

The Horizontal Effects of Charter Rights Given Expression to in EU Legislation on Non-discrimination

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Key sources of EU law in this presentation

- Art. 19 TFEU: Grants the EU the power to, within the limits of competence, take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation
- Article 21 Charter: Prohibits of discrimination on any ground, applicable only in within the scope of EU law (does not establish any 'new' rights)
- Directive 2000/78: Establishes a framework for equal treatment in employment and occupation (on grounds of religion or belief, disability, age or sexual orientation)

What is horizontal direct effect?

- The direct application of a norm of EU law in a dispute between private parties
- Not all EU norms have horizontal direct effect:
 - Directives cannot be invoked directly in a horizontal dispute
 - Directives create obligations for states to implement the directive, not directly for individual parties
- This results in gaps when directives implement a certain fundamental right
 - A gap in the effectiveness of the right
 - A gap in the access to judicial protection of the right

Horizontal effect of directives through jurisprudence

However, in different lines of case law, the CJEU **has** allowed for the horizontal direct effect of directives

- (i) Case law based on the prohibition of discrimination as a general principle of EU law
- (ii) Case law based on Charter Article 21(1): prohibition of discrimination
- (iii) Case law on article 31(1) of the Charter: annual leave

Evolution of equal treatment case law (i)

Mangold/Kücükdeveci:

- EU legislation (directive) adopted based on Article 19 TFEU gives expression to a pre-existing fundamental right to equal treatment as a **general principle** of EU law
- A general principle of EU law prohibiting AGE discrimination must be upheld over a conflicting national law **even in a dispute between private parties**

Consequences of *Mangold /Kücükdeveci* :

- CJEU upholds the direct effect of a general principle while reliance on the Directive or its legal basis (Article 19 TFEU) would not have been possible
- The Court's reasoning combines the **substance** of the legislation with the **legal effects** of the constitutional right: The directive is seen as the practical implementation of the general principle.

Evolution of equal treatment case law (ii)

This was further developed in equal treatment case law in reference to Article 21(1) of the Charter:

- *Egenberger*: CJEU extends the horizontal direct effect of the prohibition of discrimination (as enshrined in article 21(1) Charter) to discrimination on grounds of RELIGION
- *Cresco*: legal implications of the horizontal direct effect of article 21(1) go beyond disapplication of the conflicting national provision - also create a positive duty to ensure equal rights.

In these cases, the CJEU develops the approach set out in *Mangold/Kücükdeveci*.

- The Court grants horizontal effect to the prohibition of discrimination in reference to constitutional norms (here article 21 of the Charter) and examines the substance of the case based on the directive.

Common characteristics of the equal treatment case law

- The line of cases enhances the effects of the prohibition of discrimination enshrined in EU secondary legislation
- A **distinction** is made between the legislative (directive) and constitutional (Charter/general principle) versions of the right to non-discrimination
- Still, the Court relies heavily on **both** layers of norms in the case law. The Court analyses the substance of the directive to establish a violation of EU law, and investigates the practical and procedural consequences of that finding in a dispute between private parties with reference to the constitutional version of the right
- The legislative instrument thus acts as the common denominator of these cases

Does the Court extend this line to the area of EU social law? (iii)

Initial hesitation:

- *AMS*: Article 27 of the Charter does not have horizontal direct effect, since it requires more specific expression in law

Asserting the horizontal effects of Article 31(2 – ANNUAL PAID LEAVE) Charter:

- *Bauer and Willmeroth*: Article 31(2) **does** have horizontal direct effect since it is mandatory and unconditional in nature + 'in itself' confer rights on workers in disputes between private parties.

Parallels with the equal treatment case law:

- The legal effects of the violation are anchored in the Charter. Yet, the substance of the Charter provision was informed by the content of secondary legislation.

A doctrine of horizontal effects of the Charter?

A coherent approach?

Is there a clear set of conditions for Charter provisions to have horizontal effect?

Two conditions can be distilled from the case law that are necessary for Charter provisions to have horizontal effect

- i) The right at stake is 'mandatory': is the national judge in a position to establish whether the provision of EU law has been breached?
- ii) & unconditional: Charter provision does not need to be given more specific expression or clarification in EU or national law

→ Still unclear what exactly the Court means by 'mandatory and unconditional'

What is the impact of the cases on the Charter's function in the EU legal order?

- Concerns: principle of conferral, legal certainty and protection of legitimate expectations of private parties
- Difficult to reconcile the case law of the Court that continues to take a traditional approach to the lack of horizontal direct effect of directives with the assertion that the Charter may be relief upon for the same purpose (e.g. *Smith*)
- Selective use of legal sources: the Court selects legal sources that allow it to assert horizontal direct effect

Perspectives (i)

Case law on the horizontal effects of the Charter to date is limited to situations where Charter and legislative rights co-exist and are intimately inter-related, the legislative right giving expression to the constitutional version of the right.

- The directives contain the same right as that protected by the provision of the Charter that has been given horizontal effect
- Provisions of the directives containing the said right themselves fulfil the conditions to produce direct effect
- Although in procedural terms these directives do not have horizontal direct effect, in substance, the said directives are intended to apply to relationships between private parties

Perspectives (ii)

Charter is only brought in to fill a very specific gap in the judicial protection of the rights concerned

- ensure the **effectiveness** of existing rights, rather than creating new ones or unduly extending the legal effects of existing rights
- Article 47 Charter mentioned briefly in *Egenberger*, the Court also notes the need to ensure 'effective protection' in *Bauer and Willmeroth*
- Case law on the horizontal effect can be read as addressing a lacuna in the system for judicial protection by the lack of direct effect of directives

Perspectives (iii)

Seeking to protect the 'essence' of a fundamental right?

- *Bauer and Willmeroth*: the right to annual leave as an 'essential principle of EU social law' and the case is seen as a threat to the 'essential content' of the right to annual leave
- the 'essence' of the fundamental right to an annual period of paid leave in Article 31(2) of the Charter is given horizontal direct effect?

There are some problems with this reading:

- It is not clear if the essence doctrine is to be applied beyond the scope of article 31(2)
- It would be hard to distill an 'essence' in the right to equal treatment as it requires balancing between competing interests
- It is unclear *how* the essence of a right should be defined: *Bauer and Willmeroth* seems to rely on the content of EU secondary law for the definition of the notion of essence

Conclusion

- The emerging line of cases on horizontal effect of the Charter should be interpreted cautiously, because:
 - Circumstances of the cases in which provision of the Charter were given horizontal direct effect are very specific
 - It is tempting but delicate to use EU fundamental rights law as a device of European integration