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THE HORIZONTAL EFFECT OF THE EUROPEAN UNION'S CHARTER OF FUNDAMENTAL RIGHTS: FROM MARKET INTEGRATION TOWARDS THE SOCIAL JUSTICE?*

O EFEITO HORIZONTAL DA CARTA DOS DIREITOS FUNDAMENTAIS DA UNIÃO EUROPEIA: DA INTEGRAÇÃO DO MERCADO EM DIRECÇÃO À JUSTIÇA SOCIAL?

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Abstract: It is now hardly a disputed matter that fundamental rights in the European Union (hereinafter EU) may apply in proceedings between private parties (horizontal effect). So far, the Court of Justice of the European Union (hereinafter Court of Justice) has recognised such an effect with regard to the general principle of equality as it is expressed in different forms in various legal acts of the EU. Such is an example of the Chapter on 'Equality' of the Charter of Fundamental Rights of the European Union (hereinafter Charter)¹ which prohibits discrimination on various grounds and imposes directives to implement it. It is however less explored what is a rationale for the application of fundamental rights in relationships between private parties? While some authors argue that it is the promotion of the social justice, according to this article, horizontal effect of fundamental rights of the Charter pursues the latter objective only partly. This thesis is supported by references to the case-law of the Court of Justice and selected academic publications.

Resumo: A questão de saber se os direitos fundamentais na União Europeia (seguidamente, UE) podem ser aplicados em processos entre particulares (efeito horizontal) muito dificilmente ainda é controversa como foi em tempos. Até agora, o Tribunal de Justiça da União Europeia (seguidamente, Tribunal de Justiça) reconheceu tal efeito no que diz respeito ao princípio geral da igualdade, uma vez que se expressa de diferentes formas em vários actos jurídicos da UE. Trata-se de um exemplo do Capítulo sobre «Igualdade» constante da Carta dos Direitos Fundamentais da União Europeia (em seguida, Carta), que proíbe a discriminação por diversos motivos e impõe diretrizes para a sua implementação. No entanto, a razão de ser que fundamenta a aplicação dos direitos fundamentais

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[2012] OJ C 326/02, available at www.eur-lex.europa.eu/.

nas relações entre particulares é pouco explorada. Enquanto alguns autores argumentam que é a promoção da justiça social, na opinião sustentada no presente estudo afirma-se que o efeito horizontal dos direitos fundamentais da Carta visa este último objectivo apenas parcialmente. Esta tese é suportada na jurisprudência do Tribunal de Justiça e em doutrina seleccionada.

Key words: EU law, Charter of fundamental rights, horizontal effect, general principles of law, social justice

Palavras chave: Direito da União Europeia, Carta dos direitos fundamentais, efeito horizontal, princípios gerais do Direito, justiça social

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1. Introduction

1. The application of fundamental rights between private parties (horizontal effect) is a vexed topic. Fundamental rights were originally designed to be applied in the relationship between the State and a private party (vertical effect) and not in the relationship between private parties. They aim to protect the individual's autonomy and integrity. Member States and EU organisms are under a positive and negative obligation to undertake positive measures to guarantee fundamental rights and freedoms and to refrain from interference.² The horizontal effect of fundamental rights casts a doubt on the traditional understanding of the function of fundamental rights. It imposes an obligation on individuals which is negative in nature, i.e. they would be obliged not to interfere with the fundamental rights and freedoms of other individuals. What justifies the influence of fundamental rights in the relationship between private parties?

2. The wording of Article 51(1) of the Charter according to which the Charter binds Union organisms and Member States does not exclude the application of the Charter to private persons. Whether or not this non-exclusion implies the existence of horizontal effect is disputable. This paper is based on the thesis that the horizontal direct effect of the Charter is not in conflict with its Article 51(1) and that it is justified by the 'weaker party's' argument and with societal needs such as the pursuit of the social justice. In fact, fundamental rights that are applied between private parties modify the substance of this relationship, or as HARTKAMP argues "a Treaty [primary law] provision produces direct horizontal effect when it may be directly applied to legal relationships between individuals, in the sense that subjective rights and obligations are created, modified, or extinguished between individuals".³ In a more general manner, the horizontal effect of fundamental rights can also be considered as an opportunity for a redistribution of wealth. MICKLITZ observes that although Member States of the EU developed their own models of social justice in private law which are inherently linked to national culture and tradition, all models have a common thread, which is 'the use of the law by the (social welfare) state as a means to protect the weaker party against the stronger party'. This concept has been built on the premise of the redistribution of wealth from the richer to the poorer part of the society, individually and collectively.⁴ Likewise, SEIFERT considers that horizontal effect is intended to provide a minimum of social justice in private relations of the individuals in order to guarantee a space of the necessary freedom to the 'weaker' party.⁵

2. NUNO FERREIRA / JOANNA KRZEMIŃSKA-VAMVAKA / TERESA RUSSO, The Horizontal effect of fundamental rights and freedoms in European Union Law, GERT BRÜGGEMEIER / AURELIA COLOMBE CIACCHI / GIOVANNI COMANDÉ (eds.), *Fundamental Rights and Private Law in the European Union*, Volume I: A Comparative Overview, Cambridge University Press, 2010, p. 34.

3. ARTHUR HARTKAMP, The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law, *European Review of Private Law*, 3-2010, p. 529.

4. HANS-W. MICKLITZ (ed.), *Introduction, The many concepts of social justice in European private law*, Edward Elgar, Cheltenham, 2011, pp. 3 ff.

