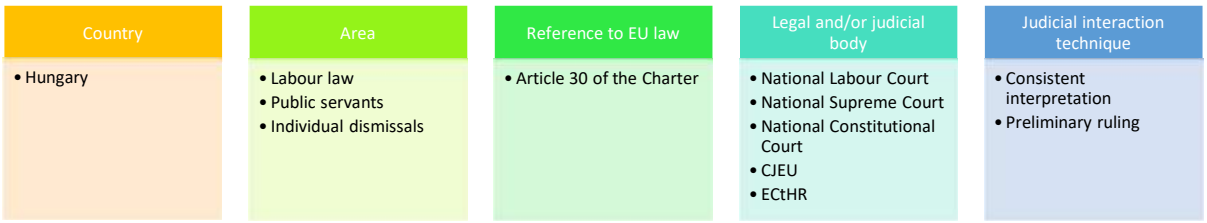
[119] Judgment of the Court of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para. 60. Emphasis added.

disconcerting and very clearly shows that the Court granted greater importance to respect for economic rights than social rights.

Individual dismissals

Core issues
Article 30 giving protection against unjustified dismissals, is one of the few labour-related Charter provisions that does not have any specific expression in secondary law. How can its presence in the Charter play a positive role in individual dismissals?

Casesheets nos. 6-9: Hungarian Act No. LVIII of 2010 on the status of public servants



The following case sheets concern a Hungarian law of 2010 allowing the dismissal of public servants without any motivation. Many public servants were dismissed on the basis of this law and brought actions before different Courts. However, related provisions left civil servants without an effective domestic remedy because in the absence of justification it was almost impossible to prove that a dismissal was ill-founded. The different actions reached the Supreme Court, the Constitutional Court, the Court of Justice and the European Court of Human Rights. The law was quashed by the Hungarian Constitutional Court, but only pro futuro. Before giving a global analysis of the role of the Charter in this context, the different arguments before the different Courts will be set out in chronological order.

Reference: Hungarian Constitutional Court, 15 February 2011, 8/ 2011.(II.18.) *AB határozat*

The Constitutional Court first pointed out that there are differences between private sector workers and public service workers, as the latter carry out tasks for the State and thus exercise public power. The Court therefore considered it was normal that additional statutory requirements are imposed on them (such as impartiality, particular responsibility and strict conflict-of-interest rules). The Court also added that Hungarian law never adhered to the principle of non-dismissal of public servants.

Regarding the duty to motivate the dismissal under the Labour Code, the Court considered its inspiration – the European Social Charter and the Charter of Fundamental Rights – and also that it was a privilege that provides additional protection for employees, that it was not a fundamental right and that furthermore this protection could only be interpreted in the context of a contract-based relationship, and not in a public service relationship which is governed by law.

The Court addressed the question from the point of view of the constitutional right to hold public office: the legislature enjoys a wide margin of discretion to regulate the grounds for

release from public office, but this margin does not grant unlimited power. The absence of grounds for dismissal endangered party neutrality and independence from political influence. Furthermore, dismissal from public office without reason contradicted the right to judicial protection guaranteed under the constitution and under Article 6(1) ECHR, which the ECtHR had extended to labour disputes involving civil servants.

The Constitutional Court annulled the law, but only for the future (dismissals dating from 31 May 2011), while many cases were still pending or were about to be brought before Court.

Reference: ECtHR, 10 July 2012, *K.M.C. v. Hungary*, No. 19554/11

The decision was brought on a claim of violation of Article 6(1) of the Convention concerning the right to fair trial. The ECtHR considered that a public servant dismissed from service was in principle entitled to challenge that dismissal in court. However, since the employer was under no obligation to give any reasons for the dismissal, the ECtHR took the view that it was inconceivable for the applicant to have brought a meaningful action, for want of any known position of the respondent employer. For the ECtHR, this legal constellation amounted to depriving the impugned right of action of all substance, and therefore to a violation of Article 6(1) of the Convention.

The Court cited Article 30 of the Charter under *"applicable law."*

Reference: CJEU, 10 October 2013, *Nagy e.a.*, joined cases C-488/12, C-489/12, C-490/12, C-491/12 and C-526/12, EU:C:2013:703.

Several people challenged their dismissal before the Labour Tribunal of Debrecen because following the Constitutional Court decision all the dismissals were executed between 27 August 2010 and 10 May 2011, before the date decided by the Constitutional Court (31 May 2011) and therefore were still affected by the law. The Labour Tribunal should therefore uphold the dismissal decisions. However, it considered that a combined reading of Articles 30 and 51 of the Charter resulted in Article 30 having direct effect with regard to its applicability. The Labour Tribunal therefore stayed the proceedings and referred three preliminary questions:

1) *Can Article 30 of the Charter be interpreted in a way that it only guarantees effective remedies in the case of an illegal and unjustified dismissal?*
2) *Does Article 30 entail that the employer must communicate the reasons for dismissal in writing to the worker concerned, without which the dismissal would be unjustified?*
3) *Does the absence of a communication of the motives in itself render the decision illegal, or could the employer indicate the motives at a later stage, during an eventual litigation procedure?*

The Court invoked its manifest incompetence, as the national law was not an implementation of Union law, and the Charter was therefore not applicable.

Reference: Hungarian Supreme Court, 30 April 2014, Mfv. I. 10. 083/2014/5

A plaintiff brought the case before the regional Labour Tribunal, which dismissed the case. On appeal, the regional court considered that even if the law on the status of public servants (which had been quashed at that point) did not impose a duty of motivation, the Labour Code did. Furthermore, the Regional Court considered that the law on the status of public servants was in breach of Articles 30 and 47 of the Charter.

The Supreme Court overruled the decision of the Regional Court. Based on the decision of the Court of Justice, the Charter was not applicable in this case since there was no implementation of EU law. Furthermore, the Court of Appeal entirely ignored the fact that the Constitutional Court had already quashed the law, referencing the Charter, and that the case at hand still fell within the temporal scope of applicability of the law.

Analysis: role of the Charter and judicial dialogue

Despite the fact that the legal provision had been quashed by the Constitutional Court barely a year after its entry into force, the number of legal fora that were mobilised in this case is impressive.

The Charter played several roles before the different judicial bodies: the lower courts, the court referring to the CJEU and the regional court considered the direct applicability of Article 30 and possible breaches of the Charter by the national legislation. The former concluded that Article 30 was directly applicable through a combined reading of Articles 30 and 51 of the Charter. There are two interpretations of the direct applicability of Article 30: on the one hand, as the text of Article 30 ("*Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices*") refers to Community law and national laws and practices, there is a strong presumption that Article 30 translates a principle (this was later pointed out by Advocate General Cruz Villalón in the *Association de Médiation Sociale* case).[120] Furthermore, as Advocate General Mengozzi pointed out in *Mono Car Styling,*[121] the use of *"unjustified"* implies that not every single dismissal is covered by this provision. The situations that are covered and those that are not should be provided for by law and therefore a more specific expression of Article 30 is necessary. On the other hand, since Article 30 contains a right to protection against unjustified dismissal, and that a dismissal without any necessity of motivation (*"justification"*) is *de facto* an unfair dismissal in the tradition of most if not all Member States, it is not exaggerated to consider that Article 30 directly applies to situations of dismissal without any motivation.

The Court of Justice and the Supreme Court disregarded the Charter altogether on the basis of Article 51 of the Charter, considering it did not apply since the Hungarian law did not translate

[120] Opinion of Advocate General Cruz Villalon of 18 July 2013 in *Association de médiation sociale*, C-176/12, EU:C:2014:2.
[121] Opinion of Advocate General Mengozzi of 21 January 2009 in *Mono Car Styling*, C-12/08, EU:C:2009:24.

any EU law into national law. This position was not entirely incoherent, but this explanation would have permitted a new insight into the workings of the Charter, especially since the scope of application is not limited to cases where Member States implement EU law into national law.

