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Horizontal application of the Charter after Bauer - Is wider recognition by the Court of Justice of the EU possible?

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Abstract

The present master thesis seeks to answer the question: is a wider recognition of horizontal application of the Charter (after Bauer) still possible? The research is motivated by a twofold problem - the problem of lack of EU law-offered direct protection in horizontal situations and the legal problem of interpretation of the Charter. In attempting to answer the research question, the thesis, firstly, assesses the relevant body of case law and the criteria applied by the Court to determine what the doctrine encompasses now and what are the unresolved doctrinal issues. The case law review is then concluded by an analysis of findings showing that even after Bauer some inconsistencies and issues of application of the doctrine remain; possible avenues of future developments are then suggested. Secondly, the broader context, concretely, the legal and political issues linked to direct horizontal application of the Charter are evaluated. Next, the thesis briefly considers possible further positive effects of a wider recognition as a potential motivation for the expansion of the doctrine. Lastly, the thesis combines the findings of the chapters and concludes that further developments of the horizontality doctrine need to address the highlighted doctrinal issues to strengthen the doctrine's acceptance and to increase its practical employability. Nonetheless, these developments presuppose only cosmetic changes, while a wider recognition of Charter horizontality, entailing the recognition of invokability of a broader spectrum of Charter rights is blocked by various factors (such as division of competences and interference with private law) analysed in the second part of the work. However, it is also suggested that such a conclusion is not necessarily a negative one.

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List of Abbreviations

AG	Advocate General of the Court of Justice of the European Union
CJ EU/ the Court	Court of Justice of the European Union
CJ	Court of Justice
Charter	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
DG JUST	Directorate General of the EC for Justice and Consumers
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EP	European Parliament
EU	European Union
Explanations	Explanations relating to the Charter of Fundamental Rights
FRA	The European Union Agency for Fundamental Rights
GC	General Court of the Court of Justice of the European Union
NYP	Case not yet published
OJ	Official Journal of the European Union
MS	Member State
MSs	Member States
Para(s)	Paragraph(s)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	TEU, TFEU

1.1. Introduction

The Charter's role in rights protection has become increasingly relevant. In its seminal judgement of 6 November 2018, *Bauer*[1] the Court ruled that Article 31 (2) of the Charter can be invoked in disputes between individuals, where the national legislation is not in line with EU law. Most notably, the Court recognised, for the very first time that Article 51 of the Charter does not preclude individuals from being addressees of Charter provisions. This means that individual obligations may be established directly on the basis of the Charter. However, the Court also maintained that only those provisions, which are *sufficient in itself*, meaning that they are unconditional and mandatory in nature, may be invoked against individuals.[2] This horizontality test seems to considerably limit the scope of invokable Charter rights. Furthermore, many questions regarding the application and the criteria of the test are still unclarified. Therefore, further analysis of the horizontal application of the Charter, and the possibility of a wider recognition of Charter horizontality with the aim to ensure stronger rights protection are still tasks worth pursuing.

1.2. (Lack of) fundamental rights protection in horizontal situations

In order to fully appreciate the relevance of *Bauer* and at the same time set the scene for the research question of the present thesis, the underlying issue of lack of rights protection in horizontal situations and in that context lack of horizontal direct effect of directives[3] needs to be addressed.

The rationale behind lack of horizontal direct effect of directives derives from their very nature defined in Article 288 (3) TFEU, which enables MS discretion in the form of a national transposition measure and excludes EU competence to impose direct obligations on individuals.[4] If it would be otherwise, the basic principle of conferral and competence[5] could be circumvented. The use of directives to maintain MS competence by allowing them to adjust legislation to their own national and constitutional particularities is characteristic to minimum harmonisation policy areas.[6] Undeniably, these policy areas have always served as political battle grounds for clashes between interests of the MS and the integrationist objectives of the EU. Thus, it is no surprise that, in order to avoid political discontent lack of direct effect of directives or the *Marshall* doctrine has not been overruled.[7]

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[1] Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn ('Bauer')*, ECLI:EU:C:2018:871; interestingly, although the factual basis for the horizontal direct effect doctrine was facilitated by the second case, Willmeroth v. Martina Broßonn, the new developments remain to be attributed to "case Bauer."

[2] *Bauer,* paras. 89-92.

[3] The rule that individuals cannot directly invoke rights from a directive in a horizontal situation; see Case C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1986:84.

[4] Case C-91/92, *Faccini Dori*, ECLI:EU:C:1994:292, para. 24; Case Bauer, para. 76, Case C-122/17, *Smith*, EU:C:2018:631, paragraph 42; Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others*, EU:C:2004:584, para. 109; Case C-282/10, *Dominguez*, EU:C:2012:33, para. 42; Opinion of AG Trstenjak in Case C-282/10, *Dominguez*, ECLI:EU:C:2011:559, para. 62.

[5] Mainly Article 5 TEU and Title I of the TFEU, and also specific policy area-related articles, such as Article 153 TFEU.

[6] It is especially so, considering the cultural, societal and economic differences between MSs, regarding, for example, social security or employee representation. Take as an example Germany's and the United Kingdom's opposing approaches to employee representation. While the labour law culture in the former MS presupposes strong employee representation in the board of a company, the latter is starkly against any employee involvement in the management of a company.

[7] See for example, *Faccini Dori, Pfeiffer* (*supra*) and Case C-201/02, *Wells,* ECLI:EU:C:2004:12.

The above described rationale, however, is unconvincing from a rights protection perspective.[8] The effective functioning of policy areas regulated by directives depends on correct implementation, which is a task often failed by the MSs.[9] Here one can pinpoint the first aspect of the problem: wrong or lack of implementation of directives might mean that individuals will be denied even the minimum level of protection laid down by a directive. Still, they cannot invoke the directive in their own defence, due to lack of direct effect.

In order to alleviate the gap in protection, the Court has developed various alternatives to the direct effect of directives,[10] which enable individuals to achieve remedy by relying on: a broad interpretation of state (emanation of state),[11] the duty of harmonious interpretation of national law in the light of the directive (indirect effect),[12] the incidental direct effect of the directive,[13] the direct effect of general principles underlying certain provisions of a directive,[14] or state liability.[15]

These alternatives, however, proved to be insufficient to provide the desired effective protection.[16] In fact, each of the alternatives introduced new legal and practical issues.[17] In particular, the complicated web of exceptions and qualifications, exclusively set out in case law,[18] make the establishment of legal claims of individuals difficult. Moreover, the effectiveness of the alternatives also depends on national legal systems, which presupposes fragmented access to protection across the EU and legal uncertainty, especially in cross-border situations.[19] The inadequacy of solutions to lack of direct effect of directives leads to unequal protection of individuals whose claims originate from the same directive.[20] Moreover, there are situations where none of the alternatives can be used to provide an effective

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[8] Paul Craig and Gráinne De Búrca, *EU Law – Text, cases, and materials*, 6th ed., Oxford University Press 2015, p. 184, 201; Paul Craig, '*The Legal Effect of Directives: Policy, Rules and Exceptions'* (2009) 34 European Law Review 349, p. 353-354.

[9] See press releases of the EC on MS compliance (including transposition of directives), available at: https://europa.eu/rapid/press-release_IP-18-4295_en.htm (2018), https://europa.eu/rapid/press-release_IP-17-1846_en.htm (2017) and https://europa.eu/rapid/press-release_IP-15-5326_en.htm (2015);
the latest 2018 EU-28 countries factsheet on monitoring the application of EU law, available at: https://ec.europa.eu/info/sites/info/files/eu28-factsheet-2018_en.pdf and accompanying 2018 Commission report on monitoring the application of EU law, available at: https://ec.europa.eu/info/sites/info/files/report-2018-annual-report-monitoring-application-eu-law.pdf, p. 3.

[10] Craig, P. and De Búrca, G., *supra* (n. 8).

[11] This will transform their claim to a vertical one, where direct effect is applicable, provided the invoked article is sufficiently clear, precise, unconditional, and the deadline for implementation has lapsed; see also *Dominguez* (*supra*) and Case C-188/89, *Foster and Others v British Gas*, ECLI:EU:C:1990:313.

[12] Case C-14/83, *Von Colson*, ECLI:EU:C:1984:153 (the general duty to interpret national law in conformity with EU law, except if the interpretation would be *contra legem*); Case C-106/89, *Marleasing*, ECLI:EU:C:1990:395 (duty of harmonious interpretation also in horizontal situations).

[13] Case C-194/94, *CIA Security International*, ECLI:EU:C:1996:172.

[14] Case C-144/04, *Mangold*, ECLI:EU:C:2005:709 and Case C-555/07 *Kücükdeveci*, ECLI:EU:C:2010:21.

[15] Joined cases C-6 and 9/90, *Francovich*, ECLI:EU:C:1991:428.

[16] Craig, *supra* (n. 8), p. 349.

[17] For the small number of successful actions and problems with integration of state liability into national law see: Barend van Leeuwen and Rónán Condon, '*Bottom Up or Rock Bottom Harmonization? Francovich State Liability in National Courts'* (2015) 35 (1) Yearbook of European Law 229; for indirect effect: Sara Drake, '*Twenty Years after 'Von Colson': The Impact of 'Indirect Effect' on the Protection of the Individual's Community Rights'* (2005) 30 (3) European Law Review 329, p. 329; and Craig, *supra* (n. 8).

[18] Craig and De Búrca, *supra* (n. 8), p. 185

[19] Craig, *supra* (n. 8), p. 360-364.

[20] See for example, *Bauer*.

protection, as demonstrated *inter alia* by the *Bauer, AMS* and, most notably, *Dominguez* cases.

Acknowledging the above issues, the Court has now turned to Charter fundamental rights, as another alternative to direct effect of directives. However, the exact role of the Charter in rights protection is not straightforward. This stems from its unclear mission – either intended as a mere collection of rights supplementing more authoritative sources of law, or rather a powerful standalone tool for rights protection. The interpretation of the Charter[21] and its scope of application[22] are also issues, which are surrounded by uncertainties. Nonetheless, in *Bauer* the Court confirmed that the role of the Charter in horizontal disputes is considerable.

Yet, the decision's true significance in terms of rights protection might be less groundbreaking, prompting further analyses on a wider recognition of horizontal application[23] of the Charter. The difficulty of that task, considering the vast body of case law and variety of opinions, is an exciting challenge, as it also highlights the classical problems of EU constitutional law.

1.3. Research question and action plan

Considering the two problem statements described above, namely the practical problem of lack of protection in horizontal situations and the legal problem of interpretation of the Charter, the present thesis attempts to answer the following:

(1) Is a wider recognition of horizontal application of the Charter (after *Bauer*) still possible?

In attempting to answer the question, Chapter II will, firstly, analyse and assess the relevant body of case law and the criteria applied by the Court to determine what the doctrine encompasses now and what are the unresolved doctrinal issues[24] that would still need to be addressed by the Court. The chapter will conclude with a critical analysis of the findings and comment on possible avenues of future developments. Then, Chapter III will consider the broader context within which a potential wider recognition of Charter horizontality needs to be analysed. Concretely, the legal and political issues of direct horizontal application of the Charter, which could halt or motivate a further expansion of the doctrine, will be dissected. Additionally, with the aim of assessing the motivation behind expanding the horizontality doctrine, Chapter III will review prospects other than the protection of fundamental rights, which can also prompt the Court to embrace a wider recognition. Lastly, Chapter IV will conclude by combining the findings of the chapters to answer the research question.

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[21] Eleni Frantziou, '*The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality'* (2015) 21 (5) European Law Journal 657, p. 657.

[22] Michael Dougan, '*Judicial Review of Member State Action Under the General Principles and the Charter: Defining the Scope of Union Law'* (2015) 52 (5) Common Market Law Review 1201.

[23] Horizontal application or horizontality for the purposes of the present thesis includes both, direct applicability and direct effect – the possibility to invoke rights in order to disapply conflicting national rules and the possibility to invoke rights and impose obligations, respectively. With *wider recognition* the present thesis refers to an expansion of the horizontality doctrine to all or a considerable number of fundamental rights and a more direct recognition of the Charter's role in horizontal situation.

[24] Bearing in mind the scope of this work, basic concepts of the theory of direct effect, although also oft-criticised, will not be addressed.

