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Application of fundamental rights in the relationships between private parties

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I. Introduction

The scope of the present paper extends to an examination of the horizontal issues raised by the provisions of the Charter of Fundamental Rights of the European Union (hereinafter, the Charter)[1].

Indeed, recent case law of the Court of Justice presents an interesting extension of the scope of application of the Charter given that a literal interpretation of Article 51(1) should essentially result in the application of the Charter by individuals *vis-à-vis* the institutions, bodies, offices and agencies of the Union and the Member States only when they are implementing Union law.[2] However, interpretation of the Charter in light of the general principles of EU law renders some of its provisions applicable in private law disputes.[3] Such a broad application of the Charter provisions by the Court of Justice substantially alters its scope. The aim of this paper then is to analyse the selected recent case law of the Court of Justice concerning horizontal direct effect of relevant Charter provisions.

II. Why the question of a horizontal direct effect of the primary law of the EU is relevant at all?

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[1] [2010] C 83/02.

[2] For a literal construction of this provision see the Opinion of the Advocate general Trstenjak rendered on 8th September 2011 in case *Dominguez*, C-282/10. The respective Advocate general argued in para 83 that: "In light of the fact, firstly, that the first sentence of Article 51(1) of the Charter clearly determines the entities bound by fundamental rights and, secondly, that to assess the function of the fundamental right in Article 31 of the Charter according to its regulatory purpose amounts to nothing more than establishment of a duty of protection on the European Union and the Member States, it is to be concluded that private individuals are not directly bound by that fundamental right."

[3] See Seifert, Achim, 'L'effet horizontal des droits fondamentaux. Quelques réflexions de droit européen et de droit comparé', *Revue trimestrielle de droit européen*, Dalloz, 2013. The author argues that in most cases, the issue of the relevance of fundamental rights in private law relationships is dealt with by way of interpretation and generally on a case-by-case basis.

Given that certain provisions of the Charter have been implemented by directives, the question arises of how to guarantee the full effectiveness of fundamental rights of the EU in a situation where a directive has been incorrectly transposed or not transposed at all by a Member State. In such a situation, a directive (act of a secondary law) which has not been transposed may, in a concrete case, impedes the application of a provision of the Charter (act of primary law).

The Court of Justice has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. It follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.[4] That position respects the particular nature of a directive. It has not been disputed in the case law of the Court of Justice that a directive, incorrectly transposed or not transposed at all by a Member State, may not be relied on in proceedings between private parties. A directive does not give rise directly to obligations on the part of the Member States to which it is addressed and can impose obligations on individuals only through the medium of national transposition measures.

In these circumstances, the Court of Justice has sought alternatives to satisfy an individual who considers himself wronged by the fact that a directive has not been transposed or has been transposed incorrectly. The first palliative for the lack of the horizontal direct effect of directives is the broad definition, by the Court of Justice, of the **concept of the "State"**. Thus, a body, whatever its legal form, which has been made responsible, pursuant to a measure, adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is included in any event among the bodies which the provision of a directive capable of having direct effect may be relied upon. The four criteria laid down in *Foster* seem to relate both to the possibility of control and the functions performed.[5] According to the **principle of conform interpretation**, the national law must be interpreted

[4] See, inter alia, Case 152/84 *Marshall* [1986] ECR 723, para 48; Case C‑91/92 *Faccini Dori* [1994] ECR I‑3325, para 20; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, para 108.

[5] Case C-188/89 *Foster* [1990] ECR 3313, para 20. See Sacha Prechal, Directives in EC Law, Oxford University press, 2nd Edition, 2006, p. 60.

in conformity with EU law. It is the obligation on national courts to interpret national law, *as far as possible*, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.[6] However, The use of "as far as possible" indicates that this approach is subjected to limits. In fact, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.

In cases where the result required by a directive cannot be achieved by interpretation, the Member States are required to make good damage caused to individuals (**Member States' liability**) through failure to transpose the directive, provided that three conditions are fulfilled. First, the purpose of the directive in question must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the Member State's obligation and the damage suffered.[7]

The above mentioned alternatives to the lack of the horizontal direct effect of directives are, in most cases, sufficient both to ensure the full effectiveness of directives and to give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States.

