(Most of) the Charter of Fundamental Rights is Horizontally Applicable

ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et al*

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INTRODUCTION

Can the Charter of Fundamental Rights be invoked in disputes between private parties, thus creating a coherent constitutional basis for the horizontal effect of fundamental rights, or does its limited scope of application preclude its use in horizontal disputes as a self-standing source of law? That was the constitutional question at the heart of a series of rulings over the last year – most recently, *Bauer*.[1]

There is little doubt that, for a long time, the EU horizontality doctrine was, as a 2006 editorial of the Common Market Law Review had put it, 'a law of diminishing coherence'.[2] The insistence on the non-horizontality of directives from

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[1]ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal and Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K.* v *Maria Elisabeth Bauer and Martina Broßonn*, EU:C:2018:871. *See also* the ruling of the Court in *Max Planck*, which was rendered on the same day as the *Bauer* judgment, further confirming its bearing: ECJ 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.* v *Tetsuji Shimizu*, EU:C:2018:874. *See also* ECJ 11 September 2018, Case C-414/16, *Egenberger* v *Evangelisches Werk für Diakonie und Entwicklung e.V*, EU:C:2018:257; ECJ 17 April 2018, Case C-68/17, *IR* v *JQ*, EU:C:2018:696;. These cases are further discussed in A. Colombi Ciacchi's note in this issue, which complements the present note, and will not be considered here in depth: *see* A. Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights', 15 *EuConst* (2019) p. 294.

[2]Editorial comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?', 43(1) *CMLRev* (2006) p. 1 at p. 1.

European Constitutional Law Review, 15: 306–323, 2019

doi:10.1017/S1574019619000166

Marshall[3] onwards led to the adoption of often unpredictable exceptions, as exemplified by the *Mangold* judgment,[4] which generated substantial legitimacy challenges[5] and bids to 'stop the European Court of Justice'.[6] It was against this terse legal background that a nearly decade-long debate about the horizontal direct effect of the Charter emerged.[7] Supporters of a cautious approach pointed to the problems of the *Mangold* ruling and the text of Article 51(1) of the Charter, which is addressed to Member States and Union institutions, arguing that the principle of horizontality should not be extended to its substantive provisions.[8] Others advocated a more expansive approach, founded upon the coherent and effective application of fundamental rights to all legal disputes – against state and private actors alike.[9]

[3]ECJ 26 February 1986, Case C-271/91, *Marshall* v *Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

[4]ECJ 22 November 2005, Case C-144/04, *Mangold* v *Helm* [2005] ECR I-9981; *see also* ECJ 19 January 2010, Case C-555/07, *Kücükdeveci* v *Swedex GmbH* [2005] ECR I-365.

[5]German Constitutional Court 6 July 2010, *Honeywell* - BVerfGE 126 (Az: 2 BvR 2661/06). For a detailed discussion, *see* M. Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualising the Relationship between the German Constitutional Court and the European Court of Justice', 48 *CMLRev* (2011) p. 9; C. Möllers, 'German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell', 7(1) *EuConst* (2011) p. 161.

[6]R. Herzog and L. Gerken, 'Stop the European Court of Justice', *EU Observer*, 10 September 2008, <euobserver.com/opinion/26714>, visited 29 April 2019.

[7]An overview is provided in the Opinion of AG Bot, delivered on 29 May 2018, in Joined Cases C-569/16, *Stadt Wuppertal* v *Maria Elisabeth Bauer* and C-570/16, *Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K.* v *Martina Broßonn*, EU:C:2018:337 (hereafter 'Bauer Opinion') paras. 77-78; *see further* E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019) ch. 4.

[8]The most significant challenge to the horizontal effect of the Charter was mounted by AG Trstenjak in her Opinion in *Dominguez*, a case which concerned the very same right (paid annual leave): Opinion of AG Trstenjak, delivered on 8 September 2011, in Case C-282/10, *Dominguez* v *Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre*, EU:C:2011:559 (hereafter '*Dominguez* Opinion'), paras. 80-83; *see also* C. Ladenburger, 'FIDE Conference 2012 Institutional Report' (2012) XXV FIDE Congress, Tallinn, 30 May-2 June 2012, p. 34-35.

[9]*See*, e.g., D. Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights', 38(4) *EL Rev* (2013) p. 479; E. Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality', 21(5) *ELJ* (2015) p. 657. AG Cruz Villalón had powerfully advocated this approach, especially in his Opinions in *Prigge* and *Association de médiation sociale* – uncharacteristically, not followed by the Court: Opinion of AG Cruz Villalón, delivered on 19 May 2011, in Case C-447/09, *Prigge and Others* v *Deutsche Lufthansa*, EU:C:2011:321; Opinion of AG Cruz Villalón, delivered on 18 July 2013, in Case C-176/12, *Association de médiation sociale* v *Union locale des syndicats CGT*, EU:C:2013:491.

