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## THE HORIZONTAL DIRECT EFFECT AND THE CHARTER: A COMMENT

### O EFEITO DIRECTO HORIZONTAL E A CARTA: COMENTÁRIO

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**Sumário:** Introductory words; 2. Brief overview of the paper; 3. First question: why is it so important to admit the horizontal direct effect of the provisions of the Charter?; 4. Second question: can the case law mentioned really support the argument put forward by the author?; 5. Conclusion

**Abstract:** The present text corresponds to the comment presented on the 20<sup>th</sup> May 2014, during the Lisbon International Conference on Social Rights in celebration of the 70<sup>th</sup> anniversary of the ‘Second Bill of Rights’, regarding the paper “The Horizontal Direct Effect and the Charter of Fundamental Rights of the European Union”, submitted by Saša Sever, Administrator at the Court of Justice of the European Union and Doctoral candidate at the Faculty of Laws of the University of Ljubljana. The text corresponds to the version written for that purpose, which was meant to be a critical discussion of no more than fifteen minutes, where the main aspects of the commented paper were highlighted and some questions were raised, so as to stimulate a further debate, chaired by Professor Gonçalo de Almeida Ribeiro.

**Keywords:** Charter of Fundamental Rights, horizontal direct effect, prohibition of discrimination, Title IV (‘Solidarity’), effectiveness of European Union law

**Resumo:** O presente texto corresponde ao comentário efectuado no passado dia 20 de Maio de 2014, no âmbito da Conferência de Lisboa sobre Direitos Sociais em Comemoração do 70.º Aniversário da ‘Second Bill of Rights’, ao *paper* “The Horizontal Direct Effect and the Charter of Fundamental Rights of the European Union”, apresentado por Saša Sever, funcionário do Tribunal de Justiça da União Europeia e doutorando na Faculdade de Direito da Universidade de Ljubljana. O mesmo corresponde no essencial à versão elaborada para esse efeito, pensada para uma breve exposição crítica de não mais de quinze minutos, onde se procurou sublinhar os principais aspectos do texto e colocar algumas questões, por forma a fomentar um posterior debate, sob moderação do Professor Doutor Gonçalo de Almeida Ribeiro.

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**Palavras-chave:** Carta dos Direitos Fundamentais, efeito directo horizontal, proibição de discriminação, Título IV (‘Solidariedade’), eficácia do Direito da União Europeia.

## 1. Introductory Words

Mr. Saša Sever, who is Administrator at the Court of Justice of the European Union and Doctoral candidate at the Faculty of Laws of the University of Ljubljana, submitted a paper entitled “The horizontal direct effect and the Charter”, which explores the mentioned subject through an analysis of recent case law of the Court, namely the *Mangold* case<sup>2</sup>.

I will try to highlight the aims of the text and the main arguments presented and finally ask some questions which arise from the reading of the paper.

The study of the Charter of Fundamental Rights has, indeed, always attracted attention, both before and after 2009.

Prior to 2009, one of the main questions raised was the one concerning its legal status. Following the entry into force of the Lisbon Treaty, as we all know, the Charter was given the same legal value as the European Union treaties, even if Professor GUERRA DA FONSECA, in this same conference, considered this subject still open to discussion<sup>3</sup>.

After 2009, the discussion surrounding the Charter centered itself, therefore, on other questions, such as the nature of the rights granted by its text, the relationship between the Charter, other provisions of European Union Law and national law or, as is the case of the paper now analysed, the effectiveness of the rights granted by the Charter.

Regarding the theme of the present conference, the Charter is an interesting document as it enshrines not only civil, but also certain political, social, and economic rights. That means that it goes beyond other texts, such as the European Convention on Human Rights, because it has included social rights, therefore enhancing their constitutionalisation in the member states of the European Union<sup>4</sup>.

Even though the Charter is not the first attempt to place human rights’ principles

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2. Case C-144/04, European Court Reports 2005, p. I-09981, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0144&qid=1409270583530>.

3. The reference is to the session of the 19<sup>th</sup> May, under the title “Social Rights and Legitimacy in the context of Global Constitutionalism”, presented by RUI GUERRA DA FONSECA (FDUL/CIDP) discussed by PEDRO MAGALHÃES (ICS) and chaired by DAVID DUARTE (FDUL/CIDP).

4. JULIA ILIOPOULOS-STRANGAS, La Charte des droits fondamentaux de l’Union européenne face à la protection constitutionnelle des droits sociaux dans les Etats membres, in *Droits sociaux et droit européen. Bilan et prospective de la protection normative*, Bruxelles, 2002, pp. 11-87.

at the core of European Union law, the inclusion of social rights in its text shows that the protection and the respect of human dignity can not be fully guaranteed if a legal protection does not cover social and economic rights as well, which should therefore not be considered as split realities from political and civil rights, as seen in this same conference<sup>5</sup>.