The Constitutional Court and the ECtHR formally cited Article 30. However, it did not substantially feed their case law or their interpretation. Regarding the judgment of the ECtHR, it is a good example of the blurred boundaries between social and civil rights in the Convention, where a non-labour-related right (in this case the right to fair trial) has a direct impact on labour provisions.

As for the Constitutional Court, it identified the Charter as a source of inspiration for the Labour Code. However, it stressed that the Labour Code, or at least the disputed provision, did not contain any fundamental constitutional right. While there was no substantive argument made on the basis of the Charter, this part of the judgment indicates that social rights had no constitutional value.

The absence of the Charter in the Constitutional Court's review lay in the construction of the relations between EU law and national Hungarian law, as the Constitutional Court could not assess the compatibility of domestic acts with the Charter.[122]

If anything, these different positions on the Charter show that there is still much confusion surrounding the role and scope of the Charter.

[122] For more detail, see A. Berkes, "Hungary," in L. Burgorgue-Larsen (ed.), *The Charter of Fundamental Rights as Apprehended by Judges in Europe* (Paris, Editions Pedone 2017), pp. 425-464.

Freedom of thought, conscience and religion in the workplace

Core issues

Is the freedom to conduct business a sufficient reason to limit the external dimension of freedom of religion, i.e. wearing religious symbols in the workplace? Can stricter rules be applied when working in the public sector? How can a stance from the point of view of anti-discrimination law play a role in these issues?

Connex cases

ECtHR, 15 January 2013, *Eweida et. al. v. UK*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10

ECtHR, 26 February 2016, *Ebrahimian v. France*, No. 64846/11

Casesheet No. 10: Achbita v. G4S Secure Solutions

References: CJEU, 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203; Belgium, Court of Cassation, BE:CASS:2017:ARR.20171009.1, 9 October 2017[123]

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial interaction technique
• Belgium	• Labour law • Non-discrimination law • Freedom of Religion • Freedom to conduct business	• Article 10 of the Charter • Article 16 of the Charter • Article 21 of the Charter • Directive 2000/78	• National Labour Court • National Supreme Court • CJEU • ECtHR (indirectly)	• Consistent Interpretation • Preliminary ruling • Cassation

Case description

a. Facts and antecedents of the case

This case concerned a Muslim woman who worked with a permanent contract as a receptionist at G4S Security Services and in April 2006, three years after her hiring, decided to wear the Islamic headscarf during working hours. She had not held any position requiring her to wear a specific uniform so far. However, a few days after she decided to wear the headscarf at work, she was informed that it would not be tolerated because it was contrary to the neutrality policy of the company. The work regulations of the company were also amended to forbid workers from wearing any visible symbol expressing their political, philosophical or religious beliefs. As she refused to remove her headscarf on the premises of the company, the Muslim employee was laid off.

[123] Casesheet drafted on the basis of the 2018 Belgian Country report on non-discrimination directives written by Prof. Emmanuelle Bribosia and Prof. Isabelle Rorive with the collaboration of Cecilia Rizcallah and on the basis of the casesheet drafted in the framework of the ACTIONES project, available at https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONESplatform.

Ms. Achbita, joined by the Belgian centre for equal opportunities and combating racism (UNIA), unsuccessfully challenged her dismissal before the Labour Court (Antwerpen) and the Higher Labour Court (in appeal). According to both labour courts, the employer could prohibit the wearing of any religious symbols by employees in order to preserve the neutral image of the company. She then challenged this decision before the Belgian Court of Cassation, which referred to the Court of Justice for a preliminary ruling. On 9 March 2015,[124] the Belgian Court first recalled the purpose of 2000/78/EC Directive (Article 1) and the prohibition on direct and indirect discrimination (Article 2). On this basis, considering that the appeal court ruled that there was no direct discrimination and that the applicants claimed that such an interpretation was not compatible with the text of the Directive, the Court of Cassation decided to suspend the proceedings and to submit the following request for a preliminary ruling to the Court of justice:

> *Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?*

On 31 May 2016, Advocate General J. Kokott delivered her conclusions. In her view, if the ban was based on a general company rule which prohibits political, philosophical and religious symbols from being worn visibly in the workplace, such a ban may be justified if it enables the employer to pursue the legitimate policy of ensuring religious and ideological neutrality. The Advocate General took the view that there was no direct discrimination on the ground of religion where an employee of Muslim faith was banned from wearing an Islamic headscarf in the workplace provided that the ban relied on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudices against one religion or against religious beliefs in general. If that were the case, there would be no less favourable treatment based on religion. The ban might constitute indirect discrimination based on religion, but might, however, be justified in order to enforce a legitimate policy of religious and ideological neutrality pursued by the employer in the company concerned in so far as the principle of proportionality is observed. According to Advocate General J. Kokott, in such a case, the proportionality test is a delicate matter. The Court of Justice should therefore grant the national authorities, in particular the national courts, a margin of appreciation to be exercised in strict accordance with EU rules. Accordingly, it was ultimately for the Belgian Court of Cassation to strike a fair balance in the present case between the conflicting interests, taking into account all the relevant circumstances of the case, in particular the size and conspicuousness of the religious symbol, the nature of Ms Achbita's activity and the context in which she had to perform her activity and also the national identity of Belgium. Indeed, in the view of Advocate General Kokott, there could be no doubt, in principle, that the ban at issue in this case was appropriate to achieve the legitimate objective

[124] Court of cassation, 9 March 2015, S.12.0062.N, www.UNIA.be/en.

pursued by G4S of ensuring religious and ideological neutrality. The ban was necessary for the purposes of implementing that company policy. Less intrusive but equally suitable alternatives to achieve the objective pursued were not identified during the proceedings before the Court. Finally, as far as proportionality in the narrow sense was concerned, in Advocate General Kokott's view, the ban at issue in the present case did not unduly prejudice the legitimate interests of the female employees concerned and must therefore be regarded as proportionate.

b. Reasoning of the Court of Justice and follow-up by the Court of Cassation

The Court of Justice rendered its judgment on 14 March 2017.[125] The CJ considered that the general ban on wearing religious, political or philosophical symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It nevertheless stressed that it could constitute indirect discrimination if it was demonstrated that people with a particular religion were more disadvantaged by this measure. If the proof of this disadvantage was noticed by the national judge, relying on the ECtHR *Eweida* case,[126] the court noted that the measure may, however, be lawful if it pursued a legitimate aim and if it was proportionate to the aim pursued. The CJ stated that a general ban on the wearing of religious symbols could be justified by the aim of a company to maintain a corporate image of neutrality as it related to the freedom of the company to conduct a business (Art. 16 of the EU Charter). However, contrary to what the ECtHR decided, the CJ considered that such a blanket ban could be proportionate if it only applied to employees in contact with clients and provided that in the case at stake the employer tried to offer the employee another position where she would not be in contact with clients.

