The *Bauer et al.* and *Max Planck* judgments and EU citizens' fundamental rights: An outlook for harmony

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Introduction

On 6 November 2018, the Court of Justice of the EU (hereafter CJEU or Court) delivered important judgments in two similar cases: one in joined cases *Bauer* and *Broßonn* (hereafter Bauer et al.), and one in *Max-Planck-Gesellschaft* (hereafter Max Planck). In these cases the Court determined that Article 31(2) of the EU Charter on paid annual leave has direct effect and horizontal application.[1] The judgments constitute a crucial step in the further strengthening of citizens' fundamental rights in general, including the principle of non-discrimination and gender equality and social rights in particular, also vis-à-vis other private individuals. Not only did the Court unequivocally hold that EU Charter rights may have horizontal direct effect, but also that this extends to rights included in the Solidarity Title; i.e., social rights.

In this article the focus will lie on the impact of the *Bauer et al.* and *Max Planck* judgments on the direct effect and horizontal application of the EU Charter in general and on fundamental social rights in particular. Although the judgments do not directly concern gender equality and non-discrimination, they bring the Court's case law in relation to the horizontal applicability of the EU Charter, including Article 21 as set out in *Egenberger*,[2] to a higher level. By enhancing the legal effects of fundamental social rights contained in the Charter and by clarifying the conditions under which Charter provisions have horizontal application, these judgments necessarily have repercussions for the principles of gender equality (contained in Art. 23 EU Charter) and non-discrimination (Art. 21 EU Charter) in the EU. This article thus provides a thorough analysis of these judgments and assesses their consequences for EU equality law.

The judgments build upon the narrative of the recognition of (horizontal) direct effect of EU law as it has unfolded in a number of seminal cases. This narrative starts with the foundational judgment of the Court in *Van Gend & Loos,* where it set out the doctrine of direct effect for Treaty provisions, and *Defrenne,* in which it recognised the horizontal direct effect of Article 157 Treaty on the Functioning of the European Union (TFEU), which establishes the principle of equal pay for men and women. This continues with, *inter alia*, *Van Duyn* – in respect of direct effect of directives – and *Faccini Dori* – in

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1 CJEU 6 November 2018 *Stadt Wuppertal v Maria Elisabeth Bauer* and *Volker Willmeroth v Martina Broßonn* joined cases C-569/16 and C-570/16; CJEU 6 November 2018 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* Case C-684/16.

2 CJEU 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Case C-414/16.

respect of the non-horizontality of Directives. Finally, the narrative ends (for now, at least) with the horizontal nature of the EU Charter.[3]

By analogy with Piet Mondriaan's painting 'Composition with Yellow, Blue and Red', the development of the Court's case law can be categorised into three stages. During the first stage, the Court – similarly to the painter who draws horizontal and vertical lines – defines and demarcates the conditions under which EU law has vertical and horizontal direct effect. During the second stage, the painter uses colours to fill in blank spaces. The different colours may well reflect the different status of fundamental rights and the extent to which they have been subject to secondary legislation, been given shape and meaning in case law, and have (horizontal) direct effect.

During the third and final stage, whereas the painter illustrates a lookout for harmony, the Court works towards a harmonious and 'seamless web of judicial protection'[4] for citizens within the EU. We will then be able to assess how fundamental (social) rights, in particular the right to non-discrimination, have been strengthened and may further contribute to the social and human face of the EU.

Introduction: the *Bauer et al.* and *Max Planck* judgments

The case of *Max Planck* concerns an employee of Max-Planck-Gesellschaft (Mr. Shimizu) who had not taken his right to 51 days of paid annual leave before the termination of his employment, and who unsuccessfully sought payment from Max Planck of an allowance corresponding to this 51 days of paid annual leave. In the procedure that followed, the referring German court noted that 'Max Planck is a non-profit-making organisation governed by private law which is, admittedly, largely financed from public funds but which, however, has no special powers as compared to the rules applicable between individuals, so that it should be regarded as an individual'.[5] The dispute between Max Planck and Mr. Shimizu was thus horizontal in nature, which raises questions on the horizontal application of the EU Charter.

The preliminary ruling in *Bauer et al.* stems from two distinct yet similar cases. After the death of her husband, Mrs. Bauer, who was the sole legal heir of her husband, claimed nearly EUR 6 000 from Stadt Wuppertal, the employer of her husband and a public authority. This amount corresponded to 25 days of outstanding paid annual leave, which her husband had not taken prior to his death. However, Stadt Wuppertal rejected Mrs. Bauer's request.

Mrs. Broßonn was also the sole legal heir of her husband, who had been employed by a private company, TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K., owned by Mr. Volker Willmeroth. Mrs. Broßonn claimed an amount of almost EUR 4 000, which corresponded to 32 days of outstanding paid annual leave, which her husband had not taken prior to his death. Therefore, contrary to the case of *Bauer* but (highly) similar to *Max Planck*, the dispute between Mrs. Broßonn and Mr. Willmeroth was horizontal in nature.

According to German law, the right to paid annual leave lapsing upon a worker's death or, in the case of Mr. Shimizu, upon the expiring of the employment relationship, cannot be converted into an entitlement to an allowance in lieu or form part of the deceased's estate. According to the referring German court, any other interpretation of the provisions of the national law would be *contra legem*.[6]

3 CJEU 5 February 1963 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* Case C-26/62; CJEU 8 April 1976 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* Case C-43/75; CJEU 8 April 1976 *Defrenne v Sabena (II)* Case C-43/75; CJEU 4 December 1974 *Yvonne van Duyn v Home Office* Case 41/74; CJEU 14 July 1994 *Paola Faccini Dori v Recreb Sri* Case C-91/92.

