

# Deepening and widening of the protection of fundamental rights of European citizens vis-à-vis non-state, private actors

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### Introduction

Traditionally, fundamental rights relate to the vertical relationship between the state and the citizen. The primary addressees of the obligation to respect fundamental rights are public authorities, and the fact that fundamental rights may also bind private individuals is generally considered problematic (de Vries, “Securing Private” 43). Of course, non-state, private actors have always played a role in society and may have regulatory powers. But their role has significantly grown and become crucial in domains which would traditionally be reserved for the state, particularly as a consequence of digitalization and rapid technological developments. As a result the dividing lines between the public and private domain are increasingly blurring. Big tech companies dominating the digital market place have a big impact on businesses’ and consumers’ access to the market and major possibilities to invade and monitor citizens’ lives, to influence the democratic process and to impact civic space and European citizens’ fundamental rights.

In this chapter we will focus on the protection of EU citizens’ fundamental rights, particularly vis-à-vis non-state, private actors within the EU legal order. We will show how in European law the traditional fundamental rights narrative of the individual versus the state has changed, how a narrative of citizens relying on fundamental rights in a dispute with other citizens and private parties has unfolded and how this narrative may contribute to a more comprehensive judicial protection for EU citizens.

We will first briefly introduce the origins of EU citizenship and fundamental rights protection within the European legal order, and then focus on the application of the EU Charter of Fundamental Rights (hereafter EU Charter or Charter), which has become the most important human rights document for the European Court of Justice (hereafter Court or CJEU). We will specifically address the remarkable development of the Charter into an EU source of rights for private individuals in so-called horizontal disputes. We will conclude this chapter with a couple of observations, and explain how the case law of the CJEU may contribute to filling the gaps in judicial protection of citizens trapped between the public and private domain.

## Origin of EU citizenship and its relationship with fundamental rights

In a constitutional context citizens are bearers of fundamental rights, as so to compensate for the power of authorities and to guarantee equality and freedoms.<sup>1</sup> European citizenship definitely has elements similar to national citizenship, but at the same time it differs, because European citizenship is transnational. All EU citizens have the right to vote in European elections, for instance.<sup>2</sup> The right to vote and stand for election in both municipal and European elections in other Member States has created a more direct political nexus between the EU and its citizens. Political rights granted to EU citizens are essential in defining EU citizenship in constitutional terms. But at the same time EU citizenship rights are granted primarily to those EU citizens who have actually exercised their right to move to and to reside in another Member State. At that moment transnational EU citizenship becomes important.<sup>3</sup> Recent case law has added that in exceptional circumstances, EU citizenship can apply in the absence of movement, because of this, according to the European Court of Justice, EU citizenship is (destined to be) the fundamental status of nationals of the Member States.<sup>4</sup> Although EU citizenship can be described as a constitutional concept within the European legal order, it continues to have a strong connection with the internal market and to the so-called concept of “market citizenship” (Nic Shuibhne).

From the inception of the European Economic Community (EEC) European citizenship, although not included in the Treaties, there has been the concern of the EU institutions and the CJEU. In the early case law of the CJEU we find references to the nationals of the Member States.<sup>5</sup> In the famous and landmark judgment *Van Gend and Loos*, which can be seen as the first ‘citizenship case,’ the Court held that

the Community (now the European Union, HvE/SdV) constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals.<sup>6</sup>

The Court refers to nationals of the Member States as actors within a European multi-layered legal order, and it thereby creates specific individual rights for citizens, such as the right to invoke EU law before national courts.

The next step in the development of EU citizenship was taken with the Tindemans report in 1974, which stressed the need to include European citizenship in the Treaties.<sup>7</sup> In the section “A citizens’ Europe,” he urged that Europe should be close to its citizens and that

Measures taken in connection with the social policy of the Union, as regards security, concertation and participation will be directly felt in the daily lives of Europeans. They will emphasize the human dimension of the undertaking.<sup>8</sup>

Meanwhile, well before the formal inclusion of EU citizenship in the Treaties, the Court increasingly granted EU citizens (fundamental) rights that they could claim under EU law. The rights to equal treatment and free movement were first developed within the context of the internal market. In addition the Court provided for a broad scope of application of the four freedoms, which in principle require an economic connotation. Tourists, for instance, were also seen as recipients of services under EU law and could thus invoke the right not to be discriminated against.<sup>9</sup> Through this broad interpretation, even persons who were not economically active as workers or self-employed but who had sufficient financial means and sickness insurance were granted the right to free movement. In 1993 three free movement enhancing Directives were adopted, which further codified the right to reside in other Member States for EU citizens who were not economically active (students, the retired and nationals with sufficient means).<sup>10</sup>

The connection between European citizenship, social policy and fundamental rights has been made from early on. One of the famous cases is the case of Ms. Defrenne, a stewardess for a Belgian airline named Sabena. Ms. Defrenne complained at the national court that she was discriminated against on grounds of gender. The Belgium court referred a preliminary question to the CJEU in the national case asking for guidance whether individuals could derive rights from EU law. In its judgement the CJEU held that although Article 119 EC (Article 157 TFEU) is being addressed to the Member States, it “does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.”<sup>11</sup> This ground-breaking judgement opened the door for many cases on gender discrimination for nationals of all EU Member States.<sup>12</sup> Hence, European citizenship was informally one of the key elements of European law, although it took until the Treaty of Maastricht to formally include the concept of EU citizenship in the Treaties (1992) and the Charter of Fundamental Rights (2009). EU citizenship has been developed in the case law of the Court into a dynamic and broad concept, granting several rights to citizens moving to and living in other Member States, based on the principle of equal treatment.