Based on the decision of the CJ, in a ruling on 9 October 2017 the Belgian Court of Cassation[127] overturned the decision of the Labour Court of Antwerp of 9 March 2015. It followed the interpretation of the CJ as to the absence of any direct discrimination in the case at hand. However, the Court of Cassation considered that there could be an abuse of the right to dismiss (and indirect discrimination) even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. It underlined that, in principle, an employer could not be held liable, according to Belgian law, for an abuse of the right to dismiss employees when the employer was not able to foresee that the dismissal was unlawful. However, Directive 2000/78, as construed by the CJEU in its former case law (including the case law on equality between women and men), entailed, according to the Court of Cassation, a liability of employers committing discrimination even in the absence of a fault and even if the wrongful conduct had been committed unknowingly. Therefore, the Court of Cassation considered that the recognition of liability of the employer for a breach of anti-discrimination rules could not be

[125] Judgment of the Court of justice of 14 March 2017, *Achbita*, C-157/15, EU:C:2017:203.
[126] This case concerned a woman who was told by her employer to cover her crucifix while at work. The ECtHR considered that the right to manifest religion was not absolute. However, the restrictive measure should be proportionate. In this case, the ECtHR considered that a fair balance between Eweida's religious beliefs and the company's desire to have a particular corporate image had not been reached.
[127] Decision of the Court of Cassation, 9 October 2017, S 12.062.N1, available at: https://www.unia.be/files/Hof_van_Cassatie_Achbita.pdf

made conditional on evidence brought by the victim of the discrimination that a fault had been committed. Hence, the Labour Court's decision was unlawful to the extent that it considered that the employer could not be held liable for the breach of the anti-discrimination rules since it could not reasonably foresee that the dismissal was unlawful because of the uncertainty of the case law on the issue and because the employee had not provided sufficient evidence of the existence of a fault. The case was referred to the Labour Court of Ghent, which was only bound by law to follow the ruling of the Court of Cassation (there is no *stare decisis* doctrine in Belgium). It is pending at the time of writing this handbook.

Analysis: role of the Charter and judicial dialogue

While this case gravitated around the interpretation of Directive 2000/78, which is a more specific expression of Article 21 of the Charter, and its relation to Article 16 of the Charter, neither the CJ nor the Court of Cassation referred to Article 21. The CJ did, however, refer to Art. 16 of the Charter and the freedom to conduct business.

The CJ relied on *Eweida* to decide that a blanket ban on religious symbols could be justified for the sake of corporate image. However, while it is true that the ECtHR did consider that the right to religion can be restricted and that a fair balance of interests must be struck, it decided that banning religious symbols in the name of a corporate image was *not* striking a fair balance in the context of the *Eweida* case. It is somewhat strange that the CJ cited this case law to support an opposite solution.

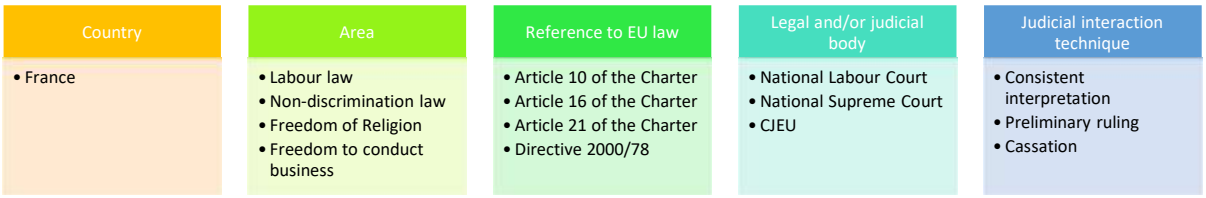
The Belgian Court of Cassation followed the CJ in its reasoning that there was no direct discrimination. It is interesting to note that the written company regulations were only modified *after* Ms. Achbita decided to wear the Islamic headscarf at work. This element was not mentioned in A.G. Kokott's Opinion or in the decision of the Court, but it was present in the recitals preceding the legal analysis. Since the Court of Cassation can only rule on law and not on fact, it is not strange that that element, which was purely factual, was not debated. The question remains whether the Ghent Labour Court will take it into account.

An element that can be criticized, however, is the approach toward the argument of indirect discrimination, which was only examined under the angle of the liability of the employer, without ever addressing the proportionality review proposed by the Court of Justice, which relied on *Eweida* while simultaneously supporting the opposite solution. This was probably a strategic move by the Court of Cassation. The issue should be discussed in the pending judgment before the Ghent Labour Court.

Casesheet No. 11: Bougnaoui v. Micropole SA

Reference: CJEU, 14 March 2017, *Bougnaoui and ADDH v. Micropole SA*, C-188/15, EU:C:2017:204; France, Court of Cassation – social division, FR:CCASS:2017:SO02484, 22 November 2017[128]

At a glance



Case description

a. Facts and antecedents of the case

Ms. Asma Bougnaoui was employed as a design engineer by Micropole SA, a company described as specialising in advice, engineering and specialised training for the development and integration of decision-making solutions. Her contract of employment with Micropole started on 15 July 2008.

On 15 June 2009, she was called to an interview preliminary to possible dismissal and she was subsequently dismissed by letter on 22 June 2009. The reason for her dismissal was that a company client had complained about Ms. Bougnaoui wearing the Islamic veil and she had been told beforehand that she would not be able to wear it under all circumstances. Furthermore, Micropole decided that her failure to work during the notice period was attributable to her and she was therefore not remunerated for the notice period. In November 2009, Ms. Bougnaoui challenged the decision to dismiss her before the *Conseil de prud'hommes* (labour tribunal), Paris claiming that it was a discriminatory act based on her religious beliefs. The *Association de défense des droits de l'homme* (Association for the protection of human rights – ADDH) intervened in the proceedings. In a judgment on 4 May 2011, the tribunal held the dismissal to be well-founded on the basis of a genuine and serious reason, ordered Micropole to pay Ms. Bougnaoui the sum of EUR 8,378.78 by way of compensation in respect of her notice period and rejected her other claims on the merits.

On appeal, the *Cour d'appel de Paris* (Court of Appeal, Paris) upheld the judgment of the Labour Tribunal on 18 April 2013.

[128] Casesheet drafted on the basis of analyses provided by Law and Religion UK, available at http://www.lawandreligionuk.com/2017/11/22/religious-dress-bougnaoui-in-the-french-cour-de-cassation/ and on the basis of the casesheet drafted in the framework of the ACTIONES project, available at https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONESplatform

Ms. Bougnaoui brought an appeal against that judgment before the Court of Cassation, which referred the following question to the Court of justice:

> *Must Article 4(1) [of Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?*

In her Opinion, Advocate General Sharpston considered that since the manifestation of belief is inherently linked to the freedom of religion, and since Ms. Bougnaoui had been sacked because she wore the Islamic veil, she had been treated less favourably because of her religion and the dismissal therefore amounted to direct discrimination. She further considered that the wish of a client to not see the Islamic veil could in no way be considered a genuine and determining occupational requirement. While she considered the case at hand to amount to direct discrimination, the Advocate General also developed an argument based on indirect discrimination, were the Court to disagree with her first assessment. In that case, she believed that a neutrality agreement in the company amounted to indirect discrimination, as workers who want to stay true to their faith have no choice but to infringe the company rule and face the consequences. The rule could, however, be justified if it pursued a legitimate aim and was proportionate.

b. Reasoning of the Court of Justice and follow-up by the Court of Cassation

Based on Directive 2000/78 and its former case law, the Court of Justice decided that the wish of a client not to see a religious symbol could *not* be considered a genuine and determining occupational requirement. First, it could not on the ground on which the difference in treatment was based but a characteristic related to that ground. Second, it was only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement. Finally, such a characteristic may constitute such a requirement only "*by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out."*[129] The Court of Justice left it up to the Court of Cassation to decide whether there was direct or indirect discrimination in this case, since this could not clearly be deduced from the facts.