4 Prechal, S. and de Vries, S. (2009), 'Seamless Web of Judicial Protection in the Internal Market?' *European Law Review* vol. 34 issue 5.

5 CJEU 6 November 2018 *Max-Planck-Gesellschaft* Case C-684/16.

6 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 15.

In both cases, the CJEU was asked to interpret Article 7 of Directive 2003/88[7] concerning certain aspects of the organisation of working time and Article 31(2) of the EU Charter of Fundamental Rights.[8] Article 7 of Directive 2003/88 provides the following:

> '(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.'

Article 31(2), which is laid down in the Solidarity Chapter of the EU Charter, stipulates the right of every worker to a limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave. In the following assessment I refer mainly to the relevant paragraphs of the *Bauer et al.* judgment, as the Court in *Max Planck* in part refers to *Bauer et al.*

The Court first looked into *the reach and nature of the right to paid annual leave*;[9] or, in other words, into the question of whether the right to paid annual leave under Article 7 of Directive 2003/88 and Article 31(2) of the EU Charter can give rise to an entitlement after a worker's death, and whether that can be passed on to the worker's legal heirs by inheritance. According to the referring court, 'the purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure', which no longer appears once the person concerned has died.[10]

According to the Court, however, the right to paid annual leave must be considered as a 'particularly important principle of EU social law', and 'in order to ensure respect for that fundamental right affirmed in EU law, Article 7 of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it'.[11] Furthermore, the 'receipt of financial compensation if the employment relationship is terminated by reason of the worker's death is essential to ensure the effectiveness of the entitlement to paid annual leave'.[12]

The Court goes on by emphasising the fundamental nature of the right to paid annual leave, which is expressly recognised by Article 31(2) of the EU Charter and which applies to national legislation implementing Article 7 of Directive 2003/88. That right can only be limited under strict conditions as stipulated by Article 52(1) of the EU Charter.

According to Article 52(1) of the EU Charter:

> 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

The Court stated that Article 7 of Directive 2003/88 read in light of Article 31(2) of the Charter does not allow a Member State to adopt legislation 'pursuant to which the death of a worker retroactively deprives

7 Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, pp. 9-19.
8 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391-407.
9 Frantziou, E. (2018) 'Joined Cases C-569/16 and C-570/16, Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable', *European Law Blog*, 19 November 2018: available at: http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/.
10 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 37.
11 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 38.
12 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 50.

him of the right to paid annual leave acquired before his death, and, accordingly, his legal heirs of the allowance in lieu thereof by way of the financial settlement of those rights'.[13]

In a similar vein, in *Max Planck* the Court held that where a worker has not asked to exercise their right to paid annual leave during the reference period concerned, Article 7 of Directive 2003/88 and Article 31(2) of the Charter preclude national legislation. This automatically, and without prior verification of whether the employer had in fact enabled them to exercise that right, excludes a right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated.

The Court has thus 'used' Article 31(2) of the EU Charter to provide for a particularly broad interpretation of Article 7 of Directive 2003/88, underlining the fundamental status of the principle of paid annual leave and leaving no or little discretion for Member States to delineate this principle in national law.

The second question relates to the *consequences* of the Court's interpretation of the Directive and Article 31(2) of the EU Charter for the applicable national law, and in particular, the *horizontal dispute* between Mrs. Broßonn and the private employer Mr. Willmeroth. In the case of *Max Planck*, the second question related to the horizontal dispute between Mr. Shimizu and Max Planck.

Regarding *Bauer et al.*, the Court first states that the national legislation should be interpreted in conformity with EU law, the possibility of which is for the national court to decide. The Court then holds that Article 7 of Directive 2003/88 is sufficiently precise and unconditional and is thus capable of producing direct effect. In the case of *Bauer*, which after all concerned a *vertical* dispute between Bauer and a public authority, the national court must disapply the national legislation that precludes the award of the financial allowance by Stadt Wuppertal.

However, in *Broßonn* – and in its judgment in *Max Planck*[14] – the Court reiterates its case law that confirms Directives cannot impose obligations upon individuals, and that Article 7 of Directive 2003/88 cannot apply in a dispute exclusively between private persons. In this light it must be assessed, according to the Court, whether Article 31(2) of the EU Charter may be invoked in a dispute between individuals with a view to require the national court to set aside national legislation and grant Mrs. Broßonn an allowance in lieu of paid annual leave not taken by her deceased husband.

By referring to the Community Charter of Fundamental Social Rights, Article 151 TFEU on social policy, and other international instruments the CJEU states that the right to paid annual leave constitutes an essential principle of EU social law, which is mandatory and unconditional in nature and does not require concrete expression by the provisions of EU or national law. This means that Article 31(2) of the EU Charter can be relied upon by workers in a dispute between them and their employer, in a field covered by EU law. Furthermore, Article 51(1) of the EU Charter, which states that the provisions of the Charter are addressed to the institutions, bodies, offices, and agencies of the European Union, and to Member States only when they are implementing EU law, cannot be interpreted as precluding the possibility that private individuals may be required to comply with the Charter.

