The European Court of Justice, the EU Charter and the interpretation of fundamental social rights: Judicial law-making in disguise?

**Maxime Tecqmenne**

**Abstract**

The early judgments on the horizontal effects of the right of equal treatment on the grounds of age fuelled concerns about the excessive judicialization of EU fundamental social rights. In this context, this contribution adds to the existing literature on the topical issue of the normative significance, or added value, of the EU Charter. It shows that one of the aims underlying the adoption of the Charter was to place limits on the interpretative mandate of the Court. Based upon an analysis of case law, it seeks to ascertain the manner in which the new ‘parameters of interpretation’ introduced by the Charter have been employed in the jurisprudence dealing with the interpretation of fundamental social rights. This analysis demonstrates that the entry into force of the Charter seems to have generated a renewed emphasis on literalism with respect to the interpretation of fundamental social rights. At the same time, this contribution concludes that recent judgments do not fundamentally depart from the teleological mode of reasoning traditionally employed by the Court. The Court’s recent juridprudence suggests that fundamental social rights have come to play a positive role as the self-standing source of subjective rights and obligations for the sake of individuals.

**Keywords**

CJEU, EU Charter, legal reasoning, judicial law-making, fundamental social rights

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**Corresponding author(s):**

Maxime Tecqmenne, EU Legal Studies, University of Liège, Liège, Belgium. E-mail: [mtecqmenne@uliege.be](mailto:mtecqmenne@uliege.be)

1. **Introduction**

Identifying the normative content of fundamental rights guaranteed by the EU Charter of fundamental rights (‘the Charter’) is no easy task. The reason for this is simple: most Charter rights are drafted in an abstract and open-ended manner. Based on a mere reading of the relevant Charter provision, it is therefore next to impossible to isolate the material content of EU fundamental rights. To some extent, the open-ended wording of Charter provisions reflects the ‘politicised’ character of fundamental rights.[[1]](#footnote-2) Fundamental rights reflect ‘major choices … that are focal points of moral and political disagreements in many societies’.[[2]](#footnote-3) That, in turn, presupposes that the content of fundamental rights is not fixed; it may vary over time, and space. The challenge was depicted by Joseph Weiler as one involving ‘fundamental boundaries’.[[3]](#footnote-4) In essence, the argument may be articulated as followed: what is deemed as ‘fundamental’ may vary considerably from one state or sub-state entity to another. There is accordingly an inherent tension between, on the one hand, the claim to universalism that lies at the heart of the fundamental rights discourse and, on the other hand, their politically contested (and evolving) meaning and significance. That tension is captured by the official motto of the Union: ‘United in diversity’. Topical questions inevitably arise about the level of protection afforded by EU fundamental rights norms, as well as the role of the judiciary with respect to the definition of that level of protection.

Viewed from that perspective, the definition of fundamental rights is inextricably associated with long-standing controversies about the mandate of the European Court of Justice (‘the Court’). The crux of the matter boils down to the following question: how does (or should) the Court reason? Few observers would deny that fundamental rights are particularly prone to the ‘temptations of teleology’.[[4]](#footnote-5) Adopting a teleological interpretation may nevertheless accentuate the federalising, or centripetal, potential of the narrative of rights, and is difficult to reconcile with the principle of conferral enshrined in Article 5(2) of the Treaty on the European Union (‘TEU’), and reiterated in Article 51 of the Charter. By subscribing to the temptation of teleology, the Court may indeed be able to expand the scope of EU law beyond the reach of secondary law, thereby sidestepping the rules and procedures governing EU lawmaking. This is especially problematic in relation to fundamental social rights. By contrast with other (civil and political) fundamental rights, which involve the creation of ‘negative’ rights and correlative obligations,[[5]](#footnote-6) social rights generate positive obligations whose scope and reach typically need to be fleshed out by means of legislative intervention. Concerns about ‘excessive judicialization’, or ‘judicial law-making’,[[6]](#footnote-7) are exacerbated by the limited extent of Union competences in the social policy field. One of the self-professed aims of the drafters of the Charter was precisely to introduce ‘horizontal’ interpretative provisions to neutralise the threat of competence overreach created by the fundamental rights narrative. To that end, the Charter does not only introduce a list of written fundamental norms, but it also sets out instructions with respect to the judicial interpretation of these norms. This development invites further scrutiny about the extent to which these new parameters of interpretation circumscribe, or shape, the Court’s interpretation of fundamental social rights.

Against that background, this contribution reflects on the way the new parameters of interpretation introduced by the Charter were employed in the Court’s jurisprudence dealing with the interpretation of fundamental social rights. More specifically, this contribution discusses about the extent to which the introduction of the Charter generated a renewed emphasis on literalism with respect to the interpretation of fundamental social rights.[[7]](#footnote-8) The focus here revolves primarily around the interpretative constraints deriving from the wording of Charter provisions and the explanations relating to the Charter. To that end, this contribution is structured as follows. The first section will initially proceed to analyse the ‘excessive judicialization’ critique levelled against the Court for its judgments in *Mangold* and *Kücükdeveci*. The second section will subsequently dissect the extent to which the Charter, as a new parameter of interpretation, has ushered in a change in the Court’s interpretation of fundamental social rights. Based on an analysis of the case law, it will be demonstrated that the entry into force of the Charter generated a renewed emphasis on literalism with respect to the interpretation of fundamental social rights. It will be demonstrated, however, that the Court’s approach continues to exhibit strong shades of teleology.

1. **The early case law on horizontal direct effect: An exercise in judicial law-making concealed behind the legal apparatus of effectiveness?**

This section focuses on two judgments: *Mangold* and *Kücükdeveci*. Taken together, these judgments represent the early, or formative, judgments on the doctrine of horizontal direct effect of EU fundamental social rights.It should be clear from the outset that the right of equal treatment has come to represent more than simply an EU fundamental social right. In fact, it is also a cardinal principle that has shaped the process of European integration ever since its inception. The field of equal treatment has accordingly developed into a sub-field of European social law boasting an unparalleled set of rules and processes. As we shall see, this may explain why the right of equal treatment has been immune to the influence of the interpretative framework of the Charter. At the same time, there is little denying that the judgments analysed here contained the seeds for the development of the doctrine of horizontal direct effect of fundamental social rights. Viewed from that perspective, the analysis conducted in the following paragraphs is meant to kickstart a more general reflection about the interpretative approach underpinning the Court’s jurisprudence on that matter.

A great deal has already been said and written over the years about these early judgments. Since I do not wish to rehearse here much of what has already been said elsewhere, the analysis of these judgments will be brief. Suffice it to mention, for present purposes, that both judgments boiled down to the same issue: can Directive 2000/78 (‘the Equal Treatment Directive’),[[8]](#footnote-9) or else the general principle of equal treatment on the ground of age,[[9]](#footnote-10) be relied upon in the context of a dispute between private parties to set aside a conflicting national provision? In both cases, the Grand Chamber of the Court went to great lengths to make sure that individual applicants would be afforded effective legal protection in national judicial proceedings. Despite the (well-established) absence of horizontal direct effect of directives, the Court affirmed that the general principle of non-discrimination on the ground of age supported the existence of an obligation to set aside the impugned norm at stake. That outcome was based upon a distinction between, on the one hand, that very principle, whose existence was said to derive from international instruments and the common constitutional traditions of the Member States and, on the other hand, the Equal Treatment Directive, which merely ‘[gave] expression’ to that principle.[[10]](#footnote-11) Based upon that distinction, the Grand Chamber was able to conclude that it was the general principle as such, and not the Directive, that formed the basis for the disapplication of incompatible national rules.