III. Further alternatives to the lack of horizontal direct effect of directives

However, in some situations, the abovementioned alternatives are not sufficient for an effective implementation of EU law. The Court of Justice has addressed this issue in its recent case law and has profoundly changed the scope of application of the Charter. In fact, according to the Court of Justice, the application of national law contrary to the general

[6] See, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para 26; Case C-106/89 *Marleasing* [1990] ECR 4135, para 8; *Faccini Dori*, para 26; and *Pfeiffer and Others*, *op. cit*., para 113.

[7] Joined Cases C‑6/90 and C‑9/90 *Andrea Francovich and Danila Bonifaci and Others* v *Italian Republic* [1991] ECR I‑5357.

principle of non-discrimination on grounds of age or to the Article 21(1) of the Charter can be excluded in proceedings exclusively between private parties.[8]

1. Horizontal direct effect of general principle of non-discrimination on grounds of age

The question of the exclusion of application of national law contrary to the general principle of law was at stake in *Kücükdeveci*. This case concerned the compatibility with the EU law of the last sentence of the Paragraph 622(2) of the German Civil Code (Bürgerliches Gesetzbuch, 'the BGB') providing that periods of employment completed by an employee before reaching the age of 25 were not taken into account when calculating the notice period for dismissal.

i. Facts of the case

Ms Kücükdeveci contested her dismissal before the Arbeitsgericht Mönchengladbach (Labour Court, Mönchengladbach) and argued that her period of notice should have been four months (instead of one month) since she was 10 years in service.

The Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf), hearing the case on appeal, found that the period for transposing Directive 2000/78[9] had expired by the date of the dismissal. That court also considered that the last sentence of Paragraph 622(2) of the BGB contains a difference of treatment directly linked to age, and, while it is not convinced that it is unconstitutional, it regards its compatibility with EU law as doubtful. It emphasized that it cannot interpret national law in accordance with the directive 2000/78, given that the last phrase of Paragraph 622(2) is a clear and precise provision.

It referred the following questions to the Court of Justice.

By its first question, it asked essentially whether the last sentence of Paragraph 622(2) of the BGB under which periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal, constitutes a

[8] See Cases C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I-9981 and C-555/07 *Seda Kücükdeveci* v *Swedex GmbH & Co KG* [2010] ECR I-365.

[9] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

difference of treatment on grounds of age prohibited by EU law, in particular primary law or Directive 2000/78.

By its second question, it asked whether, where it is hearing proceedings between individuals, in order to disapply a national provision which it considers to be contrary to European Union law, it must first, to ensure protection of the legitimate expectations of persons subject to the law, make a reference to the Court under Article 267 TFEU, so that the Court can confirm that the legislation is incompatible with EU law.

ii. Opinion of the Advocate General Bot[10]

With regard to the first question, AG Bot proposed that the Court of Justice should hold that Article 6(1) of Directive 2000/78 must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides generally that periods of employment completed before the age of 25 are not to be taken into account in calculating notice periods in case of dismissal.

As far as the second question is considered, AG Bot opined, firstly, that the national court considers that it cannot interpret the national provision in conformity with the objective of the directive. Secondly, AG Bot considered that, according to Article 9 of Directive 2000/78, the effective right of action must be available to persons who consider themselves wronged by failure to apply the principle of equal treatment to them. It implies that the national courts having jurisdiction can grant to persons within the disadvantaged category a legal protection *immediately* and without being required to call upon the victims to bring a civil liability action against the State. Therefore, redirecting Ms Kücükdeveci towards a civil liability action against the Federal Republic of Germany would cause her to lose her case, with the financial consequences that would flow from that, even though the existence of age discrimination contrary to Directive 2000/78 is established, and require her to initiate fresh judicial proceedings. Such a solution would run counter to the effective right of action from Article 9 of Directive 2000/78.[11] Whilst this statement was relevant at the time AG Bot delivered opinion in this case, its relevance is watered down today, since the Court of Justice recognizes

[10] Opinion of Advocate General Bot, delivered on 7 July 2008, in case C-555/07 *Seda Kücükdeveci* v *Swedex GmbH & Co. KG* 2009 [2009] ECR p. I-365.