2. The case law of the Court

The question after *Bauer* remains: could the horizontality doctrine be further expanded or are the conclusions of the Court definitive? Before answering this question on the basis of an assessment of the relevant case law two considerations must be observed. On one hand, classical decisions of the Court, such as *Van Gen den Loos,*[25]*Defrenne,*[26] *Ratti* and *Van Duyn,*[27] and *Mangold* show that it is not unusual of the Court to develop a revolutionary doctrine to further its agenda.[28] On the other hand, unwarranted and insufficiently justified court activism is opposed with considerable criticism.[29] Thus, ambitious leaps should be sufficiently scrutinized and considered in light of factors such as the relevant body of existing case law. In case of Charter horizontality, developing a universal and comprehensive doctrine is a difficult task for several reasons. Firstly, it cannot just 'brush over'[30] previous case law on (horizontal) direct effect; the Court needs to reconcile its already complicated case law with the challenges introduced by the Charter. Secondly, the solutions so far introduced by the Court seem to be rather (case) specific, making the design of a universal doctrine difficult.[31] Lastly and most importantly, the Court needs to interpret and adapt the Charter, an originally non-binding instrument of negligible relevance turned into a binding source of law post-Lisbon, to accommodate the horizontality doctrine without frustrating constitutional demarcations of competence and power. Thus, legal and political issues can be also pinpointed, which, as they are rarely directly addressed in judgements, will be considered in a separate chapter.[32]

2.1. Charter applicability in horizontal situations

The above described challenges were certainly the main reasons why the Court dodged the first opportunities to clarify its position in *Dominguez* and similar cases[33] soon

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[25] Case C-26/62, *Van Gen den Loos*, ECLI:EU:C:1963:1 (direct effect doctrine established).
[26] Case 43/75, *Defrenne*, EU:C:1976:56 (horizontal direct effect of Treaty articles in combination with the direct effect of g2.1.eneral principles established).
[27] Case C-148/78, *Ratti*, ECLI:EU:C:1979:110 and Case C-41/74, *Van Duyn*, ECLI:EU:C:1974:133 (vertical direct effect of directives is possible subject to certain conditions).
[28] See in Chapter III; for example, in case of *Van Gen den Loos* to ensure the *effet utile* of EU law or in *Defrenne* to oblige MS to finally safeguard equal pay between men and women.
[29] Most notably, the "Mangold-saga" or "Mangold-madness"; see the criticism from Roman Herzog and Lüder Gerken, '*Stop the European Court of* Justice'(EUobserver, 2008), available: https://euobserver.com/opinion/26714, accessed: 6/7/2019; or the decision of the German Constitutional Court (BVerfG) (Honeywell), Order of the Second Senate of 06 July 2010 - 2 BvR 2661/06, paras. 1-116; more on the topic by Filippo Fontanelli, '*You can teach a new court Mangold tricks – the horizontal effect of the Charter right to paid annual leave'*, (EU Law Analysis, 2018), available at: http://eulawanalysis.blogspot.com/2018/11/you-can-teach-new-court-mangold-tricks.html, accessed: 6/7/2019.
[30] Frantziou, *supra* (n. 21), p. 678.
[31] Frantziou, *supra* (n. 21), p. 664.; Craig, P. and De Búrca, G., *supra* (n. 8), p.184
[32] See Chapter III.
[33] Case C-147/08, *Römer*, ECLI:EU:C:2011:286; Case C-104/09, *Roca Álvarez*, ECLI:EU:C:2010:561; Case C-427/06, *Bartsch*, ECLI:EU:C:2008:517; see also Mirjam de Mol, '*Dominguez*: *A Deafening Silence Court of Justice of the European Union (Grand Chamber)*'(2012) 8 European Constitutional Law Review 280, p. 301; Laurent Pech, '*Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez*' (2012) 49 Common Market Law Review 1841, p. 1841-1844.

after the Charter became binding. It did so despite the appeal of the AGs to provide more clarification on the issue.[34] The Court finally undertook the challenge in a number of cases after 2015.[35]

The cases will be assessed based on the type of the Charter provision concerned. Although, the Charter itself does not contain any concrete classification of its provisions, based on the wording of the articles and the clarifications from case law the following division can be used: articles containing general principles (1), articles requiring further specification (reference to national and EU law) (2), and articles containing unconditional and mandatory rights (3).[36]

2.1.1. Articles containing general principles

The most important bricks of the horizontal application of the Charter were laid down by cases concerning the horizontal application of general principles, such as *Mangold* and *Kücükdeveci.*[37] These cases influenced the line of Charter horizontality cases commenced with *AMS.*[38] In *Mangold* the Court ruled that the general principle of non-discrimination on the basis of age can be invoked in a dispute between private parties to set aside conflicting national law, despite the fact that the time limit for the implementation of the relevant directive has not yet expired. The former was then confirmed in *Kücükdeveci*, where the Court also emphasised that it is not the directive (which only gives a specific expression to the already existing general principle of non-discrimination), but rather the general principle itself which can be relied on to set aside conflicting national law.[39] Finally, in the recent judgements of *Egenberger* and *IR*[40] the Court confirmed, while also referring to the Charter for the first time, that the general principle of non-discrimination and Article 21 of the Charter in which it is enshrined, are "*sufficient in itself"* and mandatory[41] to confer on individuals a right upon which they may rely in private disputes.[42]

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[34] Opinion of AG Trstenjak in *Dominguez*, *supra* (n. 4), para. 80 *et seq*. and Opinion of AG Kokott in Case C-104/09 *Roca Álvarez*, ECLI:EU:C:2010:254, para. 55.

[35] Most notably: Case C-176/12, *Association de mediation sociale (AMS),* ECLI:EU:C:2014:2; Case C-414/16, *Egenberger*, ECLI:EU:C:2018:257; Case C-68/17, *IR*, ECLI:EU:C:2018:696 and Joined Cases C-569/16 and C-570/16 *Bauer,* ECLI:EU:C:2018:871.

[36] A principles-rights division could have been also used. However, as it will be assessed later, such division has not yet been addressed by the Court and the ambiguous information provided in the Charter and Explanations renders this division an uneasy guide.

[37] The basis of the doctrine, however, originates from cases, such as C-43/1975, *Defrenne*, ECLI:EU:C:1976:56, para. 60; Case C 2/74 *Reyners*, ECLI:EU:C:1974:68, Case C-36/74, *Walrave and Koch*, ECLI:EU:C:1974:140.

[38] Case C-176/12, *Association de mediation sociale (AMS),* ECLI:EU:C:2014:2.

[39] *Kücükdeveci,* paras 50 and 51; Craig and De Búrca, *supra* (n.8), p. 195; Mirjam de Mol, *'The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansion of EU law?'* (2011), 18 Maastricht Journal of European and Comparative Law 109, p. 109.

[40] Case C-414/16, *Egenberger*, ECLI:EU:C:2018:257, paras.76 and 77 and Case C-68/17, *IR*, ECLI:EU:C:2018:696, para. 69; see also Case C-193/17, *Cresco Investigation*, ECLI:EU:C:2019:43, paras. 76 and 77.

[41] *Mandatory nature* means that the provision is not subject to private autonomy (Koen Lenaerts and José A. Gutiérrez-Fons, '*The constitutional allocation of powers and general principles of EU law'* (2010), 47 (6) Common Market Law Review 1629, p. 1648, footnote 104). The second criteria, *"sufficient in itself*" was for the first time explicitly mentioned in *AMS,* and implicitly referred to in Case C-101/08, *Audiolux*, ECLI:EU:C:2009:62.

[42] *Egenberger*, paras. 74-77; confirmed in *IR*; see also Aurelia Colombi Ciacchi, *'The Direct Horizontal Effect of EU Fundamental Rights'* (2019) 15(2) European Constitutional Law Review 294, p. 301.

The cases reaffirm *Kücükdeveci*[43] and the rule that only provisions of primary law can produce horizontal direct effect[44] by indicating that it is not the directive,[45]but rather the general principle itself (as derived from the common constitutional traditions of the MSs), which can be invoked by individuals, provided the case falls within the scope of EU law.[46] The Court also indicated that since Lisbon the Charter is also primary law, and its provisions are capable of producing direct effect. Article 21 of the Charter thus fulfils the requirements for direct effect, since it enshrines the general principle of non-discrimination, which is sufficient in itself to confer rights on individuals. Moreover, in *Cresco Investigations*, the Court clarified that individuals can directly rely on Article 21 of the Charter to establish the obligation of an employer, who has a duty to ensure equal treatment flowing from that article.[47]

The above conclusions, however, are confusing, if not contestable, which can be demonstrated by the Opinion of AG Bobek in *Cresco Investigations,*[48] who seems to approach the *Kücükdeveci* doctrine emphasising the important role of directives in establishing the horizontal direct effect of general principles or the Charter. AG Bobek emphasised that it is the directive which is *"effectively imported into the general principle before that 'fleshed out' principle [is] applied in a private dispute,"*[49] implying the necessity of a combined reading of general principles (or the Charter) and the relevant directive for horizontal direct effect.[50] His opinion comes after *AMS* and *Egenberger*, which according to AG Bot in *Bauer*[51] already confirm that directives cannot be relied on to establish horizontal application of primary law, including general principles and the Charter.

AG Bobek[52]clearly argues against horizontal direct effect of Charter provisions established on the basis of the provision itself and favours a combined reading of directives and the Charter for the latter to be invokable in horizontal disputes.[53] His reasoning seems to

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[43] *Kücükdeveci* and a handful of cases confirming the direct effect of general principles and the possibility to rely on them: Case C-147/08, *Römer*, ECLI:EU:C:2011:286; Joined Cases C-335/11 and C-337/11, HK Danmark, ECLI:EU:C:2013:222; Case C-501/12, Specht and others, ECLI:EU:C:2014:2005; interestingly, *Kücükdeveci* was not cited in *Egenberger.*

[44] *Defrenne,* para. *39* and Case C-281/98, *Angonese,* EU:C:2000:296, para. 33-36, as cited by the Court in *Egenberger*, para. 77.

[45] See in particular *Egenberger*, para 75 and IR, para. 69: " [*b]efore the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal status as the treaties, that principle derived from the common constitutional traditions of the Member States. The prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law."*

[46] *Kücükdeveci*, para. 23; Opinion of AG Bot in Case C-555/07, *Kücükdeveci*, ECLI:EU:C:2009:429, para 34.

[47] *Cresco Investigation*, para. 76-83; see also Lucia Serana Rossi, '*The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations'* (EU Law Analysis, 2019) available: http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html, (accessed: 24/6/2019).

[48] Opinion of AG Bobek in Case C-193/17 *Cresco Investigations*, ECLI:EU:C:2018:614.

[49] Opinion of AG Bobek in Case C-193/17 *Cresco Investigations,* para. 121; with regards to relying solely on the Charter, AG Bobek also emphasized that it is the provisions of the directive, which are "*effectively held to be implicit in Article 21 of the Charter*" (para. 122).

[50] Ibid., para. 121 and 123 (also as referring to *AMS*).

[51] Opinion of AG Bot in Case C-193/17 *Bauer*, ECLI:EU:C:2018:871, para 75; see also Frantziou, *supra* (n. 21), p. 661.

[52] Opinion of AG Bobek in *Cresco Investigations*, para. 131-149.

[53] For the sake of clarity, it is also important to unpack what is meant by horizontal direct effect of the Charter. AG Bobek in *Cresco Investigations* (para. 131) understands it as a situation when "*individuals could establish, directly on the basis of that [Charter] provision, the existence of a right and a*

be supported by prior case law, where the Court favoured a combined reading to establish horizontal application.[54] Additional support is also found in the rationale behind alternatives to rights protection, which is to fill the void created by the lack of direct effect of directives, while keeping the *Marshall* doctrine intact. Even AG Bot, who acknowledged the possibility of relying solely on a provision of primary law (provided it is mandatory and self-sufficient), infers the "*interrelationship*" of Charter rights and directives for the purpose of the latter identifying the normative content of the former.[55] This seems to be a logical conclusion considering the fact that many directives served as a basis to Charter provisions.[56]

But would such an interpretative power of directives used in combination with the Charter be less of an encroachment on the *Marshall* doctrine, than the Court's approach in the latest horizontality case law? *Egenberger* builds upon the Court's power to discover general principles and interpret them for the purpose of determining their horizontal direct effect.[57] Thus, the approach gives considerable power to the Court as theoretically it could discover a horizontally effective principle in other Charter articles as well. Consequently, the approach inevitably introduces constitutional concerns as well as prompts to revisit the doctrine of lack of direct effect of directives.[58]

The above described doctrinal loophole enabling greater power to the Court may be alleviated by a pre-set and clear horizontality test, which *inter alia* facilitates legal certainty and review. However, the test in *Egenberger* lacks these qualities due to its vagueness.[59] The critique of impossibility to determine by an individual when an unwritten general principle is directly effective in horizontal situations, voiced already in connection with the combined reading approach,[60] is even more apt when considering the *Egenberger* approach. Additionally, it is also unclear which Charter rights enshrine a general principle[61] and which general principles enshrined in a Charter provision would produce direct effect.[62] Taking Article 21 of the Charter as example, in *Egenberger* the Court seems to suggest that the

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correlating obligation on the part of the other private (non-state) party, irrespective of the existence and/or reference to the content of secondary law." De Mol uses the concept to refer to *"the effect of EU law in national proceedings between private parties (horizontal disputes), which will be "considered as 'direct' if EU law applies as an autonomous ground for review before a national court*" (De Mol, *supra* (n. 39), p. 109-110). Additionally, Craig and De Búrca referred to direct effect as the power to "*impose an obligation on a private party"* (Craig and De Búrca , *supra* (n 8.), p. 192).