The convoluted legal construction set out in those judgments drew fierce criticism from academia (and indeed members of the Court alike).[[11]](#footnote-12) In essence, much of the criticism was levelled against the methodological foundations, or ‘formal legitimacy’, of the legal construction elaborated in *Mangold* and *Kücükdeveci*.[[12]](#footnote-13) The Court was criticised because it allegedly overstepped the boundaries of its judicial mandate to venture into the troubled waters of judicial law-making or, as Horsley would put it, ‘judicial policy-making’.[[13]](#footnote-14) That was apparent, first and foremost, with respect to the Court’s discovery of the general principle at stake. In *Mangold*, the Court concluded that that principle derived from ‘various international instruments’, as well as ‘the constitutional traditions common to the Member States’. However, that statement remained startlingly unsubstantiated: the principle of equal treatment irrespective of age was not recognised in any international treaty or Convention, and featured in only a (very small) proportion of the Member States.[[14]](#footnote-15) In those circumstances, deriving a general principle of non-discrimination on the grounds of age from the (more) general principle of equal treatment, as the Court subsequently did explicitly in *Kücükdeveci*,[[15]](#footnote-16) was considered as a ‘creative’, or ‘bold’, legal construction.[[16]](#footnote-17)

Part of the criticism also arose from the fact that the remedy elaborated in those judgments was not grounded on any justification whatsoever. In support of its conclusion that the impugned national norm had to be disapplied, the Court merely recalled the obligation resting upon national courts to ensure the full effectiveness of EU law provisions, as well as to guarantee the legal protection which individuals derive from those provisions.[[17]](#footnote-18) However, the problem with arguments centred on effectiveness is that they conceal an element of judicial discretion about the outcome.[[18]](#footnote-19) There is, indeed, an uncomfortable sense of inevitability in the Court’s affirmation that the effectiveness of EU law necessitates the disapplication of conflicting national provisions.[[19]](#footnote-20) The truth is that the Court did not even begin to address the elephant in the room: why should general principles be considered as capable of imposing substantive rights and correlative obligations in legal proceedings between individuals?[[20]](#footnote-21)

The Court’s lack of engagement with that issue was even more problematic in the light of the congenital weaknesses of general principles. As unwritten norms developed by the judiciary, these principles are traditionally tainted by uncertainty with respect to their normative content.[[21]](#footnote-22) To deduce rights (and correlative obligations) for the sake of individuals from such abstract and vague rules does give rise to obvious concerns relating to legal certainty and the limits of the judicial function.[[22]](#footnote-23) Because their meaning can only be defined ex-post facto by the Court, it is indeed next to impossible for individuals to foresee with a reasonable degree of certainty their rights and obligations beforehand. These concerns are exacerbated by the paradoxical relationship existing between the general principle of equal treatment on the ground of age and the Equal Treatment Directive. On the one hand, the Court established that this general principle, as a norm belonging to primary law, possessed some independent normative value.[[23]](#footnote-24) On the other hand, the Directive was used as a de facto benchmark for assessing the legality of the national requirements at issue in the main proceedings.[[24]](#footnote-25) In doing so, the Court failed to differentiate explicitly between the matters that belong to the core of that right and ‘peripheral’ issues that fall to be defined by secondary law.[[25]](#footnote-26)

The overall picture sketched out above clarifies that the interpretative approach exhibited in *Mangold* and *Kücükdeveci* was tainted by significant methodological shortcomings. It is not difficult to understand why these judgments were criticised for their ‘activist’ and ‘axiomatic’ undertones.[[26]](#footnote-27) They have also exacerbated concerns about the ‘excessive judicialization’ of EU fundamental rights.[[27]](#footnote-28) That approach most notably fuelled criticism from one of the most prominent drafters of the Charter, Roman Herzog,[[28]](#footnote-29) who opined that the Court had acted in this judgment ‘not as part of the judicial power but as part of the legislature’.[[29]](#footnote-30) That statement appears somewhat exaggerated. The more moderate approach adopted by the German Federal Constitutional Court in its *Honeywell* decision deserves to be mentioned here. Although the Constitutional Court recognised that the outcome was rooted in the existence of a legislative compromise, with the consequence that it did not involve the creation of new competences for the sake of the EU, it also acknowledged that the Court of Justice failed to satisfy rigorous interpretative standards.[[30]](#footnote-31) Viewed from that perspective, charges of activism were essentially levied against *Mangold* and *Kücükdeveci* for the lack of ‘sustained’, or ‘elaborate’, reasoning offered in support of their outcome.[[31]](#footnote-32)

1. **Appearances may be deceiving: the case law post-Charter, a move towards more traditional methods of interpretation in the definition of fundamental social rights?**

The previous section discussed the challenges associated with the early, or formative, judgments on horizontal direct effect of EU fundamental social rights. The present section will now turn to assess the extent to which the entry into force of the Charter ushered in a shift in the Court’s approach to the interpretation of EU social rights. To that end, the first sub-section will initially describe the way the entry into force of the Charter modified the legal architecture governing the interpretation of fundamental rights at the EU level (3.1.). It will show that the Charter includes new parameters of interpretation that are intended to frame the interpretative exercise of the Court. This development invites further scrutiny on the potential of the Charter to operate as a source of legal constraints in relation to the interpretation of fundamental social rights. The following sub-section will accordingly analyse recent ECJ judgments dealing with the interpretation of EU fundamental social rights. It will demonstrate that even though the jurisprudence on Article 21 of the Charter reflects the Court’s reluctance to engage with the interpretative framework displayed in the Charter (3.2.), other jurisprudential strands signal a broader shift towards the use of more traditional methods of legal reasoning. It would seem that the entry into force of the Charter has generated a renewed emphasis on literalism with respect to the interpretation of fundamental social rights (3.3.). At the same time, this section shows that appearances may be deceiving, because the interpretation of fundamental social rights does not fundamentally depart from the teleological mode of reasoning traditionally employed by the Court with respect to fundamental rights (3.4.).

1. *The EU Charter, a new parameter for the interpretation of EU fundamental rights*

By contrast with the EU Treaties, the Charter contains several provisions that are intended to constrain, or frame, the interpretative endeavour falling upon the Court in the definition of the reach of fundamental rights.[[32]](#footnote-33) The gist of the matter revolves around the role of the judiciary in the application and interpretation of fundamental rights. The delegates of (some of) the Member States were worried that the adoption of the Charter would empower the Court of Justice to adopt an expansive interpretation of the scope of EU fundamental rights to the detriment of national competences. They were keen to introduce horizontal provisions intended to ward off any risk of ‘competence creep’ resulting from the ‘federalising force’ of fundamental rights.[[33]](#footnote-34) To put it bluntly: the Member States wanted to keep the European Court of Justice in check.