First, the Court observes that provisions of primary law addressed to Member States can be relied upon vis-à-vis other individuals. Here it refers to its judgment in *Egenberger,* where the Court referred to case law on the Treaty freedoms and non-discrimination on grounds of nationality, including *Defrenne, Angonese, Ferlini*, and *Viking Line*.[15] Ms. Vera Egenberger's application for a job with Evangelisches Werk

13 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 61.
14 CJEU *Max-Planck-Gesellschaft* Case C-684/16, para. 67.
15 CJEU *Defrenne* Case C-43/75, para. 39; CJEU 6 June 2000, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* Case C-281/98, paras. 33-36; CJEU 3 October 2000, *Angelo Ferlini v Centre hospitalier de Luxembourg* Case C-411/98 Paragraph 50; CJEU 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* Case C-438/05, paras. 57-61;CJEU 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Case C-414/16, para. 77.

was rejected, as she did not belong to a denomination. In the ensuing dispute, Ms. Egenberger relied upon the prohibition of discrimination on grounds of religion to claim compensation. In particular, she relied on Article 4(2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, and on Article 21(1) of the EU Charter prohibiting discrimination on any grounds such as sex, race [...], religion or belief [...]. Second, and as the Court held in *Egenberger*, the Court confirmed that Article 21(1) of the EU Charter, which establishes the prohibition of discrimination, can be invoked in a dispute between private actors. Finally, Article 31(2) of the EU Charter itself entails by its very nature a corresponding obligation on the employer, whether a public or private actor, to grant periods of paid leave.

The Court concludes by stating that the judicial protection for individuals flowing from Article 31(2) of the EU Charter and the guarantee of full effectiveness of this provision require the national court to disapply conflicting national legislation, if needed.

Stage I: Painting vertical and horizontal lines

The clear strand of argumentation that is used in *Bauer et al.* and *Max Planck* to support direct effect of Article 31(2) of the EU Charter and its horizontal application should certainly be welcomed. I will first examine the doctrine of direct effect in general, particularly in relation to the EU Charter, before turning to the Charter's horizontal application.

1 Drawing vertical lines: the doctrine of direct effect

1.1 Direct effect and EU law in general

The doctrine of direct effect finds its origin in the well-known and seminal *Van Gend & Loos* judgment, where the Court held that for provisions of EU law to have direct effect, there must be clear and precise obligations for Member States, the obligation must be unconditional, compliance with the obligation must not require any further legal action, and the Member States have no discretion regarding the implementation of the obligation.[16] Later, the Court gradually extended the doctrine of direct effect. First, it relaxed the conditions for provisions to have direct effect – i.e., provisions must be sufficiently precise and unconditional – and second, it turned the doctrine into a test of justiciability: is the norm sufficiently operational to be applied by a court?[17] The key test, as mentioned above, is whether provisions are unconditional and sufficiently precise.

Defrenne, a landmark gender equality case, may well serve as an illustration of how the Court determines that a treaty provision – in this case Article 157 TFEU on equal pay for male and female workers – has direct effect. First, the Court held that the principle of equal pay for men and women forms part of the foundations of the Community. It then stated that Article 157 TFEU is mandatory in the sense that Member States are bound to ensure and maintain the application of the principle of equal pay. It concluded by stating 'the Court is in a position to establish all the facts which enable it to decide whether a woman is receiving lower pay than a male worker performing the same tasks', and that Article 157 TFEU 'is directly applicable and may thus give rights to individual rights which the courts must protect'.[18]

16 Jans, J., de Lange, R., Prechal, S., and Widdershoven, R. (2007) *Europeanisation of Public Law*, Europa Law Publishing, 88-93; see also de Vries, S. (2018) 'Securing private actors' respect for civil rights within the EU: actual and potential horizontal effects of instruments', in: de Vries, S., de Waele, H., and Granger, M.P. (eds.) (2018), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, Edward Elgar, 2018, p. 46.

17 De Witte, B. 'Direct Effect, Primacy and the Nature of the Legal Order', in: Craig P. and De Burca, G. (eds) (2011), *The Evolution of EU Law*, Oxford University Press, p. 323.

18 CJEU *Defrenne II* Case 43/75, paras. 12, 16, 23 and 24.

We now know that a number of core provisions of EU primary law, including Article 18 TFEU establishing the principle of non-discrimination on grounds of nationality, the four freedoms, Article 157 TFEU on the principle of equal pay for men and women, and the general principles of EU law have direct effect. Regulations are directly applicable and are therefore by their very nature capable of having direct effect.[19] Furthermore, directives have direct effect insofar as their provisions are unconditional and sufficiently precise.

1.2 Direct effect and the EU Charter

The situation is somewhat more complicated with regard to the EU Charter, at least for the following two reasons: first, the EU Charter will only apply to Member States, when, in the words of Article 51(1), Member States are implementing EU law. Second, the EU Charter, through Article 52(5) of the Charter, introduced a new type of distinction in EU law, namely between rights that are directly enforceable and principles that require further elaboration in EU or national law.

Scope of application of the EU Charter

According to the Court, the word 'implementing' in Article 51 applies when a Member State acts within the scope of application of EU law.[20] However, from the Court's case law it is not always clear what exactly this entails. There is a minimum threshold, as the Charter does not operate in a vacuum, which means that there must be another 'accompanying' or 'supportive' provision of primary or secondary EU law that triggers the application of the EU Charter. Whereas in some cases the Court denied jurisdiction to apply the Charter because of the lack of a (sufficient) connection with EU law, although the national measures were adopted within the framework of EU legislation, in others the Court did not and allowed for the application of the Charter.[21]

One such case where the Court was unwilling to apply the Charter concerned the unemployed Romanian Elisabeta Dano, a legal resident in Germany[22] who was refused the right to social assistance. She could not seek a remedy under the EU Charter; according to the CJEU, Member States are competent to determine the conditions for granting social benefits and thus also to establish the level of social protection. The outcome of this case may well be reasonable, but the way in which the Court restricts the scope of application of the Charter stands in sharp contrast with other decisions. Although Germany did not implement EU law, it did act within the framework of EU legislation,[23] which should normally suffice to trigger the application of the EU Charter. This lack of clarity regarding the scope of application of the EU Charter is undesirable, because once a 'legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction'.[24]

19 CJEU 17 May 1972, *Orsolina Leonesio v Ministero dell'agricoltura e foreste* Case 93/71; see also Jans, J., de Lange, R., Prechal, S., and Widdershoven, R. (2007) *Europeanisation of Public Law*, Europa Law Publishing, p. 65.