In *Bauer et al*, the Court's Grand Chamber finally put this debate to rest in favour of the latter interpretation. *Bauer* is the latest of a promising set of rulings, including *Egenberger* and *IR*, which set the fundamental rights enshrined in the Charter apart from prior rules on horizontality.[10] But it is an especially significant part of that puzzle, because it draws the earlier case law together and clarifies its breadth within the field of EU fundamental rights jurisprudence in which the abovementioned debate most readily manifested itself: the social rights enshrined in the Charter's 'Solidarity' chapter (in this case, the right to paid annual leave protected in Article 31(2) thereof). It was indeed in this field that, not long ago, the Court had refrained from clarifying the reach of the horizontality doctrine and the status of various provisions of the Charter, first in *Dominguez* and, perhaps most starkly, in its heavily criticised judgment in *Association de Médiation Sociale* (*AMS*).[11]

This comment has a threefold purpose. It first analyses the key features of the *Bauer* ruling and seeks to reconstruct what might now – safely, in my view – be described as the current position on the horizontal effect of fundamental rights in the European Union. It then assesses the contribution the case makes in this regard. Finally, the note argues that *Bauer* offers food for thought about the desirability and possible future direction of horizontality in respect of fundamental employment rights. How can the ruling be related to the Court's broader analysis of horizontality? Is it convincing in its painstaking reaffirmation-but-containment of *Marshall* and *AMS*? Examining these questions brings the note to a mildly sombre ending: it is argued that, whilst *Bauer* solidifies *some* positive changes in respect of the constitutional recognition of the Charter, one should not be too quick to assume that it amounts to an effective recognition of fundamental rights in the workplace – a feat which would require a more thorough revision of the relationship between fundamental rights and market freedoms in horizontal disputes within the Union's public order.

Analysis of the ruling

The legal context and questions before the court

Bauer is not a single case: it stems from two, in all but one respect identical, sets of facts. The first case, C-569/16, concerned a dispute between Stadt Wuppertal and

[10] *See further supra* n. 1.

[11] ECJ 15 January 2014, Case C-176/12, *Association de Médiation Sociale (AMS)* v *Union Locale des Syndicats CGT Hichem Laboubi Union Départementale CGT des Bouches-du-Rhône Confédération Générale du Travail (CGT)*, EU:C:2014:2. *See also* ECJ 24 January 2012, Case C-282/10, *Dominguez* v *Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre*, EU:C:2012:33.

Mrs Maria Elisabeth Bauer. The second case, C-570/16, concerned a dispute between Mr Volker Willmeroth, in his capacity as owner of the TWI Technische Wartung und Instandsetzung Volker Willmeroth eK (a private company) and Mrs Martina Broßonn. The Stadt Wuppertal and Mr Willmeroth had been the last employers of the late husbands of Mrs Bauer and Mrs Broßonn, respectively. Both had refused to pay the claimants an allowance in lieu of annual leave not taken by their spouses before their death.

Under German law, paragraph 7(4) of the revised *Bundesurlaubsgesetz* (Federal law on leave) (BGBl 2002 I, p 1529) provides for payment in lieu of leave in case of termination of an employment relationship, while paragraph 1922(1) of the *Bürgerliches Gesetzbuch* (Civil Code) provides that the estate of a deceased person passes in whole to the heirs. The relevant legal context at the EU level is, as mentioned above, Article 31(2) of the Charter, which provides that 'every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. Secondary EU legislation occupying this field further clarifies the meaning of the right in question. Article 7 of Directive 2003/88[12] provides that:

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

Applying the finding of the Court of Justice in *Bollacke*,[13] i.e. that an annual leave entitlement cannot be altogether lost upon a person's death, German courts had initially granted the claims of both Mrs Bauer and Mrs Broßonn. On appeal, however, the proceedings were stayed, as they raised questions about the applicability of that finding in the present context, particularly in case it was impossible to interpret Article 7(4) *Bundesurlaubsgesetz* and Article 1922(1) *Bürgerliches Gesetzbuch* as comprising the death of an employee within the concept of 'termination', thus making a payment in lieu of leave part of the estate. Joining the two cases, the Court of Justice rephrased the national courts' questions as follows:

(1) Does Article 7 of Directive [2003/88] or Article 31(2) of the [Charter] grant the heir of a worker who died while in an employment relationship a right to

[12]Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299/9, 18.11.2003.

[13]ECJ 12 June 2014, Case C-118/13, *Bollacke* v *K + K Klaas & Kock B.V. & Co. KG*, EU:C:2014:1755.

financial compensation for the worker's minimum annual leave prior to his death, which is precluded by Paragraph 7(4) of the [*Bundesurlaubsgesetz*], read in conjunction with Paragraph 1922(1) of the [*Bürgerliches Gesetzbuch*]?