[54] For example, Case C-406/15, *Milkova*, ECLI:EU:C:2017:198, paras. 49-64; also, AG Trstenjak in *Dominguez*, para. 152 ("*[...] directive gives specific expression to the general principle, that principle ultimately achieves the substantive precision necessary for direct applicability*.")

[55] Opinion of AG Bot in Case *Bauer*, paras. 88-95; note that AG Bobek in his opinion for *Cresco Investigations* did refer to the Opinion of AG Bot in *Bauer* in para. 142, footnote 73; see also Case C-214/16, *King*, EU:C:2017:914, para. 56.

[56] See Explanations relating to the Charter of Fundamental Rights, (OJ 2007/C 303/02) and Opinion of AG Bot in *Bauer*, para. 88; Rossi in this context warns against the dangers of circular reasoning, see Rossi, *supra* (n. 47).

[57] Koen Lenaerts and José A. Gutiérrez-Fons, '*The constitutional allocation of powers and general principles of EU law*' (2010), 47 (6) Common Market Law Review 1629, p. 1649, 1654-1660.

[58] Opinion of AG Bobek in *Cresco Investigations*, paras. 144 and 145; Opinion of AG Kokott in Case C-321/05 *Kofoed*, ECLI:EU:C:2007:86, para 67.

[59] Luísa Lourenço, '*Religion, discrimination and the EU general principles' gospel: Egenberger*' (2019) 56 (1) Common Market Law Review 193, p. 207-208.

[60] Laurent Pech, '*Between Judicial Minimalism and Avoidance the Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez'*, (2012), 49 Common Market Law Review 1841, p. 1855.

[61] See for example *Audiolux*, where the Court ruled that the alleged principle of equal treatment of minority shareholders *cannot* be regarded as an independent general principle of EU law, because it "*presupposes legislative choices*" (paras. 61-62); Pech considered that the right to annual leave could be a general principle, see Pech *supra* (n. 60), p. 1842

[62] Craig and De Búrca, *supra* (n. 8), p. 195; see also Pech, *supra* (n. 60), p. 1842,

entire article has a general principle status.[63] This could be a valid conclusion, considering that the Charter has been noted as the "*internal source of inspiration"* for general principles.[64] However, it is unclear if all the prohibitions in Article 21 or if similar provisions fulfil the criteria of self-sufficiency and mandatory nature. For the sake of completeness, the Explanations supplementing the interpretation of Article 21 of the Charter do not presume private action based on the article; in fact, the article is explicitly addressed to public authorities.[65]

2.1.2. Articles requiring further specification

Following *Kücüdeveci* the question arose: can other sources of primary law, without the existence of a general principle, be directly applied in horizontal situations? The first case directly giving an answer was *AMS*.[66] The Court ruled, in opposition to the Opinion of AG Villalón,[67] that information and consultation rights in Article 27 of the Charter, alone or in conjunction with Directive 2002/14, cannot be invoked in a dispute between private individuals to remedy a situation caused by conflicting national law.[68] There are two main points to take away from the decision: conditional rights of the Charter[69] cannot be invoked in horizontal situations, as they need to be further specified by national or EU law (1),[70] and directives, due to their lack of horizontal direct effect cannot be relied upon to provide specification to a Charter right (2).[71] Considering that *AMS* was the first proper horizontality case,[72] the cautious conclusions came as no surprise. However, that does not excuse the minimalism of the Court's argumentation, which manifested in less than seven paragraphs,

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[63] *Egenberger*, paras. 75-79; *IR*, paras. 68-70; *Cresco Investigations,* paras. 75-77.
[64] Lenaerts and Gutiérrez-Fons, *supra* (n. 57), p. 1655-1656 (Charter as a "*sound legal basis for the establishment of general principles of EU law*); note also case law confirming non-discrimination on the grounds of age as a general principles of EU law (*Kücükdeveci*, para. 21 and *Mangold*, para. 75), on the grounds of sex (*Defrenne*, paras. 25-33). On the other hand, judgements, such as *HK Danmark* did not confirm the general principle status of non-discrimination on the grounds of disability (see also case C-354/13, *FOA*, ECLI:EU:C:2014:2463). It must be also mentioned, when considering grounds for discrimination, the scope of Article 21 of the Charter is wider than the scope of Article 10 and 19 TFEU (e.g. grounds of social origin, genetic features, language, membership in a national minority, property and birth included in the Charter, but not listed in the Treaties).
[65] See Explanations; De Mol, *supra* (n. 39), p. 133-134; Steve Peers, '*When does the EU Charter of Rights apply to private parties?'* (EU Law Analysis, 2014), available at: http://eulawanalysis.blogspot.com/2014/01/when-does-eu-charter-of-rights-apply-to.html, accessed: 11/7/2019.
[66] *AMS,* paras 45-49; the contextual background of the case provided the perfect example for lack of protection of a party that could neither fully benefit from the protection accorded by Directive 2002/14 (lack of horizontal direct effect), nor could it use the direct alternative routes to give effect to the directive (except rely on state liability), like indirect effect, as it would have led to a *contra legem* interpretation. As suggested above, see also *Dominguez*, where the applicant had to face a similar problem, as the harmonious interpretation of French law would have led to *contra legem* results. Nonetheless, the Court avoided to address the question of horizontality.
[67] Opinion of AG Villalón in Case C-176/12 *AMS*, ECLI:EU:C:2013:491; Luísa Lourenço, '*General Principles of European Union Law and the Charter of Fundamental Rights - A Case Note on Case C-176/12 Association De Médiation Sociale,'* (2013) 11/12 European Law Reporter 302, p. 304.
[68] *AMS*, operative part; see also Rossi, *supra* (n. 47).
[69] Articles phrased as: *"[...] under the conditions provided for by Community [EU] law and national laws and practices,*" or including other reference to national or EU law.
[70] *AMS*, para. 45.
[71] Ibid. para. 49; see also Craig and De Búrca, *supra* (n. 8), p. 198; Rossi, *supra* (n. 47).
[72] Eleni Frantziou, '*Case Note: Case C-176/12 Association de Médiation Sociale'* (2014) 10 (2) European Constitutional Law Review 332, p. 338; Benedikt Pirker, '*C-176/12 AMS: Charter Principles, Subjective Rights and the Lack of Horizontal Direct Effect of Directives'* (European Law Blog, 2014), available at: http://europeanlawblog.eu/?p=2162, accessed: 4/7/2019.

prompting several (still unresolved) questions. That is especially the case when considering the opposing views of the AG.[73] The issues of the ruling, linked to the above conclusions, can be boiled down to two points.

Firstly, while AG Villalón in his opinion carefully draws a map for the rights and principles discussion,[74] the Court completely declines the invitation to comment. Even though AG Bot in his opinion in *Bauer*[75] interpreted the Court's decision of ruling against the horizontal application of Article 27 of the Charter in *AMS* as a silent acceptance of the principal division between rights and principles,[76] such conclusion is not entirely clear, since the Court neither mentions principles, nor refers to Article 52 (5) or other horizontal clauses of the Charter.[77]

One could argue that by dismissing the horizontal application of Article 27, there was no need to shed light on the distinction.[78] However, considering that the Charter does not assign its articles to either of the categories and that the Explanations do not set out a concrete division,[79] more clarification would have been necessary. That is especially so, considering that the Court highlights the importance of the Explanations in assessing the Charter articles.[80] The Explanations, however, set out only a few illustrative examples of principles (Articles 25, 26 and 37), and even list some mixed articles, containing both, rights and principles (Articles 23, 33 and 34).[81]Moreover, what is referred to as principle in the case law or the Charter, does not necessarily have to be one for the purpose of Article 52 (5) of the Charter.[82]

AMS also left behind essential questions on the nature of Charter articles,[83] their legal power (especially with regards to principles) and hierarchy, despite AG Villalón's extensive

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[73] Gráinne De Búrca, '*After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*' (2013) 20 (2) Maastricht Journal of European and Comparative Law 162, p. 180.; Cian C. Murphy,*'Using the Eu Charter of Fundamental Rights against Private Parties After Association De Mediation Sociale'* (2014) 2 (2) European Human Rights Law Review 170, p. 170–178.

[74] Opinion of AG Villalón in *AMS*, paras 38, 47-80, especially paras.50 and 51.

[75] Opinion of AG Bot in *Bauer* (it must be noted that a direct address of the principle-right distinction was also avoided in *Bauer*).

[76] Opinion of AG Bot in *Bauer*, para. 70; see also Daniel Sarmiento, '*Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer'* (*Despite Our Differences*, 2018), available: https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/, accessed: 15/5/2019; and Rossi, L.S., *supra* (n. 47)

[77] Explanations on Article 52.

[78]The Court's style of minimalistic reasoning was defended by its former judge Kakouris by arguing that the practice of not citing sources mentioned by the AG does not mean that they have not been considered in the judgement, see Constantinos N. Kakouris, '*Use of the Comparative Method by the Court of Justice of the European Communities*' (1994) 6 (2) Pace International Law Review 267, p. 276–277.

[79] Charter, paras. 51-54; Steve Peers and Sacha Prechal, '*Article 52 – Scope of Guaranteed Rights*' *in* Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart (Bloomsbury) Publishing, 2014, p. 1507.

[80] *AMS*, para. 46.

[81] Explanations on Article 52.

[82] Peers and Prechal, *supra* (n. 79), p. 1507.

[83] Note that since *AMS* the Court has indirectly dealt with the rights-principles distinction several times; the distinction was addressed for the first time concretely in *Glatzel* (Case C-356/12, *Glatzel*, ECLI:EU:C:2014:350) clarifying that Article 26 of the Charter is a principle. Nonetheless, not even *Glatzel* commented on the exact role of principles in court reviews or the implications of Article 52 (5), as, on the other hand, evaluated by AG Villalón; see Jasper 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 (2) European Constitutional Law Review 321, p. 349-352, 356-357.

analysis.[84] A more detailed analysis of the wording, nature and purpose of the Charter article[85] and a better interaction with the opinion of the AG could have increased the quality and strengthened the legitimacy of the judgement. Such an approach could have foregone criticism[86] and provide a more solid basis for further (non-)expansion of the horizontality doctrine.

The Court's second conclusion that directives, due to their lack of direct effect, cannot be utilised to concretise Charter articles is perhaps the most important message of the judgement. It lays down a clear restriction on the horizontal application of the Charter - fundamental rights must be self-sufficient to be invokable in a horizontal dispute.[87] In order to determine the former, the Court applies a textual interpretation of the Explanations and the article itself. It ignores other international sources, which are, on the other hand, referenced by the AG.[88]

Additionally, the Court's approach is also questioned in the literature based on a comparison with former cases, which have assessed Article 21 of the Charter and found it invokable in private disputes, despite the Explanations and the text of the Charter indicating lack of horizontal applicability.[89] However, it must be reiterated that in those cases, instead of a direct reliance on the Charter itself, horizontal application of Article 21 of the Charter was established on the basis of the general principle enshrined therein. In *AMS* the Court clarified that Article 27 of the Charter does not contain a right which is, as in *Kücükdeveci*,[90] a general principle. Therefore, following previous case law, the Court went on to assess the horizontality of the Charter provision itself, which as a source of primary law is capable of producing horizontal direct effect.

It is true, however, that the Court's argumentation is unclear,[91] since it does not elaborate on the qualities needed for horizontality in detail. It only mentions one criterion for the horizontality test, which is later supplemented in the *Egenberger* line of cases.[92] Nonetheless, the Court's approach in *AMS*, although vaguely, rather indicated a potential expansion of the horizontality doctrine, as it suggested that more precisely formulated rights could be applied horizontally.[93] Most importantly, the Court reaffirmed the *Defrenne* doctrine: primary law, including the Charter, can be directly applicable.

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[84]see Opinion of AG Villalón in *AMS*, para. 54; the AG proposed various approaches to the identification of principles, eventually settling on the conclusion that Article 27 does not determine any individual legal situations, as it requires the public authorities to further specify the objective content of that article (what are information and consultation rights and in what situation can they be used) and some other factors, such as the effectiveness of the information, representation and timeliness.

[85] Peers and Prechal, *supra* (n. 79), p. 1507; it is suggested that since the Explanations and the qualifications are not decisive, Charter provisions require a separate analysis based on the three factors mentioned.

[86]Generally, on not engaging in a wider discussion – Frantziou, *supra* (n. 72); on not elaborating on the distinction between rights and principles and not engaging with the AG Opinion – Frantziou, E., *supra* (n.72); also on limited differentiation between rights and principles – Pirker, *supra* (n. 72).

[87] *AMS*, para. 49; Opinion of AG Bot in *Bauer*, para. 73.

[88] Opinion of AG Villalón in *AMS*, para. 52; Frantziou, *supra* (n. 72), p. 346.

[89] Frantziou, *supra* (n. 71), p. 342; Peers, *supra* (n. 65); see *cf.* sub-chapter 1.1.1., *Kücükdeveci,* para. 50. and *Bauer*, para. 89 (it is the general principle, i.e. the "*prohibition laid down in Article 21(1) of the Charter [that is] is sufficient in itself*").