20 CJEU 26 February 2013, *Åklagaren v Hans Åkerberg Fransson* Case C-617/10; see also Ward, A. (2014), 'Article 51', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.) (2014), *The EU Charter of Fundamental Rights – A Commenatry*, (Hart Publishing, Oxford, p. 1428.

21 See for instance CJEU 7 March 2013, *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios SA* Case C-128/12; see also Barnard, C. (2013) 'The Charter, the Court – and the Crisis', *Legal Studies Research Paper Series No. 18/2013, University of Cambridge*; and Barnard, C. (2015) 'The Silence of the Charter: Social Rights and the Court of Justice' in: de Vries, S. Bernitz, U. and Weatherill, S. (eds.) (2015) *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Hart Publishing, pp. 173-188.

22 CJEU 11 November 2014, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* Case C-333/13.

23 Regulation (EC) 883/2004 No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004, L 166/1; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77-123.

24 Pech, L. and Platon, S. (2018) 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case Case C-64/16, *Associação Sindicaldos Juízes Portugueses*', Common Market Law Review, vol. 55, 1833. Citizens will then have to take recourse to other human rights instruments, see: de Vries, S. 'Protecting Fundamental (Social) Rights through the Lens

The situations in the *Bauer et al.* and *Max Planck* cases, however, were clearly governed by EU law. *Bauer et al.* builds upon previous case law in the field of non-discrimination. This includes the *Egenberger* case, where Directive 2000/78 establishing a general framework for equal treatment in employment and occupation[25] was held to constitute the linchpin of the relationship between the existing EU legislation and the principle of non-discrimination on grounds of religion, as contained in Article 21 of the EU Charter. According to the Court in *Bauer et al.*, '[s]ince the national legislation at issue in the main proceedings is an implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply in the main proceedings' (para 53). Furthermore, according to the Court, a national court must, as a consequence of Article 31(2) of the Charter, disapply national legislation in situations falling within the scope of the Charter (para. 86). The Directive's mere existence and the corresponding domestic measures seeking to implement the Directive, warrant, although incorrectly, the application of the Charter.[26]

Despite this, questions remain on the relationship between the EU Charter and secondary EU legislation. First, could the Charter be used to extend the scope of application of EU law, and thereby the reach of a Directive, which in turn materializes the right established in the Charter? The answer should probably be 'no', as anything else would lead to a situation whereby Article 51(1) of the Charter is circumvented. However, the Charter can be used to ensure the full effectiveness of the Directive through the application of the Charter to a national measure at first sight not clearly covered by the Directive itself. This was the case in *CCOO*, where A-G Pitruzzella held that the lack of a national system for measuring working time is incompatible with Directive 2003/88 and Article 31 of the Charter, even though the Directive does not include a specific provision and obligation for measuring working time:

'In particular, the obligation upon Member States to take the 'necessary measures' should extend not only to the transposition of the rules on working time into national law, but also to the introduction of whatever is necessary to safeguard the fundamental rights enshrined in Article 31 of the Charter and to eliminate any impediment that might in fact restrict or undermine the enjoyment of the rights conferred on individuals for that purpose by Directive 2003/88, which, as I observed in point 36 of this Opinion, is a measure implementing Article 31 of the Charter.'[27]

In a similar vein, in *Google Spain* the EU Charter – in particular Articles 7 and 8 – played an important role in providing for a broad scope of application of the rights to privacy and protection of personal data elaborated by the former Data Protection Directive 95/46, including a right to be forgotten.[28] The Court will have the chance to shed more light on the question concerning the relationship between directives and the EU Charter in two pending Finnish cases, *AKT* and *TSN,* which both concern the reach of Directive 2003/88/EC and Article 31(2) of the EU Charter in relation to a national provision in a collective agreement.[29]

Second, could Article 21(1) of the EU Charter, which is broader in scope than Article 19 TFEU, be invoked to challenge discrimination on grounds that are not elaborated in the equal treatment directives, based on Article 19 TFEU? Next to the grounds mentioned in Article 19, Article 21(1) of the Charter also prohibits discrimination on grounds of colour, social origin, genetic features, language, political or any

of the EU Single Market: the Quest for a More "Holistic Approach"' (2016), *The International Journal of Comparative Labour Law and Industrial Relations,* vol. 32, issue no. 2, pp. 207-208.

25 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 pp. 16-22.

26 Fontanelli, F. (2018) 'You can teach a new court Mangold tricks – the horizontal effect of the Charter right to paid annual leave', *EU Law Analysis*, 11 November 2018, available at: http://eulawanalysis.blogspot.com/2018/11/you-can-teach-new-court-mangold-tricks.html.

27 Opinion of Advocate General Pitruzzella delivered on 31 January 2019 in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* Case C-55/18, para. 51.

28 CJEU 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* Case C-131/12.

29 CJEU Cases *Terveys- ja sosiaalialan neuvottelujärjestö (TSN)* C-609/17, and *Auto- ja Kuljetusalan Työntekijäliitto (AKT)* C-610/17, both lodged on 24 October 2017 and currently pending. See also Rossi, L., http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html.

other opinion, membership of a national minority, property and birth. The point of departure is that as these grounds are not the object of EU legislation, they cannot be invoked in a national procedure merely to challenge national discriminatory rules. Neither *Bauer et al.* nor *Egenberger* give rise to a different conclusion on this matter.