## **2. Brief Overview Of The Paper**

As mentioned before, the study of the Charter is not new, neither the study of the so called horizontal effect of Treaty provisions and of directives or the study of the horizontal direct effect of fundamental rights. However, when mixing these three subjects, that is, the analysis of the possibility of the Charter having a horizontal direct effect, the subject gains a different and interesting approach.

As the author states in his paper, the aim of his text is “to analyse the case law of the Court of Justice on horizontal direct effect of fundamental rights”. He starts by addressing what is horizontal direct effect of fundamental rights in European Union law and why is it important, although there can be other mechanisms which also protect individuals, even if with a different reach (the author mentions the direct and indirect effect of directives, the right for the injured party to claim damages from the breaching member state and the action of the Commission against a member state for non-compliance with European Union law).

The author then attempts to discuss the relevant case law of the Court of Justice where horizontal direct effect of fundamental rights was recognized, by applying general principles of European Union law, Treaty or Charter provisions. It should be noted – as does the author- that this case law concerns prohibition of discrimination on grounds of age and sex, therefore provisions granted by the ‘Equality’ title of the Charter (Title III).

However, the author also covers case law where the Court of Justice did not recognise horizontal direct effect to certain provisions (for instance, right to an annual leave and workers’ right to consultation and participation in undertaking), which can be found in title IV of the Charter (‘Solidarity’)<sup>6</sup>.

The main argument of the author, presented throughout the text, is therefore that the exclusion of the horizontal direct effect of those provisions undermines the full effectiveness of European Union law<sup>7</sup>.

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5. The reference is to the session of the 19<sup>th</sup> May, under the title “Um apontamento sobre a querela da ‘unidade dogmática’ entre direitos de liberdade e direitos sociais”, presented by CARLOS BLANCO DE MORAIS (FDUL/CIDP), discussed by JORGE REIS NOVAIS (FDUL/CIDP) and chaired by JOSÉ DE MELO ALEXANDRINO (FDUL/CIDP).

6. It should be noted that the analysis of relevant case law of the Court concerning the subject of horizontal direct effect is indeed one of the strengths of the paper, namely on its part IV.

7. The author expresses that the Court, through this exclusion, puts the injured parties in a ‘waiting room’, undermining the full effectiveness of European Union law, instead of admitting horizontal direct effect of those provisions and therefore allowing national courts to assure the

### **3. First Question: Why Is It So Important To Admit The Horizontal Direct Effect Of The Provisions Of The Charter?**

The first important point that should be noted on this subject, as the author highlights, is that the Charter is silent on the question of its horizontal direct effect, meaning, whether an individual may invoke rights granted by the Charter against another private individual.

In fact, Article 51.º, n.º 1, of the Charter (Field of application), under Title VII (General provisions governing the interpretation and application of the Charter), states that “The provisions of this Charter are addressed **to the institutions, bodies, offices and agencies of the Union** with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”<sup>8</sup>.

The author starts by suggesting that an analysis of the case law of the Court of Justice may help to clarify this apparent discrepancy, which is precisely one of his aims: to analyse the relevant case law of the Court of Justice on horizontal direct effect on fundamental rights, as stated above.

The problem, however, is this case law concerns rights which are found on Title III of the Charter (Equality) and not on Title IV (Solidarity).

The main question the author wishes therefore to answer is whether such a possibility can be envisaged for other provisions of the Charter – apart from those found on Title III - and whether the current position of the Court of Justice “undermines the principle of full effectiveness of EU law which is one of the reasons underlying the recognition of horizontal direct effect of the Charter”.

My first question is concerned with this last sentence and the first topic of his paper (which is “what is horizontal direct effect of fundamental rights and why do we need it”): is horizontal direct effect really intertwined with the principle of full effectiveness of European Union law? If so, what should be said on the subject of the horizontal direct effect of directives and the decisions of the Court stating 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? Not admitting it is also undermining the principle of full effectiveness of European Union law?\_

I ask this question because one of the main conclusions of the author is that other mechanisms, such as direct and indirect effect of directives, the right for the injured party to claim damages from the breaching member state or an action of the Commission against a member state for non-compliance with European

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full effectiveness of European Union law in a dispute between individuals.

8. Available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>.

Union law, are insufficient instruments in order to ensure the full effectiveness of European Union law. My question is whether it is really so. Not granting horizontal direct effect to a number of acts of European Union law means that it is not fully effective? Then what should we say regarding directives, which represent a considerable amount of European Union acts? On the other hand, the critics on horizontal effect show that this theory can also have drawbacks. Why is it nonetheless so important to agree on horizontal direct effect of the provisions of the Charter?