That is the case, first and foremost, when it comes to the identification of fundamental rights deserving of protection at EU level. One of the self-proclaimed aims of the Charter was to codify the fundamental rights *acquis* deriving from past case-law on EU general principles. At the same time, it was also meant to erect new fundamental rights such as, most notably, fundamental social rights and (principles)[[34]](#footnote-35) contained in the Solidarity chapter.[[35]](#footnote-36) But the desire to shape the interpretative endeavour of the Court did not stop here. Concerns about the centripetal force of fundamental rights were also addressed through the adoption of horizontal provisions intended to guarantee that the principle of conferral would be respected (Art. 51), or that the interpretation of Charter rights would be grounded upon the constitutional traditions of the Member States, or other international human rights instruments (Art. 52).

Most of these provisions have attracted great interest from legal commentators. One provision that has nevertheless received comparatively little attention is Article 52(7) of the Charter. It provides that the explanations relating to the Charter constitutes a source of ‘guidance’, and must accordingly be ‘given due regard’, in the interpretation of the Charter. Article 6 TEU further prescribes that the Charter provisions must be interpreted ‘with due regard to the explanations referred to in the Charter, that set out the sources of those provisions’. Both provisions were adopted during the drafting of the defunct constitutional treaty at the instigation of a group of Member States comprising the United Kingdom, (some of) the Nordic countries,[[36]](#footnote-37) as well as the Netherlands.[[37]](#footnote-38) That these Member States were in favour of the introduction of such provisions is hardly surprising, considering the fact that they have historically displayed a cautious attitude towards the judicial branch of government.[[38]](#footnote-39) The explanations relating to the Charter were accordingly meant to constrain the power held by the judiciary in the interpretation of fundamental rights.[[39]](#footnote-40) To that end, Article 52(7) of the Charter, as well as Article 6 TEU, expressed a choice in favour of a ‘subjective originalist interpretation’ of Charter rights.[[40]](#footnote-41)

Despite the clarification brought about by Article 52(7) of the Charter, the legal value of these explanations still is, to this day, very much up for debate. It remains somewhat unclear, in particular, whether they should be deemed as an expression of the authentic interpretation of the Charter or as certified *travaux préparatoires*.[[41]](#footnote-42) That debate may reflect a deeper and more general malaise shared by members of the judiciary about the prospect of being constrained legally in the interpretation of fundamental rights.[[42]](#footnote-43) It is intrinsically related to the process of drafting and integrating the explanations into the Treaties. The explanations were drawn up at the instigation of the Convention responsible for drafting the Charter. They were not debated within the Convention itself. Originally, the explanations were meant to be informative; they were not intended to play a role in the interpretation of the rights contained in the Charter. Their legal status was defined during the subsequent Convention on the Constitution of Europe. The cautious wording of Article 52(7) does not help to alleviate the uncertainty on their status. It maintains that the explanations are intended to ‘guide’ the Court’s interpretation. To that end, it falls upon the Court to take them into due ‘consideration’ when interpreting the content of the rights enshrined in the Charter. By contrast with other horizontal provisions, the Court is not compelled to comply with Article 52(7).

It is beyond doubtful, however, that the intention of (some of) the delegates of the Member States was to set limits to the interpretative power of the Court through the integration of the explanations into the Treaties. With Lenaerts and Gutiérrez-Fons, it is therefore possible to consider that it would be very difficult, if not impossible, for the Court to depart from the explanations, without thereby falling prey to the trap of judicial activism.[[43]](#footnote-44) What is more, the explanations may hold some untapped potential with respect to the interpretation of Charter provisions. The various sources of inspiration listed in the explanations relating to each Charter provision offer fruitful guidance for the identification of the normative content of EU Charter rights. Relying on these readily ascertainable sources to reconstruct the content of fundamental rights may increase the predictability of court-led interpretation of these rights. It is interesting to observe, in that respect, that the debate on the interpretative value of the explanations has taken an unexpected turn in recent judgments dealing with horizontal effects. We shall see that the Court has in recent judgments relied upon the explanations to flesh out the material content of fundamental social rights by reference to the sources mentioned in these explanations. This development signals the Court’s growing awareness of the potential of the explanations to support an interpretation of fundamental social rights that falls in line with the perspective of democratic institutions. It invites further scrutiny about the extent to which the parameters of interpretation featuring in the Charter were relied upon by the Court to flesh out the material content of such rights.

1. *Much ado about nothing: The Court’s judgments on Article 21 of the Charter, a remnant of past case-law?*

Unfortunately, it must be stressed from the outset that the Court has failed thus far to engage fully with the interpretative framework laid down in the Charter. That is mostly apparent when it comes to the judicial treatment of the right of equal treatment enshrined in Article 21 of the Charter. Strikingly, the case law dealing with the horizontal direct effect of that provision does not even mention the explanations relating to the Charter. It has accordingly been suggested that the Court made ‘selective use’ of these explanations.[[44]](#footnote-45) That argument rests on the distinction established by the explanations between, on the one hand, the power-conferring norm set out in Article 19 TFEU and, on the other hand, the constitutional benchmark for judicial review established by Article 21 of the Charter.[[45]](#footnote-46) In stark contrast with Article 19 TFEU, Article 21 of the Charter ‘does not create any power to enact anti-discrimination laws in these areas of Member State or private action’. It has been inferred from the explanations that the constituent authority decided to attribute EU policy-making authority in relation to anti-discrimination to the political institutions, who ought to act by means of directives. In doing so, they have also ruled out the possibility that Article 21 of the Charter may be endowed with horizontal direct effect. By conferring horizontal direct effect upon the right mentioned in Article 21 of the Charter, the Court stands accused of disregarding the constituent powers’ choice of legal instrument for the implementation of that right.

The Court’s apparent disregard for the express choice made in the explanations is, in fact, consonant with a more general trend characterising the case-law on the fundamental right of equal treatment: its limited engagement with the interpretative framework of the Charter. It must be stressed that the (pre-existing) general principle of equality continues to play a key role in recent judgments dealing with the horizontal direct effect of that fundamental right. This offers a stark contrast with the somewhat limited importance accorded to Articles 20 and 21 of the Charter (or even Article 52(1), for that matter).[[46]](#footnote-47) By way of illustration, consider *Egenberger*, where the Court established that the prohibition against discrimination on grounds of religion or belief was a general principle ‘laid down’ in Article 21 of the Charter.[[47]](#footnote-48) By doing so, the Court ‘elid[ed] ’ the difference between general principles and Charter rights.[[48]](#footnote-49) Following the entry into force of the Charter, it could be expected that Article 21 would become the main point of reference for articulating the guarantees offered by the right of equal treatment. In practice, that expectation has not fully materialised just yet. The case law on equal treatment does not indicate a break, or a departure, from past case law dealing with the general principle of equal treatment. Perhaps, then, it is necessary to distinguish that fundamental right from the category of social rights. After all, the Charter itself does not seem to consider the right of equal treatment as an integral component of social rights. Whereas most social provisions feature under the chapter dedicated to ‘solidarity’, equal treatment guarantees are contained in a separate title. To some extent, this reflects the peculiarity of EU anti-discrimination law, which has developed over time into an independent discipline and not merely as a ‘component of EU labour law or an emanation of EU “social rights”’.[[49]](#footnote-50) Taken in its bare form (constituted by the Aristotelian formula), the principle of equal treatment has existed ever since the inception of the community legal order. Its aim was to facilitate the creation of the single market. It is therefore unsurprising that the legal wisdom accumulated over time continues to subsist even after the adoption of the Charter.

