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Does the EU Charter of Fundamental Rights have Added Value for Social Security?

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Abstract

In this contribution the added value of the Charter in the area of social security is examined. It is concluded that Article 34 of the Charter has not created fundamental rights that can be invoked in order to improve the legal position of claimants of social security or of social assistance. This conclusion is no surprise, given the express provisions limiting the interpretation of the Charter. Instead, it is interesting to note that the Charter has, in particular, added value where the scope for interpretation has not been explicitly limited, that is where provisions are applied that are not implemented by the instrument that is disputed in a particular situation. A second added value is the doctrine of horizontal effect, which means that in some cases provisions of Directives can also be invoked in horizontal situations. This is of relevance, particularly in non-statutory social security cases. Also, the Court of Justice itself seems to have had its difficulties in applying the Charter. It is difficult to understand the consistency of the *Dano* and *CG* judgments, where in the *Dano* the Court claimed not to have jurisdiction to interpret the non-specific provisions in the case, yet in *CG,* it did so without having even been asked. In this contribution it is undertaken to analyse these judgments with a view to better understanding the added value of the Charter.

Keywords

Charter of Fundamental Rights, social security, Court of Justice, fundamental rights, horizontal effect

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1. Introduction

The Charter of Fundamental Rights of the EU requires, *inter alia*, the recognition and respect of the entitlement to social security and social services (Article 34).[1] Other Charter provisions may also be relevant to social security and social assistance, such as the provision that human dignity is inviolable, the right to property, the prohibition of discrimination, the guarantee of equality between men and women and the right to freedom of expression.

Since 1 December 2009, the date of entry into force of the Treaty of Lisbon, Article 6(1) TEU has given the Charter of Fundamental Rights of the EU the same value as the Treaties, thus expressly granting it the status of primary EU law. In view of this upgrade and a couple of recent judgments of the Court of Justice in which the Charter was interpreted,[2] the question of the added value of the Charter for social security deserves a thorough examination.

A recent contribution on this topic is contained in Issue 24(1) of this journal by Jaan Paju, who essentially investigated whether Article 34 has led the Court of Justice to accept social security and social assistance as fundamental rights. He came to the conclusion that the Charter 'cannot in itself give rise to any substantive social security rights beyond those stemming from Regulation 883/2004'. He therefore doubts whether the Charter's principles of social security can play a role and is quite pessimistic on the added value of this document. Apparently, in answer to the question in the title of his contribution, he is of the view that the Charter 'does not deliver'.

Although it is certainly interesting to examine whether social security and social assistance entitlements can be created on basis of the Charter, being a fundamental rights document, the conclusion that this is not the case can by no means come as a surprise. After all, several provisions of the Charter, including Article 34, contain the clause that the right is recognised and respected 'in accordance with the rules laid down by Union law and national laws and practices.' Its Article 51(2) provides that 'the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. The strict limitations to the applicability of the Charter set by the legislature have seriously restricted the Court of Justice in basing new entitlements for claimants or obligations for States on the Charter.

Therefore, the question of the added value can, or perhaps even should, be examined in another way. Instead of expecting fundamental rights to flow from Article 34, this contribution will analyse judgments of the Court in order to determine whether interpretations are made that cannot be found in other EU instruments and thus have added value. This examination is not restricted to Article 34, but also looks at how other Articles of the Charter are interpreted in social security cases and the meaning they have in these cases.

This approach may be seen as modest by those who expected Article 34 to become a source of fundamental rights. However, outcomes of this examination are valuable since they can contribute to a maximumal use of the Charter to realise a social Europe, *inter alia*, by showing how it can be addressed in national court procedures and in future requests for preliminary rulings of the Court of Justice.