Based on the judgment of the Court of Justice, the French Court of Cassation held that an employer might provide in the rules of the company or in a memorandum subject to the same provisions as the rules (pursuant to Article L 1321-5 of the *Code du Travail*) a neutrality clause prohibiting staff from wearing political, philosophical or religious signs or symbols in the workplace, since such a general clause would be undifferentiated and only applied to employees in contact with customers. Based on the judgment of the Court of Justice in *Achbita*,

[129] CJEU, 14 March 2017, *Bougnaoui and ADDH v. Micropole SA*, C-188/15, EU:C:2017:204, para. 40.

the Court of Cassation stated that where an employee refused to comply with such a clause in the exercise of her professional activities with the company's customers it was for the employer to decide whether, taking into account the constraints inherent in the company and without the company having to suffer an additional load, it was possible to propose that the employee's work assignment should not involve visual contact with customers rather than proceeding to her dismissal.

In casu, the company's internal rules did not include any neutrality clause prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, neither was such a rule set out in a memorandum subject to the same provisions as the rules of procedure pursuant to Article L 1321-5 of the *Code du travail*. The prohibition on Ms. Bougnaoui wearing the Islamic headscarf in her contacts with customers was merely an oral instruction given to an employee and aimed at a particular religious sign, which therefore amounted to an act of discrimination directly based on her religious convictions.

Analysis: role of the Charter and judicial dialogue

In its last decision, the Court of Cassation did not refer to the Charter, but in the entire cluster of cases the Charter naturally played an important role. The cases gravitated around the interpretation of Directive 2000/78, which is a more specific expression of Article 21 of the Charter and its relation to Article 16 of the Charter.

The Court of Cassation followed the reasoning of Advocate General Sharpston, albeit in a more casuistic way. The Court of Cassation came to the conclusion of direct discrimination on the basis of the absence of any neutrality clause rather than on the basis of the fact that Ms. Bougnaoui had been dismissed because of her religion. While the outcome was favourable, this left the door open for disguised discriminatory sanctions. While following the reasoning of A.G. Sharpston, the Court of Cassation did not cite the *Eweida* case law, which was cited extensively in the Opinion.

Casesheet No. 12: Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV

Reference: CJEU, 17 April 2018, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, EU:C:2018:257.[130]

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial interaction technique
• Germany	• Labour law • Non-discrimination law • Freedom of religion	• Article 10 of the Charter • Article 21 of the Charter • Directive 2000/78	• National Labour Court • CJEU	• Preliminary ruling

Case description

a. Facts and antecedents of the case

Ms. Egenberger had applied for a post with the *Evangelisches Werk für Diakonie und Entwicklung*, a private employer which is part of the Protestant Church in Germany. The job was to prepare a report on combatting racial discrimination. In addition to details about the post, the job description stated "*We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and identification with the diaconal mission. Please state your church membership in your curriculum vitae.*"
Ms. Egenberger was of no denomination. Although she was shortlisted, she was not invited to interview and the job was eventually offered to a candidate who was a "Protestant Christian active in the Berlin regional church." She brought a case before the German courts seeking compensation for unlawful discrimination on grounds of religion.

The German Court was unsure about the interpretation of Article 4(2) of Directive 2000/78, which allows for a limited exception to be made to the principle of non-discrimination for churches and other public or private organisations the ethos of which is based on religion or belief. The Court referred three questions to the CJEU:

> *(1) Is Article 4(2) of Directive [2000/78] to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos?*
> *(2) If the answer to Question 1 is in the negative:*
> *In a case such as the present, is it necessary to disapply a provision of national law – such as, in this case, the first alternative of Paragraph 9(1) of the AGG – which provides*

[130] Casesheet drafted on the basis of

that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations affiliated to them is also lawful where a particular religion, in accordance with the self-perception of the religious community, having regard to its right of self-determination, constitutes a justified occupational requirement?
(3) If the answer to Question 1 is in the negative:
What requirements are there as regards the nature of the activity or the context in which it is carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive [2000/78]?

The Church did not dispute that the rejection of Ms. Egenberger's application was on the ground that she was of no denomination.

b. Reasoning of the Court of Justice

Regarding the first question, the Court recalled the rationale of Directive 2000/78. The aim of the directive was to lay down a general framework for combating discrimination in the employment field. Member States must provide procedures to enforce the obligations in the Directive. The Directive is a specific expression of the general prohibition on discrimination laid down in Article 21 of the Charter. It was true that the directive also provides, in Art. 4(2), for a right of autonomy of churches and other organisations whose ethos is based on religion or belief, and these churches and organisations can lay down occupational requirements related to that belief. The directive thus balanced the right of autonomy of churches and other organisations whose ethos is based on belief or religion on the one hand, and the right of workers to not be discriminated against, on the other hand. Therefore, the review of compliance with the criteria for occupational requirements must be carried out by an independent authority such as national courts, and not the organisation itself. This was to make sure that the rationale of the directive is respected, as well as Article 47 of the Charter, which lays down the right of individuals to effective judicial protection of their rights under EU law.

The Court then answered the third question, saying that Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, the nature of the occupational activity concerned and the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.

Finally, the Court answered the second question, which related to the disapplication of national law where it is not consistent with the Directive. In this regard, the Court first recalled its well-established case law on the necessity of consistent interpretation. Then, the Court recalled its *obiter dictum* in *Association de Médiation Sociale* (see *supra*, part I, Chapter 2). The prohibition of all discrimination on grounds of religion or belief is mandatory as a general

principle of EU law. This prohibition, which is laid down in Article 21(1) of the Charter, was sufficient in itself to confer on individuals a right which they may rely on in disputes between them in a field covered by EU law. Furthermore, Article 21 of the Charter was sufficient in itself and did not need to be made more specific by provisions of EU law. Therefore, to guarantee respect for Article 21, national courts must disapply any contrary national legislation.

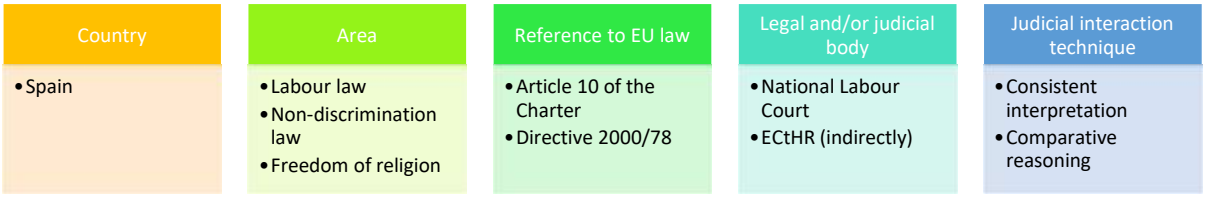
Analysis: role of the Charter and judicial dialogue

Other than its clarification of Article 4(2) of Directive 2000/78, this case also has a very important merit regarding Article 21 of the Charter. While the outcome is no surprise and in line with *Mangold* and *Kücükdeveci* (see above), the Court cleared up the role of Article 21, and said that it is the Article itself that has direct effect. This made it no longer necessary to refer to the ambiguous formulation of the two former judgments in which the Court considered that it was a general principle of EU law that the right to non-discrimination has direct effect. The Court did not entirely erase this formula from its reasoning but it is now clear that Article 21 in itself does not need a more specific expression in EU law and confers rights on individuals on which they can rely.