[11] *Ibid.*, para 68, 69.

the applicability of the general principle of non-discrimination on grounds of age in the relationships between private parties.[12]

Thirdly, AG Bot proposed a more ambitious approach which consisted in that the Court should, as it has done in regard to the general principle of EU law itself, accept that a directive intended to counteract discrimination may be relied on in proceedings between private parties in order to set aside the application of national rules which are contrary to that directive. That position is the only one which can be reconciled with what the Court decided in *Mangold*.[13] A statement according to which a directive is directly effective in the relationships between private parties is deeply misleading. However, one shall also be aware that after the Court of Justice pronounced *Mangold*, it was not clear whether it is a directive or a general principle of law which has direct effect in the relationships between private parties. Since *Kücükdeveci* it has been clear that it is the general principle of non-discrimination on grounds of age as given specific expression in the Directive 2000/78 which applies directly in the relationships between private parties. Consequently, the national court must set aside national law which is contrary to that general principle.[14]

Fourthly, given that *Mangold* has been the subject of many criticisms, above all in the Federal republic of Germany[15] AG Bot suggested that the Court of Justice should limit itself to the principal contribution of that judgment, namely that observance of the general principle of EU law prohibiting age discrimination and that the national court must therefore give full effect to that principle by disapplying any contrary provision of national law, including in proceedings between private parties.[16] AG Bot opined that the legal solution in *Mangold* should be

[12] See, for example, Cases *Kücükdeveci, op. cit.,* and C-476/11 *HK Danmark* v *Experian A/S* [2013] ECR p. I-0000 and C-176/10, *Association de médiation sociale* v *Union locale des syndicats CGT and Others* [2014] ECR I-0000.

[13] Opinion of AG Bot, *op. cit.*, para 70.

[14] *Kücükdeveci*, *op. cit.*, para 50, 51.

[15] The main critics were, firstly, that the Directive referred to was not yet applicable since the period prescribed for its transposition into national law had not yet expired, secondly, that there was insufficient grounds for extracting a general principle of non-discrimination on grounds of age, and, thirdly, the Court of Justice has not given clear and persuasive justification for the approach which it adopted. For some critical insights see: Lüder Gerken, Volker Rieble, Günter H. Roth, Torsten Stein & Rudolf Streintz, "Mangold" als ausbrechender Rechtsakt, 2009, sellier, Munich.

[16] *Ibid.*, para 76.

followed in *Kücükdeveci* despite the fact that in the first case the time-limit for the transposition of Directive 2000/78 has not yet expired, while in the latter it has expired. If the Court would have done otherwise, it would depart from the logic which underlies *Mangold*.[17]

Finally, the AG Bot proposed to the Court of Justice to answer the second question in the sense that the national court must disapply that national legislation at issue even in proceedings between private parties.

iii. Judgment of the Court of Justice

The Court of Justice endorsed the opinion of the AG Bot.

- Within the scope of EU law

Right at the outset, the Court of Justice pointed out that for the principle of non-discrimination on grounds of age to apply, the case must fall within the scope of EU law.[18] In this context, the Court of Justice considered that the period of transposition of Directive 2000/78 into national law expired and that the second sentence of Article 622(2) BGB concerns a matter governed by that directive, in this case the conditions of dismissal.[19] In this context, it has to be noted that even a national measure which does not implement Directive 2000/78 may fall within the scope of application of EU law which means that it is subject to a review of its compatibility with fundamental rights of the EU.[20] It is the general principle of EU law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether EU law precludes national legislation at issue.[21]

- Non-conformity of the exclusion of certain periods of employment with EU law

As far as the answer to the first question is considered, the Court of Justice had no difficulties to conclude that the EU law, more particularly the principle of non-discrimination on grounds

[17] *Ibid*., para 86.

[18] See *Kücükdeveci*, para 23.

[19] *Ibid*, para 25.

[20] See Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*, ECR [2013] I-0000, para 21.