5. ACHIM SEIFERT, L'effet horizontal des droits fondamentaux, *Revue Trimestrielle de Droit Européen*, 48, N° 4, 2012, pp. 801 ff.

It follows from the foregoing considerations that the influence of the EU law on the relationship between private parties prevents asymmetries between these parties and aides to restore fairness in that relationship. When national courts guarantee application of fundamental rights between private parties they enhance objectives of social justice in private relations. The examples are employment⁶ or consumer relationship⁷ where one of the parties is in a weaker position with regard to the stronger economic and informational power of the other party. Therefore, an intervention of the supranational law in these relationships guarantees more fairness between parties and enhances the social justice.

4. However, it will be argued in this paper that the horizontal effect of the Charter does not pursue the social justice objective in full and that, in the future, there is in this area a potential for the development of the future case-law of the Court of Justice which may discover new general principles of law.

5. In EU law, the primary focus of the horizontal effect of fundamental rights concerns the guarantee of equal treatment (prohibition of discrimination) which reflects the attainment of economic objectives of the European Community and less of fundamental rights objectives. Besides the horizontal effect of Articles 101 TFEU and 102 TFEU which apply between private parties in competition

6. See, for example, Judgment of the European Court of Justice, 5.10.2004, joined cases C397/01 to C403/01 *Pfeiffer and Others*, in European Court Reports, p. I8835, 2004, para. 82: "[t]he worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.", available at www.curia.europa.eu.

7. See, for example, Judgment of the European Court of Justice, 14.11.2013, case C-478/12 *Armin Maletic and Marianne Maletic v lastminute.com GmbH and TUI Österreich GmbH*, in European Court Reports, p. I-0000, 2013, para. 30: "[a]ccount must be taken of the objectives set out in recitals 13 and 15 in the preamble to Council Regulation (EC) n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concerning the protection of the consumer as 'the weaker party' to the contract [...]"., available at www.curia.europa.eu. Likewise, Recital 3 in the preamble to Regulation (EC) n° 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations provides that "[s]ince the rail passenger is the weaker party to the transport contract, passengers' rights in this respect should be safeguarded." In a similar manner, recital 16 in the preamble to Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles provides that: "Personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the road, who are usually the weakest party in an accident, should be covered by the compulsory insurance of the vehicle involved in the accident where they are entitled to compensation under national civil law. [...]". In the Judgment of the European Court of Justice, 16.06.2011, joined cases *Gebr. Weber GmbH v Jürgen Wittmer (C-65/09)* and *Ingrid Putz v Medianess Electronics GmbH (C-87/09)*, in European Court Reports, p. I-05257, 2011, para. 75, the Court of Justice pointed out that: "Article 3 of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantee aims to establish a fair balance between the interests of the consumer and the seller, by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller". [...].", available at www.curia.europa.eu.

law cases, the horizontal effect is recognised as far as certain provisions of the Charter are concerned. However, Charter provisions, as its article 51(1) provides, do not themselves have such an effect. Its provision must be an expression of a general principle of law and implemented by secondary legislation in order to apply between private parties. In addition, a situation must for the Charter to be applied fall within the scope of EU law. So far, the Court of Justice has recognised horizontal effect to some grounds of the prohibition of discrimination from the Charter, such as age, sex, sexual orientation and nationality, because they are specific expressions of a principle of equality. By contrast, the Court of Justice has not recognised horizontal effect to any other provision of the Charter. Such a stance of the Court of Justice reflects the economic aspect of the creation of the internal market since the principle of equality (prohibition of discrimination) was one of the main driving forces in the creation of the internal market before the adoption of the Charter.

6. If a contractual relationship between the private parties falls within the scope of EU law, it is subjected to a review concerning its compatibility with fundamental rights of the EU. In this context, DE MOL considers that horizontal effect means that the fundamental right can be applied as an autonomous ground for review before a national court in a dispute between private parties.⁸ If a national norm is found inconsistent with these legal instruments, then it is declared incompatible with the EU law and the contract cannot be based on it. In such cases, the EU law has an effect of excluding the application of a national norm between private parties (*exclusion effect*).⁹ However, the horizontal effect is usually limited in time¹⁰ up to the moment of a correct implementation of a national law with regard to the EU law.

7. The horizontal effect of fundamental rights in the EU law has been developed through the case-law of the Court of Justice. It determines which provision and in which conditions has such an effect. The aim of this contribution is to describe the present state of affairs in the EU law by limiting it to the applicability between private parties of provisions of the Charter on the guarantee of equality (prohibition of discrimination) from its Chapter on 'Equality'. These provisions constitute an expression of the general principle of equality and are implemented by a secondary legislation. The present state of law in this area shows that the objective of a social justice as far as the horizontal direct effect of the Charter provisions is considered has been only partly achieved. In order to substantiate this thesis, a reference will also be made to the case-law of the Court of Justice which does not recognise the application of the Charter provisions between

8. MIRJAM DE MOL, Dominguez: A Deafening Silence, *European Constitutional Law Review*, 8, 2012, p. 281.

9. MICHAEL DOUGAN, When worlds collide! Competing visions of the relationship between direct effect and supremacy, *Common Market Law Review*, 44, Issue 4, 2007, pp. 931-963; MIRJAM DE MOL, The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of non-discrimination: (Unbridled) Expansionism of EU Law?, *Maastricht Journal*, 18, Issue 1-2, 2011, pp. 110-111.