The concept of EU citizenship and the foundational right for EU citizens to move and reside freely in the territory of EU Member States can now be found in Articles 20 and 21 (1) TFEU, whereas the right to free movement is laid down in Article 45 of the EU Charter and is codified and elaborated in Directive 2004/38.<sup>13</sup> Article 20(1) TFEU reads as follows:

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

In the first case on EU citizenship, the case of *Martinez Sala*, the Court ruled that EU citizens may not be discriminated against on grounds of nationality, whenever they reside legally in the territory of another Member State than their nationality.<sup>14</sup>

That particular case concerned the entitlement to child allowances in Germany by a Spanish national. In subsequent case law the Court ruled on many social benefits and residence requirements for EU citizens in another Member State than their nationality, based on the right to move and reside freely in the EU (Article 21 TFEU).<sup>15</sup>

More recently, the Court established a new line of case law in addition to the free movement rights based cases, on the basis of which EU citizens who have not even exercised their right to free movement can claim rights under EU law and particularly Article 20 TFEU. The Court interpreted Article 20 TFEU as such that any national measure that would deprive an EU citizen of his/her genuine enjoyment of the substance of EU citizenship rights constitutes a violation of Article 20 TFEU.<sup>16</sup> So, even in the absence of free movement, Article 20 TFEU on EU citizenship can be invoked against a Member State if the effectiveness of EU citizenship would otherwise be undermined.<sup>17</sup> This approach to EU citizenship outside the realm of free movement, however, has been adopted only in very specific situations. These includes the loss of nationality by EU citizens, the right to family life as enshrined in Article 7 of the Charter, the right of EU citizens to reside in the EU with a parent with the nationality of a third country and the right to vote for the European Parliament for prisoners in their own Member State.<sup>18</sup> In the case of *Chavez*, for instance, the Court held that the right to family life (Article 7 of the Charter) and the rights of the child (Article 24 of the Charter) should be included in the assessment of whether an EU citizen is being deprived of the essence of his/her EU citizenship rights.<sup>19</sup> This case law provides for a 'fundamental rights friendly' interpretation of Article 20 TFEU (van Eijken and Phoa 970), thereby deepening the link between EU citizenship and fundamental rights.

EU citizenship and fundamental rights protection are, obviously, different in the sense that citizenship manifests inclusion of only certain individuals who belong to the community (the citizens), whereas fundamental rights are universal in nature. European citizenship may, however, certainly have contributed to a further strengthening of fundamental rights of EU citizens, particularly due to EU citizens increasingly claiming their rights, which are now enshrined in the EU Charter in cases before the national courts. An early example of this is, of course, the previously mentioned case of *Defrenne* (van Eijken 217). Moreover, citizenship is a constitutional concept which is inherently intertwined or connected with fundamental rights protection. Basically, citizens need to be and should be protected against unjustified interference from the state authorities in their freedoms. In that context the European Union, although, not a state, has legislative and policy making powers that affect the freedoms of its citizens. From this angle, we will look at the protection granted by the EU to its citizens, especially where the dividing line between the public and private domain becomes increasingly blurred. Should EU law also grant protection to EU citizens in conflicts with other private parties that interfere with their freedoms?

## Development of fundamental rights in the EU legal order

### *Fundamental rights as general principles of European law*

Similarly to EU citizenship, the fundamental rights in the EU first developed outside of the Treaties before they were codified. Fundamental ‘human rights’ were not explicitly mentioned in the original Treaties, but some Treaty provisions can certainly be considered fundamental rights, such as the principle of non-discrimination and the principle of equal pay for men and women (Kapteyn 38). These fundamental rights were linked to the internal market and oriented on the development of an equal level of market-access for workers. It was not until the adoption of the Treaty of Maastricht (1992) that fundamental rights were formally recognized as part of EU law.

The CJEU, though, had already taken on the protection of fundamental rights in its early case law and recognized fundamental rights as part of the general principles of EU law. That recognition started with the case of *Stauder*<sup>20</sup> in 1969. The Court ruled in that case that fundamental human rights are “enshrined in the general principles of Community law and protected by the court.”<sup>21</sup> With this ruling the Court reacted to the so-called *Solange decisions*<sup>22</sup> of the German *Bundesverfassungsgericht*. In these decisions the German Constitutional Court affirmed that the primacy of EU law over national law should never set aside the level of protection of human rights provided by the national constitution, because human rights at the time were not explicitly part of Community, now EU law.<sup>23</sup> In response, the Court clarified that despite absence of express mention in the Treaties, fundamental rights were part of EU law as general principles, thereby drawing inspiration from national constitutional traditions and from the European Convention on the Protection of Human Rights (hereafter ECHR).<sup>24</sup> The case law on fundamental rights within the framework of general principles of Union law has been significantly developed in subsequent case law. But in the absence of an EU ‘bill of rights,’ EU citizens were afforded less legal certainty and foreseeability in the protection of their EU human rights. It was not until the year 2001 that the EU Charter of Fundamental Rights was adopted and solemnly proclaimed in Nice. It would take another eight years before the Charter obtained legally binding force, through the current Treaty of Lisbon. The EU Charter now has the same legal value as the Treaties (Article 6(3) TEU). It is furthermore important to mention that Article 2 of the TEU contains the foundational values of the EU, which include human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

All Member States are contracting parties to the ECHR and accept the jurisdiction of the European Court of Human Rights (ECtHR). In order to apply to become an EU Member State a candidate state has to respect the values referred

to in Article 2 TEU and has to be committed to promoting them (Article 49 TEU). Respect for human rights is even a precondition to start the negotiations on potential accession to the EU.