(2) If the first question is answered in the affirmative: does this also apply where the employment relationship is between two private persons?[14]

In other words, the first question in the case was about the correct interpretation of the right to paid annual leave and the second question was procedural/constitutional, as it concerned the horizontal direct effect of a right further concretised in a directive. Thus, whilst for those of us with an Anglo-Saxon keyboard, calling the joined cases 'Bauer' avoids the uncomfortable *Eszett* in Mrs Broßonn's surname, it was, in fact, her case that made the judgment especially significant. For, even though the right to paid annual leave was engaged in both of the joined cases, it is trite EU law 'that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person'.[15]

The Opinion and judgment

The judgment was certainly influenced by the elaborate Opinion that preceded it. Maintaining a position he has consistently defended from *Kücükdeveci* onwards,[16] Advocate General Bot invited the Court to reconsider previous interpretations of fundamental rights based on general principles or 'particularly important principles of EU social law' and to confirm, once and for all, that the social rights enshrined in the Charter are equally fundamental to its other provisions.[17] The Advocate General developed his argument in close dialogue with earlier case law and, in a remarkable effort to reconcile *Kücükdeveci* and *AMS*, sought to clarify that *Kücükdeveci* should not have been interpreted as meaning that only Charter provisions further expressed in directives enjoyed horizontal direct effect. Rather, it was the constitutional character of the Charter that had led to the finding in *Kücükdeveci*, which therefore did not depend on 'further expression' in a directive.[18]

[14] *Bauer*, *supra* n. 1, para. 19.

[15] *Marshall*, *supra* n. 3, para. 48.

[16] *See* Opinion of AG Bot, delivered on 7 July 2009, in Case C-555/07, *Kücükdeveci* v *Swedex GmbH* [2010] ECR I-365; Opinion of AG Bot, delivered on 25 November 2015, in Case C-441/14, *Dansk Industri (DI)* v *Estate of Karsten Eigil Rasmussen*, EU:C:2015:776.

[17] Bauer Opinion, *supra* n. 7, para. 57, citing ECJ 29 November 2017, Case C-214/16, *King*, EU:C:2017:914, para. 32.

[18] Bauer Opinion, *supra* n. 7, paras. 74-76.

Advocate General Bot then took care to distinguish the present case from the *AMS* ruling. Unlike Article 27, which refers to 'national laws and practices', the Advocate General argued that Article 31 was clearly mandatory and specific enough to be relied upon as such – this finding not being dependent on whether a dispute was between private parties as opposed to between a private party and the state.[19] His argument rested upon the holy grail of precedent in this field: paragraph 39 of *Defrenne II* and its finding that the need to observe rules of a 'mandatory nature' applies 'not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.[20] On this basis, the Advocate General asked the Court to reaffirm its position in *Egenberger* by declaring that those provisions of the Charter which are mandatory in nature (i.e. are not principles or aspirations) are horizontally applicable *as such*, thus removing any remaining doubt regarding the need for further implementation of those rights in secondary legislation.[21]

The Court agreed and, in contrast to its earlier case law in this field, its ruling was especially detailed and methodical – a laudable development in its own right. First, the Court carefully unpacked the content of the right to paid annual leave, explaining that the proviso that limited payment in lieu of leave to cases of termination was intended to ensure the meaningfulness of that right both during (so that employers would not coerce their employees into not taking leave) and after termination of the employment relationship.[22] The reason for termination was immaterial: death marks the unfortunate but inevitable end of many employment relations.[23] Furthermore, the Court reasoned, annual leave has a measurable, pecuniary dimension, which does not dissipate upon the death of an employee, as it has been accumulated during his/her employment.[24]

Having thus set out the meaning of the right to paid annual leave, the Court also followed the Advocate General's suggestion to revise the overcomplicated distinctions between various rights in EU law that lingered in a long line of case law in this field, creating substantial and 'unnecessary ambiguity' therein.[25] It found that

[19]Ibid., paras. 79-81.

[20]ECJ 8 April 1986, Case 43/75, *Defrenne v Sabena* [1986] ECR 455, para. 39.

[21]Bauer Opinion, *supra* n. 7, para. 76, citing *Egenberger*, *supra* n. 1.

[22]*Bauer, supra* n. 1, paras. 42-43.

[23]Ibid., para. 46.

[24]Ibid., para. 48.

[25]L. Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*', 49(6) *CMLR* (2012) p. 1841 at p. 1857.

> the right to paid annual leave, as a principle of EU social law, is not only particularly important, but is also expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties.[26]

It was thus the constitutional status of the provision and not its designation as a 'general' or 'particularly important' principle of EU law that led the Court to its answer to the first question. Leaving the Directive aside entirely, the Court found that Article 31(2) of the Charter, in and of itself, had the effect of limiting the Member States' discretion to retroactively remove the enjoyment of the right, e.g. by prohibiting payment in lieu after a person's death.[27] National law and other aspects of EU law, including the Directive, should be interpreted in accordance with that core obligation.

But there is a difference between saying that entitlements accrued in accordance with Article 31 do not dissipate upon a person's death and saying that those entitlements can be invoked by the heirs of the person who accrued them in order to produce a remedy in a dispute with the employer of the deceased. While the former finding concerns the meaning of the right in general, the latter relates to the more technical aspects of the case and, more precisely, to the question of the direct effect of EU law. In this regard, the Court first affirmed the possibility of invoking directives in disputes with the state.[28] It was thus able to deal quickly with Mrs Bauer's case, which concerned a public employer, before turning to the more complicated question raised by Mrs Broßonn's circumstances. In analysing her case against Mr Willmeroth, the Court reaffirmed the non-horizontality of directives, even when they are clear, precise, and unconditional.[29] Mrs Broßonn *was unable to rely on the Directive* in a dispute with her late husband's employer. Yet, whilst the *Marshall* rule remains valid in theory, the existence of the Charter limits its relevance in a fundamental rights context.