10. JULIANE KOKOTT / CHRISTOPH SOBOTTA, The Charter of Fundamental Rights of the European Union after Lisbon, *EUI Working Papers*, Academy of European Law, 2010/6, p. 14.

private parties since it does not concern provisions which constitute an expression of a general principle of law. I will not discuss the application of fundamental freedoms and consumer protection law in relationships between private parties. These freedoms, such as the right to the free movement of workers, and the EU consumer laws are also applied between private parties, but they will not be discussed here.¹¹

2. When Is The Equality Provision From The Charter Applied In The Relationship Between Private Parties?

2.1. General principle of equal pay for equal work

8. The EU does not have a general legislative competence, but may act only when a specific power to legislate may be identified in the Treaty. The application of these rights between private parties has gone through gradual development. As it has already been mentioned, in the years following the creation of the European Economic Community, the prevailing objective was the creation of the internal market and the priority was given to the achievement of economic objectives contained in the Treaties. In this respect, the application of the general principle of equality (prohibition of discrimination) in its different expressions was of a particular importance. However, France considered that its own legislation in the area of sex equality and paid leaves was more progressive than that of the five other founding Member States and that this circumstance could have handicapped French companies operating in the internal market. This was the reason why the European Economic Treaty contained in its Article 119 (Article 157 TFEU and Article 23(2) of the Charter) a provision on gender equality with regard to payment.¹²

9. As early as the European Economic Community was founded, the prohibition of discrimination on grounds of sex from Article 119 of the EEC Treaty (Article

11. Judgments of the European Court of Justice, 16.03.2010, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard et Newcastle UFC*, in European Court Reports, p. I-2177, 2010; 15.12.1995, case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*, in European Court Reports, p. I-04921, 1995; 6.06.2000, case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, in European Court Reports, p. I-4136, 2000; 11.12.2007, case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, in European Court Reports, p. I-10779, 2007; 18.12.2007, case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, in European Court Reports, p. I-11767, 2007; 12.12.1974, case 36/74, *Walrave and Koch v Association Union Cycliste Internationale*, in European Court Reports, p. 1405, 1974; 18.03.1980, case 62/79 *Coditel e.a.*, in European Court Reports, p. 881, 1980; 15.06.1976, case 51/75, *EMI Records Limited v CBS United Kingdom Limited*, in European Court Reports, p. 811, 1976, and 1.12.2005, case C-213/04 *Ewald Burtscher v Josef Stauderer*, in European Court Reports, p. I10309, 2005, available at www.curia.europa.eu.

12. SEAN VAN RAEPENBUSCH, La jurisprudence récente de la CJCE en matière d'égalité de traitement entre hommes et femmes, Lecture given at the conference: Egalité hommes/femmes dans la vie professionnelle: jusqu'où ira-t-on?, Paris (France), 19.09.2006, footnote n. 1.

157 TFEU and Article 23(2) of the Charter) was limited to the gender equality to the pay and it applied only to the labour market. This prohibition was upgraded in 1976 to the principle which is applicable between private parties¹³. The ‘core’ case for horizontal effect of fundamental rights concerned Gabrielle Defrenne, an air hostess who worked for the Belgian airline Sabena, and who brought a legal action against it in a Belgian court because it paid her less than it did to the male cabin crew doing the same work. She claimed the back-payment of the difference. Belgian court made a preliminary reference to the Court of Justice and the central question was whether Article 119 of the EEC Treaty has direct effect. It results clearly from its wording that it is addressed to Member States to bring it into force. However, the Court of Justice ruled that Article 119 of the EEC Treaty confers rights directly on individuals in Member States and that it has horizontal effect. The Court of Justice emphasized that “since Article 119 is mandatory in nature, the prohibition of discrimination between men and women applies not only to the action of public authorities, but it also extended to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.”¹⁴ It grounded its judgment by objectives of social justice and stressed that “[t]his provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty”.¹⁵

10. In 1978, the Court of Justice ruled that the gender equality in pay from the above mentioned provision of the EEC Treaty forms part of fundamental rights which are general principles of Community law, the observance of which the Court of Justice has to ensure.¹⁶ Since the principle of gender equality to the pay from *Defrenne II* applies between private parties, this judgment by upgrading this principle to the general principle of law didn’t alter the material scope of application of Article 119 of the EEC Treaty between private parties.

2.2. General principle of non-discrimination on grounds of nationality

11. Besides the guarantee of equal pay, the Treaty on European Economic Communities provided in Article 39 of the EEC Treaty (Article 45 of the TFEU and Article 21(2) of the Charter) for a prohibition of discrimination on grounds of nationality as far as the free movement of workers is concerned. The ‘core’ case establishing a horizontal effect of this ground of the prohibition of discrimination is *Angonese* which concerned Mr Angonese, an Italian citizen whose mother tongue is German and who is resident in the province of Bolzano. In response to

13. Judgment of the Court of Justice, 8.04.1974, case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, in European Court Reports, p. 455, 1974 (*Defrenne II*), available at www.curia.europa.eu.

14. *Ibid.*, para. 39.

15. *Ibid.*, para. 10.