1. [2000] *OJ*, C 364, https://www.europarl.europa.eu/charter/pdf/text_en.pdf. The website of the European Union Agency for Fundamental Rights (FRA) is very useful, listing case law on each of the Charter provisions, https://fra.europa.eu/en/caselaw-reference/cjeu-case-c-35615-judgment.
2. For older literature see Ward (2004), Kailia (2012), Lenaerts (2012), Lock (2019) and Zetterquist (2011).

In order to provide an introduction to the interpretation of the Charter, I shall first discuss the wording and conditions of application of the Charter (Section 2). After this I shall introduce Article 34 (Section 3). Subsequently, recent judgments of the Court of Justice will be examined, which show some possibilities and impossibilities in respect of provisions of the Charter other than Article 34 for social security cases (Sections 4 and 5). In Section 6, I will go into the horizontal effect of certain provisions of the Charter; and Section 7 will present conclusions.

2. Conditions for applicability of the Charter

2.1 The fundamental rights in the Charter

The Charter contains 50 Articles, formulating rights, principles, prohibitions, assignments to Member States and recognising rights. These are all called fundamental rights. The Articles are followed by provisions governing the Charter's interpretation and application. A significant number of fundamental rights are in the field of labour and social security; some Charter provisions have a well-known corresponding instrument implementing it, such as Directive 2000/78 as counterpart of Article 21.[3]

Provisions of the Charter may differ significantly from each other in their wording. These variations were intended by the drafters. They extensively deliberated on the various drafts.[4] Moreover, it was their intention, and that of the legislature, — as the Charter itself explicitly states (Article 51(2)) — not to create new powers or tasks for the Union. This point of departure has been elaborated in the wording of the Charter provisions.

Since in current EU law there are differences in the exceptions, conditions, entitlements and the impact of other areas of law (e.g. economic freedoms) in how a particular right is elaborated, these differences are reflected in the use of the terms that describe the relationship between a particular fundamental right and the individual. Consequently, some provisions use the term 'right'; others use 'principle' or 'recognition'. Some confer 'a right to freedom or protection'; others 'guarantee' or 'recognise' a right.

Moreover, some provisions contain an explicit reference to EU and national law – for example 'in accordance with Union law and national laws and practices' - which makes clear that the Charter provision has to take the law into account and is restricted by it. An additional restriction is set out in Article 52(2), which provides that rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

A fundamental right that has few or no exceptions in EU law is worded in 'stronger' terms – that is, it does not refer to EU and national law and uses terms like 'entitlement' instead of, for instance, 'recognition' - than rights which the legislature so far has subjected to conditions. For instance, the prohibition of discrimination in employment on grounds of sex, religion, race etc. is a rather absolute one, to the extent that only very limited exceptions apply, explicitly laid down in corresponding Directives.[5] Consequently, Article 21(1) of the Charter uses strong terms: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language,

3. Directive establishing a general framework for equal treatment in employment and occupation. Implementing instruments have often already been adopted before the Charter came into force.
4. See Dorssemont et al (2019).
5. Directives 2006/54 (Equal opportunities and equal treatment of men and women) and 2000/78.

religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

In contrast, discrimination on ground of nationality is subject to the existing EU rules: according to Article 21(2): 'Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.

2.2 Conditions for the applicability of Charter provisions

There are strict conditions for the applicability of the Charter.

EU institutions. According to its Article 51 the provisions of the Charter are addressed to the institutions and bodies of the EU. The European Commission, the Parliament and the Council (but not only them; all EU institutions and bodies are addressed, including, for example, EU agencies) should therefore act, when drafting their legislative instruments and taking actions, in accordance with the Charter.[6] This means that any regulation and action must respect the rights recognised in the Charter, such as equality between men and women, the rights of the child and the freedom to choose employment.

Member States. The Charter is also addressed to the EU Member States, but only 'when they are implementing Union law'. According to the explanatory memorandum to the Charter, the term 'implementation' should be understood broadly[7] and this interpretation is followed by the Court of Justice.[8] According to this broad interpretation, the Charter provisions apply to Member States when they 'act within the scope of Union law'.