At the same time, the Court’s disregard for the choice expressed by the explanations feeds into a narrative of ‘growing irritation’ over ‘the expansive tendencies’ of the Court of Justice.[[50]](#footnote-51) Admittedly, the approach adopted by the Court is not entirely detached from textual considerations. In its recent judgments on the horizontal direct effect of equal treatment guarantees, the Court was keen to emphasise that the normative content of Article 21 of the Charter follows closely from secondary law giving specific expression to that right. In some ways, the case law described in this section therefore falls squarely in line with past judgments such as *Mangold* and *Kücükdeveci*, as far as the Court seems to rely on secondary law to put flesh on the bones of abstract rights deriving from the Charter. *Egenberger* constitutes a paradigmatic example of that jurisprudential trend. In that case, the Grand Chamber of the Court was requested to rule on the compatibility with the right of equal treatment on the ground of religion of a rule whereby applicants for a position within a religious organisation had to demonstrate allegiance to a religion. That request reflected a tension between two competing values: the freedom of religion enshrined in Article 17 TFEU, and the right of equal treatment enshrined in Article 21 of the Charter. In order to settle that tension, the Grand Chamber relied on the ‘balance struck by the EU legislature’ by virtue of Directive 2000/78.[[51]](#footnote-52) By referring to the written framework established by means of secondary law, the Court was effectively able to determine with precision the legal obligations deriving from the (abstract) right set out in Article 21 of the Charter.[[52]](#footnote-53) By the same token, it managed to avoid upsetting the vertical balance of powers between the Union and its Member States.

It would also be impossible not to mention here *Cresco Investigation*.[[53]](#footnote-54) In that judgment, the Grand Chamber made significant strides towards recognising that the right of equal treatment may produce positive rights and obligations beyond the duty to disapply national conflicting provisions. In a few words, it is possible to sum up the controversy at play in the main proceedings. Austrian Law reserved a specific pecuniary advantage for members of four churches. They were entitled to an additional day of paid public holiday on Good Friday. They also received additional pay if they worked on that day. The applicant in the main proceedings, Mr Achatzi, was denied payment of that ‘public holiday pay’ by his private employer on the ground that he was not affiliated with any of the churches mentioned in Austrian law. He challenged the national legislation at issue for its (alleged) non-compliance with the right of equal treatment based on religion.

After finding that the Austrian legislation was indeed constitutive of an unlawful discrimination,[[54]](#footnote-55) the Grand Chamber set out the remedial consequences stemming from that finding. Based on Article 21 of the Charter, the Court was able to modulate the concrete outcome of the main national proceedings.[[55]](#footnote-56) More specifically, the national referring court was instructed to extend the entitlement to ‘public holiday pay’ to the individuals who suffered from unlawful discrimination. In other words, the horizontal application of the right of equal treatment on the grounds of religion gave rise to a new obligation weighing upon employers to grant ‘public holiday pay’ to those employees that did not belong to any of the churches specifically mentioned by the relevant Austrian legislation.[[56]](#footnote-57)

The extension of the scope of existing national provisions to cover unforeseen circumstances seems difficult to reconcile with the interpretative framework featuring in the Charter. Several provisions state explicitly that the adoption of the Charter cannot have the effect of extending the scope of application of Union law beyond the powers conferred upon the Union by the Treaties. What is more, the function attributed to the right set out in Article 21 of the Charter is clear: it ought to serve as a standard of review for assessing the compatibility of national law coming within the scope of Union law. That seems to exclude the possibility that Article 21 may serve to support the creation of new rights and obligations outside the provisions of the Equal Treatment Directive. Of course, it may be argued that the solution developed in *Cresco Investigation* rests firmly on the application of national law. The Court was keen to insist that this approach prevailed only as far as a ‘valid point of reference’ could be found in national law.[[57]](#footnote-58) As such, the Court’s judgment did not create *self-standing* new rights and obligations on the *sole* basis of Article 21 of the Charter. The Court nevertheless stretched the bounds of that provision beyond the function attributed to it by the Treaties. More specifically, the application of that provision generated new positive rights and obligations through the intermediary of national law. It simodified significantly the legal relationship between two individuals. Ultimately, *Cresco Investigation* therefore reflects a certain reluctance to engage with the explanations relating to Article 21 of the Charter, as far as the explanations seemed to rule out the prospect that this provision could generate positive rights and obligations (of the type precisely developed by the Court in this judgment).

1. *The strict literal construction of Article 27 of the Charter in Association de Médiation Sociale: a turning point?*

The previous section clarified that the Court refrained from engaging with the interpretative framework of the Charter in its case law on the right of equal treatment enshrined in Article 21 of the Charter. But other strands of case law indicate a shift towards more traditional methods of legal reasoning with respect to the definition of fundamental social rights. The turning point, or so it seems, occurred in *Association de Médiation Sociale*.[[58]](#footnote-59) In stark contrast with past judgments dealing with horizontal direct effect, which displayed a vague approach to legal reasoning, the interpretative approach exhibited in *AMS* revolved around an originalist understanding of Article 27 of the Charter. By relying on the wording of Charter provisions, as well as the explanations relating to the Charter, the Court in fact sought to expose the original intention of the drafters of the Charter.

The circumstances leading up to the judgment in *AMS* may be summarised as follows. The crux of the matter revolved around the obligation, set out in Directive 2002/14,[[59]](#footnote-60) to set up bodies for the representation of employees. Based on Article 3(1) of the Directive, that obligation was conditional upon reaching specific thresholds depending on the number of employees. According to French law, a specific category of employees benefitting from assisted contracts was excluded from the calculation of that threshold. The main proceedings concerned a challenge about the compatibility of that exclusion in the light of Directive 2002/114. That issue did not require in-depth explanations and followed from past case-law: the Member States were not authorised to exclude specific categories of workers from the calculation of staff members for the purposes of Directive 2002/114.[[60]](#footnote-61)

Another, undoubtedly more problematic, issue was also referred to the Court: can Article 27 of the Charter, read alone or in conjunction with Directive 2002/14, be relied upon to set aside a national norm incompatible with that Directive in the context of legal proceedings between private parties? The answer of the Court was negative. After recalling its well-established case law on the absence of horizontal direct effect of directives, it insisted that the right of workers to information and consultation, laid down in Article 27 of the Charter, was also deprived of horizontal direct effect. The novelty of that judgment originated from its understanding of the articulation between, on the one hand, Article 27 of the Charter and, on the other hand, Directive 2002/114. The Court explicitly stated that a Charter provision must be sufficient *in itself* to confer upon individuals a subjective right invokable as such in national legal proceedings.[[61]](#footnote-62) The right enshrined in Article 27 of the Charter did not meet that requirement. Consequently, it could not produce horizontal direct effect. More importantly, that effect could not be derived from the combination of Article 27 of the Charter with the specific rights enshrined in Directive 2002/114.[[62]](#footnote-63)