Ever since fundamental rights were recognized in the EU legal order, the ECHR has been referred to as a source of civil rights too by the Court of Justice. The Court has, however, always refused the possibility of EU accession to the ECHR when asked for advice. First, in 1996 it advised that the EU had no such competence.<sup>25</sup> But, upon the introduction of the Lisbon Treaty in 2009, Article 6(2) was included in the TEU providing not only the possibility, but that the EU in fact “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” However, after a draft agreement on the accession of the EU to the ECHR had been sent to the Court of Justice for an advisory opinion, the CJEU yet again identified compatibility issues with EU law and rejected the draft agreement.<sup>26</sup> Despite the fact that the lack of competence had been resolved by the Lisbon Treaty, five other substantive grounds were still found to impede the accession by the EU to the ECHR. So, for the moment the accession has been put on hold. Under Article 218 (11) TFEU, following a negative CJEU Advisory Opinion, an envisaged agreement may not enter into force unless it has been revised or the Treaties have been amended. So, currently both the EU Charter and ECHR remain two autonomous sources of EU law, although the ECHR civil rights are principles of EU law derived from the constitutional traditions of the Member States, as enshrined in Article 6(3) of the Treaty. In brief, nowadays, the sources of European fundamental rights are the Treaties, the EU Charter, the general principles of EU law, specific EU secondary legislation and the Court of Justice’s case law.

### ***The scope and content of the EU Charter: the composite citizen in a multilevel order***

Hence, for a long time the Court protected fundamental rights by classifying fundamental rights as general principles of EU law. As the Charter became a binding instrument of primary EU law, there were actually two different regimes to protect fundamental rights for EU citizens. Either the Court would refer to a general principle of EU law in order to protect fundamental rights, or the Court would refer to the Charter. Both routes, the Charter and the general principles of EU law, have as an important threshold that they are only applicable in situations which fall within the scope of application of Union law. Hence, in order to rely on fundamental rights as general principles or on fundamental rights that are acknowledged in the Charter, it has to be established first that a particular situation falls within the scope of EU law. This condition is included in Article 51(1) of the EU Charter, which determines the field of application of the Charter and reads as follows:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [. . .] and to the Member States only when they are *implementing Union law*.<sup>27</sup>

The explanations to the Charter,<sup>28</sup> as well as the case law of the Court, define the scope of application of the EU Charter much more broadly. The explanations to the EU Charter stress that the Charter “is only binding on the Member States when they act *in the scope of Union law*.”<sup>29</sup> That *acting within the scope of EU law* entails a broader scope of application than *implementing* EU law has been subject to extensive academic debate (Ward; van Bockel and Wattel). This debate is of major importance for EU citizens, because the scope of application of EU law is a kind of “gatekeeper” to EU fundamental rights’ protection. In *Akerberg Fransson*<sup>30</sup> the Court finally ruled in favour of a broad interpretation of the term *implementing* by holding that the Charter will apply, if a situation falls within the ambit of EU law.<sup>31</sup>

In situations which are not covered by EU law, citizens can thus not rely on the EU Charter and are dependent on the national constitution or the ECHR for the protection of their fundamental rights.<sup>32</sup> In that sense EU citizenship can be defined as composite citizenship. Composite citizenship relates to the fact that different authorities are responsible to protect EU citizens’ rights: local, national, European or global. In that sense, depending on the situation EU citizens find themselves in, they will be protected by EU law and thus the Charter or by the ECHR or national law including the constitution. The citizen as such is bearer of rights, protected by different layers of rights (van Eijken 233–238).

Nowadays it is generally accepted that the scope of the Charter is triggered in at least three situations: when Member States implement EU law into national law, when Member States derogate from EU law (especially in the context of the free movement of goods, services, capital and persons) or when Member States act otherwise in the ambit of EU law, for instance when they adopt legislation that supports the effectiveness of EU law (van Eijken et al.). It is clear from the case law that in order to activate the EU Charter another provision of EU law needs to be applicable too. The Court underlined in, for instance, *Marcos* that there is no autonomous application of Charter provisions, which means that there has to be another provision of EU law applicable to the situation. The Court moreover held that these provisions should have a “certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.”<sup>33</sup> In any case, the broad interpretation of the scope of application of the EU Charter constitutes an important step in the protection of fundamental rights for EU citizens.

The EU Charter is a modern catalogue of civil, political, social and economic rights, freedoms and principles. Title I includes the right to human dignity (Article 1), the right to life (Article 2), the right to the integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the prohibition of slavery and forced labor (Article 5). Title II protects the “freedoms,” such as the right to liberty and security (Article 6), the right to data protection (Article 8), freedom of thought, conscience and religion (Article 10). Furthermore, the Charter contains a specific Title on various rights to equal treatment, the most important being Article 21 prohibiting discrimination on “any ground such as sex, race, colour, ethnic or social

origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.” This section also protects the rights of the child and elderly, as well as disabled persons (Articles 24, 25 and 26). Moreover, the Charter includes a specific Title on fundamental social rights, which is called “Solidarity.” Rights that are acknowledged in that part are, amongst others, the right of collective bargaining and action (Article 29), the right to protection against unjustified dismissal (Article 30) and the right to fair and just working conditions (Article 31). Title 5 recognizes “Citizens’ rights,” including the right to free movement and to reside freely (Article 45), political rights (Article 39 and 40) and the right to access to documents (Article 42).

Now could some of these rights, freedoms or principles be invoked by citizens vis-à-vis other citizens and private parties? For general principles of EU law the Court had determined in its case law dating from before the Charter that some of these principles can be applied in a horizontal situation, i.e. in a dispute between two citizens, and not only in a vertical relationship between the citizen and the state or public authorities.<sup>34</sup> Whether, and if so, to what extent, the EU Charter has the ability to be invoked in disputes between individuals was, at least until recently, unclear. After all, Article 51(1) of the Charter only refers to Member States and not to private actors. But, as we will discuss later, in a number of recent judgments the Court has provided for more clarity and determined that Charter provisions can be applied in horizontal disputes.