[90] *Kücükdeveci*, para. 50 and *Mangold*, para. 77.

[91] Frantziou, E., *supra* (n. 72), p. 342.

[92] *AMS*, para. 47.

[93] *cf.* Nicole Lazzerini, *'(Some of) the Fundamental Rights Granted by the Charter May be a Source of Obligations for Private Parties: AMS'* (2014) 51 (3) Common Law Review 907, p. 907; Peers, S., *supra* (n. 65); Jasper Krommendijk, '*After AMS: remaining uncertainty about the role of the EU Charter's principles'*, (EUtopialaw, 2014), available:https://eutopialaw.com/2014/01/29/after-ams-remaining-uncertainty-about-the-role-of-the-eu-charters-principles/, accessed: 12/7/2019 (broken link on 24/8/2019).

On second consideration, however, the disregard of directives' role as providing a "*specific expression*" is not entirely justified, especially, not from the perspective of rights protection. In this context, AG Villlón has also offered a position by stating that principles could be also made operational in line with Article 52 (5) of the Charter.[94] He developed the notion of implementing acts in the wider sense, "*which could be reviewed against the criteria of validity contained in the wording of the relevant principle and […] its implementing [legislative] acts in the narrow sense*".[95] Hence, relying on the corresponding directive would not just make Article 52 (5) of the Charter effective, but would also strengthen legal certainty by consolidating Charter provisions and delimiting "*the justiciability of the 'principles'[…],"* which would then clarify both to authorities and citizens the type of court review and its limits.[96]

2.1.3. Articles containing unconditional and mandatory rights

The well-anticipated *Bauer* judgement[97] gave the Court an opportunity to crystallise the horizontality test developed in the cases examined above. In the previous sections it has been established that primary law, including general principles (*Egenberger*) and the Charter (*AMS*), can be directly applicable in horizontal situations, provided the invoked provision is mandatory and sufficient in itself. In *Bauer* the right to an annual period of leave in Article 31 (2) of the Charter was under inspection in a context highlighting inequality in rights protection. While one of the applicants standing against a public authority employer (vertical situation) could rely on the applicable directive based on the principle of direct effect, such defence was ruled out by the Court in connection to the second applicant, who sued a private employer (horizontal situation).[98] Fortunately, the Court did not stop there, and in contrast to the similar *Dominguez* case moved on to apply the horizontality test from *Egenberger* to inspect the horizontality of the Charter provision.

Instead of examining whether the right to annual leave is a general principle,[99] the Court in *Bauer* borrows the concept of "*essential principle of EU social law*" used in its previous case law concerning working time disputes.[100] The Court traces back the principle to various international instruments, none of which however serve as a comprehensive and clear source to unpack the content of the right to annual period of paid leave in Article 31 (2) of the Charter or signify its special status.[101] Moreover, even the referenced case law derives the mandatory nature of the right to annual paid leave from the fact that the corresponding

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[94] Opinion of AG Villalón in *AMS*, paras. 57-72.; Pirker, *supra* (n. 72).
[95] Pirker, *supra* (n. 72), see also Opinion of AG Villalón in *AMS*, para. 70.
[96] Opinion of AG Villalón in *AMS*, as cited, para. 78.
[97] Similar Case C-684/16, *Max Planck*, ECLI:EU:C:2018:874 and Case C-385/17, *Hein*, ECLI:EU:C:2018:1018.
[98] *Max Planck*, para. 72-75.
[99] Note the absence of reference to *Mangold* and *Kücükdeveci* – clear sign to emphasize the Charter's power as primary law to produce direct effect. See also Lenaerts's article, where he argued that the provisions of the Charter should be regarded as having the same status as general principles, Koen Lenaerts, '*Exploring the Limits of EU Charter of Fundamental Rights'* (2012) 8(3) European Constitutional Law review 375, p. 376.
[100] Joined Cases C-131/04 and C-257/04, *Robinson-Steele*, ECLI:EU:C:2006:177 and Case C-173/99, *BECTU*, ECLI:EU:C:2001:356.
[101] The international documents mentioned by the Court, including the Community Charter of the Fundamental Social Rights of Workers and the European Social Charter only list general non-binding principles. Moreover, they do not even presume the same level of protection as provided by the directives, for example the Community Charter requires a minimum of two weeks annual holiday with pay, whereas Directive 2003/88/EC guarantees a minimum of four weeks.

directive does not enable derogation from that right.[102] Thus, it might be argued that the international sources cited by the Court are insufficient to inform an individual about the qualities of the right to annual paid leave, which would warrant its horizontal application. The purpose of inclusion of those sources, however, was not so much the justification of a special status or the clarification of the content of the Charter right, but the provision of evidence of its existence and capability to produce direct effect independent of the directive giving expression to the right.

Thus, the Court confirms its previous case law[103] in that the ability of primary law to produce direct effect in horizontal situations will depend solely on the source itself. Therefore, as suggested in *Egenberger* and *AMS,* it is only a textual interpretation of the Charter (and possibly the Explanations) that can be of aid to assess horizontality. Directives (or other sources) [104] cannot be relied on to give further expression for the purpose of establishing the horizontality of a Charter right.[105] Therefore, *Bauer* did not reverse *AMS*, since as ruled in the latter, Charter provisions cannot be concretised by other sources of EU law to ensure their horizontal direct effect.[106]

The development of the horizontality doctrine based on the constitutional status of the Charter is a valid initiative, considering the potential criticism of competence creep that a greater involvement of directives would inevitably entail. However, the Court's argumentation establishing the horizontality of Article 31 (2) of the Charter is unclear. Notably, in contrast to *AMS*, the Court fails to mention the Explanations,[107] which, although do not offer a detailed commentary, they do cite Directive 93/104/EC as one of the sources of the right to paid annual leave, alongside with other international documents.[108] The directive, thus, must have some kind of an interpretative role, and its strict exclusion is questionable. The directive's role is also acknowledged by AG Bot, who deems a normative *interrelationship* between the Charter and directives necessary.[109] Reliance on secondary legislation is also suggested by the Court, when it acknowledges that a *de facto* need for further specification of a Charter right does not limit its invokability, provided it passes the horizontality test.[110]

The test itself, considering the application of its two criteria, is rigid since it strictly relies on a textual analysis of the Charter. Considering the first criterion, unconditionality, the Court distinguishes Article 32 (2) from Article 27 of the Charter[111] based on the wording of the articles; the distinction being the reference to a "*concrete expression by the provisions of EU or national law*,"[112] which is not present in the former. However, as remarked above, even Article 31 (2) would require further specification to limit an unjustly broad application of the annual paid leave that could arise from a purely textual interpretation of the Charter. For example, conditions for the exercise of the right would need to be ascertained. Why would these unwritten, but implied conditions be less important than the conditions mentioned in

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[102] *Robinson-Steele*, para. 47-63; *BECTU*, para. 41-43; see also Directive 2003/88/EC, Art. 17 and 18 (repealed Council Directive 93/104/EC).
[103] *Egenberger, AMS*.
[104] AG Bot in *Bauer* rules out the possibility of concretization of a Charter right via a directive due to the lack of direct effect of the latter, which renders it impossible to import the qualities needed for direct effect (para. 74); see also Fontanelli, *supra* (n. 29).
[105] Cf. Opinion of AG Bobek in *Cresco Investigations*.
[106] Cf. Sarmiento, *supra* (n. 76).
[107] Opinion of AG Bot in *Bauer*, para. 87.
[108] Explanations.
[109] Opinion of AG Bot in *Bauer*, para. 89; see also Bogg on the synergic relationship between the provisions of the directive and Article 32 (1) of the Charter, Alan Bogg, 'Article 31 - Fair and just working conditions', in Steve Peers et al. (eds.), The EU Charter of Fundamental Rights: A Commentary, Hart (Bloomsbury) Publishing, 2014, p. 833-868.
[110] *Bauer*, para. 85.
[111] Article 27 of the Charter ruled in *AMS* as not sufficient in itself to confer rights on individuals.
[112] *Bauer*, para. 85.

Article 27 of the Charter? Is the drafter's choice to leave out the reference to further conditions in Article 31 (2) of the Charter enough to deem the article unconditional and horizontally applicable? These questions would have required the judgement's stronger engagement with the horizontality test. On the other hand, reliance on a textual interpretation for the purpose of evaluation of the unconditionality criterion is justifiable by a need to keep the test as uncomplicated as possible so it can be easily applied by national courts and understood by individuals.

Further to the second criterion, the mandatory nature of the right to paid annual leave is *inter alia* established based on the explicit use of the formulation "*every worker has the right*" in Article 31 (2) of the Charter.[113] Clearly this is a stronger communication of rights conferral than the requirement of guarantee of information and consultation rights in Article 27 of the Charter. However, although the provision on Article 27 of the Charter does not explicitly refer to a "*right*" such reference is clearly included in its title. Additionally, the Court's use of the concept of essential principle of EU social law as a further indication of the right to annual paid leave derived from various international documents is unclear. It seems to be invoked in the context of establishing the mandatory nature of the right. However, if such quality is based on international instruments, rather than the directive, it is questionable why the Court failed to use the same indication with regards to information and consultation rights, which can also be found in international documents.[114] *Peers* and *Prechal* also noted that the qualification of the right to annual leave as an essential principle of EU social law could be an argument to support the limited justiciability of Article 31 (2) of the Charter.[115]

Lastly, on the critical side, in *Bauer* the Court slightly changes the horizontality test used in previous cases, which adds to the uncertainty surrounding its application. Mandatory nature and unconditionality seem to be the two criteria that make a Charter article sufficient in itself to confer rights on individuals in horizontal situations.[116] The use of unconditionality as prerequisite for self-sufficiency[117] of the Charter article can render the test more stringent.[118]

On the other hand, the Court continues to stick to the view that indirect effect should be employed as the first line of protection and only in case harmonious interpretation is not possible should the national court resort to direct effect.[119] This makes a well-cemented court practice for indirect effect, which has been regarded as the ideal means to tackle lack of horizontal direct effect of directives.[120]Additionally, the Court somewhat more clearly, albeit rather unceremoniously, finally indicated that Charter rights can be directly effective meaning that the establishment of direct obligations on the basis of Article 31 (2) of the Charter is possible.[121]

Consequently, and most importantly, the Court eased the limitation on the scope of application of the Charter by applying an extensive interpretation to Article 51 (1), concluding

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[113] Cf. Article 25 of the Charter, setting out the "*rights of the elderly,"* but containing an unspecified and vague statement that can be likened to a principle.

[114] Concretely, the European Social Charter (Article 21) and the Community Charter on the rights of workers (points 17 and 18); see the Explanations.

[115] Steve Peers and Sacha Prechal, '*Article 52 – Scope of Guaranteed Rights*' *in* Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart (Bloomsbury) Publishing, 2014, p. 1507.

[116] *Bauer*, para. 85.

[117] Some sources regard self-sufficiency as a characteristic of unconditionality, which, in turn, means that the right does not need "*to be given concrete expression by the provisions of EU or national law*"; see Rossi, *supra* (n. 47).

[118] Eleni Frantziou, '*(Most of) the Charter of Fundamental Rights is Horizontally Applicable'* (2019) 15 (2) European Constitutional Law Review 306, p. 313.

[119] *Bauer*, para. 64 et seq.

[120] Lenaerts and Guttiérez-Fons, *supra* (n. 57), p. 1640-1641 and Pech, *supra* (n. 60), p. 1880.

[121] *Bauer*, para. 90; Opinion of AG Bot in *Bauer*, para. 77-78; Peers, *supra* (n. 65).

that since there is no explicit prohibition in the Charter the possibility to directly require individuals to comply with certain provisions of Charter rights cannot be ruled out.[122] However, the extensive interpretation applied to Article 51 (1) is in contrast with the literal interpretation used for Charter provisions for the purpose of the horizontality test. This is even more interesting when compared to the purposive approach the Court applies to secondary employment law provisions, which, according to the Court, ensures that the objectives of the legislation are not frustrated.[123] Considering this inconsistency in interpretation, the Court could have opted for a more detailed explanation of the horizontality test. Since a further evaluation of the absence of those explanations touches upon broader constitutional issues, this thesis will consider them separately in the next chapter.

2.2. Analysis of the current approach of the Court and possible further developments

Having assessed the cases on the horizontal application of the Charter, the present sub-chapter will comment on unresolved issues, inconsistencies of the case law, and based on those will consider possible developments of the horizontality doctrine.

As remarked earlier, developing a comprehensive doctrine that inevitably affects individuals and hence needs to be as clear as possible, is not an easy task. That is especially so considering the already complicated applicable body of law that the Court needs to consider and reconcile with the Charter. The challenge is not eased by the fact that the doctrine can only be developed gradually within the confines of the preliminary ruling procedure, the main purpose of which is to aid national courts in their interpretation of Union law on a case-by-case basis.[124] On one hand, the procedure by its very nature does not permit the development of a complete mechanism of rights protection, but on the other hand does offer the possibility to readjust the doctrine to accommodate new legal and political developments.