[21] See *Kücükdeveci*, *op. cit.*, para 27.

of age as given expression by Directive 2000/78 precludes national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal. The Court of Justice pointed out that the aim of this legislation is to achieve the aim of to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility. However, the legislation is not appropriate to achieve this aim, because it is clear that, under that legislation, the extension of the notice period for dismissal according to the employee's seniority in service is delayed for all employees who joined the undertaking before the age of 25, even if the person concerned has a long length of service in the undertaking at the time of dismissal.[22] Nevertheless, an individual may take advantage of this conclusion only if the Court of Justice decides that the abovementioned general principle of law applies in the relationships between private parties.

- Horizontal direct effect of the general principle of non-discrimination on grounds of age

Whilst the Court of Justice emphasized that the obligation to achieve the result envisaged by the directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts, it considered that the second sentence of Paragraph 622(2) of the BGB is not open to an interpretation in conformity with Directive 2000/78.[23]

The Court affirms its statement from *Mangold* that the general principle of non-discrimination is given expression in directive 2000/78. Therefore, it concludes that it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.[24] The Court of Justice clarified the dilemma from *Mangold* whether it is a

[22] *Ibid.*, para 39-43.

[23] *Ibid.*, para 47-49.

[24] *Ibid.*, para 50, 51.

general principle of law or a directive which has horizontal direct effect. It has been clear since now that it is the former which has such an effect. This approach assumes that a fundamental right (general principle of law) can have horizontal direct effect. It is disappointing that the Court does not explain the reasons for this assumption, because it is not at all self-evident.[25] At the time when *Kücükdeveci* was pronounced, the Charter was in force and the Court of Justice referred in its reasoning to its Article 21(1). Under this provision, '[a]ny discrimination based on … age … shall be prohibited'. This provision is an expression of the general principle of non-discrimination on grounds of age. However, it is regrettable that the Court of Justice did not make any explanation about the link between the general principle of non-discrimination on grounds of age and Article 20(1) of the Charter and the pure reference it made to this provision seems to be subsidiary and did not contribute to the recognition of its horizontal direct effect.[26]

The only rationale which the Court of Justice gave for the horizontal direct effect of the general principle of law is the principle of effectiveness of EU law. This is a policy argument. The Court of Justice neither explains the substance of this principle nor gives any additional, more legal justifications for this approach. In addition, the general principle of law is an abstract and unwritten judge made law, while a Charter or a directive is a written act adopted by the legislator of the EU. It is regrettable that the Court of Justice did not refer rather expressly to the Article 21 (1) of the Charter and to the Directive 2000/78 which implements it, since both written acts are an expression of a general principle of non-discrimination on grounds of age. Importantly, such a reference would also help to legitimate the approach of the Court of Justice from the point of view of the principle of institutional balance. In contrast with judge made general principles of law, the Charter or Directive 2000/78 are legislative legal acts of the EU. This reference to the (written) Article 21(1) and to Directive 2000/78 would also be welcomed from the point of view of the principle of legal certainty.

- Broad consequences of *Kücükdeveci*

[25] Mirjam de Mol, Case Note – *Kücükdeveci:* Mangold Revisited, European Constitutional Law Review, Volume 6, Issue 02, June 2010, pp. 293-308.

[26] See *Kücükdeveci*, *op. cit.*, para 23. For the comment on this case see Thomas Papadopoulos, Criticizing the horizontal direct effect of the EU general principle of equality, European Human Rights Review 4 (2011) 437.

Kücükdeveci has wide implications on national legal orders. A national judge has to disapply 'any' provision of national law (not only legislative act!) which may conflict with a general principle of law, providing that the provision of national law falls within the scope of EU law and in particular has been adopted to implement a directive. This may include national law in all fields, such as constitutional, administrative, criminal, private and employment law, and law adopted by any organism of the state, such as a national assembly, government or a local entity. It may also include national judicial decisions of any court, including a constitutional court. It excludes national law contrary to the general principle of non-discrimination on grounds of age in the widest possible sense. This exclusionary effect of the (unwritten) general principle of law, although it is very beneficial for the worker concerned, affects, however, adversely the principle of legal certainty and the employer. The latter can no longer rely on the (written) national law which is contrary to the general principle of law. Concretely, Swedex who gave Ms. *Kücükdeveci* a one month notice of dismissal which was in perfect conformity with the (written) second sentence of Article 622(2) BGB cannot anymore rely on this provision since it must grant to her, on the grounds of the (unwritten) general principle of non-discrimination on grounds of age, a four months' notice of dismissal.