## **The protection of fundamental rights of citizens vis-à-vis non-state, private actors**

### ***Development of horizontal direct effect of EU law***

#### *Direct Effect of EU Law in General*

As early as in its seminal *Van Gend & Loos* decision the Court held that provisions of the (EEC) Treaty can produce direct effect and create individual rights which national courts must protect.<sup>35</sup> In subsequent case law it became clear that other provisions of EU primary law can have direct effect, such as the four freedoms, the principle of non-discrimination on the grounds of nationality in Article 18 TFEU, the principle of equal pay for men and women laid down in 157 TFEU and general principles of EU law (de Vries, “The Bauer et al.”). Next to Treaty provisions and general principles, instruments of secondary EU law can produce direct effect. Regulations are by their very nature directly effective as they are, according to Article 288 TFEU, directly applicable and binding in all Member States without there being national implementing legislation (Jans et al. 65).<sup>36</sup> For Directives this is more problematic as Directives are addressed to Member States according to Article 288 TFEU and binding as to the result of the Directive to be achieved by the Member States in their national laws. But if Member States



have failed to implement the Directive in time or correctly, citizens can rely on the provisions of a Directive vis-à-vis the state, if these provisions are sufficiently clear and unconditional.<sup>37</sup>

### **Horizontal direct effect of EU Law in general**

The narrative of direct effect of EU law starts with *Van Gend & Loos* and continues with cases like *Defrenne* in which the Court recognizes the *horizontal* direct effect of the principle of equal pay for men and women enshrined in Article 157 TFEU. After all it was the stewardess Defrenne who advocated for the equality of women before the Belgian court against her employer, the airline company Sabena.<sup>38</sup> The story continues with judgments on the Treaty freedoms on persons and services, which were invoked by citizens in a horizontal dispute. These cases inter alia concerned sportsmen challenging rules set up by sporting associations restricting their free movement rights,<sup>39</sup> a banker fighting a discriminatory language policy adopted for employment by a private bank<sup>40</sup> or a ferry operator challenging a collective action by a trade union seeking to prevent it from relocating its head office to another Member State.<sup>41</sup> Hereby the Court used various strands of argumentation to justify the horizontal application of the free movement rules (*de Vries* and *Mastrigt*). The Court frequently referred to the principle of *effet utile*, meaning that the useful effect of EU law must be guaranteed and may not be jeopardized, neither by the state nor private actors. It reasoned that for effective free movement, private actors cannot be allowed to restrict free movement where governments are not allowed to do so either.<sup>42</sup>

Furthermore, the Court considers that, where certain private, regulatory bodies exercise a form of power or dominance over individuals, this may be a reason to accept the horizontal application of the freedoms.<sup>43</sup> The case of *Raccanelli* provides an example, which involved a dispute between the Max Planck Institute (MPI), which offered research places, and a foreign doctoral student.<sup>44</sup> As the MPI is a unique and prestigious research institute, it has substantial powers over the offering of research places to junior researchers and thereby has to respect the Treaty rules on free movement. Lastly, where the principle of non-discrimination on grounds of nationality is at issue, which constitutes the cornerstone of the free movement provisions and the internal market, the Court recognizes its fundamental rights character and as a consequence its horizontal application.<sup>45</sup>

The fact that the Treaty provisions on free movement, on non-discrimination on grounds of nationality or on equal pay for men and women were primarily drafted for Member States and not for private individuals – for such private individuals “the drafters of the Treaty envisaged the provisions on competition” (Mortelmans)<sup>46</sup> – did thus not seem to be an obstacle for the Court to grant direct effect to these provisions and impose obligations on citizens at the same time. Regarding secondary EU law, Regulations can have horizontal application and direct effect, whereas Directives cannot, according to well-established case law, be invoked between individuals.<sup>47</sup> As Directives contain obligations for Member States and

are specifically binding upon them, they cannot impose obligations on individuals and can thus not produce *horizontal* direct effect, according to the Court.

### ***Horizontal direct effect of fundamental rights as general principles of EU law***

The foregoing shows that, despite the fact that in (most) Member States' national legal systems vertical and horizontal dimensions of fundamental rights are strictly divided (Walkila; de Vries, "Securing Private Actors" 47), in EU law these dividing lines are less strict as a (limited) form of horizontal direct effect for Treaty provisions on free movement and for the fundamental rights to non-discrimination on grounds of nationality and to pay for men and women has been recognized. The step towards recognition of horizontal direct effect of other EU fundamental rights should therefore not be very big or problematic.

In a series of judgments dating from before the time that the EU Charter gained legally binding force, the Court indeed acknowledged the horizontal application of the principle of non-discrimination on other grounds than nationality, like age.<sup>48</sup> Article 19 TFEU includes six grounds of discrimination, including age, which need to be combatted by the EU legislator and which are elaborated in Directives.<sup>49</sup> In order to rely on any provision of EU law as an individual before a national court a specific provision needs to have direct effect in the first place. The conditions to direct effect are that a certain provision needs to be sufficient, precise and unconditional. In other words, it has to be established that an individual can rely on a clear provision that does not need further executive measures by a Member State. As Article 19 TFEU does not have direct effect, citizens cannot, contrary to the principle of non-discrimination on grounds of nationality, rely on Article 19 TFEU, directly to challenge discriminatory practices on grounds of age. Instead they should rely on the applicable Directive, but as Directives lack horizontal direct effect, they are of no help to citizens who have a conflict with, for instance, their private employer. It is here that the CJEU held that the principle of non-discrimination on grounds of age is a general principle of EU law, which as such is capable of having horizontal direct effect, thereby circumventing the prohibition of horizontal direct effect of Directives.