What is clear from the Court's case law on Charter horizontality is that avoidance characteristic to its earlier rulings is not so much the theme anymore.[125] Nonetheless, regarding some of the aspects of the horizontality doctrine, such as the assessment of collective rights or the horizontality criteria, the Court continues to maintain a cautious approach limiting its argumentation to the bare minimum. The possible reasons behind the Court's avoidance of fully reasoned judgements are: the maintenance of recognition of the judgements[126] and the minimisation of legislative constraints that could arise from competence concerns.[127] In case the Court is just testing the water in order to avoid MS opposition,[128] having regard for a Mangold-like criticism, a wider recognition of the Charter will depend on the reaction of national courts and MSs. There could be other reasons behind

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[122] *Bauer*, para. 87; Rossi L.S., *supra* (n. 47); Frantziou, *supra* (n. 118), p. 312-313.
[123] Niall O'Connor, *(Re)constructing the employment law hierarchy of norms: The Charter will not, should not and need not apply* (EU Law Analysis, 2017), available at: http://eulawanalysis.blogspot.com/2017/12/reconstructing-employment-law-hierarchy.html, (accessed: 01/08/2019); see also Case C-84/94, *United Kingdom v Council*, ECLI:EU:C:2003:437, paras. 45 and 75; Case C-151/02, *Jaeger*, ECLI:EU:C:2003:437, para. 59.
[124] Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law*, 1st edn., Oxford University Press 2014, p. 50-51; Frantziou, *supra* (n. 21), p. 672.
[125] Pech, *supra* (n. 60), p. 1841-1844.
[126] De Búrca, *supra* (n. 73), p. 178.
[127] see Gareth Davies, '*Legislative Control of the European Court of Justice* (2014)' 51 (6) Common Market Law Review 1579, p. 1579–1581.
[128] Ibid., p. 1580.

the Court's minimalistic approach, including its inclination to maintain a greater control amidst the legal uncertainty granted by a minimalist reasoning.[129]

Despite the limited argumentation of the Court, the most recent cases have clarified several aspects of Charter horizontality.[130] The Court has confirmed that the Charter does not merely enshrine fundamental rights, but these rights, provided they pass the horizontality test, can be relied upon by and invoked against individuals. Thus, as suggested by *Lenaerts* and *Gutiérrez-Fons* almost ten years ago,[131] the *Defrenne* doctrine continues to be an influential decision, justifying the horizontal applicability of not just Treaty articles, but other primary law. There is also clear continuity of the *Mangold-Kücükdeveci* case law, which served as a basis not just in *Egenberger* and similar cases, but also in *AMS* and *Bauer*. Consequently, the recent cases show a continuous and gradual development of the horizontality doctrine, which suggests greater recognition by the Court and potential further improvements.

Nonetheless, it is also clear from the assessed case law, that certain aspects of the horizontality test are still ambiguous. First of all, although the directives have been ruled out as tools of concretisation of Charter rights for the purpose of establishing their direct effect, their overall role is unclear. According to *Bauer* directives might be relied upon to specify certain conditions related to a Charter right, which based on a textual interpretation of the Charter and Explanations is deemed to be sufficient in itself (unconditional and mandatory). As demonstrated on the example of Article 31 (2) of the Charter, even a provision that is sufficient in itself may be too broad for an effective application when it is invoked directly from the Charter without further specification of conditions by another legal source. Consequently, purely from a technical, not constitutional, point of view, it is rather questionable why the Court denies further concretisation of Charter rights by secondary sources. As a matter of fact, many of those sources, especially directives, served as a basis to certain Charter rights. Clear references to directives (and other sources) in the Explanations, sometimes indicating the source of meaning of an undefined term in the Charter,[132] suggest that these sources supplement the Explanations and form part of the Charter interpretative tools.

Another sombre observation that follows from the horizontality test is that most of the Solidarity chapter articles (and some other articles as well) would not be horizontally applicable, since their formulation is not rights-conferring and they include a reference to national or EU law. Thus, they depend on a concretisation ensured by secondary legislation.[133] In case the Court continues to use the rigid-literal interpretation for the horizontality test and denies the interpretative role of directives, the Charter system will be morphed into a dualist one, where some fundamental rights will be inherently less powerful than others, just because of the wording of the article they are enshrined in.[134] This is worrying especially with regards to collective rights, such as Articles 28 and 27, where fundamental right breaches might be more wide scale due to the stronger information,

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[129] See Chapter III.

[130] Pech, *supra* (n. 60), p. 1841-1844.

[131] Lenaerts, K. and Gutiérrez-Fons, J. A., '*The constitutional allocation of powers and general principles of EU law'* (2010), 47 Common Market Law Review 6, p. 1647-1649.

[132] See for example Article 31(1) of the Charter in the Explanations.

[133] Frantziou, *supra* (n. 71), p. 346; another right with reference to Union or national law is Article 16 of the Charter, see Peers and Prechal, *supra* (n. 79), p. 1513.

[134] Such rights include the following ones: Art. 27 (workers' right to information and consultation within the undertaking), Art. 28 (right of collective bargaining and action), Art. 30 (protection in the event of unjustified dismissal), Art. 34 (entitlement to social security and social assistance), Art. 35 (right of access to preventive health care and the right to benefit from medical treatment), Art. 36 (access to services of general economic interest) in the Solidarity chapter, and other rights in Art. 9 (right to marry and right to found a family), Art. 10 (2) (right to conscientious objection), Art. 14 (freedom to found educational establishments) and Art. 16 (freedom to conduct a business).

bargaining power and resource asymmetry.[135] However, as it will be discussed in the next chapter, the limitations might be justified by factors touching upon broader legal and constitutional factors.

Essentially, the horizontality test applied in *Bauer* leaves the Solidarity chapter with four potentially horizontally applicable rights.[136] However, the Explanations denote two of them (consumer and environment protection) as principles,[137] which based on Article 52 (5) of the Charter should not lay down directly applicable rules.[138] It is questionable whether these Articles would be considered more self-sufficient than Article 27 of the Charter.[139] Since they lack mandatory nature, it is rather improbable. Nonetheless, with certain Charter articles containing both rights and principles,[140] the ambiguity surrounding the horizontality test is calling for more clarification and detailed argumentation of the Court.

Furthermore, the Court's approach to more economic and market-related rights also remains to be seen. The Court has been previously criticised for a generous interpretation of Article 16 of the Charter, prevailing over social and equality rights. [141] In *AMS* the Court's ruling was ultimately also more protective of the interests of the employer (which could have been encompassed in Article 16 of the Charter). Nonetheless, following the Court's current test, typically economic rights such as Article 16 or 17 of the Charter should also fall short of horizontal application since they are both subject to further specification by law.

In summary, it has been shown that there is a need for improvement mainly with regards to the horizontality test and its application. Whether those improvements will warrant a wider recognition of horizontal applicability of the Charter will depend on the course the Court decides to take, concretely, whether it will decide to ease the criteria or maintain the present and rather rigid approach. If it is the latter, a considerable number of Charter articles will not be invokable in horizontal disputes. In that case the Court would need to make its argumentation clearer by avoiding the use of vague terminology and providing more explanation.[142] Explanations and clear reasoning is crucial to individuals, who need to be aware of the potential outcome of their actions,[143] and national courts, which would need to apply the Court's case law anytime a fundamental right is involved in a horizontal dispute. Nonetheless, the Court's motivation to stick to or modify its case law by addressing the highlighted issues is affected by a wide spectrum of factors. To fully evaluate the possibility of a wider recognition of horizontality and the reasons behind maintaining the current strict test of the Court, those factors will be evaluated in the next chapter.

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[135]As an example, one could think of a huge corporation with several subsidiaries across the EU, enabling it to circumvent national law that poorly implements the worker protection directives, such as Council Directive 2001/23 on Transfer of Undertakings or Council Directive 98/59 on Collective Redundancies.

[136] Articles 31, 29, 37 and 38.

[137] See Explanations; Frantziou, *supra* (n. 118) p. 320.

[138] Lazzerini, *supra* (n. 93), p. 931.

[139] Frantziou, *supra* (n. 118), p. 320.

[140] Articles 23, 33 and 34 of the Charter as based on the Explanations.

[141] Case C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521; Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972 and Case C-157/15, *Achbita*, ECLI:EU:C:2017:203; with regards to Article 16 of the Charter see: Stephen Weaterhill, '*Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract'* (2014) 10 (1) European Review of Contract Law 167, p. 167–182.

[142] Frantziou, *supra* (n. 21), p. 672.

[143] Ibid.

3. The bigger picture: the issues and effects of direct horizontal application

The horizontal application of the Charter touches upon various legal and political issues. It is important to consider these factors as well, since they might halt, but also motivate a wider recognition. The case law evaluated in the previous chapter already gave an idea about the Court's appreciation of these factors. However, a more concrete consideration is needed to determine if a wider recognition is still possible. The present chapter will therefore approach each issue by presenting the Court's understanding and how that affects the horizontality doctrine, and if such understanding should be upheld, justifying a lack of need for changes in the doctrine.

3.1. Legal issues

3.1.1. Scope of application of the Charter

The scope of application is the most important and controversial factor when analysing the Charter, and a review of the issues linked to it might explain the limitations placed on the horizontality doctrine and the reason behind maintaining the current test. Both the material and personal scope of the Charter is set out in Article 51. That horizontal clause is a "*keystone which guarantees that the principle of conferral is complied with.*"[144] Therefore, when interpreting Article 51 special emphasis should be placed on its literal meaning and the principles of subsidiarity and proportionality.

Considering the personal scope first, *Bauer* stated that even though the article lists only two addressees - EU institutions and MSs, certain provisions of the Charter might be

[144] Lenaerts, *supra* (n. 99), p. 377.

applied to individuals as well, since such option is not explicitly excluded in the Charter.[145] That conclusion is markedly in contrast with how Article 51 (1) had been understood before *Bauer*.[146] Certainly, if the drafters would have wanted to include individuals as addressees, they would be explicitly mentioned. Instead, neither the articles, nor the Explanations contain such a reference.[147] This is not surprising, considering that the MSs' intention was to exclude the horizontal application of the Charter, which initially manifested in the inclusion of horizontal clauses in the Charter and following the Lisbon Treaty was reaffirmed by a prohibition of expansion of EU competences and field of application in Article 6 (1) TEU and Declaration 1 annexed to the Final Act of the Lisbon Intergovernmental Conference.[148]

Moreover, according to *Lenaerts*, any interpretation in conflict with the Explanations would amount to judicial activism, and only in case the explanation therein is incomplete or there is no explanation at all may the Court employ other interpretation methods.[149] Since the *ratio personae* is explicitly dealt with in the Charter and explained in the Explanations, no teleological interpretation should be applied.[150] In the absence of any reference to individuals as addressees, only the mentioned subjects should be bound by the Charter.[151]

Nevertheless, the idea of a more teleological interpretation of Article 51 (1) is not entirely new. [152] A recent EP resolution went as far as suggesting the abolishment of Article 51 of the Charter and converting the document into a Union Bill of Rights.[153] Moreover, the Charter would not be the first primary law source where the Court uses such an interpretation method. As early as in *Van Gend en Loos* the Court established the principle of direct effect of Treaty articles, basing its arguments on the interpretation of the preamble and the purpose of the Treaty – the establishment of a 'new legal order'.[154]Applying the same approach to the Charter, there is a view that its preamble also contains reference to responsibilities of individuals.[155]

Although there are articles which do not specifically refer to an obligation of public authorities, and which would rather presume a duty on the side of an individual, it cannot be concluded that it is an acknowledgement of horizontal direct effect.[156] It is evident that, even though the subjects bound by the Charter are MSs and EU institutions, the circumstances where Charter rights will in fact manifest are horizontal situations. However, it does not mean that private individuals could be held liable solely based on the Charter, but rather that the MSs and EU institutions have a positive obligation to ensure those rights through *inter alia*

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[145] *Max-Planck*, paras 76-79 and *Bauer*, para 87-90.
[146] Opinion of AG Trstenjak in *Dominguez*, paras. 80-83; Lenaerts, *supra* (n. 99), p. 377 and footnote 11; Lenaerts and Guttiérez-Fons, *supra* (n. 57), p. 1657;
[147] The Explanations do no mention individuals even though there is a detailed section on Article 51, mentioning EU institutions as the primary addressees.
[148] Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon,
signed on 13 December 2007, p. 3; see also Monica Claes, '*Fundamental Rights*' *in* Pieter J. Kuijper et al. (eds.), *The Law of the European Union*, 5th edn., Kluwer Law International, 2018, p. 111.
[149] Lenaerts, *supra* (n. 99), p. 402; Lenaerts then as Vice-President of the CJEU.
[150] Moreover, the application of Article 52 (1) of the Charter to individuals would be also problematic, as they cannot satisfy the requirement that any limitation must be provided for by law.
[151] See for example Opinion AG Trstenjak in *Dominguez*, para. 83; Takis Trimidas, '*Fundamental Rights, General Principles of EU Law, and the Charter'* (2014) 16 Cambridge Yearbook of European Legal Studies 361, p. 382, 389-390; Frantziou, *supra* (n. 21), p. 659.; De Mol, *supra* (n. 39), p. 134.
[152] Frantziou, *supra* (n. 21), p. 659-660.
[153] EP Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254(INL), p. 20.
[154] Craig and De Búrca, *supra* (n. 8), p. 189.
[155] Frantziou, *supra* (n. 21), p. 660.
[156] *cf*. Frantziou, *supra* (n. 21), p. 660.