B. Horizontal direct effect of the prohibition of discrimination on grounds of age from Article 21(1) of the Charter

The question of the horizontal direct effect of the Charter and the exclusion of national law provisions which are contrary to its provisions was at stake in *Association de médiation sociale (AMS).*[27] This case concerned the compatibility with Article 27 of the Charter and the Directive 2002/14 of Article L 1111-3 of the French Labour Code which excludes from the calculation of the staff numbers apprentices, employees with an employment-initiative contract or an accompanied‑employment contract, and employees with a professional training contract ('employees with assisted contracts'). The essential question was whether the application of an apparently incompatible provision of the French Labour Code with EU law can be excluded in a proceeding exclusively between private parties.

i. Facts of the case

[27] For an excellent comment on this case see Cariat, Nicolas: L'invocation de la Charte des droits fondamentaux de l'Union européenne dans les litiges horizontaux — État des lieux après l'arrêt *Association de médiation sociale*, Cahiers de droit européen 2014/2, pp. 305-336.

In this case, the trade union "Union départementale CGT des Bouches-du-Rhône" appointed Mr Laboubi as representative of the trade union section created within the *AMS*. The latter challenged that appointment and claimed that, in accordance with Article L. 1111-3 of the Labour Code, it had staff numbers of fewer than 11 and, *a fortiori*, fewer than 50 employees which is a threshold provided by the Directive 2002/14 for the appointment of the representation of employees. As a result, it was not required, under the relevant national legislation, to take measures for the representation of employees, such as the election of a staff representative. Additionally, *AMS* considered that it was necessary to exclude from the calculation of its staff numbers apprentices, employees with an employment-initiative contract or accompanied-employment contract and employees with a professional training contract ('employees with assisted contracts'). It is to be noted that because of the legal nature of the *AMS* which was a private association with social objectives, the trade union cannot rely on the provisions of Directive 2002/14, as such, against that association.

The Tribunal d'instance de Marseille (Marseille District Court), hearing an application brought by the *AMS* for the annulment of Mr Laboubi's appointment as representative for the CGT trade union section and a counterclaim by that trade union for an order that the *AMS* organise elections for the purposes of setting up within it bodies representing staff, referred a priority question on constitutionality to the Cour de cassation (Court of Cassation) concerning the provisions of Article L. 1111-3 of the Labour Code.

The Cour de cassation referred that question to the Conseil constitutionnel (Constitutional Council). The Conseil constitutionnel declared that Article L. 1111-3 of the Labour Code was not unconstitutional.

The Tribunal d'instance de Marseille upheld those arguments and did not apply Article L. 1111-3 of the Labour Code on the grounds that it did not comply with EU law. The tribunal thus declared the appointment of Mr Laboubi as trade union section representative to be valid.

The *AMS* brought an appeal before the Cour de cassation against that judgment which referred the following questions to the Court of Justice for a preliminary ruling:

May the fundamental right of workers to information and consultation, recognised by Article 27 of the Charter …, and as specified in the provisions of Directive 2002/14 …, be invoked in

a dispute between private individuals in order to assess the compliance [with European Union law] of a national measure implementing the directive?