They 'act within the scope of EU law' when implementing EU law, such as a Directive, in national law. In the broader interpretation this is also the case when certain national measures, decisions or acts *fall within the scope of EU law*. An example from the case law is the *YS* judgment,[9] concerning a pension scheme of a public undertaking that made a distinction on the basis of age (see Section 5).[10] Age discrimination in working conditions falls within the scope of Directive 2000/78, and as a result the issue is within the scope of EU law, even though the undertaking concerned did not implement EU law, but, on the contrary, allegedly infringed it. Also, a rule or act that can be seen as recognition of an EU law instrument or Treaty provision is considered as implementation of EU law.[11] As a result of this broad interpretation, the Charter can be applicable in quite a broad range of cases. Some examples of this application are given in Sections 4 and 5.

Even though the term 'implementation of EU law' has a broad interpretation, an important condition has to be satisfied before a particular act or rule can be considered as such implementation: there has to be a direct link between the rules of EU law that are invoked as part of the argument that EU law is being implemented on the one hand, and the national measure that is challenged, on the

6. This is the case also when they act outside the EU legal framework (Cases C-8/15 P to C-10/15 P, *Ledra Advertising*, ECLI:EU:C:2016:701).
7. [2007] *OJ* C 303. According to Article 6(1) sentence 3 TEU and Article 52(7) of the Charter, the explanations referred to in the Charter 'shall be given due regard by the courts of the Union and of the Member States'.
8. Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, see also Fontanelli (2013) and Hancox (2013).
9. Case C-223/19, *YS,* ECLI:EU:C:2020:753.
10. The acts of a public undertaking can, under some conditions, be considered as those of a Member State.
11. Case C-709/20, *CG,* ECLI:EU:C:2021:515.

other. That link must go beyond the fact that the matters in question are related to each other or that one matter has indirect influence on the other.

In the *Hernández* judgment[12] the Court held that *the mere fact* that a national measure falls within an area in which the European Union has powers cannot bring that measure within the scope of EU law and therefore lead to the application of the Charter. For the latter's applicability it is required that the EU provision at stake imposes direct obligations on Member States. This requirement therefore asks for a precise analysis of the dispute.

By way of illustration, the *Hernández* judgment concerned Spanish legislation intended to mitigate, for employers, the effects of the duration of dismissal procedures before the courts. Under the legislation, it was provided that when procedures lasted more than 60 days, the State had to compensate the wages of the employees involved. However, this obligation for the State only existed if the dismissal was declared *unlawful*, and not if it was declared *void*. Is this difference contrary to Article 20 of the Charter (equality before the law)? The Court of Justice remarked that under the Spanish rules, in the event of their employer's insolvency, the employees could claim their wages from the relevant fund. Although these rules applied in cases of insolvency, which suggests a link with Directive 2008/94 (the Insolvency Directive), this does not mean that the Spanish rules implemented EU law. This is because the aim of the national legislation was not to partially safeguard employees' wages in the event of employer's incapacity to pay, but to compensate employers in the event of lengthy proceedings. Hence, the Spanish scheme did not fall within the scope of the Insolvency Directive or another Directive, and did not implement EU law. This condition means that law practitioners must analyse their case very carefully in order to decide whether the Charter is applicable.

If the Charter applies, all of its provisions are applicable, that is to say, all those that are relevant to the resolution of the dispute concerned. The Charter provisions that are thus invoked - that is, the ones that are not implemented by the applicable EU instrument - are referred to here as *non-specific articles*. If, for example, age discrimination in a pension scheme is challenged (implying that Directive 2000/78 is relevant), the prohibition of discrimination under Article 21(1) of the Charter is the specific fundamental right involved. Provisions such as those on the protection of dismissal, right to information, right to employment and property protection can, where relevant in view of the circumstances of the case, be invoked as non-specific articles in order to assess the alleged discrimination.[13] However, the entry ticket of — in this example — age discrimination cannot serve to challenge, with the help of the Charter, a completely different aspect of the legislation in question than discrimination, such as compulsory affiliation to the pension scheme. For the latter issue, it has to be investigated as separate question, whether the Member State, when regulating this aspect, acted within the scope of EU law.