It is true that the problem of the horizontal effect of the Charter is not a simple one, as the author explains.

One could argue that, if primary law of the EU may produce horizontal direct effect and if the Charter is an act of primary law, then the Charter might also produce horizontal direct effect. This conclusion could allegedly be derived from case law of the Court, such as *Akerberg Fransson*<sup>9</sup>, where the Court stated that, within the scope of application of Union Law, “The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”. That is not, however, true after analysing the case law of the Court which confirms that this topic is not as simple as it might seem.

If it is true that fundamental rights first and foremost bind organisms of the Union and its member states, there are an ever growing number of cases concerning the effects of certain provisions of the Charter *in relations between individuals*.

To be honest, as the author explains, the discussion on horizontal direct effect of certain rights pre-exists the adoption of the Charter, meaning that the norms of the Charter that are the same as those discussed in previous case law do not raise a problem.

The author gives some examples to support his statement: firstly, the *Defrenne* case<sup>10</sup>, regarding equality between men and women. Even though it is was a Treaty provision, the Court did not consider the fact it was formally addressed to member states and focused instead on its nature of a general principle (equal pay for equal work), which can be derived from article 23.<sup>o</sup>, n.<sup>o</sup> 2, of the Charter.

Not only *Defrenne*, but also *Van Gend en Loos*<sup>11</sup> - which as we know was prior to *Defrenne* - allows to conclude that the fact that a provision of a Treaty is formally addressed to member states and does not expressly confer rights on individuals, does not prevent it from being (horizontally or vertically) directly effective.

The author mentions also the *Angonese* ruling<sup>12</sup>, where the Court of Justice ruled

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9. Case C-617/10, European Court Reports 2013, p. I-0000, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1409270769281&uri=CELEX:62010CJ0617>

10. Case 43/75, European Court Reports 1976, p. 455.

11. Case 26/62, European Court Reports 1963, p. 1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0026&qid=1409271452157&from=PT>.

12. Case C-281/98, European Court Reports 2000, p. I-4136, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2000/247/08&qid=1409271683050&>

another prohibition of discrimination on grounds of nationality (article 48.º of the Treaty) as having horizontal direct effect, which can be derived nowadays from article 21.º, n.º 2 of the Charter. This time the Court expressly stated that a provision of the Treaty can be formally addressed to member states and confer rights at the same time on any individual who has an interest in compliance with the obligations thus laid down. That meant that this provision being mandatory in nature, it applied equally to contracts between individuals.

It can therefore be concluded that rights which are also enshrined in the Charter and whose horizontal effect was established in case law of the Court of Justice before the Charter was adopted in 2000 (the preamble of the Charter reaffirms the case law of the Court of Justice of the European Union) are not problematic.

#### **4. Second Question: Can The Case Law Mentioned Really Support The Argument Put Forward By The Author?**

The author then informs us that the case law of the Court of Justice analysed in the texts mainly results from the preliminary references concerning European Union's secondary legislation on labour, insurance and banking law, but that the focus of his paper is on the horizontal direct effect of certain provisions of the Charter, which is a question of the primary law of the EU.

My second question would then be: if the analysis derives from secondary legislation, is it correct to draw conclusions from this case law in what regards the Charter, which is an act of primary law?

Would it not be more appropriate to study that case law in what regards secondary law of the European Union and the relationship with the national legislations which implement it, which, it should be noted, is excluded by the author from his analysis?

In addition, the analysis concerning the *Mangold* case and the opinions which support this approach are not, really, a question of horizontal direct effect, but one of the scope of European Union law, the hierarchy of legal norms and namely the relation between a norm of primary law and secondary legislation.

Studying the horizontal direct effect of the Charter through this approach, I ask, does not reduce the question to one of analysing whether *general principles of law* have horizontal direct effect? If so, then it is the applicability of these principles, and not of the Charter itself, which is at stake.

The following question must be asked: Where is the border, the frontier, between general principle, Charter and directive in what concerns horizontal effect?

Nevertheless, the author continues his article through the analysis of some of

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the most important case law of the Court after the adoption of the Charter, thus, after 2000.

I will limit myself to summarize the most important aspects, as it is not possible to analyse in detail all the case law presented on the paper, given the scope of this comment. Important are the conclusions the author draws: the Court of Justice is for the time being not prepared to recognise a horizontal direct effect of any right contained in the Solidarity chapter.

The author chooses firstly *Mangold*, where the Court recognised the prohibition of discrimination on grounds of age as a general principle of European Union law. The Advocate General proposed that a national court, hearing a dispute involving private parties only, could not refuse to apply, at their expenses, provisions of national law in conflict with a directive. The Court, however, did not follow that opinion: it concluded that the Directive<sup>13</sup> in question was subordinated to Union acts which were of a higher hierarchical value. By doing this, the Court of Justice, in fact, found out that the Directive is an expression of a general principle of European Union law which is a higher source of law, therefore applicable in a relation between private parties, as the author remarks.