The interpretative approach offered in support of that conclusion placed significant emphasis on the wording of Article 27 of the Charter. More specifically, the Court focused on the textual limitations set out in that provision. It insisted, in particular, that that provision offered guarantees of information and consultation to workers ‘in the cases and under the conditions provided for by Union law and national laws and practices’.[[63]](#footnote-64) It followed from the wording of Article 27 of the Charter that it had to be given ‘more specific expression’ by means of EU or national provisions in order to become ‘fully effective’.[[64]](#footnote-65) That judgment was accordingly taken to mean that a mere reference in the relevant Charter provision to the adoption of implementing measures, be it at EU or national level, could suffice to rule out the possibility that such provision could produce horizontal direct effect.[[65]](#footnote-66) The reference to additional concretizing measures was deemed to reveal the intention of the founding fathers of the Charter to ‘entrust the EU legislature and/or the national legislatures with the task of specifying the content of the fundamental rights recognised’ in the Charter. The Court’s insistence on the reference, set out in Article 27 of the Charter, to the adoption of concretising legislation appeared to imply that the right concerned could only become fully effective in the presence of such legislation.[[66]](#footnote-67) Conversely, the absence of such concretising legislation would constitute an absolute bar to the justiciability of such Charter provisions.[[67]](#footnote-68)

That approach was criticised for failing to isolate the minimum, or core, normative content of Charter provisions.[[68]](#footnote-69) Upon closer analysis, however, it seems that the Court did attempt to isolate the normative content of the right enshrined in Article 27 of the Charter. Crucially, that analysis was conducted autonomously, independently from the requirements arising from secondary law.[[69]](#footnote-70) Once again, the Court placed significant emphasis on the wording of Article 27 of the Charter. At para 46, the Court considered that ‘[i]t [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, [laid] down and addresse[d] 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’. The French version is even more explicit. It states that the rule set out in Article 3 of the Directive could not be inferred from the wording and the explanations relating to Article 27 of the Charter.[[70]](#footnote-71)

That judgment clarified that, to identify the content of a given Charter provision, regard must be had to the wording and explanations relating to the relevant provision. Upon such a reading, what matters most is that the normative content of a given Charter provision must be ‘inferable’ or, to put it differently, identifiable in the light of the wording and explanations relating to that Charter provision. It is regrettable that the Court did not specify in a positive manner what the normative content of Article 27 entailed.[[71]](#footnote-72) Instead, it merely stated that the rule deriving from Article 3 of the Directive could not be inferred from Article 27. The cautious position of the Court may be better understood when viewed in relation to the issue raised in the main proceedings. However disappointing that position may be, it is worth remembering here that the Court was requested to provide guidance in relation to a specific issue: can Article 27 of the Charter be relied upon to set aside the national norm at stake? The answer formulated by the Court was negative. It considered that the rule prohibiting the exclusion of certain categories of employees from the calculation of thresholds for setting up representative bodies could not be inferred from Article 27 of the Charter. It followed that that provision could not be relied upon to disapply the national legislation under consideration in the context of horizontal proceedings. As was pointed out by Lenaerts, the answer given by the Court in the context of preliminary ruling proceedings must ‘constitute, first and foremost, a real contribution to the solution of the case pending before the referring court’.[[72]](#footnote-73) Viewed from that perspective, it can safely be assumed that the Court discharged the duties laid upon it by providing an answer to the question asked by the referring court.[[73]](#footnote-74)

The comments expressed in previous paragraphs may nevertheless open new argumentative opportunities with respect to the normative content of Article 27 of the Charter. Of course, there is little denying that, in the light of *AMS*, the role played by Article 27 of the Charter is bound to remain limited. By adopting a strict textual understanding of the content of that right, the Court seems to have ruled out the prospect that it may function as a source of rights and obligations in the context of private proceedings. Be that as it may, there is, in my view, a reasonable argument to be made that that provision, or some of its core components, could produce some horizontal effects in other settings. The limited normative content ascribed to that right in *AMS* suggests that it is particularly well-suited to operate as a benchmark for reviewing the compatibility of national norms *in abstracto* even in the context of private law proceedings. In that context, Article 27 of the Charter could be relied upon in its bare form to guarantee that workers are not denied the very possibility of benefiting from guarantees of information and consultation.

Ultimately, though, it falls upon the Court of Justice to determine the precise reach of that provision. As was made clear, that endeavour needs to rest on considerations stemming from the text of that provision, as well as, more importantly, the explanations relating to that provision. By referring to the explanations, the Court would be able to seek inspiration from other exogenous sources mentioned in these explanations such as, for instance, the European Social Charter or the Community Charter of fundamental social rights of workers. Although the Court remained oblivious to that possibility in *AMS*, presumably because the issue raised by the referring court did not command it, it cannot be ruled out that the Court could do so in future cases.

Overall, that judgment reflects the Court’s willingness to use the new parameters of interpretation featuring in the Charter to define the material content of EU fundamental social rights. A great deal was made, in this judgment, about the limitations intrinsic to the wording of Article 27 of the Charter. In doing so, the Court expressed a more general stance about the way the material content of fundamental (social) rights norms ought to be reconstructed. The bottom line was clear: the interpretation of fundamental social rights must, as far as possible, be grounded on the wording of Charter provisions and the explanations relating to the Charter.

1. *Bauer and Max-Planck: Article 31(2) of the Charter, a source of (self-standing) subjective rights and obligations?*

The interpretative approach adopted in *AMS* was developed a step further in *Bauer* and *Max-Planck*. In these judgments, the Grand Chamber was requested to clarify the scope and legal value of the right to paid annual leave laid down in Article 31(2) of the Charter. It relied upon the explanations in order to flesh out the content of that right by reference to Article 7 of Directive 2003/88 (‘the Working Time Directive’).[[74]](#footnote-75) Before delving into an analysis of these judgments, it is perhaps necessary to provide some insights about the circumstances at issue in each of these cases. The proceedings in *Max-Planck* concerned a national legislation according to which workers lost their right to paid annual leave (and correlative allowance *in lieu*) in circumstances where an application for being granted that right was not submitted prior to the end of the employment relationship. The proceedings in *Bauer* concerned a national legislation whereby the right to paid annual leave ceased to exist and could not be transmitted to the worker’s legal heirs, in circumstances where the employment relationship came to an (abrupt) end due to the worker’s death. In both cases, the Court was called upon to answer the following question: can Article 31(2) be relied upon in private law proceedings to set aside a national provision conflicting with that right?

Seized of that matter, the Grand Chamber relied upon the explanations relating to the Charter to flesh out the content of Article 31(2) of the Charter by reference to the provisions of the Working Time Directive. By doing so, it confirmed the ‘symbiotic interrelationship’ existing between these legal provisions.[[75]](#footnote-76) That development was made possible because the explanations relating to Article 31(2) prescribed that this provision was ‘based on’ the predecessor of the Working Time Directive (i.e., Directive 93/104[[76]](#footnote-77)). Together with other sources, such as the European Social Charter or the Community Charter of the Fundamental Social Rights of Workers, that Directive was used as a source of ‘inspiration’ for establishing the right enshrined in Article 31(2) of the Charter.[[77]](#footnote-78) The explanations were accordingly viewed as a token of the intention of the drafters of the Charter to define the normative content of the right to paid annual leave by reference to the sources set out in these explanations.