legislation,[157] which would then establish enforceable obligations to individuals. A similar system is set out by the ECHR, which is a benchmark for the Charter and a standard in human rights protection.[158] Consequently, lack of horizontal direct effect of Charter articles would not indicate that the EU rights protection system falls behind that of the CoE.[159]

The rationale behind the teleological interpretation applied in *Van Gend en Loos* was to develop a principle, which would fill the gaps left by the Treaty, and in that way help to establish an effective Union in its early days,[160] when non-compliance would have threatened the existence of the entire project. In that context the question arises: is the effective protection of fundamental rights in the EU truly on such an insufficient level as to prompt an extensive interpretation of Article 51 of the Charter? As set out in the introduction of the present work, there are certainly situations when the national or EU legislation do not provide sufficient protection. In those situations, however, the Union's right protective role should focus on strengthening other types of Court actions, which would target the core of the problem – partial, wrong or lack of implementation of directives, via infringement procedures based on Article 258 TFEU or preliminary rulings procedures.[161]

However, the Court's wide interpretation of the personal scope is limited by the fact that only "*certain provisions of the Charter*"[162] can bind individuals. The literal interpretation of provisions applied in the horizontality test of the Court denies horizontality to several articles of the Charter. The same literal interpretation would also exclude articles, such as Article 11 (1) of the Charter, which include a concrete reference to a public authority obligation. Nonetheless, should the Court identify a gap in protection, it could again opt for a purposive interpretation[163] drawing on its approach to Article 51 (1) of the Charter.

Another important limitation on the scope of application of the Charter is the requirement that the situation must fall within the scope of EU law.[164] Although the scope of application of EU law is still a controversial matter,[165] in case of the Charter, it seems that just like with general principles,[166] the directives act as a "*pull factor*" that bring the case within EU law.[167] The requirement of having a *normative yardstick*,[168] a secondary legislation, that would draw the case within EU law also acts as a guarantee against competence creep. With regards to general principles, case law has already shown that the Court will deny horizontal application if there is no substantive link with EU law.[169]

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[157] Opinion of AG Trstenjak in *Dominguez*, para. 84-87.
[158] Art. 52 (3) and 53 of the Charter
[159] Opinion of AG Trstenjak in *Dominguez*, para. 87; Trimidas, *supra* (n. 151), p. 392.
[160] Craig and De Búrca, *supra* (n. 8), p. 189-190.
[161] For example, in the infringement procedure Case C-235/17, *Commission v. Hungary,* ECLI:EU:C:2019:432 the Hungarian legislation was found to be in breach of Art. 17 of the Charter; in a preliminary ruling in Case C-203/15, *Tele2 Sverige*, ECLI:EU:C:2016:970 the Court found national laws to be in breach of Arts. 7, 8 and 11 of the Charter.
[162] *Bauer*, para. 87.
[163] Maja Brkan, '*Freedom of expression and Artificial Intelligence: on personalisation, disinformation and (lack of) horizontal effect of the Charter'* (2019), SSRN Electronic Journal, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354180, accessed: 08/08/2019, p. 1, 11-12.
[164]Art. 51 (1) of the Charter; Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras 19-27; Judgement of the German Constitutional Court (BVerfG) of 24th April 2013 - 1 BvR 1215/07 (Counter-Terrorism Database) warning the Court not to surpass the limits of its competence when applying the Charter.
[165] Craig and De Búrca, *supra* (n. 8), p. 195; Frantziou, *supra* (n. 118), p. 316; see also Dougan, *supra* (n. 22).
[166] Lenaerts and Gutiérrez-Fons, *supra* (n. 57), p. 1879-1880.
[167] Rossi, *supra* (n. 47) and Fontenelli, *supra* (n. 29).
[168] *Kücükdeveci*, para. 23; see also Lenaerts and Gutiérrez-Fons, *supra* (n. 57), p. 1649.
[169] For example, cases *Audiolux* and *Bartsch*.

An additional limitation is that the cooperation between the Charter and directives should not enable, pursuant to Article 51 (2) of the Charter, the extension of competence of the EU.[170] Such a situation can occur in minimum harmonisation areas, for example in employment and social security law, where the EU has limited regulatory competence. It is possible that, although in these areas there is an existing directive to which there is a corresponding Charter right, the situation falls outside the scope of EU law, if the MS opts for upward discretion, so goes beyond the scope of a minimum harmonisation directive.[171] In those cases the Charter could not be invoked, as it would extend the EU's competence and compromise the rules of conferral.[172] The same applies when the case is not within the scope of EU law due to no EU competence whatsoever. This would affect rights such as Article 28 (partially, in that it refers to strike action and freedom of association).[173] Furthermore, most of the Charter provisions which concern areas of limited or no EU competence include a reference to national or EU law. [174] Consequently, it is perhaps no coincidence that to minimise competence issues, the horizontality test has been constructed in a way to exclude conditional rights from horizontal application.

Some cases, however, seem to suggest that the Court is not always receptive of the constitutional limitations attached to minimum harmonisation. Notably, in *Alemo-Herron*, the Court widened the scope of review of Charter fundamental rights in a minimum harmonisation field to encompass a MS measure that went beyond the minimum requirements laid down by the directive. [175] Since the Charter horizontality cases so far did not involve a clear use of upward discretion in a minimum harmonisation field, the Court's approach to the application of the Charter in this context remains to be seen.

3.1.2. Clash of rights

Another factor that needs to be considered is the clash of rights. Such a situation can arise when a Charter right is invokable by each of the parties of a horizontal dispute, alternatively when national fundamental rights, free movement rights or rights representing other interests need to be weighed up against Charter rights. The main issue revolves around the balancing of rights and their limitation.

The first point to consider is that in the absence of clear and pre-set rules on horizontally invokable Charter rights, national courts might fail to assess and detect

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[170] Rossi, *supra* (n. 47).

[171] For example, in an *Alemo-Herron* type of situation, where the MS goes beyond the scope of the directive by enacting a more protective law, the Charter should not be invoked in a horizontal situation; see on this issue also Eleanor Spaventa, '*Should we "harmonize" fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system'* (2018) 55 (4) Common Market Law Review 997, p. 1019. In contrast, a national rule enacted based on a discretion, which allows the MS to choose whether it wants to adopt the rule in a directive or not falls within the scope of EU law (see *Milkova*, para. 52-54).

[172] See also Eleanor Spaventa, '*Should we "harmonize" fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system'* (2018) 55 (4) Common Market Law Review 997, p. 1008; see also cf. Judgement of the English Court of Appeal in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, holding Art. 7 of the Charter directly effective.

[173] Both, the right of association and right to strike are excluded from the social policy competence of the EU, see Art. 153 (5) TFEU.

[174] Peers and Prechal, *supra* (n. 79), p. 1513.

[175] Marija Bartl and Candida Leone, '*Minimum Harmonisation After Alemo-Herron: The Janus Face of Eu Fundamental Rights Review*' (2015) 11 (01) European Constitutional Law Review 140, p. 140; see also *Achbita*; Eleanor Spaventa, '*What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case'* (EU Law Analysis, 2017), available at: http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html, accessed 14/09/2019.

conflicting directly effective) Charter rights standing against an already invoked right by the applicant. National courts not always refer a preliminary reference, therefore a clear horizontality test and a categorisation of Charter articles by the Court are essential for the effective application of the horizontality test. That is even more so, considering that sometimes the Court's judgement also fails to address conflicting Charter rights.[176] An example of a recent case is *Egenberger*, where the Court failed to assess the horizontality of Article 10 of the Charter, as a right standing against Article 21 of the Charter.[177] Another example could have been *AMS*, where the Court failed to directly address the balancing of collective rights against the freedom of establishment. Since the Explanations provide no concrete solution, the division of Charter articles to principles and rights in the light of Article 52 (5) of the Charter could bring more clarity and legitimacy to the matter.[178] Although the issue has been (most notably in *AMS*) side-stepped, the Court might address it in the upcoming cases[179] as a task conferred on it to be completed on a case-by-case basis.[180]

Further, clarification demands are also linked to the balancing test itself. The evaluation of situations where two competing invokable provisions or alternatively one invokable and one non-invokable Charter provision meet could also use further guidance from the Court. The horizontality case law has not really focused on clashes of rights so far. Nonetheless, the Court confirmed that the balance between competing fundamental rights must be struck by the national court in the light of the principle of proportionality.[181] On one hand this statement follows the approach of judicial restraint stemming from the "*principle of limited and shared jurisdiction*."[182] It is also in line with the requirements of Article 52 (6) and 53 of the Charter, as national courts are granted the opportunity to consider constitutional specificities and national fundamental rights. Especially, with regards to Article 53, which allows national courts to apply (higher) national standards of protection of fundamental rights when they implement EU law, while the Charter remains the floor.[183] On the other hand, the Court also observes that national courts must take into consideration the balance the EU legislature struck between various interests[184] which would lessen the courts' power to make their own evaluation.

3.1.3. Interference with private national law

It is undeniable that the horizontality doctrine should not be only concerned with competence and other constitutional issues but should also take into account concepts of

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[176] Case C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, Joined Cases C-680/15 and C-681/15, *Asklepios*, ECLI:EU:C:2017:317, Case C-176/12, *Association de mediation sociale (AMS),* ECLI:EU:C:2014:2.

[177] Eleni Frantziou, '*Mangold Recast? The ECJ's Flirtation with Drittwirkung in Egenberger'* (European Law Blog, 2018), available at: https://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/, accessed: 09/08/2019.

[178] Lazzerini, *supra* (n. 93), p. 931; cf. Dóra Guðmundsdóttir, *'A renewed emphasis on the Charter's distinction between rights and principles: Is a doctrine of judicial restraint more appropriate*?' (2015) 52 (3) Common Market Law Review 685, p. 719.

[179] Case C-609/17, *TSN*, nyr and Case C-610/17, *AKT*, nyr.

[180] Monica Claes, '*Fundamental Rights*' *in* Pieter J. Kuijper et al. (eds.), *The Law of the European Union*, 5th edn., Kluwer Law International, 2018, p. 113-114.

[181] *Egenberger*, paras. 80-81.

[182] Spaventa, *supra* (n. 172), p. 1020-1023, Guðmundsdóttir, *supra* (n. 178), p. 718-719

[183] Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, paras. 55-64; that is provided the "*primacy, unity and effectiveness of EU law*" is not compromised.

[184] *Egenberger*, para. 81; this is also in line with the Court's earlier case law, which required national courts to reconcile the exercise of fundamental rights with rights protected under the Treaty (C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:809, paras. 95-96; C-112/00, *Schmidtberger*, ECLI:EU:C:2003:333, para. 77; C-36/02, *Omega*, ECLI:EU:C:2004:614, para. 36)

private law, such as private power and autonomy[185] and the individual itself. Consequently, the focal points of further developments should also be the minimisation of intrusion into the private (contractual) sphere and maximisation of legal certainty.

Considering the first point, fundamental rights were created to protect the individual against the state, encompassing negative and sometimes positive obligations of public authorities. In contrast, horizontal situations are characterised by private (contractual) autonomy which individuals can limit freely via an agreement. While protection of fundamental rights is also present in horizontal situations, it is shaped differently. For example, a breach of contractual rights could eventually result in the nullity of the contract. Infusing fundamental rights into horizontal disputes thus blurs the dividing line between private and public law. It can upset private autonomy by placing individuals under the obligation of fulfilling duties similar to that of public authorities, and shift legislative powers to courts, which could override policy choices.[186] The overall effect of disruption of private law doctrines may result in "*misunderstanding and distortion.*"[187]

The above described dangers of interference with private law are facilitated by the Charter horizontality doctrine as well, concretely by the application of Article 51 of the Charter to individuals and by the intervention of courts' via the horizontality test, which can ultimately overrule existing rules that have already created certain legitimate expectations to individuals. Considering that the Charter also includes economic and social rights, which in national law are usually applied as guiding principles without facilitating a legal basis for claims,[188] the horizontal application of the Charter is likely to have a great impact on private autonomy.