The Court quickly went on to mediate the aforementioned limitation by means of an affirmation of the possibility of direct effect for the Charter in both vertical and horizontal disputes. To do so, it returned to the nature of Article 31(2) of the Charter and examined its potential for horizontality as a self-standing provision of EU primary law. In this respect, following the analysis of its Advocate General,[30] the Court acknowledged the existence of a debate over the scope of application of the Charter and definitively (and, in my view, correctly) resolved it:

> [A]lthough Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European

[26] *Bauer*, *supra* n. 1, para. 51.
[27] Ibid., paras. 61-63.
[28] Ibid., paras. 70-72.
[29] Ibid., para. 77.
[30] Bauer Opinion, *supra* n. 7, paras. 77-78.

> Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.[31]

In these terms, *Bauer et al* unequivocally affirmed the Charter's horizontality as a matter of constitutional principle. The Court then went on to analyse the conditions under which specific provisions might be applied horizontally. On this point, too, the Court followed the Advocate General's approach, finding that Article 31(2) was mandatory and specific enough (although the Court does translate this into a – potentially – more stringent requirement of unconditionality, which could restrict its application to certain provisions).[32] As the Court put it:

> The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right.[33]

It follows that Charter provisions which are mandatory and unconditional are horizontal, with or without further expression in secondary legislation.

The question of which provisions these are, of course, remains. The case law has now provided a range of examples: the *Bauer* judgment reaffirmed last April's ruling in *Egenberger* (and, more recently, in *IR*), meaning that Articles 31(2), 47, and 21, are in themselves sufficient to provide redress to individuals in private disputes.[34] At the same time, though, *Bauer* emphatically distinguished and reaffirmed *AMS* on its facts.[35] As I discuss further in the following sections, this raises concerns regarding the fate of Article 27 and, presumably, of all rights that refer to national laws and practices. Yet, before turning to a critique of the judgment, it is

[31] *Bauer*, *supra* n. 1, para. 87.

[32] Ibid., paras. 82-83. While 'unconditionality' is, of course, part of the classic formula for vertical direct effect, as well, cases such as *Reyners* had relaxed its operation in practice substantially: *see* Case 2/74, *Reyners* v *Belgium* [1974] ECR 63. The use of unconditionality in *Bauer* seems, in turn, to support what appears to be the Court's overall position stemming from this case law, namely that conditionality upon national laws and practices diminishes a particular provision's potential for being used in a horizontal dispute (a good example of which remains Art. 27 EUCFR, as seen in the *AMS* ruling, *supra* n. 11).

[33] Ibid., para. 85.

[34] Ibid. *See also IR v JQ,* and the relevant note in this issue, *supra* n. 1.

[35] *Bauer*, *supra* n. 1, para. 84.

worth briefly analysing its last substantive section, which considered the available remedies.[36]

From an orthodox EU law perspective, the immediate implication of the case might appear to be that there is not only a right to paid annual leave in the Union that can be invoked against public and private employers, but that there is also a corresponding obligation for those employers to comply with it directly. This is likely true in practice but only partly so in terms of the constitutional structure proposed by the Court. The mandatory and unconditional nature of the right (i.e. the fact that it enjoys horizontal direct effect under EU law) means that:

> if the [national] court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31(2) of the Charter, it will therefore be required, in a situation such as that in the particular legal context of Case C-570/16, to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying *if need be* that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).[37]

The ruling thus seems to confirm a trend traceable to *Dansk Industri*[38] but, as noted in the judgment, more explicitly assumed in *Egenberger*, i.e. to refrain from harmonising the remedial stage of the process by stipulating the *direct* use of a fundamental right in a private relationship (note the absence of a reference to *Mangold* and *Kücükdeveci*). Rather, the Court appears to be prepared to allow national courts to guarantee the full effectiveness of the right by *any* appropriate means including, but perhaps not limited to, its disapplication.

The significance of the Bauer ruling: fundamental social rights matter in vertical and in horizontal disputes

Based on the set of findings described above, it appears to me that the *Bauer* ruling makes three significant contributions to fundamental rights law in the European Union: it reaffirms the status of the Charter's social rights; it settles the question of the Charter's horizontality in principle and, indeed, by reference to its most controversial set of provisions (those found in Chapter IV); and, finally, it clarifies certain aspects of the operation of the doctrine of horizontal direct effect. This section analyses each of these contributions in turn.

[36]Ibid., paras. 90-91.

[37]Ibid., para. 91, author's emphasis.

[38]ECJ 19 April 2016, Case C-441/14, *Dansk Industri (DI)* v *Estate of Karsten Eigil Rasmussen*, EU:C:2016:278, paras. 29-35.