One problematic issue could arise in that context: because the explanations referred to the predecessor of the (current) Working Time Directive, and not the Working Time Directive as such, that interpretation had the potential of “ossifying” the content of Article 31(2) of the Charter.[[78]](#footnote-79) That issue was addressed by the Court in a rather laconic fashion. To rely on the (current) Working Time Directive, the Court stressed that it was adopted with a view to codifying Directive 93/104. It added that Article 7 of the Working Time Directive merely reproduced the terms of Article 7 of Directive 93/104.[[79]](#footnote-80) In doing so, the Court essentially followed the suggestion expressed by Advocate General Bot. AG Bot had attempted to identify the core guarantees deriving from Article 31(2) of the Charter by reference to the ‘very heart’ of Directive 93/104. According to him, the right to paid annual leave for a period of four weeks ‘enshrine[d] and consolidate[d] what appear[ed] most essential in that Directive’.[[80]](#footnote-81) That conclusion was warranted precisely because that guarantee was reproduced identically in Article 7 of the Working Time Directive, and did not allow for any derogation to the right thereby instituted. Consequently, the Court could rely upon the Working Time Directive and article 7 thereof, to ascertain the content of the fundamental right set out in Article 31(2) of the Charter.

That preliminary step enabled the Court to analyse the compatibility of the national provisions at stake in those cases by reference to Article 7 of the Working Time Directive. In other words, the content of Article 31(2) of the Charter was fleshed out by reference to Article 7 of the Directive. The latter provision could therefore serve as a *de facto* legal benchmark for assessing compliance of national legislation with the Charter right to paid annual leave. In both cases, the Grand Chamber of the Court was adamant that the deciding factor for determining whether there was indeed a violation of the right to paid annual leave was whether the worker had been put in a position to effectively exercise that right. Admittedly, the Member States retained considerable discretion with respect to the establishment of conditions for the exercise of the right to paid annual leave. But the Member States did not enjoy unfettered discretion to regulate the conditions for the exercise of that right. They had to make sure that workers were given the (effective) possibility to exercise that right.[[81]](#footnote-82) Applying that proviso to the *Bauer* case meant that the national legislation was contrary to the requirements arising from the Article 31(2) of the Charter. Because the right to paid annual leave could no longer be effectively exercised by the worker, it was considered necessary that the entitlement to an allowance *in lieu* continue to subsist and be transferred to the legal heirs of the worker.[[82]](#footnote-83) In *Max-Planck*, the case file did not allow to determine conclusively whether the worker had been given the opportunity to exercise his right. It was unclear whether the loss of that right occurred automatically, even in circumstances where the worker had not been put in a position to exercise that right. The referring court was therefore instructed to determine whether the worker had been put in a position to do so. Provided that this was the case, the national legislation at issue would be compatible with the right to paid annual leave enshrined in Article 31(2) of the Charter.

The judgments handed down in *Bauer* and *Max-Planck* exhibit a broad understanding of the guarantees offered by Article 31(2) of the Charter. Based upon these judgments, one might wonder about how far exactly the ‘effective possibility’ test may be taken. Based on that requirement, the Court was able to deduce detailed subjective rights and obligations for the sake of employment protection (beyond the mere disapplication of conflicting national legislations). As the Court put it: ‘the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave’.[[83]](#footnote-84) The Court affirmed, in particular, that employers were under an obligation to make sure that their employees had been put in a position to exercise their right to paid annual leave. In particular, the employer was instructed to inform employees ‘accurately and in good time’ about the possibility of taking leave days.[[84]](#footnote-85) The Court was also adamant to insist that, in the event legal proceedings were initiated to verify whether that was the case, the employer would bear the burden of adducing evidence that all due diligence had been undertaken to make sure that the worker concerned was given the effective possibility to exercise that right.

From a normative perspective, that outcome makes perfect sense. After all, the employer is in a situation of power asymmetry in comparison with workers. To remedy that imbalance, it may be deemed necessary to impose obligations of diligence upon employers. Yet, what matters most, for present purposes, is that these obligations do not feature explicitly in the Working Time Directive (or, for that matter, Article 31(2) of the Charter). Surprisingly, the Court did not even mention the right, set out in Article 27 of the Charter of information in the context of employment. Even considering the limited (or absence of) justiciability of that provision when read *alone*, the possibility that it be endowed with some sort of justiciability when read *in conjunction* with other Charter provisions cannot be ruled out. That is, in essence, the suggestion proffered by Guy Braibant, one of the most prominent drafters of the Charter, during the drafting of that instrument.[[85]](#footnote-86) According to him, the reference to the adoption of implementing measures laid down in some Charter social provisions does not necessarily mean that they should be deprived of any legal effect whatsoever. He suggested that such provisions should be capable of being relied upon in legal proceedings in conjunction with other Charter provisions. If that suggestion were indeed taken up, the normative effect of Article 27 of the Charter could be enhanced by virtue of its combination with another Charter provision (and not, as clearly ruled out by the Court, secondary law). Similarly, it would have been possible for the Court to ground the creation of obligations of information in relation to the right to paid annual leave based on a combined reading of Articles 31(2) and 27 of the Charter.

At the same time, it is also important to stress that if the Court had applied the strict literal approach displayed in *AMS* in relation to Article 31(2), there is little doubt that the scope of that provision would have been rather more limited. As a reminder, the Court was keen to insist in *AMS* that the material content of Article 27 of the Charter had to be construed based on a strict reading of that provision. In other words, the emphasis was placed on a literal construction of the material content of Article 27 of the Charter. By contrast, the judgment delivered in *Bauer* and *Max-Planck* moved beyond an analysis focusing solely on the wording of Charter provisions (or even the sources of inspirations mentioned in the explanations, for that matter). In these judgments, the Court introduced an additional element of teleology about the normative aspirations underpinning the right to paid annual leave set out in Article 31(2) of the Charter. By construing the material content of that right in the light of the objective to offer an effective possibility that leave days be taken by the workers, these judgments confirmed the teleological approach that characterised much of the (past) case law dealing with the right to paid annual leave.[[86]](#footnote-87) The teleological approach applied in these judgments offers a stark contrast by comparison with the type of originalist lens of interpretation prevailing in *AMS*.

1. **Conclusion**

A great deal has been said and written over the past few years about the normative significance, or added value, of the EU Charter. In some ways, this debate reflects a compromise between two vastly different perspectives about the role of the Charter that was already discernible during the drafting phase of the Charter.[[87]](#footnote-88) The Preamble of the Charter provides a case in point to illustrate that tension. On the one hand, it emphasises that the Charter is meant to ‘strengthen’ the protection of EU fundamental rights, which form the backbone of the European project. Viewed from that perspective, the Charter may be seen as an instrument of great constitutional significance which crystallises the ‘common values’ shared by the peoples of Europe. On the other hand, the Preamble clarifies that the Charter merely ‘reaffirms’ pre-existing rights without affecting the limits of competences conferred upon the EU. This suggests that the Charter was simply meant to codify pre-existing rights with a view to erecting barriers against the Union’s increased powers.

Against that background, the purpose of this contribution was to analyse the way the new parameters of interpretation introduced by the Charter have been employed in the jurisprudence dealing with the interpretation of fundamental social rights. It was demonstrated that the horizontal provisions featuring in the Charter were introduced by the drafters of the Charter to operate as *garde-fous* against the centripetal potential, or federalising force, of EU fundamental rights. An analysis of the case law also revealed that this new interpretative framework has served to align the interpretation of fundamental social rights with the perspective of democratic institutions. The dictum formulated in *AMS*, and reiterated in subsequent judgments, is clear: the interpretation of fundamental social rights must, as far as possible, be grounded on the wording of Charter provisions and the explanations relating to the Charter. The explanations have served to support an interpretation of fundamental social rights that follows closely the perspective of the political institutions responsible for fleshing out the content of fundamental rights by means of secondary law.