This means that a tension continues to exist between Article 21(1) of the Charter and Article 19 TFEU, as the grounds not mentioned in the latter provision may find themselves in a certain vacuum.[30] This can also be inferred from the Court's decision in *Kaltoft.* Here the Court was asked to decide on discrimination on grounds of obesity, and whether this ground would fall within the scope of Directive 2000/78, which prohibits, *inter alia*, discrimination on grounds of disability. According to the Court, obesity cannot be regarded as a ground protected by Directive 2000/78, and since neither Article 19 nor the Directive refer to obesity, the provisions of the Charter were inapplicable.[31] The only possibility in this case to invoke the equal treatment Directive and/or Article 21(1) of the Charter would be if obesity constituted disability within the meaning of the Directive; something the Court, for that matter, did not exclude.

However, the scope of application of some fundamental rights seems to be broader. This appears true for the principle of non-discrimination on grounds of nationality, which constitutes the cornerstone of EU Single Market law and is laid down in Articles 18 TFEU and 21(2) of the EU Charter. This principle is triggered either 'when the interstate trade is affected in some way (even indirectly), or when there is some competence within the Treaty to act on a certain issue'.[32]

The second Charter provision with a broad of application is Article 47 on effective judicial protection. Article 47 was applied in *Egenberger* alongside the principle of non-discrimination on grounds of religion, but it did not specifically materialise in the equal treatment Directive. It rather served to support the horizontal direct effect of Article 21(1) of the Charter in the dispute between Ms. Egenberger and the Evangelical Foundation ('Evangelisches Werk').

That Article 47 of the Charter in itself could have horizontal application had been suggested by the English Court of Appeal in the case *Benkharbouche v Sudan and Janah v Libya*. This case involved two UK workers that brought employment law complaints against the embassies of Sudan and Libya. The question was whether invoking state immunity amounted to a breach of fundamental rights, in particular Article 6 of the European Convention on Human Rights (ECHR) and the corresponding provision in the EU Charter, Article 47, on effective judicial protection. The Court of Appeal assimilated the embassies of non-EU Member States to private parties,[33] and held that Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect.[34]

There are limits to the broad scope of Article 47 of the EU Charter. In the *Portuguese judges* case on the principle of independence of the judiciary, the Court preferred to apply Article 19(1) Treaty on European Union (TEU) on effective legal protection, which has a broader scope of application and could be seen as 'a systematic requirement used *in abstracto* to challenge national measures affecting the independence of judges, to Article 47 of the Charter'.[35]

30 Dudek, T. 'EU citizenship and EU anti-discrimination law' (2018) in: de Vries, S. de Waele, H., and Granger, M. P. (eds.) (2018), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Edward Elgar, Cheltenham, p. 141.

31 CJEU 18 December 2014, *Fag og Arbejde (FOA) (Kaltoft) v KL* Case C-354/13, paras. 34-39.

32 Prechal, S. de Vries, S., and van Eijken, H. (2011), 'Chapter 12 – The Principle of Attributed Powers and the "Scope of EU Law"' in: Besselink, L., Pennings, F., and Prechal, S. (2011), *The Eclipse of the Legality Principle in the European Union*, Kluwer Law International, Alphen a/d Rijn 2011, p. 221.

33 Peers, S., EU law analysis at: http://eulawanalysis.blogspot.nl/2015/02/rights-remedies-and-state-immunity.html.

34 UK Court of Appeal (civil devision), 5 February 2015, *Benkharbouche v Sudan Embassy and Janah v Libya*, EWCA Civ 3, para. 78.

35 CJEU 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* Case C-64/16, See in particular Pech, L. and Platon, S. (2018) 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case Case C-64/16, *Associação Sindicaldos Juízes Portugueses*', Common Market Law Review, vol. 55, p. 1839.

Rights and principles

The second complication relates to Article 52(5) of the EU Charter, which distinguishes between rights and principles. The idea behind this distinction is that there exists a 'dichotomy between individual and fully enforceable rights on the one hand, and programmatic norms (principles) that require the intervention of the legislator or the executive [...] on the other'.[36] But, although the aim of Article 52(5) was to clarify the judicial nature of rights and principles and thereby reinforce legal certainty,[37] it has been questioned whether Article 52(5) does not in fact lead to more confusion. Deciding which provision contains a right or principle is complex, and introducing a new category of principles – especially considering that EU law already contains a range of various principles – is not altogether helpful.[38]

It is therefore perhaps not surprising that the Court in *AMS* avoided the question of whether Article 27 of the EU Charter on workers' representation or the right to information and consultation should be considered as a right or a principle. One of the questions raised in this case was whether Article 27 could be invoked to disapply a rule that excluded certain categories of employees from the threshold that triggers a right to information and consultation. The Court confined its analysis to whether Article 27 could be considered fully effective or not, and came to the conclusion that it was not directly effective. This led many to believe that the social rights in the Solidarity Title should be considered principles; until the Court's decisions in *Bauer et al* and *Max Planck*.[39]

By contrast, the early case law of the Court made clear that the principle of non-discrimination on grounds of nationality (EU free movement law) or sex (*Defrenne*) has direct effect. Later the Court confirmed that the principle of non-discrimination or the right not to be discriminated on the grounds elaborated in the equal treatment directives based on Article 19(1) TFEU (race, gender, sexual orientation, disability, religion and belief, and age) is directly effective. Article 21(1) of the EU Charter reinforces the 'rights character' of the principle of non-discrimination, which was made unequivocally clear by the Court in respect of discrimination on grounds of religion in *Egenberger.* According to the Court, Article 21(1) of the EU Charter on the prohibition of discrimination does not have to be made specific in EU or national law and is sufficient in itself. The Court held that:

> 'the prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.'[40]

With respect to the mandatory effect of Article 21 of the Charter, the situation is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals.'[41]

By reiterating its doctrine of (vertical) direct effect in respect of directives and treaty provisions, the Court has in *Bauer et al.* and *Max Planck* now developed a *general* test to be applied to all the rights protected by the Charter. This test 'is based on a twofold condition', according to which Charter rights have direct

36 Peers, S. and Prechal, S. (2014), 'Article 52- Scope and Interpretation of Rights and Principles', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, pp. 1505-1506.