16. Judgment of the Court of Justice, 15.06.1978, case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, in European Court Reports, p. 1365, 1978, paras. 26, 27. (*Defrenne III*), available at www.curia.europa.eu.

the news published on the local Italian daily Dolomiten, he applied to take part in a competition for a post with a private banking undertaking in Bolzano, the Cassa di Risparmio. However, one of the conditions for entering the competition was the possession of a type-B certificate of bilingualism (in Italian and German). Even though Mr Angonese was not in the possession of the Certificate, he was indeed perfectly bilingual. However, the Cassa di Risparmio informed Mr Angonese that he could not be admitted in the competition because he had not produced the Certificate. The Court of Justice held that a job applicant could sue a private bank before a national court by invoking a principle of the free movement of workers – a specific expression of the general principle of equality – from Article 39 of the EC Treaty¹⁷, recognising thus that this provision of the Treaty has horizontal effect. The Court of Justice reasoned that the findings in *Defrenne II* could by analogy apply since the general principle of equal pay for equal work and the general principle of non-discrimination on grounds of nationality as expressed by the free movement of workers are ‘mandatory in nature’¹⁸ and therefore the prohibition of discrimination applied equally to all agreements intended to regulate paid labor collectively, as well as to contracts between individuals.¹⁹ By appealing to the free movement of workers as a justification for the horizontal effect of the abovementioned Treaty provision, the Court of Justice pursued an objective of social justice.

2.3. General principle of non-discrimination on grounds of age

i) *Mangold*²⁰

12. If the guarantee of equal pay in the EEC Treaty was limited to the labour market, the Treaty of Amsterdam which was adopted in 1997 provided in Article 13 a legal basis for the adoption of legislative measures which go beyond the prohibition of discrimination in the labour market. It prohibits a wide variety of discrimination practices. Besides discrimination on grounds of sex, it prohibits discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. However, this provision lacked direct effect and presupposed the adoption of the secondary legislation by the legislator of the EU.

13. Among others, the directive 2000/78²¹ concerning the general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the area of employment and occupation was adopted on the basis of this provision of the Treaty of Amsterdam. Directives, however,

17. The Court of Justice has recognized the direct effect of Article 39 of the EC Treaty also in judgment rendered in case *Walrave and Koch*.

18. Which means that the parties cannot derogate from it.

19. See *Angonese*, p. 34.

20. Judgments of the Court of Justice, 22.11.2004, case C-144/04 *Werner Mangold v Rüdigger Helm*, in European Court Reports, p. I-9981, 2005, and 19.01.2010, case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, in European Court Reports, p- I-365, 2010, available at www.curia.europa.eu.

21. Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, p. 16.

lack horizontal effect.²² As *Mangold* witnesses, a certain directive may contain provisions which are an expression of a certain general principle of law. Such is the case of a directive 2000/78 which contains provisions that are expressions of the general principle of non-discrimination on grounds of age and, therefore, can be applied between private parties. In *Mangold*, the referring national court asked the Court of Justice whether Article 6(1) of the directive 2000/78 must be interpreted as precluding Paragraph 14(3) of the TzBfG²³, a provision of German law, which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.

14. Mr. Mangold was a 56-year-old worker employed on a fixed term contract in a permanent full-time job. As mentioned above, according to the German law, fixed term contracts are unlawful unless they can be objectively justified. However, if the employee is over 52, that requirement does not apply.

15. Article 6(1) states that, notwithstanding Article 2(2), Member States may ensure that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. The Court of Justice concluded that Paragraph 14(3) of the TzBfG, must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued since it takes into a consideration the age as the sole factor.

16. Given, however, that the directive 2000/78 has not been transposed by the federal Republic of Germany at the time the Court of Justice decided the case and that the dispute in the main proceedings concerned private parties, that directive could not have been applied directly between those parties. Directive 2000/78 does not itself lay down the general principle of equal treatment in the field of employment and occupation, but only lays down a general framework to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation. However, the Court of Justice made a bypass to this limitation and developed, by applying quite an innovative approach, a new general principle of non-discrimination on grounds of age.²⁴ The Court of Justice justified this

22. Judgments of the Court of Justice, 26.02.1986, case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, in European Court Reports, p. 723, 1986, para. 48; 14.07.1994, case C91/92 *Paola Faccini Dori v Recreb Srl*, in European Court Reports, p. I3325, 1994, para. 20; and cases *Bernhard Pfeiffer e.a.*, para. 108, available at www.curia.europa.eu.

23. Law on part-time working and fixed-term contracts amending and repealing provisions of employment law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 (BGBl. 2000, p. 1966, 'the TzBfG') that entered into force on 1 January 2001) as amended by the First Law for the provision of modern services on the labour market of 23 December 2002 (BGBl. 2002 I, p. 14607).

24. *Ibid.*, para. 75.

development by stating that the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the Directive 2000/78, in various international instruments and in the constitutional traditions common to the Member States.²⁵

17. This finding has important consequences. The Court of Justice, by referring to its previous case-law in *Simmenthal*²⁶ and *Solred*²⁷, concluded that:

‘it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection that individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.’²⁸

18. By imposing an obligation on national courts to apply in proceedings between private parties the general principle of prohibition of discrimination on grounds of age, the Court of Justice in *Mangold* pursues social justice objectives. Since the directive 2000/78 also refers to the combat of discrimination on the grounds of religion or belief, disability and sexual orientation, it remains an open question whether the Court of Justice can extend in future cases the approach from *Mangold* to these other grounds of discrimination which apply in the area of occupation and employment.

ii) *Kücükdeveci*

19. *Kücükdeveci* confirmed and clarified *Mangold*. It concerned the compatibility with the EU law of national legislation 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. The employer calculated the notice period as if the employee had three years’ length of service, although he had been in its employment for 10 years. The Court of Justice, referring to *Mangold* and *Defrenne II*, ruled that the general principle of non-discrimination as given expression in directive 2000/78 and in Article 21(1) of the Charter applies in proceedings between private parties. The Court of Justice reiterated, by referring to *Mangold*, that Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of law that constitutes a specific application of the general principle of equal treatment.²⁹ Consequently, the Court of Justice held that:

25. See *Mangold*, para. 74.

26. Judgment of the Court of Justice, 9.03.1976, case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, in European Court Reports, p. 629, 1977, para. 21, available at www.curia.europa.eu.