Casesheet No. 13: Daniela v. Acciona Airport Services

Reference: Spain, Labour Court of Palma de Mallorca, ES:JSO:2017:2, 6 February 2017[131]

At a glance



Case description

a. Facts

Ms. Daniela, a worker in the *Acciona Airport Services* company at Palma de Mallorca airport, informed the company of her intention to wear the Islamic headscarf (hijab). Provisionally, she was allowed to do so, but afterwards she was told that she had to respect the mandatory dress code and that the hijab was prohibited. The main reason offered by the company was the need to preserve the corporate image. Nonetheless, the worker decided to continue to wear the hijab and as a consequence she was financially sanctioned on seven occasions, each time with an increasing degree of severity. Since conciliation attempts failed, she filed a judicial complaint before the Labour Court of Palma de Mallorca.

b. Reasoning of the Court

The Labour Court examined whether the sanctions were in breach of the right to religious freedom. The Court referred to Directive 2000/78 and the concepts of direct and indirect discrimination. The Spanish Court observed that discrimination on religious grounds is *"classically*" prohibited in several international treaties and it quoted Article 18 of the Universal Declaration of Human Rights, Article 9 of the ECHR and Article 10 of the EU Charter. The Labour Court finally referred to the Spanish Constitution and the constitutional case law to confirm that the wearing of a hijab constitutes an external dimension of the right to religious freedom.

The Labour Court recalled that according to Article 4 of Directive 2000/78 a difference in treatment shall not constitute discrimination where

> *by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and*

[131] Casesheet drafted on the basis of a template provided by Aida Torres Pérez, member of the working group.

determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Nonetheless, the Labour Court argued that the company did not have any internal policy of neutrality or a rule banning religious symbols at work. In addition, the company had not proven that the use of the hijab had caused any damage to its corporate image.

The Labour Court argued that religious freedom may only be restricted according to the law, and that any restriction should be necessary in a democratic society. The Labour Court relied heavily on the ECtHR *Eweida* case in which the court concluded that by prohibiting a worker from wearing a crucifix, British Airways was in breach of Article 9 ECHR.

Finally, the Labour Court proceeded to balance the right to religious freedom and the interest of the company in its corporate image, taking into account the circumstances of the case. The Labour Court held that the company did not have any policy of religious neutrality and that the reason for banning the hijab was merely aesthetic. Moreover, the company had not alleged or proven how the use of the hijab might undermine its corporate image, and there was no rule against it. For all these reasons, the Labour Court concluded that the prohibition on using the hijab and the sanctions imposed constituted discrimination on religious grounds.

Analysis: role of the Charter and judicial dialogue

Despite this being a single decision, the role the Charter did (and did not) play and the judicial dialogue in this case are very interesting.

Regarding the Charter, the Labour Court referred to Article 10 as the basis for the prohibition of discrimination on religious grounds. However, Article 10 focuses on freedom of thought, conscience and religion, whereas Article 21 enshrines the prohibition of discrimination, including on grounds of religion. The absence of Article 21 (or of Article 14 of the ECHR for that matter) in the reasoning of the Labour Court is quite astounding, as it insisted on the presence of discrimination. Furthermore, the CJEU has considered that the principle of non-discrimination contained in Article 21 of the Charter is a general principle of EU law applicable in horizontal disputes between private parties (see part I, section III.B). Since the Labour Court relied on Directive 2000/78, which is a more general expression of the principle contained in the Charter, it would seem natural to invoke Article 21.

Regarding the judicial dialogue, the Labour Court relied heavily on case law, both national and from the ECtHR, namely the *Eweida* case. What is striking is that the Court copied substantial parts of *Eweida* in its decision, including the part where the ECtHR deemed it unnecessary to examine a violation of the combination of Articles 9 and 14, as there was already a violation of Article 9 in itself. This clearly indicates that the sanctions Ms. Daniela faced were first and foremost dealt with as a violation of the freedom of religion rather than as a violation of the prohibition of discrimination.

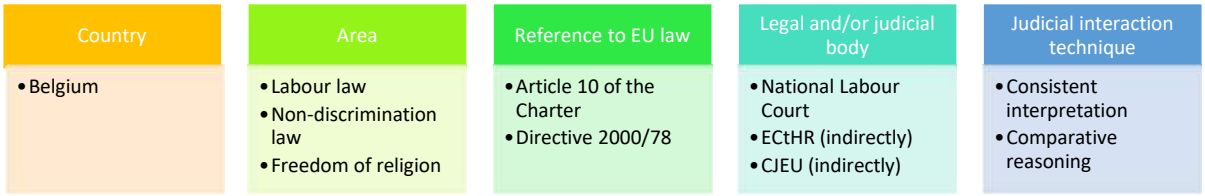
Conspicuously absent from the judgment of the Labour Court is a reference to the Opinions of Advocates General Kokott and Sharpston in the *Achbita* and *Bougnaoui* cases respectively, pending before the Court of Justice (see casesheets No. 10 and No. 11). Even if the final judgment of the Court of Justice was delivered a month after the Spanish judgment, it is interesting to note the Spanish Court made no reference to them, as these were the first cases concerning the Islamic headscarf at the level of the CJEU. The Opinions of the two A.G.s were diametrically opposed, so the Labour Court could have been inspired by at least one of them, especially since Advocate General Sharpston in the *Bougnaoui* case extensively cited and relied on *Eweida* favourably to the worker. It is also possible that, given these opposing views, the Spanish Court did not feel comfortable citing either Opinion as it could not be determined what the outcome would be before the Court of Justice.

The extensive citation of both the Charter and the ECHR possibly found its source in Article 10(2) of the Spanish Constitution, which expressly provides that fundamental rights should be interpreted in the light of international treaties. The findings may also indicate, however, that national courts are still wary about relying exclusively on EU sources to deal with fundamental rights matters. An integrated approach to human rights is naturally always preferred.

Casesheet No. 14: G. and A. v. asbl PSE

Reference: Belgium, Labour Tribunal of Brussels ruling in summary proceedings, BE:TTBRL:2016:15/7170/A, 9 June 2016

At a glance



Case description

a. Facts

A. and G. had been employed since 2007 and 2008 by PSE. PSE is a non-profit organisation that promotes good health in schools. It employs nurses who follow up on the medical files of students, do screenings for STDs and generally implement programmes that promote a healthy school environment. It has agreements with both state and catholic schools, among which some prohibit their members of staff from wearing any philosophical or religious symbols.

When A. and G. were employed, they were told they could not wear the Islamic veil. Until 2014, they complied with this rule. During the summer of 2014, they asked if it would be possible to occupy purely administrative positions rather than medical positions in order to be able to wear their veils. This request was denied during a staff meeting which raised much tension. Both became unable to work in September 2014.

A. and G. were incapable of working until June 2015. In December 2014, the remaining staff complained about the lack of staff. However, none of them wanted A. and G. to return because their attitude had caused much stress and had required the intervention of a psychologist to follow up with the remaining staff members.

During their incapacity, A. and G. had several exchanges intermediated by their representatives and the former Interfederal centre for equality and fight against racism (now UNIA) but PSE would not budge. In June 2015, PSE displayed new work regulations in the office with an express prohibition on wearing any ostentatious philosophical, political or religious apparel, since regular contact with minors imposed a duty of neutrality.

At the end of their incapacity, the counsels for A. and G. informed PSE that their clients would be returning to work with their veils, and if they were not allowed to work matters would go to court. When they arrived at work they were denied access. Based on the federal Belgian anti-discrimination law of 10 May 2007, which provides a special anti-discrimination procedure by

means of summary proceedings, A. and G. introduced a request for preliminary consideration before the Brussels Labour Tribunal.

b. Reasoning of the Tribunal

A. and G. considered they were victims of direct and indirect discrimination, which was prohibited by several international obligations. PSE considered there was no discrimination as the prohibition on wearing religious apparel was justified by its duty of neutrality *vis-à-vis* children and by the risk of losing its subsidies.

The tribunal first analysed the governing principles. It considered that the anti-discrimination law, which covers discrimination on grounds of religion, should be assessed in the light of Directive 2000/78, of which the law is a transposition, the case law of the CJEU, and what had inspired the European legislator – the ECHR. The tribunal then extensively cited the *Ebrahimian v. France* case, in which an employee working in a public hospital was forbidden to wear her Islamic veil. The ECtHR upheld the ban on the basis of the large margin of appreciation of the Member States and the possibility for Member States to elevate secularism (*principe de laïcité*) to the constitutional level.