The author gives us a detailed overview of the outstanding number of critics to the judgment, from academics and Advocate Generals (even though some others praised it), from asking whether it was an *ultra vires* act to regarding the risk of a spill over effect<sup>14</sup>.

It should be noted that the Charter was not then legally binding and at the time of the pronouncement of this judgment, neither international documents on human rights nor the most of constitutional traditions of member states did explicitly ban this ground of discrimination.

As MARLENE SCHMIDT<sup>15</sup> puts it, “The decision raises more questions than it answers. Therefore, whether or not the Court in *Mangold* has finally given up its established case law rejecting direct horizontal effect of directives remains to be seen”.

Hence the author concludes that “It follows that in order to guarantee the full effectiveness of EU law, in some situations, there is a justification for horizontal direct effect of fundamental rights.” Does that mean that the horizontal direct effect is only necessary in a pathological situation and as a second option?

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13. Council Directive 2000/78/EC of the 27<sup>th</sup> November 2000 establishing a general framework for equal treatment in employment and occupation, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0078&qid=1409272700175&from=EN>

14. See Part IV, b) and c) of the paper.

15. MARLENE SCHMIDT, The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* Judgment, *German Law Journal*, volume 7, n.º 5, 2006, available at [http://www.germanlawjournal.com/pdfs/Vol07No05/PDF\\_Vol\\_07\\_No\\_05\\_505-524\\_Developments\\_Schmidt.PDF.pdf](http://www.germanlawjournal.com/pdfs/Vol07No05/PDF_Vol_07_No_05_505-524_Developments_Schmidt.PDF.pdf)



Next is the ruling concerning *Association de médiation sociale*<sup>16</sup>, which is important mainly due to the opinion of the Advocate General CRUZ VILLALÓN, who stated that since the horizontal effect of fundamental rights is not unknown to European Union law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse.

The decision covered article n.º 27 of the Charter, precisely the first article of title IV (Solidarity) on “Workers’ right to information and consultation within the undertaking” and argued that the horizontal effect “cannot be denied on the basis of the argument that the Charter, as a consequence of the provisions of Article 51(1), has no relevance in relations governed by private law”.

The respective Advocate General added that the right of workers to information and consultation within the undertaking, as guaranteed in Article n.º 27 of the Charter, should be understood as a ‘principle’ for the purposes of Articles 51 .º, n.º 1 and 52.º n.º 5. He concluded, on the basis of the second sentence of Article 52.º, n.º 5, of the Charter, that Article 27.º of the Charter may be relied on in a dispute between individuals, with the potential consequences which this may have concerning non application of the national legislation.

However, the Court of Justice did not follow the opinion of the respective Advocate General and instead decided for the exclusion of horizontal direct effect with regard to the right of participation and consultation of workers in an undertaking, therefore considering that article n.º 21 of the Charter was sufficient in itself to confer on individuals an individual right, but not article n.º 27, which could not be invoked between individuals in order to not apply a national provision.

In *Test-Achats*<sup>17</sup>, the Court also recognised the prohibition of discrimination on grounds of sex as a general principle of Union law (regarding unisex rules on the insurance services sector).

Finally, the author makes reference to the *Dominguez*<sup>18</sup> ruling, concerning the right in article 31.º, n.º 2, of the Charter (right to paid annual leave), which is silent with regard to the horizontal direct effect, and the *Heimann*<sup>19</sup> ruling, which considers an horizontal direct effect of this right.

After these various references to case law of the Court, my remark remains the same: the case law mentioned seems to reduce the question to one of analysing whether general principles of law have horizontal direct effect and, if so, then it is the applicability of these principles, and not of the Charter itself, which is at stake.

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16. Case C-176/12, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CA0176&qid=1409273795895&from=EN>

17. Case C-236/09, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CA0236&qid=1409274230602&from=PT>

18. Case C-282/10, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CA0282&qid=1409274618278&from=PT>

19. Joined cases C-229/11 and C-230/11, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0229&qid=1409274454655&from=PT>

## **5. Conclusion**

I would like to finish my comment by returning to the main argument presented by the author throughout the text, as highlighted above: the author should explain why the exclusion of the horizontal direct effect from the ‘Solidarity’ title of the Charter undermines the effectiveness of European Union law. Is that so because it shifts the responsibility for the correct implementation of European Union law to the member states?

Finally, as already stated, the author has expressed his views that other mechanisms are insufficient instruments to ensure the full effectiveness of EU law, but I think this topic lacks some development in his paper, and should be addressed more specifically.

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