Regarding the second point, direct effect of Charter provisions constitutes direct obligations to individuals, who, in turn, would need to be aware of the exact scope of their duties. Although the Charter was devised as a tool to make fundamental rights more visible, Charter references by national courts, parliaments and governments are still insufficient and superficial.[189] Consequently, it is rather unlikely that individuals are adequately familiar with the Charter, even more so with its horizontal application developed exclusively by case law. As argued in the previous chapter, the horizontality doctrine is still under development and there are several unresolved aspects, which makes its comprehension difficult to individuals. Moreover, a teleological interpretation or varied application of the horizontality test might increase legal uncertainty, especially in case of provisions formulated as principles. Clarification and promotion of Charter rights and a consistent application of the horizontality doctrine are, thus, essential to tackle ambiguities and minimise legal uncertainty.[190]Additionally, *Leczykiewicz* stated that to increase legal certainty only sufficiently precise rights, which are not limited by references to national or EU law should be applied horizontally;[191] this stance seems to be followed by the Court.

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[185] Frantziou, *supra* (n. 21), p. 674.

[186]Oliver Gerstenberg, '*Private Law and the New European Constitutional Settlement'* (2004) 10 (6) European Law Journal 766, p. 766, 769.

[187] Hugh Collins, '*On the (In)compatibility of Human Rights Discourse and Private Law*' (2012), LSE Law, Society and Economy Working Papers 7/2012, p. 15.

[188] Collins, *supra* (187), p. 9-10.

[189] Fundamental Rights Report 2018 of the EU Agency for Fundamental Rights (FRA), available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-fundamental-rights-report-2018_en.pdf, accessed: 14/08/2019, p. 35.

[190] The work of the FRA is essential in this aspect, for example the development of informative applications, such as https://fra.europa.eu/en/charterpedia; or the informative work of the EC via DG JUST.

[191] Dorota Leczykiewicz, '*Horizontal Effect of Fundamental Rights'* (2012) 38 (4) European Law Review 479, p. 496.

On the other hand, factors, such as globalisation and transfer of public functions to private actors clearly transform the landscape of private law.[192] Certain actors, considering their information, knowledge and economic resources, can have a considerable impact on various aspects of our lives and thus *de facto* act as public authorities. The inequality arising from information asymmetries, economic superiority or the regulatory power of one of the parties in certain contractual relations warrants a review against the Charter with the purpose of maintaining contractual freedom. For example, the inherent economic imbalance in an employment relationship or standard contracts and unilaterally prescribed contractual terms often used by operators or service providers restrict contractual freedom.[193] The position of the weaker party and the *de facto* public authority behaviour of certain private law actors, thus, could justify the horizontal application of the Charter. Nonetheless, since most of the Charter provisions presuming an inequal standing of parties refer to further specification by EU and national law (for example the Solidarity chapter), and therefore based on the horizontality test cannot be directly applied in horizontal situations – the Charter is of no help where it is most needed. The justification of remedying inequality is thus not invokable as a valid rationale behind the Court's intrusion into private relations. On the other hand, as mentioned above, Charter rights with reference to secondary legislation due to their ambiguous content present a risk of legal uncertainty even to the economically or otherwise stronger party.

Furthermore, while it could be said that in *Bauer* the Court considered the potential economic superiority tipped towards the employer, on closer inspection, it is evident that Mr. Broßonn's employer was not a big company but only a sole trader bearing its own risks.[194] Would this circumstance amount to a sufficient degree of actual economic imbalance, justifying the horizontal application of the Charter? The Court did not seem to engage in a situational analysis. Instead, it has sent a powerful message that it does not matter whether it is a small or big employer, or a service provider, the Charter is horizontally applicable. This suggests that considerations behind the horizontality doctrine did not really include the individual's situation or the changing landscape of the private sphere. It is unlikely that further developments would focus on these issues.

However, lack of regard for the individual's position in the form of a situational appreciation could reinforce inequality. Smaller employers with limited resources might find it more complicated to detect horizontally applicable Charter rights (not considering conditional provisions).[195] Therefore, accessible and clear argumentation by the Court is necessary. In this context, a better interaction with other international and EU law legal sources was proposed.[196] Although the Court did refer to such sources in its most recent judgements, the purpose of those references was not the concretisation of Charter rights, but the clarification of their origin. Such approach is welcomed, since reference to various documents for the purposes of the horizontality test might increase legal uncertainty.

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[192] Frantziou, *supra* (n. 21), p. 674.

[193] Leczykiewicz., *supra* (n. 191), p. 493-494; Leczykiewicz uses the terms "the regulatory effect doctrine" and "the economic imbalance doctrine" as possible situational justifications for the horizontal application of the Charter. Walkila also regards employment relationships and employment law as the optimal area for the development of the horizontal effect of fundamental rights, since in an unequal relation it would be easier to justify horizontality as an attempt to strengthen the position of the weaker party (see Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law*, Europa Law Publishing 2016, available online at EBSCOhost, p. 199). Similar concepts are also used with regards to consumer protection, where there is also bargaining power and information inequality between the consumer and the trader.

[194]By way of comparison, in *AMS* (no direct effect of the Charter provision) the employer was an association engaging in social services.

[195] Admittedly, this would be problematic even for bigger employers, other subordinated parties and the aggrieved party.

[196] Frantziou, *supra* (n. 72), p. 347.

3.2. Political issues

It is a classic scenario in the EU that anytime a significant change regarding human rights is achieved, MSs seek to limit its impact and effectiveness.[197] This was observable also in case of the Charter, where the MSs sought to limit its scope of application and impact through the horizontal clauses.[198] Thus, a wider application of the Charter to national measures, especially in politically sensitive policy areas over which the MSs wish to retain control, inevitably gives rise to sovereignty concerns. Additionally, a broader application might be hard to justify due to the lack of concrete fundamental rights competence of the EU. Therefore, an overly centralistic approach by the Court with lack of regard for national identity will be controversial. If the Court goes beyond what is perceived as a comfortable line of tolerance, it will be subjected to activism criticism[199] and national courts and MSs might decline to recognise or follow its doctrine.

A good example concerning the horizontality doctrine is the negative reception of the Court's *Dansk Industri*[200] judgement by the Danish Supreme Court[201] which refused to set aside a national provision in conflict with the general principle of non-discrimination based on age, arguing that general principles of EU law can be neither found in the Treaties, nor in Danish law. In contrast, a markedly different reaction, where a national court went well beyond the requirements of Court case law, might be also observed. Such a situation arose in two cases from the United Kingdom in *Vidal-Hall*[202] and *Benkharbouche,*[203] where the Court of Appeal recognised the direct effect of Articles 7, 8 and Article 47 of the Charter, respectively. Since the Court has not yet examined the direct effect of those Charter rights except for Article 47, there was no requirement placed on the national court to make such a recognition. Although the details of the cases are outside the scope of this work, it is important to mention that the approach taken by the Court of Appeal reflects an "*English judicial development,*"[204] as it draws on national court cases and constitutional specificities while examining the direct effect of Charter rights.[205] Therefore while the judgements reflect a positive approach, considering that in the end fundamental rights benefited from a wider protection, the national courts clearly took the matter in their own hands by failing to refer a preliminary ruling to the Court and further developing the doctrine on the basis of their national law.

The above cases illustrate one of the underlying partly political and partly constitutional factors that the Court needs to take into consideration when furthering its horizontality doctrine. The Court's work to harmonise and constitutionalise fundamental rights to strengthen their protection, no matter how noble this goal is, is also perceived as an intrusion into national constitutional practices and national constitutional specificities.[206]

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[197] Gráinne De Búrca, '*The Road Not Taken: The European Union as a Global Human Rights Actor*' (2011) 105 (4) The American Journal of International Law 649, p. 691-692.
[198] Ibid.; Article 51-54 of the Charter.
[199] See *supra* (n. 29).
[200] C-441/14, *Dansk Industri*, ECLI:EU:C:2016:278.
[201] Judgment No. 15/2014 of the Danish Supreme Court of 6th Dec 2016, *DI on behalf of Ajos A/S v. estate of A.*
[202] Judgement of the Court of Appeal, *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.
[203] Judgement of the Court of Appeal, *Benkharbouche v Sudanese Embassy* [2015] EWCA Civ 33.
[204] Joshua Folkard, '*Horizontal Direct Effect of the EU Charter of Fundamental Rights in the English Courts,*' (UK Constitutional Law Association 2015), available at: http://ukconstitutionallaw.org, accessed: 08/08/2019.
[205] It is worth to note that the judgements were rendered following *AMS*, but prior to *Egenberger* and *Bauer.*
[206] Spaventa, *supra* (n. 171), p. 998.

Considering that the EU has no fundamental rights competence[207] and thus no power to create a coherent framework of fundamental rights legislation, a centralised system developed by the Court, instead of by a democratic legislative procedure, might be opposed by the MSs. Especially, if such a system would considerably affect policy areas where the MSs have already made constitutional choices prioritising one right above the other.[208] Such area is represented by the Solidarity chapter of the Charter, which was one of the most problematic parts of the document already at its drafting. Solidarity chapter social rights can influence the sustainability and competitiveness of the national economy and labour. Thus, as *Frantziou* puts it, the "*unwillingness to accord horizontal effect to these provisions may not be squarely justified in legal terms [...] but it can perhaps be understood in light of the political contestability of horizontal effect.*"[209]

Consequently, a wider recognition of horizontality of the Charter, especially regarding its Solidarity chapter, might be also blocked for political reasons. Subsequently, the mentioned political considerations also provide a motivation to the Court to give due regard in its horizontality test to Article 4 (2) TEU[210]and Article 53 of the Charter,[211] without prejudice to the fact that the Charter itself is a reaffirmation of rights as they result from the constitutional traditions of the MSs.[212] In that sense, *Spaventa* proposes to use the Charter as a minimum standard and leave greater freedom to national courts to strike a balance between national (fundamental) rights and the Charter.[213] This could manifest in formulating a more flexible horizontality test or leaving the balancing to national courts, which would allow them to consider the constitutional traditions reflected in national rules. On the other hand, attention should be paid to keep certain aspects of the horizontality test universal, so that considerable differences in its application especially in cross-border situations are avoided. Otherwise, the fragmentation of rights protection in the EU could intensify following the example of the Court of Appeal, developing its own horizontality test and circumventing the principle of primacy.

3.3. The effects of a wider recognition

The motivation behind the Court's approach to a wider recognition, apart from a stronger protection of fundamental rights in the EU, is also the recognition of its judicial activity as enhancing the functioning of the EU. As the potential negative effects have been already addressed while considering some of the legal and political factors, the present sub-chapter will focus on two potential positive effects of a wider recognition – a more human rights focused EU and the strengthening of the rule of law. Since both effects can considerably enhance the reputation of the Court, it is likely that these prospects are also considered while developing the horizontality doctrine.

Considering the first effect, the EU as an originally strictly economic entity has been long criticised for its elevated focus on economic integration and the functioning of the internal market while paying less attention to human rights. However, as early as in the

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[207] Claes, *supra* (n. 180), p. 104, Spaventa, *supra* (n. 172) p. 997-998.
[208] See Speventa, *supra* (n. 172), p. 998 addressing the same issue.
[209] Frantziou, *supra* (n. 21), p. 672.
[210] Case C-36/02, *Omega*, ECLI:EU:C:2004:614 and C-208/09*, Sayn-Wittgenstein*, ECLI:EU:C:2010:806.
[211] See also Elise Muir, '*The Fundamental Rights Implications of Eu Legislation: Some Constitutional Challenges*,' (2014) 51 (1) Common Market Law Review 219, p. 244-245.
[212] The Preamble to the Charter.
[213] Spaventa, *supra* (n. 172), p. 999; Guðmundsdóttir, *surpa* (n.178), p. 718-719.

Defrenne ruling, the Court emphasised that the (then) Community is "*not merely an economic union*", but that it also has its social objectives.[214] A significant milestone in reshaping the Union to a more human rights accommodating organisation was the Charter becoming legally binding, which led to several important fundamental rights promoting judgements of the Court.[215] The Charter's power was supplemented by the FRA, and EU institutions also started to raise their voices for a more human rights centred EU.[216]

Nonetheless, despite the binding nature of the Charter, the EU still cannot be regarded as a human rights organisation.[217] Considering that the single market is not yet completed, the EU's focus is and presumably will be on the smooth functioning of the market. Although this has led to positive results in social and fundamental rights protection in the field of consumer protection or employment law as well, the focus has inevitably remained on the achievement of economic goals – the eradication of barriers to trade to stimulate cross-border purchase of goods or minimisation of social dumping to safeguard fair competition.[218] With regards to the Court, it could be said that case law has been also attentive to such legislation, and along that line rights protection strengthened.[219] Nonetheless, as legislative focus on human rights seems to be existent only up until it can aid the achievement of economic objectives, the same ideology might also influence the Court's decision-making especially if the economic interests can facilitate further integration.[220] Consequently, in cases where human rights stand against more economic rights the Court may pay more attention to the latter. Alternatively, in a purely human rights conflict, less motivation might be present to develop ground-breaking doctrines.