In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with the following contracts: apprentice, employment‑initiative contract, accompanied-employment contract and professional training contract?'

ii. Opinion of the Advocate General Cruz Villalón[28]

1. Horizontal direct effect of Article 27 of the Charter

With regard to the first question, AG Cruz Villalón opined that Article 27 of the Charter may be relied on in a dispute between individuals, since it would appear more than daring to exclude any effect of such rights in private relations, as the article itself refers in its title to the right having to be granted 'within the undertaking' and definitely implies legal obligations for undertakings in practice.[29] In addition, since the horizontal effect of fundamental rights is not unknown to EU law, it would be, according to the respective AG, paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse.[30]

- Distinction between rights and principles in the Charter

Since the Charter does not clarify whether Article 27 is a right or a principle[31], the respective AG addressed the content of the provision and opined that the right of workers to information and consultation within the undertaking, as guaranteed in Article 27 of the Charter, should be understood as a *'principle'* for the purposes of Articles 51(1) and 52(5). In fact, Article 27 mirrors a typical social right as it is also enshrined in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers; also, it is the first article in

[28] Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013, in case C-176/12 *Association de médiation sociale* v *Union locale des syndicats CGT and Others* [2014] ECR I-0000.

[29] *Ibid.*, para 39, 40.

[30] *Ibid.*, para 34, 35.

[31] *Ibid.*, para 43.

the title 'Solidarity' of the Charter; before entry into force of the Charter, the right was already enshrined in secondary legislation such as Directive 2002/14.[32]

- Substantial and direct concretization of a Charter principle

To affirm the practical effectiveness of legal principles, the respective AG suggests that implementing acts should be understood as those that *'substantively and directly' concretize the content of a principle*, to avoid regarding whole areas of regulatory action such as the social or environmental law of a Member State as an implementing measure.[33] Article 3 (1) of Directive 2002/14 offers a good example of 'substantive and direct' concretization, as this provision concerns based on its title the scope of application of the rights enshrined in the Directive.[34] Article 3 (1) lays down the personal scope of application of the right to information and consultation and thus forms part of the content of Article 27 of the Charter that can be enforced before a court.[35] Article L.1111-3 Code du travail is such an implementing act in the wider sense, because it acts as a 'channel' to implement the right to information and consultation and is suitable – as a norm that excludes a certain category of workers from the calculation of the number of employees – to violate the content of the principle as concretized substantially and directly by implementing acts.[36]

The respective AG concluded, on the basis of the second sentence of Article 52(5) of the Charter, that Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14[37], may be relied on in a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation.[38] In addition, the respective AG opined that while the action for damages had been initially conceived to protect those having a subjective right to be enforced before national

[32] *Ibid.*, para 52, 53.

[33] *Ibid.*, para 63-64.

[34] *Ibid.*, para 65.

[35] *Ibid.*, para 66.

[36] *Ibid.*, para 72.

[37] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, p. 29.

[38] Opinion of AG Cruz Villalón, *op. cit.*, para. 80.

courts, a reasonable solution in the present situation could be that the party who had drawn a benefit from the implementing act contrary to EU law now would be required to carry the burden of undertaking the necessary steps of an action for damages against the Member State; this would appear more justified than to impose said burden on the party who possesses a right created through the concretisation of the content of a principle.[39]

2. National legislation contrary to Article 27 and directive 2002/14

With regard to the second question, AG Cruz Villalón opined that *Confédération générale du travail and Others* (*CGT*)[40] enabled the Court to rule for the first time on Directive 2002/14, in a case from the French Republic in which a question was raised concerning the exclusion of a category of workers until they had reached a specific age. According to the *CGT*, the fact that the Court declared that that exclusion was contrary to Directive 2002/14 confirms that in the present case, where once again a category of workers is excluded, there has been an infringement of that directive. Accordingly, Article 27 of the Charter, given specific substantive and direct expression by the second subparagraph of Article 3(1) of Directive 2002/14, must be interpreted, in the light of *CGT*, so as to allow the States to establish methods for calculating the number of workers for the purposes of staff numbers, but under no circumstances does this entail the possibility of excluding an employee from that calculation.[41] Consequently, the respective AG proposed to the Court of Justice to interpret Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, as meaning that it precludes national legislation which excludes a specific category of workers, namely those with 'excluded contracts', from the calculation of staff numbers for the purposes of that provision.[42]

iii. Judgment of the Court of Justice

The Court of Justice didn't endorse the opinion of the respective AG.

[39] *Ibid.*, para 79.

[40] Case C‑385/05 *Confédération générale du travail and Others* [2007] ECR I‑611.