### **Horizontal application of the EU charter of fundamental rights**

Hence, there were already clear clues in case law that fundamental rights could apply in horizontal disputes. After the EU Charter became binding and elevated the EU fundamental rights to the same legal status as the Treaty rules, the question quickly arose whether the Charter could apply in horizontal disputes as well (de Mol). The main obstacle for applying the EU Charter in horizontal disputes appeared to be Article 51 of the Charter. As observed, Article 51(1) of the EU Charter determines the scope of application of the EU Charter and limits the

addressees of the Charter to EU institutions and Member States, not to individuals. This induced, for instance, Advocate General Trstenjak at the time in the *Dominguez* case to argue in favor of a restrictive reading of the EU Charter. According to her the Charter cannot 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.”<sup>50</sup> But this point of view did not seem to be shared by everyone. In his convincing opinion in the *AMS* case on a conflict between a trade union and the private body AMS, Advocate General Cruz Villalón noted that “it would be paradoxical if the advent of the Charter changed this state of affairs in a negative sense” and held (Ward 1429):

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.<sup>51</sup>

In November 2018 the Court, in two cases, *Max Planck* and *Bauer and Broßonn*, unequivocally held that the fact that the Charter is addressed to the Member States does not preclude that Charter provisions may have horizontal direct effect.<sup>52</sup> Both cases concerned the right to paid annual leave for four weeks which is laid down in Article 31(2) of the Charter under the Solidarity Title. *Max Planck*, and *Bauer and Broßonn* (*Bauer et al.*) are of crucial importance for the protection of fundamental rights for EU citizens in three ways: the judgments strengthen EU citizens’ fundamental rights in general, they strengthen EU citizens’ fundamental rights vis-à-vis other citizens and private parties and they strengthen citizens’ fundamental *social* rights which are provided for in the Charter. But before we will more thoroughly assess the relevance of these judgments, we briefly discuss the facts of the *Bauer et al* judgment in particular first.

### **The Bauer et al. Judgment**

In the *Bauer* case, the widow Mrs. Elisabeth Bauer claimed EUR 6,000 from Stadt Wuppertal, the employer of her husband after her husband’s death, because he had not obtained his full four weeks of paid annual leave at the time he died. The case of *Broßonn* concerned a similar situation, except for the fact that the husband of Mrs. Broßonn was employed at a private company owned by Mr. Willmeroth. Ms. 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.

The question was whether the heir of a worker, who died while in an employment relationship, has a right to financial compensation for the worker’s minimum annual leave prior to his death based on Article 7 of Directive 2003/88 and Article 31(2) of the Charter. Article 7 of Directive 2003/88 obliges the Member

States to ensure that every worker is entitled to paid annual leave of at least four weeks. Article 31 (2) of the EU Charter 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.

The Court ruled that

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 recognizes as having the same legal value as the Treaties.

In the case of *Bauer*, the Court stated that she could invoke Article 7 of the Directive to challenge the German legislation because that provision is sufficiently precise and unconditional and her situation is vertical in nature – an EU citizen vis-à-vis Stadt Wuppertal, a public authority – and citizens can under these certain circumstances invoke provisions of Directives against Member States, if Member States have not or have not properly implemented the Directive in their national legislation.

In the case of *Broßonn* the situation is different, because her husband worked for a *private* company (TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K., owned by Mr. Volker Willmeroth) when he died. As Directives cannot be invoked directly vis-à-vis a private party and impose obligations on citizens, the Court continued to examine whether Article 31(2) of the Charter could play a role here. According to the Court the right to paid annual leave is as regards its very existence mandatory and unconditional in nature. Therefore, national courts are obliged to set aside any national law that violates Article 31(2) of the Charter. But, as this case concerned a horizontal dispute, the Court then continued to determine whether Article 31(2) of the Charter could be invoked against a private company. The Court concludes that, although Article 51(1) of the Charter refers to the EU institutions and Member States, “the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals.” It subsequently ruled that Article 31(2) of the Charter lays down “a corresponding obligation on the employer, which is to grant such periods of paid leave.”<sup>53</sup>

In the *Max Planck* case, which was decided on the same day as *Bauer and Broßonn*, a similar reasoning was used by the Court in allowing the horizontal application of Article 31(2) of the Charter. Article 31(2) can indeed be invoked directly by an individual against his employer, the Max Planck research institute. For that matter, the Court did not refer to its argumentation used in cases on the Treaty provisions on free movement, like *Raccanelli*, based on the fact that the Max Planck Institute is a prestigious institute having substantial powers over the offering of research places (see previous example).

The reasoning of the Court with respect to the horizontal application of the EU Charter in *Bauer et al* and *Max Planck* largely rests upon its previous judgment

in *Egenberger*, but is more detailed, explicit and extensive. The *Egenberger* case concerned a dispute between Ms. Vera Egenberger and the Evangelisches Werk für Diakonie und Entwicklung eV ('Evangelisches Werk'). Her application for a job with Evangelisches Werk was rejected because she did not belong to a denomination. In the following dispute Ms. Egenberger relies upon the prohibition of discrimination on grounds of religion to claim compensation, which is laid down in Article 4(2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation and in Article 21(1) of the EU Charter prohibiting discrimination "on any grounds such as sex, race [. . .], religion or belief." In its decision the Court upheld its view that Directives cannot produce horizontal direct effect as they cannot of themselves impose obligations on an individual and cannot therefore be relied upon as such against an individual. With respect to the possibility to apply Article 21(1) of the EU Charter in a horizontal dispute, 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 Treaty prohibiting discrimination. It hereby refers to the case law on free movement and equal pay for men and women (see previous example).<sup>54</sup>

### ***The importance of Bauer et al. for fundamental rights protection of EU citizens***

In *Bauer et al* the Court continues to fill in the white spaces that are left in fundamental rights protection in the EU by further clarifying the scope of application of the EU Charter, which has after all become the most relevant human rights document for the CJEU. It has thereby built upon its originally bold approach towards general principles of EU law and hereby secured citizens' fundamental rights on the basis of the EU Charter, not only vis-à-vis the Member State, but also vis-à-vis other citizens.