This development may contribute to enhance the predictability of the judicial identification of the content of abstract fundamental rights. However, the judgments analysed here also seem to fall squarely in line with the teleological interpretative approach dominating the Court’s case-law on fundamental rights. Judgments such as *Max-Planck* or *Bauer*, for instance, illustrate the Court’s tendency to employ the narrative of rights to legitimize the creation of positive obligations going beyond the nitty-gritty details of secondary law. By doing so, the Court is coming dangerously close to acting as a law-making body. This development may admittedly seem perfectly sound from a normative standpoint, but it is difficult to square with the principle of conferral articulated by the Treaties. In doing so, the Court provided (additional) ammunition to the ‘judicialization critique’; once again, it ventured into the muddy waters of judicial lawmaking.

1. M. Dawson, ‘Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits’, 19 *European Public Law* (2013), p. 383. [↑](#footnote-ref-2)
2. J. Waldron, ‘The Core of the Case Against Judicial Review’, 54 *The Yale Law Journal* (2006), p. 1367. [↑](#footnote-ref-3)
3. J. Weiler, ‘Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space’ in R. Kastoryano (ed.), *An Identify for Europe – The Relevance of Multiculturalism in EU Construction* (Palgrave MacMillan, 2009). [↑](#footnote-ref-4)
4. N. Coghlan and M. Steiert, ‘Analytical Introduction’ in Coghlan and Steiert (eds.), *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (EUI, 2020), p. 12. [↑](#footnote-ref-5)
5. S. Coppola, ‘Social Rights in the European Union: The Possible Added Value of a Binding Charter of Fundamental Rights’ in G. Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer, 2011), p. 200. [↑](#footnote-ref-6)
6. For the purposes of this contribution, ‘judicial law-making’ should be taken to include instances where the Court either modifies or creates (new) law. [↑](#footnote-ref-7)
7. The term ‘literalism’ describes a type of legal reasoning by which the material content of fundamental social rights is reconstructed by means of a literal interpretation of the wording of the Charter provisions, as well as the (sources of inspiration mentioned in the) explanations relating to the Charter. By contrast, the term ‘teleologism’ refers to a form of consequentialist reasoning by which the material content of fundamental social rights is ascertained having regard to the *telos* underpinning the creation of such rights. [↑](#footnote-ref-8)
8. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16. [↑](#footnote-ref-9)
9. As highlighted by Takis Tridimas, the questions referred to the Court of Justice in *Mangold* did not even mention the existence of that general principle (Tridimas, ‘Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions’ in U. Bernitz, X. Groussot and F. Schulyok (eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013), p. 219). [↑](#footnote-ref-10)
10. Case C-144/04 *Mangold*, EU:C:2005:709, para. 74; Case C-555/07 *Kücükdeveci*, EU:C:2010:21, para. 20, 50. [↑](#footnote-ref-11)
11. See e.g. Opinion of AG Geelhoed in case C-13/05, *Chacon Navas*, EU:C:2006:184, para 56; Opinion of AG Jarabo Colomer in Joined Cases C-55/07 and C-56/07, *Michaeler*, EU:C:2008:248, para 21. [↑](#footnote-ref-12)
12. See, for a detailed account on the methodological challenges associated with these judgments, J. Mazak and M. K. Moser, ‘Adjudication by Reference to General Principles of EU Law: A Second Look at the Mangold Case Law’ in Adams et al. (eds.), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2015), p. 61-86. [↑](#footnote-ref-13)
13. T. Horsley, *The Court of Justice as an Institutional Actor: Judicial Lawmaking and its Limits* (CUP, 2018). [↑](#footnote-ref-14)
14. See, amongst others, M. Schmidt, ‘The Principle of Non-Discrimination in Respect of Age: Dimensions of the ECJ’s *Mangold* Judgment’, 7 *GLJ* (2005), p. 505, 519; D. Schiek, ‘The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’, 35 *Industrial Law Journal* (2006), p. 334. [↑](#footnote-ref-15)
15. Case C-555/07 *Kücükdeveci*, para. 50. [↑](#footnote-ref-16)
16. G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP, 2012), p. 45. [↑](#footnote-ref-17)
17. Case C-144/04 *Mangold*, para. 77; Case C-555/07 *Kücükdeveci*, para. 51. [↑](#footnote-ref-18)
18. G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, p. 116-117, 140, 212. [↑](#footnote-ref-19)
19. J. Weiler, ‘Epilogue: The Judicial Après Nice’ in G. De Bùrca and J. Weiler (eds.), *The European Court of Justice* (OUP, 2001), p. 215. See, in a similar vein, M. 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?’, 18 *MJECL* (2011), p. 133. [↑](#footnote-ref-20)
20. B. De Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in P. Craig and G. De Bùrca (eds.), *The Evolution of EU Law* (3rd ed, OUP, 2021), p. 202. See, however, M. Dougan, ‘In Defence of Mangold?’ in A. Arnull et al. (eds.), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart Publishing, 2011), p. 224-6; N. Lazzerini, ‘The Horizontal Application of the General Principles of EU Law: Nothing Less Than Direct Effect’ in K. S. Ziegler, P. J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar, 2022), p. 176-181. [↑](#footnote-ref-21)
21. Opinion of AG Mazak in Case C-411/05 *Palacios de la Villa*, para. 88. [↑](#footnote-ref-22)
22. J. Mazak and M. K. Moser, in Adams et al. (eds.), *Judging Europe’s Judges*, p. 80. See, in contrast, AG Cruz Villalon in Case C-176/12 *AMS*, EU:C:2013:491, para. 78-9. For present purposes, the principle of legal certainty implies that rules should be clear and precise, so that individuals are cognizant of their rights and obligations. See, on that topic, J. Raitio, ‘The Expectation of Legal Certainty and Horizontal Effect of EU Law’ in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law*, p. 199ff. [↑](#footnote-ref-23)
23. M. Dougan, in A. Arnull et al (eds.), *A Constitutional Order of States?*, p. 227. [↑](#footnote-ref-24)
24. Case C-144/04 *Mangold*, para. 56-66. [↑](#footnote-ref-25)
25. M. Dougan, in A. Arnull et al (eds.), *A Constitutional Order of States?*, p. 242-3. [↑](#footnote-ref-26)
26. T. Tridimas, in U. Bernitz, X. Groussot and F. Schulyok (eds.), *General Principles of EU Law and European Private Law*, p. 217. [↑](#footnote-ref-27)
27. E. Frantziou, ‘The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle’, 22 *CYELS* (2020), p. 212-213. [↑](#footnote-ref-28)
28. A former president of the German Federal Constitutional Court, Roman Herzog also officiated as president of the Praesidium which was entrusted with the task of drafting the Charter. [↑](#footnote-ref-29)
29. R. Herzog and L. Gerken, ‘Stop the European Court of Justice’, *EUObserver* (2008) [Stop the European Court of Justice (euobserver.com)](https://euobserver.com/opinion/26714). [↑](#footnote-ref-30)
30. BVERFG, 2 BvR 2661:06, 6 July 2010, para 68. [↑](#footnote-ref-31)