27. Judgment of the Court of Justice, 5.03.1996, case C-347/96, *Solred SA v Administración General del Estado*, in European Court Reports, p. I-937, 1996, para. 30, available at www.curia.europa.eu.

28. See *Mangold*, para 77.

29. *Ibid.*, para. 50.

“it is 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” (hereinafter: the *Mangold/Kücükdeveci* approach).³⁰

20. Since the *Mangold/Kücükdeveci* approach enables a weaker party to refer to the prohibition of discrimination on grounds of age vis-à-vis other private party, the prevailing objective of this approach is the pursuit of social justice. In fact, by applying the general principle of non-discrimination on grounds of age in a relationship between private parties, the Court of Justice pursues a social justice objective. Likewise, *Angonese* is justified with the promotion of the free movement of workers.³¹

21. Despite the positive aspects of this orientation of the Court of Justice, it is also exposed to critics. Notably, a more serious deficit of the *Mangold* and less of the *Kücükdeveci* is that the Court of Justice did not provide in these cases a clear reasoning as to the relation between a directive, on one hand, and a general principle or a provision of the Charter, on the other hand.³² In particular, it should have reasoned more clearly that a provision of the Charter or of a directive has direct effect in horizontal situations only if it is an expression of a general principle of law. DE MOL considers that *de facto* a directive has such an effect whereas *de iure* it is a general principle of law and a provision of the Charter which are horizontally effective.³³

2.4. General principle of prohibition of discrimination on grounds of sexual orientation

22. In *Römer*³⁴ the Court of Justice ruled that the prohibition of discrimination on grounds of sexual orientation is a general principle of law. According to the facts of the case, Mr Römer worked for the Freie und Hansestadt Hamburg, as an administrative employee and lived since 1969 continuously with Mr U. They entered into a registered life partnership, in accordance with the German law, and Mr Römer requested for the amount of his supplementary retirement pension to be recalculated on the basis of a more favourable deduction since he considered that he was entitled to be treated in the same manner as a married, not permanently separated, pensioner. In his opinion, his right to equal treatment with married, not permanently separated, pensioners results, in any event, from

30. *Ibid.*, para. 51.

31. “The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law” (para. 32).

32. SACHA PRECHAL, Competence creep and General Principles of Law, *Review of European Administrative Law*, III, Nr. 1, Europa Law Publishing, 2010, p. 19.

33. MIRIAM DE MOL, Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law, *European Constitutional Law Review*, 6, 2010, pp. 293-308.

34. See para. 59.

Directive 2000/78.

2.5. In search of new general principles of law concerning the application of the Charter between private persons

23. The entry into force of the Charter in 2000 and the recognition of its binding effect in 2009 represent an important extension of the grounds of prohibition of discrimination. These grounds might instigate an important and substantial contribution to the social justice if they become horizontally applicable in the future case-law of the Court of Justice. In its Article 21 (1), the Charter prohibits “any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”. The same Article provides in its second paragraph that: “[w]ithin the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited”. This latter prohibition applies in relation to the citizenship of Union or with one of the provisions on the free movement.

24. So far and according to the well-established case-law of the Court of Justice, this provision is applicable between private parties with regard to the prohibition of discrimination on grounds of age³⁵, sexual orientation,³⁶ sex³⁷ and nationality³⁸. It is yet to be defined whether the Court of Justice will recognise horizontal direct effect to other grounds of non-prohibition as well.

25. First, further extension of the *Mangold/Kücükdeveci* approach and the horizontal effect of the grounds of non-discrimination mentioned in Article 21 of the Charter could not be excluded if one takes into account that the directive 2000/78, although in the context of professional and employment area, prohibits not only discrimination on the grounds of age but also discrimination on the grounds of religion or belief and disability.

26. Second, what is the appropriate solution as to the applicability between private parties of other grounds of prohibition of discrimination enumerated in the Article 21 (1) of the Charter, such as race, colour, ethnic or social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth? Taking into an account the present case-law of the Court of Justice, the answer to this question should rather be positive since the grounds of non-discrimination mentioned in that provision are specific expressions of a more substantive general principle of equality which is a general principle of law. This conclusion results from the reasoning of the Court of Justice

35. *Ibid.*

36. Judgment of the Court of Justice, 10.05.2011, case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, in European Court Reports, p. I-0000, 2011, available at www.curia.europa.eu.

37. See *Defrenne II*.

38. See *Angonese*.

in *Mangold*³⁹ and *Kücükdeveci*⁴⁰, according to which the directive only provides a general framework to combat discrimination in the area of employment and occupation whereas its source is the general principle combating those forms of discrimination which can be found in various international instruments and in the constitutional traditions common to the Member States. The Court of Justice relied on this argument in *Römer*⁴¹.

27. This argument derives from the constitutional principle of the hierarchy of norms according to which a lower ranking norm draws its inspiration and legitimacy from a higher ranking constitutional norm and shall be interpreted in conformity with the latter. It means that a directive as a legal act of secondary law shall be interpreted in conformity with the Charter and general principles of law, which constitute acts of primary law.⁴² Similarly, Advocate General Bot emphasised that the hierarchy of legal norms of the EU law according to which a directive, that has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination, cannot reduce the scope of that principle.⁴³

28. Thirdly, by employing the wording “such as”⁴⁴, Article 21(1) of the Charter enumerates grounds of discrimination in a non-exhaustive manner. It can be argued, on the basis of the arguments exposed, that grounds of prohibition of discrimination which are not enumerated in that provision may also constitute, on the basis of the application of the *Mangold/Kücükdeveci* approach, general principles of law.