The first step in the judgment has been to establish whether and, if so, under what conditions, citizens can invoke Charter provisions before a national court in the first place. The EU Charter itself seeks to distinguish between judicially enforceable rights on the one hand and principles, which need to be specified and elaborated by EU or national measures, on the other. Article 52(5) of the Charter aims to clarify this distinction and reinforce legal certainty, however, it "is not an example of clear drafting" (Peers and Prechal 1505–1506). Rather than referring to Article 52(5) the Court simply looks at the drafting of the Charter provision itself and examines whether it is mandatory and unconditional. By reiterating its doctrine of (vertical) direct effect in respect to directives and Treaty provisions, the Court has in *Bauer et al.* now developed a *general* test to be applied to all the rights protected by the Charter (Rossi).

By including the criteria mandatory, unconditional and sufficient in itself, the Court seems to have used a strictly textual interpretation of the Charter provisions

in accepting horizontal direct effect. The criteria mandatory and unconditional are coherent with previous case law regarding the four freedoms and build upon the narrative of direct effect as set out by the Court in *Van Gend & Loos*.<sup>55</sup> In the case *Defrenne* the principle of equal pay for men and women was held to extend to contracts between individuals because it was mandatory in nature.<sup>56</sup> It clarified mandatory as a provision that “imposes on States a duty to bring about a specific result to be mandatorily achieved within a fixed period.”<sup>57</sup> It gives the EU Charter a forceful effect into the national legal orders of the Member States and provides citizens with more clarity about which fundamental rights in the Charter should be regarded as judicially enforceable rights. Furthermore, as in *Bauer et al.* it concerned a fundamental social right, the idea that all social rights in the Charter should be seen as non-judicially enforceable principles and should thus be abandoned (see hereafter).<sup>58</sup>

The second step has been to acknowledge the horizontal application of the EU Charter per se and the explicit recognition that Article 51(1) of the Charter does not constitute an obstacle to do so. The case law dating from before *Bauer et al.* concerned the horizontal application of the free movement provisions in the Treaty, or the principle of non-discrimination on various grounds either as mentioned by the Treaty, as a general principle of EU law or as laid down in Article 21(1) of the Charter. In *Bauer et al.* the Court looks beyond the domain of non-discrimination, thus opening up a new playing-field in the enforcement of not only fundamental social rights, but other fundamental rights in Europe as well (Sarmiento). The Court may thereby more generally accept the increasingly important role of private actors in our mixed economies and the fading dividing lines between the public and private. As stated in the introduction, in our increasingly digitalized societies, private actors play a major role. Think, for instance, about the big tech companies, like Google, Amazon or Facebook, 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?<sup>59</sup>

The third and last step involves the qualification of Article 31(2) as a fundamental social right that is indeed judicially enforceable. After a previous judgment of the Court in the *AMS* case it was unclear as to what social rights laid down in the Solidarity Title could be considered as enforceable rights. Advocate General Cruz Villalón held that social and employment rights generally belong to the category of principles, but this view should thus be put into perspective. 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.<sup>60</sup> 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. This approach may contribute to the attainment of a more inclusive internal market, a so-called social market

economy as set out in the objectives of the Treaty and give the EU a human, more citizenship friendly face.

The extent to which other fundamental rights enshrined in the EU Charter may have horizontal application just like that remains to be seen. The right to paid annual leave is a work-related principle and is thus strongly linked with the internal market and with the concept of market citizenship. Also in other cases wherein the Court had to decide on fundamental rights in conflicts between private individuals, the internal market connotation was obvious, particularly due to the application of supporting EU secondary legislation adopted within the context of the internal market. Think about the already mentioned principle of non-discrimination or the rights to privacy and protection of personal data, which have been the object of extensive EU legislation. As the EU Charter itself states in Article 51(2) that it cannot extend the field of application of Union law beyond the powers of the Union or establish new powers, fundamental rights that are not supported by another provision of EU law or by secondary legislation remain out of the Court's sight. This may create an anomaly between fundamental rights, i.e. between those rights that are harmonized or materialized in EU legislation and those that are not. Since market-based rights are most developed in EU law, these rights are stronger and more prevalent.

### **Concluding observations: towards a seamless web of judicial protection for European citizens?**

The broad interpretation by the Court of the material scope of application of the EU Charter is to be appraised, because it strengthens fundamental rights protection of EU citizens. Offering EU fundamental rights a broad scope of application coheres with the classic model of an authority having been granted powers by the people, in which fundamental rights serve to protect the people from abuse by this authority. In the context of a transnational and composite EU citizenship, it is crucial that where the EU has powers, the people are granted broad rights that effectively protect them in a transnational context too.

In addition, as the personal scope of application of the EU Charter now extends to horizontal disputes between private actors as well, the protection of citizens' fundamental rights has been further enhanced, which is particularly important considering the fading dividing lines between the public and private domains. The acceptance of horizontal direct effect of EU Charter provisions supports the development of a more harmonious and seamless web of judicial protection for EU citizens. The potential for gaps in protection caused by, for instance, the prohibition of horizontal direct effect of Directives materializing fundamental rights becomes most strikingly clear from the *Bauer et al* case. After all, in *Bauer et al* we are dealing with two similar situations, which, as a result of the non-horizontality of Directives, could have led to entirely different outcomes. Where Bauer could invoke the directly effective provision of the Directive vis-à-vis the *public* authority Stadt Wuppertal, Broßonn could not vis-à-vis the private employer of

her deceased husband. The Court uses a broad interpretation Article 31(2) of the Charter to fill in this gap in judicial protection, thereby building upon its previous case law on general principles of EU law, which were also applied in horizontal disputes alongside Directives.