First, and perhaps most importantly, the ruling confirms that the fundamental social rights enshrined in the Charter have a normative core that is applicable in all disputes that fall within the scope of EU law. As noted in the introduction, it was as part of its case law on the Solidarity chapter that the Court had limited any argument in favour an overarching constitutional analysis of the Charter by finding, in *AMS*, that certain provisions did not have a 'rights-conferring' nature,[39] thus excluding their meaningful effect.[40] The *Bauer* case, to some extent, revises this approach by formally acknowledging the inclusion of social rights in a 'written constitution'.[41] While it should be carefully noted that *Bauer* does not overrule *AMS*, so that the most contentious set of provisions found in the Charter (collective employment rights) may remain limited in their effect insofar as they are conditional upon national laws and practices – a problem to which I shall return in the following section – the ruling does clarify that all fundamental rights should be taken into account in the interpretation of national law before considering their ability to produce direct effect. It thus signals a marked and, in my view, welcome revision of one of the most problematic aspects of the *AMS* judgment: it confirms that the Charter's provisions are indivisible in their constitutional status, even if they are not directly effective. Indeed, unlike its rejection of any form of horizontality in *AMS*, the Court in *Bauer* appears to have embraced the idea that fundamental rights are capable of *radiating* across the legal system of the European Union, in vertical as well as in horizontal disputes.[42] And, in this way, fundamental social rights do not become, as Advocate General Bot had so aptly put it, a 'mere entreaty'.[43]

A second, albeit related, point of note is that the judgment fits into a series of cases offering more detailed guidance regarding the horizontal direct effect of the Charter, including *Egenberger* and *IR*,[44] thus presenting a glimmer of hope that the lack of clarity emanating from cases like *Mangold*, *Kücükdeveci*, and *AMS*, is finally behind us. An especially positive dimension of the ruling was the very joining of the the *Bauer* and *Broßonn* cases, which highlighted, in the clearest way

[39]*AMS*, *supra* n. 11, para. 47.

[40]*See further* E. Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union', 10 *EuConst* (2014) p. 332.

[41]*Prigge* Opinion, *supra* n. 9, para. 26.

[42]I borrow the idea of a 'radiating effect' (or '*Ausstrahlungswirkung*') from German constitutional theory: R. Alexy, *A Theory of Constitutional Rights* (tr J Rivers, Oxford University Press 2002) p. 355; *see also* German Constitutional Court 15 January 1958, *Lüth* – BverfGE 7, 198 (Az: 1 BvR 400/51).

[43]*Bauer* Opinion, *supra* n. 7, para. 95, 'une simple incantation' citing the wording of R Tinière, 'L'invocabilité des principes de la Charte des droits fondamentaux dans les litiges horizontaux', *Revue des droits et libertés fondamentaux* (2014) Chronicle No 14.

[44]*See further*, Colombi Ciacchi, *supra* n. 1, text at nn. 48-51.

possible, the problems of non-horizontality, both for the protection of fundamental rights in the Union and for the coherence of EU law: in bringing together a case against a public employer and a case against a private employer in the same factual scenario, the Court offered an illustration of the substantive unfairness that might have ensued from the lack of horizontal direct effect of directives. This concern had already been echoed in the academic literature for many years, as well as in Advocate Generals' Opinions as early as *Faccini Dori*.[45] As the famous dictum goes, like cases must be treated alike. In *Bauer*, the Court appears to have recognised the problems its earlier case law had created in this respect, at least in the fundamental rights context, in which rights of a very similar character suffered a different fate depending on their source in EU legislation and, consequently, their (subjectively determined) status as general principles of EU law in line with *Mangold*/*Kücükdeveci*.

In fact, *Bauer* is important precisely because it forms part of a faction of horizontal effect jurisprudence in which exceptions to the non-horizontality rule, such as the one set out in the *Mangold*/*Kücükdeveci* saga, had never operated. Arguably, in the light of this line of case law, the main question for the Court had never been whether provisions of the Charter that had previously enjoyed (or almost certainly would have enjoyed) horizontal direct effect as general principles of EU law would also enjoy such effect under the Charter. Rather, as Advocate General Trstenjak had noted in her Opinion in *Dominguez*, the key question was whether provisions such as the right to paid annual leave, which had not previously enjoyed general principle status and, therefore, could not readily be comprised within the exception created by *Mangold*/*Kücükdeveci*, should now also acquire horizontality solely by virtue of their inclusion in the Charter.[46] The Grand Chamber's judgment in *Bauer* largely – though not without reservation – answered this question in the affirmative.

While the scope of application of the Charter remains a difficult matter, *Bauer* leaves no doubt that, as a solid constitutional proclamation of rights, it is not subject to the application of any rules concerning directives but to conditions similar to those applicable to other aspects of EU primary law. Even though the Charter 'is not literally freestanding' and presupposes 'some lock onto EU law' in order

[45]Opinion of AG Lenz, delivered on 9 February 1994, in Case C-91/92, *Faccini Dori* v *Recreb Srl* [1994] ECR I-03325, paras. 50-57. In the academic commentary, *see* P.P. Craig, 'Directives, Direct Effect, Indirect Effect and the Construction of National Legislation', 22 *ELR* (1997) p. 519; T. Tridimas, 'Horizontal Direct Effect of Directives: A Missed Opportunity?', 19 *ELR* (1994) p. 621; D. Kinley, 'Direct Effect of Directives: Stuck on Vertical Hold', 1 *EPL* (1995) p. 79; R. Mastroianni, 'On the Distinction Between Vertical and Horizontal Effects of Community Directives: What Role for the Principle of Equality?', 5 *EPL* (1999) p. 417; T. Tridimas, 'Black White and Shades of Grey: Horizontality of Directives Revisited', 21 *YEL* (2002) p. 327.