Furthermore, the EU is an avid promoter of human rights in the international sphere and deems those rights as being the fabric of its international identity. The high standards of human rights protection required by the EU of its partners and keen focus on human rights promotion are evident, for example from Article 3 (5) TEU and the European Neighbourhood Policy, especially from the accession or Copenhagen criteria. However, it seems that what the EU requires and promotes on the international plain is not always required inside the Union.[221] Naturally, it is not suggested that the EU would fall behind in human rights protection, but the double-sided reality has already earned some criticism and might dim the EU's authority and effectiveness in promoting human rights in the world.[222]

Considering all these factors, a wider recognition of horizontality would clearly bring a positive recognition from rights protecting organisation and international bodies. A broader recognition would help to strengthen the credibility of the EU and alleviate criticism generated, for example by the failed accession to the ECHR halted by the Court's Opinion 2/13.[223]

Another potential positive effect of a wider recognition of the Charter in horizontal situations is that it could act as a universal tool of promotion of Article 2 TEU values and help to build a rule of law culture from the bottom-up, when some MSs deviate from the common

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[214] *Defrenne*, para. 6.

[215] For example, Case C-293/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238 or Case C-92/09, *Schecke*, ECLI:EU:C:2010:662.

[216]European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254(INL) and EC Communication on Strengthening the rule of law within the Union A blueprint for action, COM(2019) 343 final

[217] Lenaerts, *supra* (n. 99), p. 377.

[218] Collins, *supra* (n. 187), p. 9-10.

[219] Good examples are consumer protection cases, where the right to an effective judicial remedy and procedure has been given a considerable attention.

[220] Bartl and Leone, *supra* (n. 175), p. 154.

[221] De Búrca, *supra* (n.197), p. 685, 691-692.

[222] Ibid.

[223] Opinion 2/13 of the Court (Full Court) of 18 December 2014.

value system. MSs might systematically breach their obligations to correctly implement directives and adopt national legislation in conflict with EU law. This might have negative effects on the press, the civil society, and eventually effect fundamental rights on the horizontal level.

Rule of law concerns in the past few years have been on the rise with the EC initiating Article 7 TEU and several infringement procedures.[224] Yet, the EU has no concrete mechanism to enforce Article 2 TEU values, apart from the procedure under Article 7 TEU, which is a prisoner of its own device. Although infringement procedure under Article 258 TFEU can be applied,[225] it is addressed to the MS which might ignore the penalties and continue to infringe EU law, leaving potential breaches at the horizontal level unresolved. [226] A wider recognition could ensure that the Charter standards are maintained when the case is within the scope of EU law, despite a conflicting national legislation. For example, this could help to ease constraints on solidarity rights in an employment relationship facilitated by a contradictory legislation. [227] It could also give national courts another tool to safeguard fundamental rights, when harmonious interpretation is deliberately blocked by a national measure. Additionally, the encouragement to rely on the Charter in horizontal disputes might nurture a rule of law culture and recognition of fundamental rights, which could also make individuals more aware of rule of law concerns. Consequently, it is perhaps no coincidence that the Court decided to address the horizontal application of the Charter in 2018. It could be said that rule of law concerns prompted the Court to make the Charter more relevant in horizontal situations, even though the problems are more linked to vertical issues. The increased employment of the Charter on the individual level is also encouraged by rule of law related documents from EU institutions.[228]

However, while the above described outlooks are optimistic, when acknowledging the Court's limited capacity to shape the Union through its case law, it is questionable if such a role or responsibility should be conferred on Luxembourg or a judicial body in the wider sense. While the Court's engagement in the mentioned issues is required, as suggested throughout this chapter, the overstepping of constitutional boundaries would generate internal criticism and non-recognition from the MS. Instead, action is more required from the legislature and executive. For example, relatively non-contentious measures would be the inclusion of Charter articles in the legislative proposals and then in the legal basis of the adopted text more often or the more frequent incorporation of Charter articles in infringement procedure applications. On the other hand, what is perhaps required of the Court in terms of promotion of the rule of law and human rights is, as suggested in the first chapter, a more detailed and well-supported argumentation that avoids ambiguous concepts and is thus comprehensible and accessible to individuals. The argumentation should be also clear

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[224] Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531; C-192/18, *Commission v. Poland*, NYR; Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687 – with regards to the state of the judiciary, and two additional disputes over higher education law and law on foreign-funded NGOs of Hungary.

[225] Charter referenced several times in such cases, see for example the EC press releases of the infringement procedures initiated against Hungary, available here: https://europa.eu/rapid/press-release_IP-17-5004_en.htm and here: https://europa.eu/rapid/press-release_IP-17-1982_en.htm.

[226] Outside the EU, individuals may make use of an application to the ECtHR or the collective complaints procedure under the ESC system, although each of the mechanisms have their own disadvantages.

[227] See for example news report on the so called "slave law" passed by Hungarian lawmakers, available at: https://www.euractiv.com/section/future-eu/news/chaos-as-hungarian-mps-pass-slave-law-and-government-controlled-court/.

[228] For example, the ambitious resolution of the EP from 2016 proposes individual actions under Article 258 and 259 TFEU for Charter breaches, see *supra* (n. 150), p. 20; or the new EC Blueprint for the strengthening of rule of law within the EU, see *supra* (n. 214).

enough to enable external review regardless of the perceived acceptability of the judgements.[229]

3.4. Assessment of legal and political factors

The present chapter assessed the legal and political factors and their effect on the horizontality doctrine with the aim to determine the scope of further developments and improvements, and thus the possibility of a wider recognition. The Court's approach to the assessed factors suggests avenues of further developments. For example, a non-standard approach to certain factors could indicate determination to further the doctrine.

The present chapter found only one such case, the wide interpretation of Article 51 (1) of the Charter, which is in contrast with previously well-cemented readings of the article. The conclusion that even individuals might be directly required to comply with certain provisions of the Charter is a substantial leap from previous interpretations,[230] which identified as addressees only MSs and EU institutions. The horizontal clauses of the Charter, including the *ratio personae* in Article 51 (1), encapsulate MS competence concerns, the principles of subsidiarity and proportionality, and caused much controversy already at drafting. In that context, the Court's decision to list individuals as addressees of Charter provisions suggests a determination to develop the doctrine further.

Nonetheless, the Court's wide interpretation of the *ratio personae* is balanced out by limitations of the doctrine embodied by the actual horizontality test, which facilitates the horizontal direct effect of only some Charter rights and the *ratio materiae*. These limitations considerably whittle down the impact of the doctrine.

The material scope of application is also explicitly mentioned in Article 51 of the Charter, even though the notion of "*implementing Union law*" has been also subject to controversies. A wide interpretation of this concept would generate considerable opposition from the MS and result in the non-recognition of the doctrine. The rigid application of the horizontality test, as described in the second chapter, also stems from political and competence considerations. The Court's literal interpretation of Charter provisions reflects strong regard for the political and legal factors evaluated in the third chapter. The test, as currently applied by the Court, excludes many of the Charter articles falling within the scope of minimum harmonisation policy fields. As it is clear from the Charter, these fundamental rights require further MS or EU legislature action. They affect policies, which are of special importance to the MSs, and where they want to retain as much competence as possible. Consequently, the reason behind maintaining the horizontality test is not so much an attempt to exclude social rights from the horizontality circle, but a necessary consideration of the underlying competence issues and the scope of application of the Charter. With a more activist approach, the Court could risk a Mangold-like criticism and non-application of its doctrine by the national courts.

A regard for political opposition and competence can be also seen when evaluating interference with private national law. By not applying a contextual appreciation, translating into a less strict interpretation of Charter provisions linked to situations of inequality, the Court essentially takes into consideration, again, the minimum harmonisation areas.

In consideration of the above, the current application of the horizontality test by the Court, which results in the lack of horizontality of several Charter fundamental rights has its political and legal justifications. The political and legal factors prevent a wider recognition of the Charter in terms of broadening the scope of horizontally applicable rights by including conditional rights mainly present in the Solidarity chapter. Lastly, having noted that the proposed positive effects of a wider recognition could be achieved by other means with

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[229] See on the style of the Court's judgements De Búrca, *supra* (n. 73).
[230] See *supra* (n. 146) and sub-chapter 3.1.1.

relatively less controversy, those effects cannot be regarded as considerable motivation behind a further development of the horizontality doctrine. The significance of those effects is also lessened by the Court's inclination towards economic interests, facilitating closer integration.

4. Conclusion

In the second chapter of the present thesis it has been shown that the latest case law on the horizontal application of the Charter did clarify many of the unresolved aspects of the horizontality doctrine, which have prompted academic discussions since *AMS*, or even since *Kücükdeveci*. Most importantly, the Court and AGs made a successful attempt at consolidating the case law on the horizontal application of primary law, which *inter alia* resulted in the crystallisation of the horizontality test in *Bauer*. This suggests promising developments from a rights protection perspective – the improvement of the doctrine could be evidence of the Court's intention to use and promote the horizontality doctrine. However, not even *Bauer* has cleared all the hurdles and brought about the desired revolution in rights protection.

The impact of the doctrine is limited by the strict and rigid application of the horizontality test. As of now, the test disqualifies a great number of fundamental rights, which require further concretisation and are not clearly rights-conferring. From a rights protection perspective this is clearly a battle lost, since several of such fundamental rights belong to the Solidarity chapter characterised by power and economic inequality. As a result, the Charter sets out a dualist tool for rights protection, where not all fundamental rights can provide the same level of protection. Therefore, it does not ensure the desired protection that would be sufficient to fill the gap created by the lack of direct effect of directives.

The development or improvement of the doctrine suggested in the thesis is rather cosmetic, procedural, and does not facilitate a wider recognition of Charter horizontality, entailing the recognition of invokability of a broader spectrum of Charter rights. Most importantly, the Court would need to minimise legal uncertainty and safeguard a stronger acceptance of the doctrine, as concluded by the second chapter. The improvements, thus, would need to address a number of issues, should the Court wish to uphold its current approach. Firstly, a clear explanation of the rights and principles division would be necessary to give *AMS*-like cases, which exclude the horizontality of certain Charter rights, more legitimacy and provide national courts a clearer roadmap on horizontally invokable Charter rights. Secondly, since it has been shown that some of the judgements were vague and minimalistic, it is important that clarity, the explanatory style of the judgements and a better interaction with the Explanations and AG opinions is ensured to make the case law more accessible to individuals. Thirdly, the judgements would need to take into thorough consideration conflicting rights. These improvements are essential for the successful application of the doctrine and its practical employability.

Then, as shown in the third chapter of this work, wider recognition is essentially blocked by political considerations and competence requirements. Admittedly, *Bauer* already crossed the line established by those blocking factors. However, the horizontality test of the Court kept the breaks on a doctrine, which could have gone further. A wider recognition could have been achieved in two ways: accepting directives as tools of concretisation of conditional Charter rights and a more purposive and less literal interpretation of Charter rights for the purpose of the horizontality test. The first option would be a circumvention of the *Marshall* doctrine, as it would enable the EU legislature, shaping the content of the directives, to influence rights protection in horizontal situations. The second option could be seen as interference with competence demarcation and would likely meet MS opposition

because it would enable interference with sensitive policy areas. These considerations, namely restraining the power of the EU legislature over the national (1) and maintaining a regard for national identity and minimum harmonization (2), are the factors that have been translated into the Court's approach to Charter horizontality and the horizontality test itself, limiting the overall impact of the doctrine.

One might ask why the Court even bothered to conquer smaller mountains, if then stopping short of addressing the main challenge? In this context, it is essential to highlight one of the factors - the importance of recognition of the doctrine. On one hand the use of the Charter by national courts, an originally barely cited non-binding document, has always been a controversial matter. On the other hand, the success and any impact of the horizontality doctrine will be ensured only by its consistent application at national level. Should the doctrine be too intrusive, the national courts could decline to apply it. The Court thus trod a delicate line between recognition and rights protection, since it is better to have some degree of protection than end up in a zero-sum game. Considering the above, wider recognition of the horizontal application of the Charter does not seem to be possible. However, it remains to be seen if the Court will uphold its stance when more economic rights will be up for assessment.

Lastly, it cannot be said that such a conclusion is entirely negative. The EU is still an organisation of states united in diversity, and the Charter is a microcosmos of this union. Allowing the consideration of different constitutional particularities, the will of drafters and the division of competences to infuse the horizontality doctrine is perhaps the optimal choice. It is possible that before advocating for wider recognition of the Charter horizontality, it is worth reconsidering its role as an instrument of rights protection in horizontal situations.

5. Annex 1

Horizontal application of the Charter – the Court's current approach
The following requirements need to be fulfilled for a Charter right to be directly invokable in a horizontal dispute:
1. Contextual requirements
   - The case needs to fall within the scope of EU law – directives could act a "*pull factor.*"[231]
   - The counterparty is not an emanation of the state.
   - Indirect effect is not possible (*contra legem*) – the impossibility of harmonious interpretation must be examined by the national court.

2. Material requirements
   - The Charter provision is sufficient in itself, meaning it is:
     - unconditional (no reference to further concretization by EU or national law),
     - mandatory (a rights-conferring provision of absolute nature and possibly also recognised in international law instruments).

[231] Rossi, *supra* (n. 47).

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