[41] Opinion of AG Cruz Villalón, *op. cit.*, para 84-87.

[42] *Ibid.*, para 97.

Right at the outset, the Court of Justice emphasised that it was appropriate to consider together the questions by which the referring court sought to ascertain, in essence, whether Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with EU law, that article of the Charter can be invoked in a dispute between individuals in order to disapply that national provision.

In the first place, the Court of Justice had, by referring to *CGT*, no difficulties to conclude that Article 3(1) of Directive 2002/14 must be interpreted as precluding a national provision, such as Article L. 1111-3 of the Labour Code, under which workers with assisted contracts are excluded from the calculation of staff numbers in the undertaking when determining the legal thresholds for setting up bodies representing staff.[43]

In the second place, the Court of Justice recalled, referring to *Pfeiffer and Others* and to *Kücükdeveci*,[44] that, according to settled case law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.[45] In this connection, the Court of Justice pointed out that the *AMS* is an association governed by private law, even if it has a social objective. It follows from this reasoning that, because of the legal nature of the *AMS*, the defendants in the main proceedings cannot rely on the provisions of Directive 2002/14, as such, against that association. In addition, the Court of Justice opined that it was apparent from the order for reference that the Cour de cassation could not interpret Article L. 1111-3 of the Labour Code in conformity with Directive 2002/14.[46]

- Lack of horizontal direct effect of Article 27 of the Charter

According to the Court of Justice, it was an essential question in this case to ascertain whether the situation in *AMS* was similar to that in the case which gave rise to *Kükükdeveci*, so that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14,

[43] *AMS*, *op. cit.*, para 28, 29.

[44] *Cases Pfeiffer and Others*, *op.cit.*, para 109, and *Kücükdeveci*, *op. cit.*, para 46.

[45] *AMS*, *op. cit.*, para 36, 37.

[46] *Ibid.*, para 40.

could be invoked in a dispute between individuals in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive. The Court of Justice decided that the situations in these cases were not similar.

In that respect, the Court of Justice opined that the national legislation at issue was adopted to implement Directive 2002/14 and that Article 27 of the Charter was applicable to the case in the main proceedings.[47]

The Court of Justice paid a particular attention to the wording of Article 27 of the Charter, entitled '*Workers' right to information and consultation within the undertaking'*. It provides that workers must, at various levels, be guaranteed information and consultation in cases and under certain conditions as provided for by EU law and national laws and practices. However, it was clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in EU or national law.[48] Thus, the Court of Justice opined that it was not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation. Accordingly, article 27 of the Charter cannot, as such, be invoked in a dispute between private parties in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.[49] Neither, it could be invoked in such dispute in conjunction with Article 3(1) of Directive 2002/14.[50] However, a party injured as a result of domestic law not being in conformity with EU law can none the less obtain, if appropriate, compensation for the loss sustained.[51] Concretely, Mr Laboudi or the respective trade union section may institute an action in tort against the French Republic for its failure to transpose correctly Article 3(1) of the Directive 2002/14 which differs from the option they

[47] *Ibid.*, para 43.

[48] *Ibid.*, para 44, 45.

[49] *Ibid.*, para 46-48.

[50] *Ibid.*, para 49.

[51] See Joined Cases *Francovich and Others*, op. cit., and Case C-282/10 *Maribel Dominguez* v *Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre* [2012] ECR I-0000, para 43.

wanted to exercise, namely the appointment of the trade union representative. It is also not clear how a claimant can determine such compensation in tort. However, *AMS* doesn't have to appoint Mr Laboubi as representative for the CGT trade union section as long as the French legislator does bring Article L. 1111-3 of the Labour Code in conformity with the respective directive.