[46]*Dominguez* Opinion, *supra* n. 8, paras. 128-135.

to apply, once a situation is deemed to lie within the scope of EU law, horizontality is not excluded by virtue of the text of Article 51(1) for *any* part of the Charter.[47] Just as Advocate General Cruz-Villalón had put it in his noteworthy Opinion in *AMS* (which was not followed by the Court at the time), through its more recent rulings, the Court now seems to accept that 'there is nothing in the wording of the article or [. . .] in the preparatory works or the Explanations relating to the Charter, which suggests that there was any intention [. . .] to address the very complex issue of the effectiveness of fundamental rights in relations between individuals'.[48] In other words, the inclusion of a right in the Charter could provide sufficient reason to give it horizontal effect in cases that fall within the scope of EU law, even for rights that might previously not have enjoyed general principle status: having found a place in the Charter, those rights should now be considered to enjoy an equivalent status, even if the Court had not previously decided on that particular matter.[49]

A final point of significance in this case is something I take to be a tentative clarification of the existing doctrine of horizontal direct effect. The omission of any explicit reference to direct effect in paragraph 91 of the ruling might be easy to overlook. However, read in the light of the cases and Opinions that preceded it, including perhaps the outright rejection of the *Mangold* doctrine by the Danish Supreme Court in *DI*,[50] the judgment appears to make a careful and accurate procedural adjustment to its horizontality case law. This adjustment appears to me to be that the direct effect of EU law refers to whether it can be invoked in disputes before national courts and not to the remedies offered at the national

[47]P.P. Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis', 48(2) *CMLR* (2011) p. 395 at p. 434; *see also* D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', 50(5) *CMLR* (2013) p. 1267 at p. 1275-1276.

[48]*AMS* Opinion, *supra* n. 9, para. 31.

[49]This is consonant with a position previously advocated by the Court's President, Judge Lenaerts, albeit in his academic capacity, arguing that all provisions of the Charter should be seen as having the status of general principles: K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', 8(3) *EuConst* (2012) p. 375 at p. 376; *see also* K. Lenaerts and J. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *CMLR* (2010) p. 1629 at p. 1656 ff.

[50]Danish Supreme Court 6 December 2016, Case no. 15/2014, *DI acting for Ajos A/S* v *The Estate left by A*. For an analysis of this case, *see* M.R. Madsen, et al., 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation', 23(1-2) *ELJ* (2017) p. 140; S. Klinge, 'Dialogue or Disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court Challenges the Mangold-Principle', *EU Law Analysis Blog*, 13 December 2016, <eulawanalysis.blogspot.com/2016/12/dialogue-or-disobedience-between.html> visited 29 April 2019. *See also* the German Constitutional Court's judgment in *Honeywell*, *supra* n. 5, para. 61.

level – a stance that was pioneered by the reporting judge in her academic capacity.[51] While Member States must ensure that *a* remedy is offered within the confines of the dispute in question – *including* that of disapplying national legislation, if need be – the ruling does not stipulate that the right should be applied in a direct manner in the private dispute as a matter of EU law. Lenaerts and Corthaut have previously highlighted, for instance, that 'the power of a rigorously applied duty of consistent interpretation should not be underestimated'.[52]

As I have argued in more detail elsewhere,[53] this approach should be welcomed in this field: not only is it constitutionally more refined than an assumption that direct effect equals the direct application of a right in a private dispute but, provided the relevant standard of protection has been clearly interpreted by the Court, as is the case in *Bauer*, it does not raise concerns about effectiveness. In cases involving the state, there is often parity between the invokability of the right and the availability of a remedy. Yet, in horizontal disputes, different legal systems have historically incorporated fundamental rights in a variety of ways – for example, by reading a right into a private law obligation, requiring the state to step in to protect the victim of a violation, or, in a few instances, directly imposing a constitutional duty on a private actor.[54] Beyond an appeal to primacy which, as recently highlighted by the Danish response, never took seed in national courts, it is unclear what benefit accrues to individuals from fundamental rights derived from EU law being applied differently from other fundamental rights within the legal orders of the Member States, and indeed being applied directly, if their meaningful effect would not have otherwise been compromised. Echoing *Egenberger*, *Bauer* now suggests that, *as long as* the means used are outcome-neutral, i.e. do not place the aggrieved party at a disadvantage or leave them without redress simply due to the structures of national law, more space can be carved out for the constitutional complexity of horizontality to be accommodated within EU discourse.

Where, then, does *Bauer* leave us in respect of the horizontal effect of fundamental rights in the EU? Taking account of the recent Grand Chamber judgments in this field, the position now appears to be the following. First, the Charter is capable of producing indirect and direct horizontal effect in principle

[51] *See*, e.g., S. Prechal, 'Does Direct Effect Still Matter?', 37(5) *CMLR* (2000) p. 1047. For a more recent account, *see* S. Robin-Olivier, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections', 12 *ICON* (2014) p. 165.