The Tribunal also considered the neutrality principle in Belgium, which finds its main application in education, and recalled that the Belgian Constitutional Court and Council of State had considered the application of neutrality in education (i.e. the prohibition on wearing religious or philosophical apparel in schools) to be justified and proportionate. Furthermore, the Tribunal compared it to the French *principe de laïcité* and considered that the case law of the ECtHR was applicable in Belgium too.

The tribunal also invoked the *Acbhita* and *Bougnaoui* cases, in the former of which A.G. Kokott had already issued her Opinion considering that the prohibition of the Islamic veil does not amount to direct discrimination (see casesheets Nos. 10 and 11). However, the judge added that there was a factual distinction to be made as PSE was charged with a public mission.

When applying the principles to the case, the tribunal first considered there was no direct discrimination as the prohibition on wearing religious and philosophical apparel applied indistinctly to any kind of garment, whether it be an Islamic veil, a kippa, a turban or a big crucifix.

When considering whether there was indirect discrimination, the tribunal considered that the prohibition was justified: the principle of neutrality was provided for by law in educational decrees. Even if PSE was not a school, it was in close contact with schools and students. Furthermore, the tribunal considered there was a risk that students and teens are a vulnerable target group and can be influenced by nurses if they wear religious symbols, or on the other hand could be afraid to confide in the nurses for fear of being judged. The parents of the children could have problems with religious symbols too.

Even if this first argument was enough to justify the prohibition, the tribunal pointed out that losing subsidies was a real risk for PSE. It would be impossible to pick and choose schools to work with based on the dress code of the school or the choice of nurses, since these can change over time.

Finally, considering the request to change positions, the tribunal considered that all the nurses have similar tasks and it would be unreasonable to ask the PSE to only attribute administrative tasks to people who would like to manifest their religion while paying them as nurses, since this would be discriminatory. The Tribunal rejected the request.

Analysis: role of the Charter and judicial dialogue

The Tribunal deceptively little mobilised the Charter, despite this being a textbook case of Article 21 of the Charter and Directive 2000/78. The Directive was also very little mobilised, with the Tribunal focusing primarily on the case law of the ECtHR.

Several criticisms can be formulated. First, the tribunal did not take into account that the work regulations only dated from June 2015, disregarding the fact that before that only an oral order was given to A. and G. that they could not wear their Islamic veils. Since the displaying of the regulation coincided with the reinstatement of both workers, it can easily be deduced that the regulations were specifically targeting A. and G.

Furthermore, regarding the request to change positions, the Tribunal gave no explanation whatsoever as to why it would be unreasonable. This would have been an excellent application of the principle of reasonable accommodation outside the scope of people with disabilities. It is nowhere stated that the applicants wanted to keep their status as nurses and keep the same remuneration. It is furthermore also a key element in the proportionality test: are there alternative measures that are less detrimental to the rights of the persons involved?

While the decision in itself is not unusual in the Belgian social and legal context, certain factual elements reveal a barely concealed racial prejudice: the Tribunal did not address the outrageous statements made by the colleagues of the applicants, who essentially did not want them to return because they wanted to wear the Islamic veil. This element had nothing to do with the mission of the PSE but was underlined several times in the facts of the case and in the application of the principles by the tribunal. Furthermore, the tribunal considered with very little evidence (in its own words, "*scientific research is not needed*") on the impact of religious symbols on children and teens, and considered it a non-negligible risk that teens would no longer want to talk about delicate subjects (such as intercourse, unwanted pregnancy, depression or bullying) if someone wears a veil. While this might be true, the judge presented it as a fact and considered therefore that such issues cannot be discussed within the Muslim community, furthering prejudice and stereotypes against the latter.

Finally, in none of the cases regarding the Islamic veil discussed here was the issue of discrimination on grounds of gender raised. Bans on the Islamic veil are, however, textbook

cases of intersectional discrimination, i.e. discrimination that can only be fully understood and appreciated when analysing more than one ground for discrimination. In this case, the Islamic veil concerns two grounds for discrimination: religion and gender. Men of the Islamic confession do not face this kind of discrimination. Article 23 of the Charter, on equality between men and women, could certainly have played a role here. However, neither the Directive nor the Belgian legislation implementing it recognise intersectional discrimination.

Protection of social rights in times of financial crisis

Core issues

Are human rights instruments effective in preserving social rights against the consequences of austerity policies in the framework of the financial crisis? Which forum is the most appropriate to address claims related to social reforms?

Connex cases

ECtHR, 12 October 2004, *Kjarta Asmundsson v. Iceland*, No. 60669/00

CJEU, 20 September 2016, *Ledra Advertising Ltd. v. Commission and ECB*, C-8/15 P, EU:C:2016:701

Casesheet No. 15: Florescu

Reference: CJEU, 13 June 2017, *Florescu e.a.*, C-258/14, EU:C:2017:448.

At a glance

Case description

a. Facts and antecedents of the case

Ms. Florescu and two others were members of the Romanian judiciary and also professors in a law faculty. After 30 years of service, they claimed their pension entitlements for their roles in the judiciary on the basis of a law of 2004 allowing a combination of retirement pensions and income derived from their teaching activity. A new 2009 law, however, prohibited this combination. The three applicants therefore decided to suspend the payment of their retirement pensions, which happened from 1 January 2010. The Constitutional Court declared the law to be compatible since certain holders of office and the members of the highest courts (Constitutional Court, Court of Cassation, etc), whose roles are laid down in the Constitution, are excluded from the prohibition. In March 2010, the applicants brought an action before the Sibiu Regional Court for the annulment of the decision to suspend their pensions and for an order that they should be paid their pensions from January 2010. They argued that the rules on the combination of pension and employment incomes were contrary to EU law, namely the Charter, since the law was adopted in order to comply with the Memorandum of Understanding (MoU) between the troika (Commission, ECB and IMF) and Romania. The action was dismissed, as was the appeal. However, the applicants asked for a revision of the judgment of

the court of appeal and for a request for a preliminary ruling to be referred to the Court of justice. The referring Romanian Court, the Sibiu Regional Court, asked 10 questions.

b. Reasoning of the Court

In its first question, the referring court asked in essence whether the MoU was an act of an EU institution in the sense of Article 267 TFEU, which may therefore be subject to interpretation by the Court of Justice. The Court first noted that the MoU was based on Article 143 TFEU, which gives the Union the power to grant mutual assistance to a Member State whose currency is not the euro and which faces difficulties or is seriously threatened with difficulties as regards its balance of payments. Regulation 332/2002 establishes the procedures applicable to the mutual assistance facility provided for in Article 143 TFEU, which provides that the Commission and the Member State conclude a MoU setting out in detail the conditions laid down by the Council. The Court therefore considered that the MoU was an act of an EU institution since its legal basis lay in provisions of EU law and it was concluded by the EU, represented by the Commission.

In its second to fourth questions, the referring court asked whether the MoU should be interpreted as requiring the adoption of national legislation that prohibits combining retirement pensions with employment income if the amount exceeds the national gross average salary. The Court considered that the MoU is mandatory and that it states that the pension system must be reformed but that it does not contain any specific provisions on adopting legislation such as that *in casu*.

In its sixth, seventh, ninth and tenth questions, the referring court inquired about the compatibility of the national legislation at hand with Article 6 TEU and Article 17 of the EU Charter (right to peaceful enjoyment of property). The Court started by recalling the scope of the Charter, which is limited to Member States when they are implementing Union law. The Court then departed from its former stance on national legislation implementing a MoU and considered that the 2009 law was an implementation of Union law since it was adopted to comply with the commitments Romania made to the European Union.