2.3 The relationship between Charter provisions and EU instruments implementing them

From the case law follows another restriction to the interpretation of the Charter. This is the approach of the Court of Justice according to which, when they adopt measures which come within the scope of application of a Directive which gives specific expression to a fundamental right provided for by the Charter, the Member States must comply with that Directive. It

12. Case C-198/13, *Hernández,* ECLI:EU:C:2014:2055.
13. See e.g., Case C-223/19, *YS,* ECLI:EU:C:2020:753.

follows, the Court has ruled, that the question referred by a national court must be examined in the light of that Directive.[14] In other words, if a Directive gives expression to a fundamental right of the Charter, the provisions of that Directive define the contents of that right.[15]

This seriously restricts the meaning of the Charter, as the Court does not test whether a Charter provision requires stronger and/or more rights than laid down in the instrument implementing it. This is the case even when a Directive gives fewer or other rights than the corresponding fundamental rights in international conventions. For Article 34 of the Charter, this was confirmed in several judgments (see the following section).

3. Article 34 of the Charter: social security and social assistance

3.1 General

The Charter provision most specifically addressing social security and social assistance, Article 34, reads:

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

All of these paragraphs refer to EU law and national law. The first paragraph is addressed to the Union, and requires recognition and respect of the entitlement to social security benefits. It does not guarantee a right to benefit in case the risks mentioned materialise. Since the EU has not adopted minimum provisions on social security, apart from recommendations, this provision can be applied only when a particular EU instrument, or the implementation of this instrument in national law, impacts on social security rights. By means of a hypothetical example: suppose that a particular EU rule (outside the social security area) has the effect that it reduces or terminates social security benefits being paid, Article 34 may be relevant. Another example is that an EU recommendation suggests cutting benefits in order to promote the activation of beneficiaries. Article 34 requires that in such a case, entitlement to social security benefits and services must be respected. What the actual impact will be remains to be seen and will depend on the actual case.

The second paragraph of Article 34 is not addressed to the EU, but gives ‘everyone’ residing and moving legally within the European Union the entitlement to social security benefits and social advantages in accordance with Union law and national laws and practices. This provision is

14. Case C-530/13, *Schmitzer,* ECLI:EU:C:2014:2359.
15. See also White et al. (2014).

elaborated in Regulation 883/2004 and Directive 2004/38 and several Directives relevant to third-country nationals.

The third paragraph recognises and respects the right to social and housing assistance for all those who lack sufficient resources. As was already remarked, this right is subject to EU national law and practices. In Section 3.3, we will see the relevance of this Article in some cases.

3.2 *The Charter and the Dano* judgment

An important part of Paju's (2022) examination of the meaning of Article 34 concerns the way the Court dealt with it in the *Dano* judgment.[16] This is a landmark case for the access of economically inactive persons to social assistance[17] in the host country. In this judgment the Court interpreted Directive 2004/38 as giving the right to equal treatment on ground of nationality to economically inactive persons only if they satisfy the condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence. It followed that Member States are allowed to exclude them on ground of nationality from social assistance and comparable benefits until they obtain the right to permanent residence.

I will not discuss this judgment as such here; an abundance of (very critical) contributions have already been published on this and related judgments.[18] Instead, I will examine how the Court dealt with the Charter in *Dano*.

The national court had asked whether the provision of special non-contributory benefits which guarantee a level of subsistence for Union citizens[19] may be limited to the provision of the necessary funds for return to the home State, or whether Articles 1, 20 and 51 of the Charter require more extensive payments.