29. It follows from the foregoing considerations that Article 21 of the Charter has a large potential scope of material application as far as its horizontal effect is considered and is thus susceptible to contribute importantly in the future to the social justice in the EU. It is however yet to be defined whether the Court of Justice will exploit this potential in its future case-law and thus importantly contribute to the further development of the social justice in the EU.

39. *Ibid.*, para. 74.

40. *Ibid.*, para. 20.

41. *Ibid.*, para. 59.

42. See judgment of the Court of Justice, 26.09.2013, case C-476/11, *HK Danmark v Experian A/S*, in European Court Reports, p. I-0000, para. 19: “[Directive 2000/78] gives specific expression, in the field of employment and occupation, to the principle of non-discrimination on grounds of age, which is regarded as being a general principle of European Union law. The prohibition of any discrimination on grounds, inter alia, of age is, moreover, set out in Article 21 of the Charter, which, from 1 December 2009, has the same legal status as the Treaties”, available at www.curia.europa.eu.

43. Opinion of Advocate-General Bot, 7.07.2009, case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, in European Court Reports, p. I-365, 2010, available at www.curia.europa.eu.

44. In the French version of the Charter “notamment”.

3. Which restrictions exist with regard to the application of the Charter in the relationship between private parties?

30. The horizontal effect of the Charter has been developed by the Court of Justice and is not an unlimited one. If it is true that the Court determines which provision and in which conditions has such an effect it is, in this respect, limited in several ways.

31. First, the scope of application of the Charter is a question connected with its horizontal effect. In this context, Article 6(2) of the Treaty on European Union provides that the provisions of the Charter shall not extend in any way the competences of the Union as defined in Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the EU or establish any new power or task for the EU, or modify powers and tasks as defined in the Treaties.

32. According to the existing case-law of the Court of Justice, the situation must fall within the scope of EU law in order for the Charter to apply⁴⁵ which means that it must fall within the scope of the Treaties, a regulation or a directive. On the contrary, the Charter cannot be applied to a situation that does not fall under the scope of EU law.⁴⁶ In such situation, the Court of Justice will reject the applicability of the EU law. For example, in her opinion in *Bartsch*⁴⁷ the Advocate General Sharpston argued that the situation giving rise to the reference does not fall under the scope of EU law. The case concerned the occupational pension scheme of Bosch-Siemens Hausgeräte GmbH ('BSH'). Paragraph 6 (4) of the scheme's guidelines provided that a pension should be paid to the widow(er) of an employee who has died during his or her employment relationship, if certain conditions have been met. However, payments will not be made if 'the widow/widower is more than 15 years younger than the former employee. The widow, Mrs Bartsch, was born in 1965, whereas Mr Bartsch, was born in 1944 and died in 2004 whilst employed by BSH. Therefore, one of the conditions for the widow's pension was not met. The respective Advocate General considered that there was no pertinent specific substantive rule of Community law governing the situation in question. In those circumstances, she considered that the general principle of equality, and specifically equal treatment irrespective of age as identified by the Court of Justice in *Mangold*, cannot be applied horizontally. In so saying, she added that she accepted that such a general principle can be applied (both vertical and horizontally) to the extent that it does so within a specific EU law

45. Judgment of the Court of Justice, 7.05.2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, in European Court Reports, p. I-0000, 2013, para. 21, available at www.curia.europa.eu.

46. Judgment of the Court of Justice, 7.07.2012, case C-27/11, *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, in European Court reports, p. I-0000, 2012, para. 56, available at www.curia.europa.eu.

47. Opinion of Advocate-General Sharpston, 22.05.2008, case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, in European Court Reports, p. I-07245, 2008, available at www.curia.europa.eu.

framework⁴⁸. The Court of Justice followed her opinion.⁴⁹ Likewise, in a recent case *Julian Hernández e.a.*⁵⁰ the Court of Justice considered that Article 13 EC (now Article 19 TFEU) could not, as such, bring within the scope of the EU law, for the purposes of the application of fundamental rights as general principles of the EU law, a national measure which does not come within the framework of the measures adopted on the basis of that article. In this case, the referred court expressed uncertainty as to whether the difference in treatment between employees who are the subject of an unfair dismissal and employees who are the subject of an invalid dismissal must be considered contrary to Article 20 of the Charter since the national legislation provides for payment by the Spanish State of outstanding remuneration after the 60th working day following the date on which actions challenging dismissals were brought solely in cases where the dismissal is declared to be unfair, and not in cases where the dismissal is declared to be invalid.

33. Secondly, if a particular situation falls within the scope of EU law, it raises the question whether it should concern a fundamental right that is applied horizontally. A Charter provision as such cannot apply horizontally according to Article 51(1) of the Charter which governs the Charter's scope of application providing that individuals may invoke fundamental rights *vis-à-vis* the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law. However, as mentioned above, a provision of the Charter applies horizontally only if it is an expression of a general principle of law. This results from the application of the *Mangold/Kücükdeveci* approach.

34. Thirdly, the Charter distinguishes between rights and principles. While the first can be horizontally applicable, the latter are socio-economic principles from the Chapter 'Solidarity' of the Charter⁵¹ which do not have horizontal effect. 34. This is illustrated by *Heimann*⁵² and *Dominguez*⁵³. The first case concerns

48. *Ibid.*, paras. 86, 87.