31. E. Muir, M. Dawson and B. De Witte, ‘Introduction: The European Court of Justice as a Political Actor’ in E. Muir, M. Dawson and B. De Witte (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013), p. 3; Editorial Comment, ‘The Court of Justice in the Limelight – Again’, 45 CMLRev (2008), p. 1573. [↑](#footnote-ref-32)
32. K. Lenaerts and J. A. Gutiérrez, *Les Méthodes d’Interprétation de la Cour de Justice de l’Union Européenne* (Bruylant, 2020), p. 167. [↑](#footnote-ref-33)
33. See, on that topic, A. Knook, ‘The Court, the Charter and the Vertical Division of Power in the EU’, 42 *CML Rev* (2005), p .367; A. Torres Pérez, ‘The Federalizing Force of the EU Charter of Fundamental Rights’, 15 *I-Con* (2017), p. 1080. [↑](#footnote-ref-34)
34. The distinction set out at Article 52(5) of the Charter between rights and principles will not be discussed here. Suffice it to mention, for present purposes, that the Court does not seem overly willing to shed light on this grey area. The issue is barely discussed in recent judgments, and the Court seems more comfortable discussing about the (extent of the) justiciability of Charter rights through the lens of the conceptually distinct – though partially overlapping – debate on direct effect. [↑](#footnote-ref-35)
35. Although (most) of these rights were already recognised by secondary law, as well as (some) international Treaties, they had not yet been recognized as forming part of EU fundamental rights (under the guise of general principles). See, on that matter, L. Pech and X. Groussot, ‘Fundamental Rights Protection in the EU Post-Lisbon Treaty’, 173 *European Issue* (2010), p. 1-13. [↑](#footnote-ref-36)
36. On the Swedish model of judicial review, see T. Bull, ‘Judges Without a Court – Judicial Review in Sweden’; on the Finnish model of judicial review, see K. Tuori, ‘Judicial Constitutional Review as a Last Resort’, both contributions can be found in T. Campbell, K. D. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (OUP, 2011). [↑](#footnote-ref-37)
37. J. Ziller, ‘Le Fabuleux Destin des Explications Relatives à la Charte des Droits Fondamentaux de l’Union Européenne’ in *Chemins d’Europe: Mélanges en l’Honneur de Jean Paul Jacqué* (Dalloz, 2010), p. 773. For more insights on the demands of that delegation of states, see N. Coghlan and M. Steiert (eds), *The Charter of Fundamental Rights of the European Union*, p. 6870, 7276-7287. [↑](#footnote-ref-38)
38. These countries have traditionally been wary of the risks associated with a ‘government of judges’, and instead exhibit a preference in favour of the democratic will expressed by the legislature. That wariness is reflected in these countries’ allegiance to ‘parliamentary sovereignty’. See, on that topic, M. Ogorek, ‘The Doctrine of Parliamentary Sovereignty in Comparative Perspective’, 6 *GLJ* (2005), p. 967; M. De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, 2015). [↑](#footnote-ref-39)
39. J.-P. Jacqué, ‘The Explanations Relating to the Charter of Fundamental Rights of the European Union’ in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p. 1718. As Protocol No 30 on the application of the Charter of fundamental rights to Poland and the United Kingdom adequately demonstrates, the Brits were keen to place an even greater emphasis on the legal value of these explanations as a constraint on the interpretative activity of the judiciary. Its Preamble states that the Charter must be interpreted by the courts of the United Kingdom ‘*strictly* in accordance with’ the explanations (emphasis added). The possibility to confer authoritative value upon these explanations was even touched upon during the drafting of the Constitutional Treaty (See N. Coghlan and M. Steiert (eds.), *The Charter of Fundamental Rights of the European Union*, p. 7281). [↑](#footnote-ref-40)
40. G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, p. 249. [↑](#footnote-ref-41)
41. J. Ziller, in *Chemins d’Europe: Mélanges en l’Honneur de Jean Paul Jacqué*, p. 775; K. Lenaerts and J. A. Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’, *EUI Working Paper* 9 (2013), p. 41. [↑](#footnote-ref-42)
42. In a similar vein, Eleanor Sharpston has also downplayed the relevance of the explanations for identifying the normative content of (some) Charter rights (E. Sharpston, ‘Foreword’ in N. Coghlan and M. Steiert (eds.), *The Charter of Fundamental Rights of the European Union*, p. 8-9). [↑](#footnote-ref-43)
43. That does not mean, however, that the explanations must prevail even where they leave gaps, or questions unanswered. See, on that topic, M. Tecqmenne, ‘Les Limites de l’Office du Juge de l’Union Mises à l’Epreuve de l’Evolution des Standards de Droits Fondamentaux : Vers une Conception Renouvelée du Droit à (Ré)concilier Vie Familiale et Vie Professionnelle’, *Revue de la Faculté de Droit de l’Université de Liège* (2023), p. 289-90. [↑](#footnote-ref-44)
44. E. Muir, ‘The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*’, 12 *REAL* (2019), p. 214. [↑](#footnote-ref-45)
45. See further E. Muir, ‘The Essence of the Fundamental Right to Equal Treatment: Back to the Origins’, 20 *GLJ* (2019), p. 817. [↑](#footnote-ref-46)
46. A. Ward, ‘The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?’, 20 *CYELS* (2018), p. 42. [↑](#footnote-ref-47)
47. Case C-414/16, *Egenberger*, para 76. [↑](#footnote-ref-48)
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56. Case C-193/17 Cresco Investigations, EU:C:2019:43, para. 83ff. That obligation was mitigated by the requirement (deriving from the relevant national provision) that the employees concerned had to inform their employers if they wished to avail themselves of the entitlement to ‘public holiday pay’ on Good Friday. [↑](#footnote-ref-57)
57. Ibid., para. 81-82. [↑](#footnote-ref-58)
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77. See further Opinion of AG Trstenjak in Case C-282/10 *Dominguez*, EU:C:2011:559, para. 157. [↑](#footnote-ref-78)
78. Ibid., para. 157 [↑](#footnote-ref-79)
79. Case C-684/16 *Max-Planck*, para. 53. [↑](#footnote-ref-80)
80. Opinion of AG Bot in Joined Cases C-569/16 and C-570/16 *Bauer*, para. 88. [↑](#footnote-ref-81)
81. Ibid., para. 38. [↑](#footnote-ref-82)
82. Even though, as pointed out by the referring court, speaking of ‘effective possibility’ to take leave days in those circumstances is counter-intuitive since the right bearer is, well, dead. [↑](#footnote-ref-83)
83. Joined Cases C-569/16 and C-570/16 *Bauer*, para. 90. [↑](#footnote-ref-84)
84. C-648/16 *Max-Planck*, para. 45. [↑](#footnote-ref-85)
85. N. Coghlan and M. Steiert (eds.), *The Charter of Fundamental Rights of the European Union*, p. 1626. [↑](#footnote-ref-86)
86. A case in point is provided by the recent judgment in Case C-55/18 *Federacionn de Servicios de Comisiones Obrera (CCOO)* v. *Deutsche Bank SAE*, EU:C:2019:402. [↑](#footnote-ref-87)
87. P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, 39 CML Rev (2002), p. 954. [↑](#footnote-ref-88)