37 Peers, S. and Prechal, S. (2014), 'Article 52- Scope and Interpretation of Rights and Principles', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, p. 1506.

38 Peers, S. and Prechal, S. (2014), 'Article 52- Scope and Interpretation of Rights and Principles', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, p. 1506.

39 See also Barnard, C. (2019), 'Brexit and the Charter of Fundamental Rights', *Modern Law Review* vol. 82, issue 2, p. 354.

40 CJEU *Egenberger*, Case C-414/16, para. 76 (See, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C176/12, EU:C:2014:2, Paragraph 47).

41 CJEU *Egenberger*, Case C-414/16, para. 77 (see, by analogy, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, Paragraph 39; of 6 June 2000, *Angonese*, C281/98, EU:C:2000:296, Paragraphs 33 to 36; of 3 October 2000, *Ferlini*, C411/98, EU:C:2000:530, Paragraph 50; and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C438/05, EU:C:2007:772, Paragraphs 57 to 61).

effect if they are (i) unconditional in nature, and (ii) mandatory.[42] We must thereby assess whether the Charter provisions themselves do not explicitly contain the caveat 'the conditions provided for by Union law and national laws and practices' – as it was the case with Article 27 of the Charter, and which was at issue in the *AMS* case. If such a reference is absent in the Charter provision itself, the fundamental (social) right may be an individually enforceable right, which is only subject to the limitations laid down in the general derogations clause in Article 52 of the Charter.[43]

2 Drawing horizontal lines: horizontal application of the EU Charter

2.1 Horizontal application and direct effect of fundamental rights in general

The classic approach to fundamental rights relates to the vertical relationship between the state and the citizen. However, in EU law we have seen that the principles of non-discrimination on grounds of nationality and of equal pay for male and female workers could be invoked in horizontal disputes. This was not self-evident, as the point of departure was that the treaty provisions on free movement, incorporating the principle of non-discrimination on grounds of nationality, were primarily drafted for Member States or public authorities. In a similar vein, Article 157 TFEU only refers to Member States. The EU provisions on competition, however, were drafted for private parties; companies.[44]

However, the Court has extended the scope of application of EU free movement provisions and Article 157 TFEU to private actors. If we look at this case law the following three strands of argumentation can be discerned:[45] the first argument is based on the *effet utile* principle, which implies that neither the State nor private law bodies may detract from the useful effectiveness of EU law. The free movement provisions would be prevented from functioning effectively if private organisations were allowed to create or maintain obstacles that governments are not allowed to create or maintain.[46] A second and related argument for the Court to accept a (limited) form of horizontal direct effect is the aspect of dominance; or, in other words, the fact that certain private organisations exercise a certain power over (other) individuals.[47] In *Raccanelli* it was the prestigious research institute, Max-Planck-Gesellschaft, which undoubtedly exercises some powers over (especially young) researchers.

The third and final argument relates to the fundamental (mandatory) nature of the freedoms and the key role of the principle of non-discrimination. The fact that the principle of non-discrimination may have triggered horizontal direct effect could be deduced from *Angonese*,[48] where the Court emphasised the fact that Article 45 TFEU constitutes a specific application of the general principle of non-discrimination, as contained in Article 18 TFEU. It could therefore be argued that the fundamental rights character of the non-discrimination principle is crucial in creating obligations for private individuals. A similar approach can be found in the cases of *Defrenne* and *Viking & Laval*.[49]

42 Rossi, L., http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html.
43 Barnard, C. (2019), 'Brexit and the Charter of Fundamental Rights', *Modern Law Review* vol. 82, issue 2, p. 355.
44 Mortelmans, K. (2001), 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' *Common Market Law Review*, vol. 38, pp. 613-614. This dividing line has been marked by the terms 'imperium' and 'dominium', or public and private interests.
45 De Vries, S. and van Mastrigt, R. (2013). 'The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?', in: Bernitz, U., Groussot, X., and Schulyok, F. (eds.) (2013) *General Principles of EU law and European Private Law*, Kluwer Law International, Alphen a/d Rijn, pp. 264-265.
46 CJEU 12 December 1974 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* Case C-36/74; CJEU 15 December 1995 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* Case C-415/93; CJEU *Viking* Case C-438/05, and CJEU 18 December 2007 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* Case C-341/05.
47 For instance, CJEU *Ferlini* Case C-411/98.
48 CJEU *Angonese* Case C-281/98.
49 CJEU *Defrenne II* Case C-43/75.

The acceptance by the Court of (limited) forms of horizontal direct effect of EU treaty provisions has thus also caused ramifications for fundamental rights; this despite the rather rigorous dividing line between the vertical and horizontal dimensions of fundamental rights in the legal systems of most Member States.[50] In addition, the Court in the *Mangold et seq* case law recognised the horizontal application of the principle of non-discrimination on grounds other than nationality as a general principle of EU law.[51] This particularly served to circumvent the prohibition of horizontal direct effect of directives, which led at first to considerable confusion as to whether it was the directive, despite its lack of horizontal direct effect, or the general principle that has the capacity to be invoked in a horizontal dispute. However, Mangold is especially significant, as it was the first case wherein the Court recognised the horizontal direct effect of a fundamental right, thereby using the Directive as a metaphoric trampoline.