As for the question of whether Article 17 was respected, the Court recalled Article 52(3) saying that Article 1 of Protocol No. 1 to the ECHR must also be taken into account. Based on the case law of the ECtHR, the Court proceeded to a classic proportionality test. First of all, the 2009 reform did not call into question the very principle of the right to a pension, but restricted its exercise in defined and limited circumstances for a limited period of time. Second, the law pursued the aim of healthy public finances. Finally, regarding the suitability and the necessity of the national legislation, the Court recalled that given the particular economic context, Member States have a large margin of appreciation when adopting economic decisions. The law did not impose a disproportionate burden on the persons concerned. The law was compatible with Article 17 of the Charter.

Finally, in its eighth question, the referring court asked whether Directive 2000/78 precluded legislation that differentiates between professional judges and judges whose term is laid down in the Constitution. The Court recalled an earlier judgment based on the same provisions: the grounds of discrimination which are listed exhaustively in the Directive do not cover discrimination on the ground of professional category or place of work. The Directive therefore did not apply to the national legislation.

Analysis: role of the Charter and judicial dialogue

In this case, the Court of Justice for the first time assessed domestic legislation implementing a MoU in the framework of the crisis against the Charter.[132] This was a major step forward as several others had tried to do this (regarding Greek, Portuguese and other Romanian laws) but the Court had systematically invoked its lack of competence. While the Court now accepted to test national legislation against the Charter, it had yet to conclude a violation of the right to peaceful enjoyment of property in the context of the crisis. The Court accorded a very large margin of appreciation in matters of economic and financial policy and therefore considered that the national reforms pursued a legitimate aim and were proportionate. Given the very large margin of appreciation, it was difficult to prove a manifest error of appreciation.

The Court relied on the case law of the ECtHR in the matter of Article 1 of Protocol 1 to the ECHR in order to consider that pensions can be considered property. While this was a clear example of the fact the ECHR also covers social rights, it was rather non-sensical to do this for the Charter since it already had articles dedicated to social security and old-age benefits. This is linked to the difficulty in claiming and the lack of enforceability of the social rights and principles in the Charter, and many claimants challenging national reforms therefore rely on the right to peaceful enjoyment of property contained in Article 17 rather than the social provisions, such as the right to social security or the right to fair and just working conditions, which are a more appropriate lens through which to assess social reforms.

Finally, Directive 2000/78 was indeed based on a closed list. However, articles 20 and 21 of the Charter, translating the general principles of equality, are not based on a such a closed list, and could have been mobilised to appreciate this discrimination.

[132] It should be noted that this MoU was not elaborated in the framework of the MES but in the framework of the existing legal instruments for financial aid for Member States which are not part of the eurozone.

Casesheet No. 16: Koufaki and ADEDY

Reference: ECtHR, 7 May 2013, *Koufaki and ADEDY v. Greece*, nos. 57665/12 and 57657/12.

At a glance

Case description

a. Facts and antecedents of the case

In 2010, the Greek Government adopted a series of austerity measures, including reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, with a view to reducing public spending in order to limit the effects of the financial crisis. In July 2010, the applicants took the matter before the Supreme Administrative Court. The first applicant disputed the indiscriminate 20% pay cut Greek law reforms had imposed on all civil servants on top of cuts in holiday bonuses, alleging a drastic fall in her standard of living. The second applicant, the Public Service Trade Union Confederation (ADEDY), sought judicial review because of the detrimental effect of the measures on the financial situation of its members: an indiscriminate cut did not take into account the lowest ranked and therefore the most vulnerable civil servants. On 20 February 2012, the Supreme Administrative Court rejected the applications.

The applicants took the matters to the ECtHR, relying on Article 1 of Protocol No. 1 to the ECHR. ADEDY also alleged violations of Articles 6(1), 8, 13, 14 and 17 ECHR. The applicants considered in particular that the proportionality principle had not been respected, as the legislature had not examined whether the impact would be temporary or permanent, whether the scope and duration of the restrictions imposed were compatible with the aim pursued and whether they were accompanied by compensatory measures (for instance, a reduction in direct or indirect taxation and in the price of basic essentials).

b. The reasoning of the Court

The Court started by recalling that state parties to the Convention enjoy quite a wide margin of appreciation in regulating their social policy. National authorities are better placed than international courts to choose the most appropriate means of achieving state expenditure balance, especially since this exercise involves consideration of political, economic and social issues. Any interference by a public authority in Article 1 of Protocol No. 1, which also applies to salaries and welfare benefits, should be lawful, pursue a legitimate aim and be reasonably proportionate. The Court noted on this account that Article 1 of Protocol No. 1 cannot be

interpreted as giving an individual a right to a pension of a particular amount. The Court noted first that the interference was provided for by law. Second, the adoption of the reforms pursued the legitimate aim of public interest, given the exceptional crisis without precedent in recent Greek history, the wide programme of structural reforms the disputed law was part of, and the extensive notion of public interest and the large margin of appreciation of states. Finally, on the proportionality of the measures, the Court attached great weight to the reasons for dismissal given by the Supreme Administrative Court: the fact that the cuts in wages and pensions were not merely temporary was justified, since the legislature's aim had been not only to remedy the acute budgetary crisis at that time but also to consolidate the State's finances on a lasting basis. Furthermore, the applicants' situation had not worsened to the extent that they risked falling below the subsistence threshold. Finally, the fact that alternative solutions possibly exist does not render the contested legislation unjustified, provided that the legislature remains within the bounds of its margin of appreciation.

The Court considered that the complaint concerning Article 1 of Protocol No. 1 was manifestly ill-founded and must be dismissed.

Analysis: role of the Charter and judicial dialogue

Seeing as this was only a decision on admissibility and not a proper judgment, there was a certain lack of nuance and space to allow for a comparative analysis. The EU Charter was not mentioned, neither was the European Social Charter. While comprising salaries and welfare benefits in the scope of Article 1 of Protocol No. 1 is an important feat of applying the Convention to social rights, this decision of inadmissibility was wholly unsatisfying: the depth, scale and consequences of the Greek social reforms were at this point very mediatised. The European Committee of Social Rights had already condemned Greece for violating the right to social security (see casesheet 16). The risk of violating Article 1 of Protocol No. 1 was therefore not *manifestly* ill-founded. Even if it were, the claimants were clearly not the part of the population that were worst off. It would have been more politically courageous to allow an in-depth analysis of the situation, be it considering that there was no violation of Article 1 of Protocol 1. This also proved once more (see part I, section II.E), that the right to property is not an adequate lens through which to assess respect for social rights.

Casesheet No. 17: IKA-ETAM v. Greece

Reference: ECSR, 7 December 2012, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, No. 76/2012

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial interaction technique
•Greece	•Social security	•Decision 2010/320 (indirectly)	•European Committee of Social Rights	•Proportionality • Comparative reasoning

Case description

a. Facts and antecedents of the case

In order to receive financial aid from the EU and the International Monetary Fund (IMF), Greece had to implement a series of labour, social security and fiscal reforms. Several trade unions submitted collective complaints to the European Committee of Social Rights (CoE) claiming a violation of the right to fair remuneration, the right to safe working conditions and the right to social security. We will discuss the latter, as there were five regrouped cases on a violation of the right to social security.