[52] K. Lenaerts and T. Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law', 31(3) *EL Rev* (2006) p. 287 at p. 293.

[53] *See* Frantziou, *supra* n. 7, chs. 6 and 8.

[54] Ibid., ch. 2. The history and contestability of the doctrine of horizontality in Germany, in particular, is explained in further detail in the contribution on *Egenberger* and *IR v JQ* in this issue, *supra* n. 1, text at nn. 31-44.

because, in line with Article 6(1) TEU, it has 'the same legal value as the Treaties'. Its scope of application does not preclude such a finding. National courts should thus first strive to interpret national law in the light of any materially relevant provision of the Charter. Second, even if an interpretation of national law in conformity with the right is impossible and the right in question is mandatory and unconditional (its 'unconditional nature not needing to be given concrete expression by the provisions of EU or national law'),[55] so that the right is directly invokable in private disputes as such, the national courts' ability to develop the legislation in a manner that is compatible with fundamental rights is not diminished. In such cases, national courts must ensure that a remedy is offered within the confines of the dispute in question. Failing that, state liability in damages may be claimed.

If my analysis is correct, this is a clearer and more coherent endorsement of the horizontal effect of fundamental rights. At least from the perspective of constitutional design, but in my view also from the perspective of the effective protection of fundamental rights, *Bauer* should be (moderately) celebrated. At the same time, however, as the final section of this comment highlights, one should not necessarily assume that *Bauer* marks a drastic revision of horizontal effect altogether or that it provides sufficient protection in respect of *all* fundamental rights, even in combination with a set of rulings issued over the past year, which point in the same direction. For, in distinguishing the present case from *AMS* (rather than revising that case altogether), the Court's ruling in *Bauer* does not go quite as far as one might have hoped.

A critical query: do all fundamental social rights matter equally?

While *Bauer* seemingly confines *AMS* to its well-deserved 'isolated corner',[56] the Court's continued appeal to the differences between rights such as information and consultation within the undertaking and rights such as paid annual leave is more problematic than it might initially appear. Of course, there is a technical reason for differentiating *AMS* from *Bauer*: unlike Article 31, Article 27 defers to national laws and practices. However, placing an acute emphasis on that distinction is problematic both in terms of the protection of collective employment rights and in terms of coherence with the Court's case law beyond the

[55] *Bauer, supra* n. 1, para. 85.

[56] D. Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: Comment on *Bauer*', *Despite Our Differences*, 8 November 2018, <despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/> visited 29 April 2019.

Solidarity chapter. It thus largely undermines the – otherwise positive – bearing of the *Bauer* ruling on the status of social rights in the Union.

As Collins puts it, deference to national laws and practices in respect of certain rights stipulates limitations to the core obligation and not only to the application of those rights to private disputes.[57] In turn, if their conditionality on national laws and practices is the reason why certain provisions of the Charter are not invokable as such, consistent interpretation, to which the Court appeals as the first step of its analysis, should actually matter very little (because an obligation, in the light of which national law should be interpreted, would itself logically depend on what national law provides). Since further enshrinement in a directive is also not enough to render such provisions horizontal, inequality in the level of protection accorded in public and private contexts is preserved for those rights as a direct consequence of the Court's insistence upon the validity of *Marshall* and *AMS*.

This limitation may prove to be a problem for a number of provisions across different parts of the Charter and not just those in the Solidarity chapter. For example, Article 9 (the right to marry and found a family), Article 10(2) (the right to conscientious objection), Article 14(3) (aspects of the right to education), and Article 16 (the freedom to conduct a business) could all be rendered ineffective in horizontal disputes if reference to national laws and practices were taken to be the determining criterion for whether they can be invoked. Yet, it should not be overlooked that the restriction of horizontal effect for provisions that refer to national laws and practices in *Bauer* is likely to continue to operate (very) predominantly as a hurdle for the horizontal effect of the Solidarity chapter. Within the latter, Article 31 is exceptional in that it does *not* defer to national laws and practices, rather than in doing so. The only Solidarity provisions that do not include such a statement, other than Article 31, are Articles 29 (access to a placement service), 37 (environmental protection), and 38 (consumer protection). Are these provisions – the latter two being clearly labelled as 'principles' in the Charter's Explanations[58] – any more mandatory or unconditional than, say, Articles 27 and 28, which

[57]H. Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' (2012) LSE Law, Society and Economy Working Papers 7/2012, <www.lse.ac.uk/law/working-paper-series/2007-08/WPS2012-07-Collins.pdf> accessed 29 April 2019, p. 10.

[58]Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 27-28. While this is not the space to discuss in detail the salience of the distinction between rights and principles in the Charter, *see further* Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles', 38(5) *CMLR* (2001) p. 1201; J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice', 11(2) *EuConst* (2015) p. 321; S. Peers and S. Prechal, 'Article 52: Scope and Interpretation of Rights and Principles', in S. Peers, et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Beck/Hart 2014) para. 52.190.

respectively enshrine the *right* to be informed and consulted in the workplace and to collective bargaining and action, including strike action? If not, one might altogether question the rigour of the justification adduced for distinguishing *Bauer* from *AMS*.