Together with the *Max Planck* and the *Egenberger* cases, *Bauer et al* shows that the Court recognizes 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 their responsibility in protecting citizens' fundamental rights remains to be seen. In our increasingly digitalized societies, private actors like the five big tech companies play a crucial role, and their actions have a huge impact on fundamental rights of EU citizens. To what extent could these private actors be obliged to comply with EU fundamental rights, like Articles 7 and 8 on privacy and protection of personal data or human dignity as laid down in Article 1 or the freedom of expression as enshrined in Article 11, in a dispute with citizens before a national civil court?<sup>61</sup>

In this respect *Bauer et al* and *Max Planck* raise a number of important questions. First, it is unclear against exactly which type of private actors EU Charter rights can be invoked. Could all private actors, irrespective of their dominance, their power and possibility to exercise a certain power over individuals, be bound by a fundamental right like Article 31(2)? For example, the prestigious research institute Max Planck is quite a different private actor compared to Mr. Wilmroth in the *Bauer et al.* case. The Court does not at all refer to or mention these different characteristics. This is somewhat unfortunate as the precise obligations that the Charter imposes on private actors are not always clear and can be far-reaching. Whether paid leave should be three or four weeks is not specified at all in Article 31(2) of the Charter; only the Directive demands a four week period. Is it fair that a private employer is obliged to pay for four weeks leave, even if the Charter does not clarify the specific time of leave that needs to be granted? On the one hand it is a good thing that the Court aligns the Charter with the text of the Directive and does not create two different norms. On the other hand, through a broad application of the Charter the private employer is bound by specific obligations they did not even know they were subject to under national law, let alone EU law. Horizontal application of Charter rights thus gives rise to legal uncertainty. The creation of obligations for private parties based on Charter provisions, even though such specific obligations cannot be read directly into the Charter, therefore deserves greater justification than the Court has so far provided in the *Bauer et al.* case.

Second, the limited, albeit broad, scope of application of the EU Charter may reinforce a certain hierarchy between fundamental rights. In areas where the EU has strong regulatory powers and has used these powers through the adoption of secondary legislation, for instance, in the field of the internal market or, closely related, in the areas of non-discrimination and employment, EU fundamental rights have a forceful effect. Once the EU has adopted legislation that materializes certain fundamental rights, the EU Charter can be easily triggered in disputes



between citizens and public or private actors. These fundamental rights may as a consequence gain more prominence than others, which remain second-division. Therefore there is no seamless web of protection but the case law does support broader, but also more fragmented, protection of fundamental rights.

Finally, even though the scope of application of the Charter has been broadened, at least for Article 31(2) of the Charter, there are many situations which fall outside the scope of application of the Charter. In these situations, as observed in Section 2.3, EU citizens will have to rely on national or international fundamental rights, which makes sense in the light of the division of powers. But what if a Member State systematically harms the fundamental rights of its citizens? Should these citizens not be protected under EU law, simply because they are EU citizens? In light of that question, and considering the growing threats in a number of EU Member States to the rule of law and fundamental rights and the difficulty for the EU to intervene, Bogdandy et al. came up with the following citizenship based proposal:

beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection *as long as* it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU. However, should it come to the extreme constellation that a violation is to be seen as *systemic*, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts.

(Bogdandy et al., emphasis added)

In such a scenario the Member State would in principle remain responsible for the protection of their citizens under national law, unless the level of fundamental rights protection would be systematically reduced below a threshold of what is regarded as a minimum level of protection of fundamental rights. Member States are after all bound by the values upon which the EU is based, as mentioned in Article 2 TEU, and therefore have to ensure a certain level of fundamental rights. Linking Article 2 TEU to EU citizenship (Article 20 TFEU) would guarantee all EU citizens a minimum level of protection of fundamental rights, irrespective of whether they have exercised their free movement rights.

A next step would be to extend this doctrine to *private parties*, particularly the extremely powerful tech firms, which, acting within their sphere of private autonomy, are presumed to abide by EU fundamental rights. Could it then be argued that private companies – even in the absence of EU supporting legislation – should always abide to a minimum norm of EU fundamental rights protection, which could be invoked by citizens before the national courts whenever there is a systematic and serious impediment of their fundamental rights and a threat to the rule of law? An affirmative answer could further enhance a human rights based EU citizenship model as advanced by Granger, especially where the dividing lines between the public and private domain are increasingly fading (Granger).