49. Judgment of the Court of Justice, 23.09.2008, case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH.*, in European Court Reports, p. I-07245, 2008, available at www.curia.europa.eu.

50. Judgment of the Court of Justice, 10.07.2014, case C-198/13, *Victor Manuel Julian Hernández e.a. v Reino de España (Subdelegación del Gobierno de España en Alicante) e.a.*, in European Court Reports, p. I-0000, 2014, available at www.curia.europa.eu.

51. This Chapter contains provisions concerning workers' right to information and consultation within the undertaking (Article 27), right of collective bargaining and action (Article 28), right of access to placement services (Article 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of young people at work (Article 32), family and professional life (Article 33), social security and social assistance (Article 34), health care (Article 35), access to services of general economic interest (Article 36), environmental protection (Article 37) and consumer protection (Article 38).

52. Judgment of the Court of Justice, 8.11.2012, joined cases *Alexander Heimann (C-229/11) and Konstantin Toltschin (C-230/11) v Kaiser GmbH*, in European Court Reports, p. I0000, 2012, available at www.curia.europa.eu.

53. Judgment of the Court of Justice, 24.01.2012, case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre*, in European Court Reports, p. I0000, 2012, available at www.curia.europa.eu.

a compatibility with the Article 7(1) of the Directive 2003/88 of a social plan agreed between an undertaking and its works council, under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*. Whereas in the second case Ms Dominguez, who has been employed by the CICOA⁵⁴, following an accident on the journey between her home and her place of work, was absent from work from 3rd November 2005 until 7th January 2007. Ms Dominguez claims for 22.5 days' paid leave in respect to that period and, in the alternative, a payment in lieu of leave. The referring court had doubts about the compatibility with Article 7 of directive 2003/88 of the Article L. 223-4 of the French labour code (Code du Travail) according to which the period of suspension of her contract of employment, following the accident on the journey to work should be treated as being equivalent to actual work time for the purpose of calculating her paid leave. The Court of Justice decided that national provisions or practices that make entitlement to paid annual leave conditional on a minimum period of ten days' or one month of actual work during the referenced period, are contrary to Article 7 of the mentioned directive.

35. Both abovementioned cases concern the interpretation of Article 31 (2) of the Charter – entitlement of every worker to paid annual leave – where the Court of Justice emphasised that the right to a paid annual leave must be regarded as a particularly important principle of European Union social law.⁵⁵ It is to be noted that this right can be, according to the Article 52(5) of the Charter, implemented by legislative and executive acts taken by institutions, bodies and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. Additionally, principles shall only be cognisable in the interpretation of such acts and in the ruling of their legality. In other words, provisions of the Charter that contain principles do not have horizontal effect because they are not an expression of a general principle of law.

36. Fourthly, a provision like Article 27 of the Charter which provides which workers must, at various levels, be guaranteed information and consultation in the cases and “under the conditions provided for by European Union law and national laws and practices” is conditional upon the adoption of further measures. Several Articles of the Charter include more general formulations limiting their direct effect such as: “under the conditions established by national laws and practices” (Articles 28, 30 and 35) or “in accordance with the rules laid down in Union law and national laws and practices” (Article 34). Even if it is not expressly stated in Article 31(2), the right to a paid annual leave is also conditional upon further implementation measures since at least its length and the authority for its approval must be determined in advance so that this right can be applied in practice. As mentioned, in order to the Article 27 of the Charter be fully effective, it must be given more specific expression in EU or national

54. *Ibid.*, para. 32.

55. Judgments of the Court of Justice, 20.01.2009, case *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* (C-350/06) and *Stringer and Others v Her Majesty's Revenue and Customs* (C-520/06), in European Court Reports, p. 1179, 2009, para. 54, and 3.05.2012, case C337/10, *Georg Neidel v Stadt Frankfurt am Main*, in European Court Reports, p. I0000, 2012, para. 28, available at www.curia.europa.eu.

law.⁵⁶ In such a situation, a provision of the Charter lacks horizontal effect as it is illustrated by *Association de médiation sociale (AMS)* since it is ‘not sufficient in itself’ to have such an effect.⁵⁷ In this case the *Union départementale CGT des Bouches-du-Rhône* appointed Mr Laboubi as representative of the trade union section created within the AMS. The AMS challenged that appointment. It took the view that it had staff numbers of fewer than 11 and, *a fortiori*, fewer than 50 employees and that, 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. The AMS considered that it was necessary to exclude from the calculation of its staff numbers, in accordance with Article L. 1111-3 of the Labour Code, apprentices, employees with an employment-initiative contract or accompanied employment contract and employees with a professional training contract (‘employees with assisted contracts’). However, the AMS is an association governed by private law, even if it has a social objective. Due to AMS’ legal nature, the defendants in the main proceedings cannot rely on the provisions of Directive 2002/14, as such, against that association.

37. Likewise, the Court of Justice concluded that it is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to 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.⁵⁸ The Court of Justice added that this finding cannot be called into question by considering Article 27 of the Charter alongside with the provisions of Directive 2002/14.⁵⁹ In other words, such provisions lack horizontal effect because they do not constitute an expression of a general principle of law.

38. Lastly, in the future, one may expect an increase of cases where the Court of Justice will be confronted with situations that raise the question of the right to rely, in proceedings between private persons, on directives that contribute to ensure the observance of fundamental rights, since among the fundamental rights contained in the Charter a number are already part of the existing body of the EU law in the form of directives.⁶⁰

56. *Ibid.*, paras. 44, 45.

57. Judgment of the Court of Justice, 15.01.2014, case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, in European Court Reports, p. I0000, 2014, available at www.curia.europa.eu.