2.2 Horizontal application of fundamental rights enshrined in the EU Charter

As some of the general principles are incorporated in the EU Charter as fundamental rights, it would seem self-evident that Charter rights could also apply and be invoked in horizontal disputes between private parties. The main legal obstacle for accepting horizontal direct effect of EU Charter rights appears to be Article 51(1) of the Charter. Advocate General Trstenjak at the time of the *Dominguez* case argued in favour of a restrictive reading of the EU Charter. According to her, Article 31 of the Charter could not apply in a horizontal dispute, as Articles 51(1) and 52(2) of the Charter 'indicate an intentional restricting of the parties to whom fundamental rights are addressed'.[52] This point of view, however, was clearly not shared by everyone. In his Opinion in *AMS*, Advocate General Cruz Villalon noted, contrary to AG Trstenjak, that 'it would be paradoxical if the advent of the Charter changed this state of affairs [i.e. the recognition in the Court's case law of horizontal direct effect of Treaty provisions and general principles prior to the Charter] in a negative sense' and held:[53]

> '[…] There is nothing in the wording of the article or, unless I am mistaken, in the preparatory works or the Explanations relating to the Charter, which suggests that there was any intention, through the language of that article, to address the very complex issue of the effectiveness of fundamental rights in relations between individuals.'[54]

The Court itself in *AMS* did not exclude the possibility of horizontal direct effect of Charter provisions per se.[55]

The reasoning of the Court with respect to the horizontal application of the EU Charter in *Bauer et al.* largely rests upon its previous judgment in *Egenberger*, although it is more detailed and extensive. In *Egenberger* the Court basically uses two arguments for the horizontal direct effect of the principle of non-discrimination on grounds of religion. First, it states that it is mandatory as a general principle of law, and that Article 21(1) of the EU Charter is no different from various provisions of the TFEU prohibiting discrimination. Here it refers to the case law on free movement (the judgments in *Angonese* and *Viking*) and its judgment in *Defrenne* (see above). This outcome is not really surprising, and implies that with respect to the grounds of discrimination elaborated in EU directives based on Article 19 TFEU and discrimination on grounds of nationality and sex (Article 157 TFEU), the EU Charter can be invoked in a horizontal dispute.

50 Walkila, S. (2016) *Horizontal Effect of Fundamental Rights in EU L*aw, Europa Law Publishing, Groningen; de Vries, S. (2018) 'Securing private actors' respect for civil rights within the EU: actual and potential horizontal effects of instruments', in: de Vries, S., de Waele, H., and Granger, M.P. (eds.) (2018), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, Edward Elgar, 2018, p. 47.

51 CJEU 22 November 2005, *Werner Mangold v Rüdiger Helm* Case C-144/04; CJEU 19 January 2010, *Seda Kücükdeveci v Swedex GmbH and Co.* Case C-555/07.

52 CJEU Opinion of AG Trstenjak, delivered on 8 September 2011, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* Case C-282/10, para. 80.

53 See Ward, A. (2014), 'Article 51 – Field of Application' in Peers, S. and others (eds.) (2014), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, p. 1429.

54 CJEU 15 January 2014, *Association de médiation sociale v Union locale des syndicats CGT (AMS)* Case C-176/12 (Opinion of AG Cruz Villalón), para 31.

55 CJEU 15 January 2014, *Association de médiation sociale v Union locale des syndicats CGT (AMS)* Case C-176/12.

Contrary to *Egenberger*, the Court in *Bauer et al.* and *Max Planck* explicitly refers to Article 51(1) of the Charter and the addressees mentioned therein. By pondering on its *personal* scope of application, the Court in *Bauer et al.* affirms for the first time the horizontality (in principle) of the EU Charter.[56] Furthermore, the Court emphasises that in Article 31 of the Charter there is an explicit reference to 'worker', which necessarily entails that there is an obligation for the employer to grant the right to a limitation of working hours. This individualisation of addressees leads to a 'strong presumption in favour of horizontal application'.[57] Lastly, the Court regards Article 31(2) as the *essential principle of EU social law* based on various international instruments and EU law itself. The national constitutional traditions to which the Court refers in the equal treatment case law, including in the *Egenberger* case, are not mentioned in its judgment in *Bauer et al*. Does this mean that national constitutional traditions are not a relevant criterion anymore for a Charter right to be considered mandatory and to have (horizontal) direct effect? Does the Court herewith leave the door ajar to accepting the (horizontal) direct effect of Article 21(1) of the Charter as a whole, where other grounds than those elaborated in the equal treatment directives are at issue and whose fundamental rights' status is perhaps not recognised in all Member States, but is at EU level, simply because they are in the Charter?

Stage II: Filling in the white blanks with yellow, blue and red: Strengthening the social face of the EU

Turning to the second stage of Mondriaan's painting, and to spaces filled with the non-colours white and grey and the primary colours red, yellow and blue, we can discern a certain pattern in the status and scope of fundamental rights enshrined in the Charter.

At the background in the white spaces, 'creating a point of rest', remain those fundamental rights which need to be further clarified and elaborated in EU or national legislation. These rights must probably be seen as principles within the meaning of Article 52(5) of the Charter. An example is Article 27 on workers' rights to information, as can be inferred from the *AMS* case. After *AMS* it was unclear to what extent social rights stipulated in the Solidarity Title could be considered enforceable. Advocate General Cruz Villalon held that social and employment rights generally belong to the category of principles, but this view should, after *Bauer et al.* and *Max Planck*, be put into perspective.