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## Notes

- 1 Marshall refers to civil, social and political rights in his famous essay on citizenship. He argues that all three categories of fundamental rights are actually a precondition for full citizenship.
- 2 Article 24 TFEU, Article 39 TFEU, Case C-650/13 *Delvigne* [2015] ECLI:EU:C:2015:648.
- 3 Case C-85/96 *Martinez Sala* [1998] ECR 1998 I-02691; Article 21 TFEU.
- 4 Case C-221/17 *Tjebbes* [2019] ECLI:EU:C:2019:189, par 7.
- 5 Case 26-62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Case 6-64 *Costa/Enel* ECLI:EU:C:1964:66.
- 6 Case 26-62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.
- 7 Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities, Supplement 1/76.
- 8 Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities, Supplement 1/76.
- 9 Case 186/87 *Cowan* [1998] ECR 1989-00195; Case C-348/96 *Calfa* [1999] ECR 1999 I-00011.
- 10 Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, Council Directive 90/364/EEC of 28 June 1990 on the right of residence.
- 11 Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 31.
- 12 See for more information. Accessed 13 June 2019.
- 13 Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr. 2004 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 Apr. 2004, pp. 77–123.
- 14 Case C-85/96 *Martinez Sala* [1998] ECR 1998 I-02691, paras. 61–64.
- 15 Case C-184/99 *Grzelczyk* [2001] ECR 2001 I-06193; C-148/02 *Garcia Avello* [2003] ECR 2003 I-11613; Case C-333/13 *Dano* [2014] ECLI:EU:C:2014:2358.
- 16 Case C-256/11 *Dereci* [2011] ECR 2011-00000, para. 64; Case C-34/09 *Ruiz Zambrano* [2011] ECR 2011 I-01177, para. 42.
- 17 Case C-256/11 *Dereci* [2011] ECR 2011-00000, para. 67.
- 18 Case C-34/09 *Ruiz Zambrano* [2011] ECR 2011 I-01177, Case C-650/13 *Delvigne* [2015] ECLI:EU:C:2015:648, Case C-133/15 *Chavez* [2017] ECLI:EU:C:2017:354; C-165/14 *Rendón Marín* [2016] ECLI:EU:C:2016:675.
- 19 Case C-133/15 *Chavez* [2017] ECLI:EU:C:2017:354.
- 20 Case 29-69, *Stauder* [1969] ECR 1969-00419.
- 21 Case 29-69, *Stauder* [1969] ECR 1969-00419, para. 7.
- 22 *BVerfG* 37, 271 2 BvL 52/71 (*Solange I*), 29 May 1974 and *BVerfG* 73, 339 (*Solange II*), 22 Oct. 1986.
- 23 On this development of fundamental rights in EU law, see furthermore Knook and Lenaerts.
- 24 Case 29-69, *Stauder* [1969] ECR 1969-00419, para. 7.
- 25 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR 1996 I-01759.
- 26 Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454.

- 27 The text of the Charter was changed during the process. In a discussion document of May 2000, the scope of the Charter was defined as “The provisions of the Charter are addressed to the Member States exclusively within the scope of Union law.” Italics added.
- 28 Explanations relating to the Charter of Fundamental Rights, OJ, 14 Dec. 2007, 2007/C 303/02.
- 29 Explanations relating to the Charter of Fundamental Rights, OJ, 14 Dec. 2007, 2007/C 303/02, Italics HvE/SdV.
- 30 C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105. See also van Bockel and Wattel.
- 31 Case 11/70, *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114 and Case C-260/89, *Elliniki Radiophonia Tiléorassi* [1991] 1991 I-02925. Nowadays also provided in the EU Charter (Article 51 (1)) and Case C-390/12, *Pfleger* [2014], ECLI:EU:C:2014:281.
- 32 See Case C-256/11 *Dereci* [2011] ECR 2011-00000; See also Van Eijken.
- 33 C-265/13, *Marcos* ECLI:EU:C:2014:187, para. 33.
- 34 Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR 2005 I-09981; Case C-555/07 *Seda Küçükdeveci v. Swedex GmbH and Co* [2010] ECR 2010 I-00365.
- 35 Case 26-62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.
- 36 Case 93-71 *Orsolina Leonesio v. Ministero dell'agricoltura e foreste* [1972] ECLI:EU:C:1972:39.
- 37 Case C-91/92 *Faccini Dori* [1994] ECR 1994 I-03325.
- 38 Case 43/75 *Defrenne v Sabena* [1976] ECR 455; see also, p. 57.
- 39 Case 36-74 *Walrave* [1974] ECR 1974-01405; Case C-415/93 *Bosman* [1995] ECR 1995 I-04921.
- 40 Case C-281/98 *Angonese* [2000] ECR 2000 I-04139.
- 41 Case C-438/05 *Viking Line* [2007] ECR 2007 I-10779.
- 42 Case 36-74 *Walrave* [1974] ECR 1974-01405; Case C-415/93 *Bosman* [1995] ECR 1995 I-04921; Case C-438/05 *Viking Line* [2007] ECR 2007 I-10779; Case C-341/05 *Laval* [2007] ECR 2007 I-11767.
- 43 For instance, Case C-411/98 *Ferlini* [2000] ECR 2000 I-08081.
- 44 Case C-94/07 *Raccanelli* [2008] ECR 2008 I-05939.
- 45 Case C-281/98 *Angonese* [2000] ECR 2000 I-04139.
- 46 This dividing line has been marked by the terms ‘imperium’ and ‘dominium’, or public and private interests.
- 47 Case C-91/92 *Faccini Dori* [1994] ECR 1994 I-03325.
- 48 Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR 2005 I-09981; Case C-555/07 *Seda Küçükdeveci v. Swedex GmbH and Co* [2010] ECR 2010 I-00365.
- 49 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22–26; Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 Dec. 2000, pp. 16–22; Council Directive 2004/113/EC of 13 Dec. 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 Dec. 2004, pp. 37–43; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26 July 2006, pp. 23–36.
- 50 Case C-282/10, *Dominguez* EU:C:2011:559, Opinion of AG Trstenjak, para. 80.
- 51 Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT (AMS)* [2014] ECR 0000, Opinion of AG Cruz Villalón, para. 31.
- 52 Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßmann* [2018] ECLI:EU:C:2018:871; Case C-684/16

- Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu* [2018] ECLI:EU:C:2018:874.
- 53 Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn* [2018] ECLI:EU:C:2018:871, paras. 88–90.
- 54 Case 43/75 *Defrenne v Sabena* [1976] ECR 455.
- 55 Case 26-62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.
- 56 Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 39.
- 57 Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 32.
- 58 Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 32.
- 59 Case C-131/2 *Google Spain v. AEPD and Mario Costeja González* [2014] ECLI:EU:C:2014:317.
- 60 Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 31.
- 61 Case C-131/2 *Google Spain v. AEPD and Mario Costeja González* [2014] ECLI:EU:C:2014:317.

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