More fundamentally, though, even if a reference to national laws and practices could be thought indicative of a structural barrier to direct effect (after all, it does render a degree of conditionality fairly obvious), a consistency challenge to the Court's position could still be levied. If we were to zoom out of the *Bauer* case in order to assess the significance of references to national laws and practices in the Court's broader case law, we might come to question the objectivity of a criterion based on references to national laws and practices in the first place. For example, does *Bauer* succeed in reconciling *AMS*, which substantially limited the core content of Article 27, with *Alemo-Herron*, which substantially extended the core content of Article 16?[59] While both of these provisions refer to national laws and practices, only the one found in the Solidarity chapter succumbed to the limitation. In turn, if the Court does not always take references to national laws and practices to be determinative of the absence of a core EU obligation, as the *Alemo-Herron* judgment suggests, this begs the question of which criteria could be driving this determination.

Such inconsistencies are difficult to iron out by means of the case-by-case adjustment of problematic rulings of times past without a more thorough revision of the qualities of horizontality within EU constitutional law as a space of contestation and, at times, of conflict between different types of fundamental rights[60] and between fundamental rights and market freedoms.[61] Seen in this light, *Bauer* could be taken to suggest that those aspects of the Solidarity chapter that have collective and political, rather than individual (or, as the Court put it, measurable or 'pecuniary'[62]) dimensions, might still not play quite as fundamental a role in

[59]ECJ 18 July 2013, Case C-426/11, *Alemo-Herron and Others* v *Parkwood Leisure Ltd*, ECLI:EU:C:2013:521, para. 31. Substantial critiques have been made of the use of this provision in the Union: *see* notably J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 Alemo-Herron v Parkwood Leisure)', 42 *Industrial Law Journal* (2013) p. 434; S. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"', 10 *European Review of Contract Law* (2014) p. 157.

[60]Ibid.

[61]ECJ 11 December 2007, Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779; *see also* ECJ 18 December 2007, Case C-341/05, *Laval Un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets Avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

[62]*Bauer*, *supra* n. 1, para. 48.

the Union as the Charter's other provisions.[63] Thus, while the ruling stands neatly alongside *Egenberger* and *IR* in clarifying the relevance of *Mangold* and, with it, in ensuring the effective protection of some fundamental rights, its scope and meaningfulness become far more uncertain if placed in the context of a line of case law on workplace politics in which the corrosive effects of the *Viking* heritage continue to hold much of their ground.[64]

Conclusion

It is perhaps high time that we stopped teaching the *Mangold* saga as the exception to the non-horizontality of directives and entirely reversed our analysis. As most recently reaffirmed in *Bauer*, the constitutional norm now appears to be that the Charter of Fundamental Rights is horizontally applicable, at least indirectly and, in many cases, directly as well. There is a limited exception to this basic premise, stemming from the *Marshall* rule, which is that direct horizontal effect must be rooted in primary law and not in a directive. In turn, any Charter provisions which are not concrete enough as such will not enjoy direct effect in horizontal relations simply because they are further expressed in a directive, although they could still enjoy indirect effect therein.

As I have highlighted above, in practice, this limitation could have a discernible, negative impact on the protection of certain fundamental employment rights in the European Union. For rights that defer to national laws and practices, in particular, it may continue to operate as a cause of unequal protection in like cases. Similarly, the generous references to *AMS* in the ruling and Opinion appear somewhat underwhelming, revisiting as they do a tradition of horizontality that has, at times, been used not only to advance but also to stall the operation of fundamental rights in the workplace.

It is thus worth asking: should we content ourselves with only a near-rejection of the non-horizontality of directives; or, in turn, with the near-endorsement of the relevance of fundamental social rights to intersubjective disputes? An effort to resist the continued fragmentation of the principle of horizontality, as well as an overarching attempt further to define its contours, might be significant further improvements in this field. Such improvements could be built squarely upon the task undertaken in *Bauer* (and *Egenberger* before it), i.e. that of setting out

[63] *See* E. Frantziou, 'Constitutional Reasoning in the European Union and the Charter of Fundamental Rights: In Search of Public Justification', 25(2) *EPL* (2019). *See further* S. Tsakyrakis, 'Proportionality: An assault on human rights?', 7(3) *ICON* (2003) p. 468 at p. 475.

[64] *See* A. Bogg, '*Viking* and *Laval*: The International Labour Law Perspective', in M. Freedland and J. Prassl (eds.), *EU Law in the Member States: Viking, Laval and Beyond* (Hart 2014) p. 41 at p. 71.

a clearer constitutional role for the Charter in the EU legal order. However, they would also require a neater hierarchisation of fundamental rights within that order, so that the horizontal conflicts often arising in this field might eventually be resolved. Still, these judgments suggest a greater receptiveness on the part of the Court to review its more problematic case law on horizontal effect. It is to be hoped that they will not prove to be the Court's final words on the topic but, rather, the beginning of a deeper engagement with the merits and challenges of horizontality in an ever-changing and ever-more private-centric field of fundamental rights protection in the Union's constitutional space.

https://doi.org/10.1017/S1574019619000166 Published online by Cambridge University Press