- Horizontal direct effect of the prohibition of discrimination on grounds of age from Article 21(1) of the Charter

According to the Court of Justice, the facts of the case in *AMS* may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, was sufficient in itself to confer on individuals an individual right which they may invoke as such. In this context, as noted by Nicole Lazzerini[52], the first clarification provided by *AMS* is that at least some fundamental rights granted by the Charter may have horizontal effect.[53] Thus, individuals may not only derive rights from the Charter, but may also be subject to obligations and duties thereunder. In this context, the Court of Justice pointed out that a provision like Article 27 of the Charter shall be distinguished from a provision like Article 21(1) of the Charter. If the former cannot be invoked in a dispute between private parties, then the latter, which lays down the principle of non-discrimination on grounds of age, is 'sufficient in itself' to confer on individuals an individual right which they may invoke as such.[54] Thus, the dilemma is which provisions of the Charter other than the prohibition of discrimination on grounds of age from Article 21(1) are 'sufficient in itself' and applicable in disputes between private parties?

- Provision of the Charter which is "sufficient in itself" to confer on individuals an individual right which they may invoke as such

[52] Lazzerini, Nicole: (Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: *AMS*, Common Market Law Review 2014 Vol.51 p.907-933.

[53] The same observation has been made by Carpano, Éric: La représentation des travailleurs à l'épreuve de l'article 27 de la Charte des droits fondamentaux de l'Union : précisions sur l'invocabilité horizontale du droit de l'Union, Revue de droit du travail 2014 p.312-320: «[…] [L]'arrêt [*Association de médiation sociale*] pourrait comporter une petite révolution en matière de protection des droits fondamentaux en consacrant implicitement, sous certaines conditions, l'effet direct horizontal de la Charte.»

[54] See *AMS*, *op. cit.*, para 47.

Nicole Lazzerini further pointed out that a provision of the Charter can be invoked by an individual *vis-à-vis* another individual only if "by itself" it satisfies the requirements for horizontal effect. This may at first sight seem limited. However, if the Court of Justice had done otherwise, it would be tantamount to granting horizontal effect to (some provisions of) a directive that implements a fundamental right which is by itself not "fully effective". In this context, the Court of Justice opined that it is not possible to infer from the wording of Article 27 of the Charter, or from the explanatory notes to that article, the content of Article 3(1) of Directive 2002/14.[55] Thus, any provision of the Charter which refers to further implementation measures at the EU or national level is deprived of a horizontal direct effect. This in turn means that contrary national provisions cannot be disapplied by a national jurisdiction.[56]

IV. Conclusion

Whilst *Mangold* and *Kücükdeveci* provide that an (unwritten) general principle of non-discrimination on grounds of age, as expressed in (written) Directive 2000/78, applies in the relationships between private parties, according to *AMS*, it is, however, a (written) prohibition of discrimination on grounds of age from Article 21(1) of the Charter which applies autonomously in such relationships. Since, this prohibition is an expression of the general principle of non-discrimination on grounds of age, *AMS* is coherent with *Mangold* and *Kücükdeveci*.

A criterion for distinguishing provisions of the (written) Charter which are capable of having direct effect in horizontal situations from those which are not is whether a certain provision of the Charter is 'sufficient in itself to confer individual rights on individuals'. It can, thus, be deduced from the clear and unequivocal wording of Article 21(1), which does not refer to further EU or national implementing measures, that it is horizontally effective, whereas a provision like Article 27 of the Charter which refers to the 'conditions provided for by European Union law and national laws and practices', lacks such an effect. It follows from this distinction that the Court of Justice does not recognise horizontal direct effect with regard

[55] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, p. 29.

[56] *See AMS*, *op. cit.*, para 51.

to Charter provisions from the Chapter on "Solidarity" since a majority of them refer to further implementation measures on EU or national level.

However, the criterion derived from *AMS* presents, from the point of view of EU law, an important step forward since it strengthens the principle of institutional balance and the principle of legal certainty. The Court of Justice refers, with regard to the horizontal direct effect of fundamental rights, to the Charter which is a (written) constitutional act of the EU. Whilst *AMS* clarified that the principle of non-discrimination on grounds of age from Article 21(1) of the Charter has horizontal direct effect, it would mean that national courts may apply it autonomously in the relationships between private parties and without making reference to the (unwritten) general principles of law as the source of the horizontal direct effect in *Mangold* and *Kücükdeveci*. The reference to Article 21(1) of the Charter absorbs the principle of non-discrimination on grounds of age, since the former is the expression of the latter.[57]

[57] *Ibid.*, para 47.