58. *Ibid.*, para. 46.

59. *Ibid.*, para. 49.

60. OLIVIER DE SCHUTTER, Les droits fondamentaux dans l’Union européenne: une typologie de l’acquis, in EMMANUELLE BREBOSIA / LUDOVIC HENNEBEL (eds.), *Classer les droits de l’homme*, Bruylant, Bruxelles, 2004, p. 315. The author cites, among the other, workers’ protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), the prohibition of child labour and protection of young people at work (Article 32), the right to reconcile family and professional life (Article 33), and the right of migrant workers to social security (Article 34(2)).

4. Conclusion

39. Case-law of the Court of Justice previously analyzed follows only partly the social justice objective partly. On one side, the present case-law is unfortunately and predominantly influenced by the preoccupations stemming out of the creation of the internal market, such as the guarantee of equality, a circumstance that blocks a further development of horizontal effect of the Charter beyond its provisions on equality. The horizontality of the Charter's provisions is still influenced by the economic objectives of the internal market and not by fundamental rights concerns. On the other side, an ever growing case-law on the horizontal effect of Article 21 of the Charter may be an inspiration for the Court of Justice to overcome this self-restriction and to apply horizontal effect also to other provisions of the Charter. By substantially widening the horizontal effect of the Charter beyond its equality provisions, it would contribute importantly to a redistribution of wealth in the internal market and to an increase of fairness in contractual relations in the EU. Or, as SMITS argues, the values behind fundamental rights reflect our societal norms and are thus an important tool as on how to assess a private law case.⁶¹

40. However, one may find an extension of the horizontal effect of the Charter beyond equality provisions as a too ambitious one. In fact, one of the challenges of the Court of Justice may be the extension of the horizontal effect to all grounds of prohibition of non-discrimination from Article 21 since at the present time there are only few grounds of prohibition of discrimination, such as age, sexual orientation, sex and nationality which enjoy full applicability in relations between private parties. The potential to apply provisions of the Charter on horizontal effect to other anti-discrimination grounds enumerated in Article 21 of the Charter has not been yet exhausted by the Court of Justice and remains a challenge for its future case-law. *Römer* shows a positive tendency of the Court of Justice in applying the *Mangold/Kücükdeveci* approach to ever newer grounds of prohibition of discrimination from Article 21 of the Charter. However, it should be noted whether *Römer* announces the beginning of a positive and lasting trend in the future or whether it remains an isolated try. Taking into account that all grounds within the Article 21 are of an 'equal value', there shall be no barriers in the future case-law of the Court of Justice to recognise horizontal effect with regard to the prohibition of discrimination on the grounds of race, colour, ethnic or social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth. However, the approach of the Court of Justice shall be prudent and moderate and shall also take into account whether a particular ground of discrimination has been accomplished or not by a directive. In this later case, the recognition of a horizontal effect shall be avoided since general principles of law and Charter provisions are too abstract by its wording and would therefore not enable private parties to deduce which are their rights and obligations. Since it does not enumerate exhaustively the grounds of prohibition of discrimination, Article 21 of the Charter presents the possibility of a 'discovery' of new grounds of prohibition of discrimination, such as material standing, education or any other personal circumstance. Article 21 of the Charter, therefore, presents future challenges with regard to the development of the social justice in the EU.

61. JAN M. SMITS, Private law and fundamental rights: a sceptical view, in TOM BARKHUYSEN / SIEWERT LINDENBERGH (eds.), *Constitutionalism of private law*, Leiden/Boston, 2006, pp. 9-22.

41. In cases where the Court of Justice assesses the validity of an EU norm in the light of Article 21 of the Charter, the horizontal effect seems to be an irrelevant circumstance for the Court of Justice. Thus, in *Association Belge des Consommateurs Test-Achats e.a.*⁶² horizontal effect of the prohibition of discrimination on grounds of sex from Article 21(1) of the Charter was purely incidental. This case concerned the validity of Article 5(2) of Directive 2004/113⁶³ in light of the (general) principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter. The problem was that this provision enabled the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits. The Court of Justice ruled that this works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter. However, this case-law of the Court of Justice plays an equally important role in the achievement of the social justice.

42. Finally, the pursuit of the social justice is inherent to the EU law since the Preamble to the Charter and Article 2 of the Treaty on European Union stipulate, that the Union is founded on universal values of human dignity, freedom, equality and solidarity. The recognition of the horizontal effect of the Charter's rights on Equality contributes thus to these values on which the Union has been founded. It is true, as MICKLITZ observes, that these values are not fully accomplished in the established legal order and that provision must be read as a *Leitnorm*, of no direct legal consequences⁶⁴, this is certainly not true for the value of non-discrimination and equality between men and women which figures in the Article 21 of the Charter.

43. The answer to the question whether horizontal effect of the Charter pursues social objective in full can unfortunately not be answered positively in its entirety. Therefore, as the case-law of the Court of Justice currently stands, the horizontal effect of fundamental rights from the Charter is a large development potential for the future case-law of the Court of Justice and a possibility for the discovery of new general principles of law.

62. Judgment of the Court of Justice, 1.03.2011, case C-236/09, *Association belge des Consommateurs Test-Achats ASBL ; van Vugt, Yann ; Basselier, Charles v Kingdom of Belgium (Council of ministers)*, in European Court Reports, p. I-00773, 2011, available at www.curia.europa.eu.

63. Directive of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L 373, p. 37.

64. HANS-W. MICKLITZ (ed.), *Introduction, The many concepts of social justice in European private law*, 2011, p. 39.