The primary colours red, yellow and blue represent the Charter rights, which are directly enforceable and not subject to the caveat in the Charter provision itself 'provided for by Union law and national laws and practices'. Here we find Article 21(1) and Article 31(2) of the Charter, but also other important rights, including the rights to privacy and protection of personal data (Articles 7 and 8), right to property (Article 17) or the right to freedom of expression (Article 11).

However, depending on the fundamental right at issue, the colour may be bright red, yellow or blue. As set out above, the principles of non-discrimination on grounds of nationality, sex, and effective judicial protection have a far-reaching scope of application. Treaty provisions or the EU Charter are easily triggered, also in horizontal disputes. For discrimination on the grounds mentioned in Article 19 TFEU, however, the scope of application of Article 21 of the Charter is more limited, as it can be invoked only in respect of the grounds corresponding to those in Article 19 TFEU and the directives. That there should be a clear connection with EU secondary law also appears from *Bauer et al.*

56 Frantziou, E. (2018) 'Joined Cases C-569/16 and C-570/16, Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable', *European Law Blog*, 19 November 2018: available at: http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/.

57 Sarmiento, D. (2018), 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer', 8 November 2018, available at: https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/.

The importance of this judgment is, though, that the Court has taken a first and important step in recognising that fundamental social rights produce (horizontal) direct effect, which so far seemed to have been reserved to the domain of non-discrimination. The Court has now finally extended this rationale to social rights differently to discrimination, 'thus opening up a new playing-field in the enforcement of social rights in Europe'.[58]

Concluding Stage III: Towards a harmonious and 'seamless web of judicial protection' for EU citizens?

It is assumed that Mondriaan's painting is a depiction of the essence of life. The interplay of contrasting pictorial elements is indicative of the inner harmony of life that lies beneath the surface.[59] Creating more convergence and harmony between different EU rules having their own modes of application has perhaps been at the back of the Court's mind when it developed judicial techniques such as horizontal direct effect. These techniques, as Sacha Prechal and I argued ten years ago, served to fill the gap in judicial protection of citizens against breaches of EU free movement and competition law.[60]

Similarly, the acceptance of horizontal direct effect of EU Charter provisions supports the development of a harmonious and seamless web of judicial protection for EU citizens. That there can be a gap in protection caused by, for instance, the prohibition of horizontal direct effect of directives materialising fundamental rights, becomes most strikingly clear from the *Bauer et al.* case. After all, in *Bauer* we are dealing with two similar situations, which, as a result of the non-horizontality of directives, could have led to entirely different outcomes. Whereas *Bauer* could invoke the directly effective provision of the Directive vis-à-vis the public authority (Stadt Wuppertal), Broßonn could not do so vis-à-vis the private employer. The Court uses Article 31(2) of the Charter to fill this gap in judicial protection. It is however unclear whether all private actors, irrespective of their dominance and possibility to exercise a certain power over individuals, can be bound by a fundamental right like Article 31(2). *Max Planck* is quite a different private individual compared to Mr. Wilmeroth in the *Bauer et al* case.

Together with the *Max Planck* and the *Egenberger* cases, *Bauer et al.* demonstrates how the Court recognises the role of private employers in regulating gainful employment. Whether this also means that the Court more generally accepts the increasingly important role of private actors in our mixed economies and the fading dividing lines between the public and private, remains to be seen. In our increasingly digitalised societies, private actors play a major role. Think, for instance, about the five big tech companies, whose actions have a significant impact on the fundamental rights of EU citizens. To what extent could these private actors be obliged to comply with EU fundamental rights as enshrined in the Charter, like Article 21 on non-discrimination, Articles 7 and 8 on privacy and protection of personal data, or Article 11 on the freedom of information and expression, in a dispute with citizens before a national civil court?[61]

The creation of a truly seamless web of judicial protection against infringements of fundamental rights, including the right not be discriminated, runs up against certain limits that are – at least to some extent – inherent in EU law. First, the lack of clarity regarding the scope of application of the EU Charter leads to legal uncertainty about when exactly citizens can invoke the EU Charter. It seems that a certain hierarchy exists between EU fundamental rights, with the principle of non-discrimination on grounds of nationality and sex and the principle of effective judicial protection taking the lead.

58 Sarmiento, D. (2018), 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer', 8 November 2018, available at: https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/.

59 'Composition with Red Blue and Yellow', painting by Piet Mondriaan, 1929.

60 Prechal, S. and de Vries, S. (2009), 'Seamless Web of Judicial Protection in the Internal Market?' *European Law Review* vol. 34 issue 5.

61 CJEU *Google Spain* Case C-131/12.

Second, this hierarchy between fundamental rights may be reinforced through the adoption of secondary legislation in areas where the EU legislator has competence, for instance the field of the internal market or (closely related) non-discrimination and employment. Once the EU has adopted legislation that materialises certain fundamental rights, the EU Charter can be easily triggered in disputes between citizens and domestic public or private actors. These fundamental rights may, as a consequence, gain more prominence than others that remain second division.

Next to the development of a seamless web of judicial protection, the value of *Bauer et al.* lies in the Court's reiteration of the EU's social values and objectives, which have been inherent in the economic integration process right from the inception of the EEC (*Defrenne*), as well as the EU's respect for non-discrimination and equality between men and women, which according to Article 2 TEU, belong to the EU's foundational values. The Court affirms the constitutional status of fundamental social rights as enshrined in the EU Charter, and aligns them with, for instance, the right to equal treatment. Against this background, *Bauer at al.* strengthens the position and status of the right to gender equality and non-discrimination in EU law. This approach may also contribute to the attainment of a social market economy as set out in the objectives of the Treaty (Article 3(3) TEU) and give the EU a human face.