In this specific case, the complainant trade union invoked a breach of Article 12, the right to social security, due to a number of modifications made to both public and private pensions. The Government counter-argued that the modifications were democratically approved, that they were necessary for the protection of public interest and that the most vulnerable social groups had been protected. The Government also considered that in any case the modifications resulted from the MoU with the EU and IMF (the troika) and the international obligation this MoU entailed.

b. Reasoning of the Committee

The Committee first considered the assessment of the situation by other international and national bodies, such as the Committee of Ministers of the Council of Europe and the ILO. The Committee also took stock of the case law of the ECtHR on the matter, which analysed the right to social security through a right to property lens.

In its introductory remarks the Committee addressed the government's argument on its international obligations towards the troika. Even if the legislation sought to fulfil other international obligations, that would not subtract it from the scope of the Social Charter. State parties should take full account of the Social Charter when agreeing on other binding measures.

On the crux of the matter, the Committee recalled that reductions in benefits do not automatically constitute a violation of Article 12. Restrictions are compatible with the Charter if they appear necessary to ensure the maintenance of a given system of social security and do not prevent members of society from continuing to enjoy effective protection against social and economic risks. However, even if it is impossible to maintain the level of social security as it is, the level should at least be satisfactory, taking into account the rights and expectations of the beneficiaries.

In order to assess compatibility with the European Social Charter, several criteria had to be taken into account, such as the nature, the necessity, the results of the modifications and the reasons for them. On the basis of these criteria, the Committee considered that the reductions did not constitute a violation of the European Social Charter in and of themselves. However, the cumulative effect of the restrictions was bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned. The Committee therefore concluded that the effects of the measures adopted risked bringing about large scale pauperisation for a significant segment of the population and that the Government had not made efforts to maintain a sufficient level of protection of the most vulnerable members of society. Due to the cumulative effect of the measures, they violated Article 12 of the European Social Charter.

Analysis: role of the Charter and judicial dialogue

The Committee did not include the EU Charter in its assessment. This is not surprising, given the lack of case law at that time and its limited scope. The Committee did, however, make a reference to the case law of the ECtHR. It is again understandable that it was not reflected in the assessment, given the completely different angle of approach of the two bodies.

Part III: hypotheticals

The final part of this handbook contains hypotheticals which mobilise the information from the first two parts. These hypotheticals do not call for an absolute answer but should allow those trying to solve them to advance different arguments based on different elements: the law, case law, practices, opinions of scholars. These hypotheticals were discussed and amended as necessary during the workshop on 4-5 October 2018 in Brussels. The feedback from the participants was most welcome.

Hypothetical 1: enforceability of social rights

FACTS

Edith O'Donnell is an employee in an Irish shoe production factory, *Eire Shoes*. She works in the middle of an assembly line, sticking soles inside the synthetic cases that will become the final shoes. Edith stands straight for rotating shifts of 9 hours with two 30-minute breaks. At the end of the day, her back hurts very badly.

Edith asked her superior manager for ergonomic sitting balls. She said that they presented no risk to the assembly line seeing the belt was low enough, and considered that they would improve productivity as the workers' backs would hurt less and they would not drag out their breaks since they would not be exhausted.

Eire Shoes, however, was in bad financial waters, given the cheap imported shoes from developing countries. Given that ergonomic sitting balls represented a serious cost, and given that one worker cannot be advantaged, the management refused to purchase them.

In the following months, Edith developed lumbago and had to make frequent expensive trips to the doctor. A second request for ergonomic sitting balls was denied, and Edith decided to take matters to the Dublin Labour Court.

Edith invoked a violation of her right to safe working conditions provided for in Article 31 of the Charter in the European Framework Directive on Safety and Health at Work (Directive 89/391 EEC). Eire Shoes replied that Article 31 is a mere principle and cannot be used in a dispute between individuals. Furthermore, the Directive is only a framework directive and needs to be specified in subsequent matter-specific directives. It cannot therefore be considered a more specific expression of Article 31. Finally, if the Labour Court were to consider that the Charter was applicable, Eire Shoes invoked its freedom to conduct business, considering that siding with Edith would result in the death of the company.

1) *Discuss both points of view with regard to: the applicability of the Charter, the application of rights/principles, the balance between workers' rights and the freedom to conduct business.*

Consider, for the exercise, that a) Ireland transposed the Directive correctly (due date in 1992), b) it did not and c) there was no directive.

Keep in mind the relevant case law.

2) *Extracts from Directive 2000/78*

Article 1: ***Purpose***

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of *religion or belief*, *disability, age or sexual orientation* as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 5: Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Is there discrimination on grounds of handicap in this case? Can lumbago even be considered a handicap? If so, is the refusal of the management justified with regard to Article 5?

If lumbago cannot be considered a handicap, what other means does Edith have to prove she is being discriminated against?

Hypothetical 2: freedom of thought at the workplace

FACTS

Bernardo de la Paz, a millennial with far-left-leaning tendencies and a sympathy for anarchy, works as an administrative employee for a law firm in Brussels specialised in finance and banking, M&A and tax law. His job consists mostly in answering the phone, guiding clients towards the waiting rooms and making photocopies.

While there is no written dress code, employees and lawyers must at all times be presentable to high-profile clients. Bernardo usually wears a white oxford shirt, khakis and dress shoes.

On a particularly hot Wednesday, Bernardo decides to wear a cotton shirt because it is too warm to wear an oxford shirt. He tells himself he can, since on Wednesdays the office does not schedule any meetings with clients. He takes the first shirt off the pile, which has a large anarchy sign on the front. On arriving at the office, a senior partner tells him to go home and change because "*this leftwing crap will not be tolerated, especially not by our clients*" and Bernardo cannot come back until he is properly dressed. Bernardo considers he is being discriminated against and invokes his freedoms of expression and of thought, conscience and religion.

Serena Willermans, an assistant working in the same law firm, started dating an orthodox Jew. In order for him to consider marrying her, she has to convert to his religion, which she happily does because she is very much in love and envisaged a future with him. After a two-week holiday, during which she became acquainted with Jewish customs, rituals and prescripts, she comes back to work with her hair covered in a scarf so as to respect the religious rules. Her manager tells her she has to take it off because it is unacceptable with regard to the corporate image, especially since she is often in contact with clients. Serena, too, considers she is being discriminated against and invokes her freedoms of expression, thought, conscience and religion.

DISCUSSION

Discuss the following questions. Keep in mind the scope of application of the Charter and the relevant case law, the principle of proportionality and the specificities of each case.

1) *Is the Charter applicable?*
2) *Are the two situations comparable? Do other elements have to mobilised?*
3) *Is the prohibition on wearing the shirt/scarf because of the perception of clients legitimate?*
4) *Can the employer rely on an unwritten dress code?*

5) *Do the answers to any of the above questions change if*
    a. *Bernardo and Serena wear their respective disputed garments purely for aesthetic reasons without any political conviction?*
    b. *They work in a public institution?*

Hypothetical 3: financial crisis

You are a member of the STUTP (Socialist Trade Union of Train Personnel), a major trade union in a Member State trying to undo austerity policies having a negative impact on social security and the benefits of all the workers in the country. For the workers you represent, more precisely the 13th month and the end of year bonus are cut and pension benefits are lowered while simultaneously the retirement age is lifted. These austerity policies were enforced through national law after a Memorandum of Understanding was reached in the framework of the European Stability Mechanism. What is your course of action? Consider the following questions:

What is the outcome if the question is treated before

- The CJEU? What rights will you mobilise? Can you make an argument based on the Pillar of Social Rights?
- The EctHR?
- The ECSR?

Elements to consider: stare decisis, access to the jurisdiction, length of procedures, rights to mobilise, prerequisites for mobilising human rights instruments, previous case-law…

- What are the advantages and inconveniences of mobilising
  - Social rights as such?
  - The right to property?

Elements to consider: the enforceability of social rights, the specificities of the right to property versus those of social benefits