The Court of Justice replied that Article 51(2) of the Charter means that it does not extend the field of application of EU law beyond the powers of the EU or establish any new powers or tasks for the EU, or modify powers and tasks as defined in the Treaties. Since neither Regulation 883/2004 nor Directive 2004/38 define the conditions for benefits, Member States, when laying down the conditions for the grant of special non-contributory cash benefits, are not implementing EU law and the Court therefore does not have jurisdiction to answer this question, the Court ruled.

Note that the national court did not ask how the exclusion of economically inactive persons from social assistance must be interpreted in light of the Charter, but asked how the subsistence level should be guaranteed. Apparently, the Court of Justice chose to answer the question strictly according to its actual wording and did not reinterpret it in order to discuss it in relation to Directive 2004/38.

I will come back to this issue in Section 4.3 and show that the Court has approached the Charter differently in other judgments, with the result that the conclusion is premature that the Charter has no added value for social security and social assistance on the ground that the EU legislature does not have the powers to lay down conditions for benefits.

16. Case C-333/13, *Dano,* ECLI:EU:C:2014:2358.
17. Including benefits assimilated with social assistance for the purpose of the Directive (the so-called special non-contributory benefits).
18. E.g., Verschueren (2014); Verschueren (2015); Verschueren (2021); Pennings (2018) and Jacqueson and Pennings (2019).
19. See note 17.

3.3 Article 34 in cases other than Dano

In cases where the Court did not deny its jurisdiction to answer questions on the application of the Charter to a social security case, it followed the approach mentioned in Section 2.2, that is, that a question on a right mentioned in the Charter on which a Directive or other instrument gives specific expression must be examined in the light of that instrument. Examples are the *Melchior*[20] and *My* judgments.[21] In the *UB*[22] and *M* judgments,[23] we find a similar approach.

In these cases, the Charter had no added value. However, the *Istituto nazionale della previdenza sociale (INPS)* judgment[24] shows that the outcome can also be different. In a national procedure, the Italian Constitutional Court had to examine whether the exclusion by national legislation of some categories of third-country nationals from the entitlement to childbirth and maternity allowance was contrary to the Italian Constitution and the EU Charter. In order to answer this question, the Constitutional Court asked the Court of Justice about the relevance of Article 34 of the Charter to the case. The Court of Justice started by reiterating that when an issue lies within the scope of a Directive that gives specific expression to a Charter provision, the question concerned must be answered on the basis of that Directive. The relevant provision here was Article 12(1)(e) of Directive 2011/98, that requires equal treatment of third-country nationals with nationals of the host State with regard to branches of social security as defined in Regulation 883/2004. Article 34(2) of the Charter provides that *everyone* (emphasis added) residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with EU law and national laws and practices. This Article would therefore not allow a distinction between categories of third-country nationals, as was made by the Italian law.

However, what is meant by 'social security benefits and social advantages' in Article 34(2)? Is it relevant that Article 34(1) does not mention childbirth and maternity benefits? The Court of Justice ruled that since the disputed provision of the Directive refers to Regulation 883/2004, it must be held that this Article gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter.

By means of this U-turn, the Court required, on the basis of Article 34(2) Charter, equal treatment for all categories meant in the Directive as regards the benefits covered by the Regulation 883/2004. The disputed benefits were therefore ruled as being within the Directive's scope.

Consequently, the Court's approach not only means that a particular Charter provision must not be interpreted differently from the implementing Directive, but also that the provisions of a Directive implementing a Charter provision may be relevant to another Directive implementing that same Charter provision.

Another judgment in which Article 34 played a role is *Kamberaj.*[25] This concerned the legislation of an Italian province which provided that the funds for housing benefits for low-income tenants would be allocated to the three linguistic groups in that province in proportion to the weighted average of their needs. In 2010, Kamberaj was informed that his application for housing benefit was rejected, since the funds for third-country nationals were exhausted. This

20. Case C-647/13, *Melchior,* ECLI:EU:C:2015:54.
21. Case C-293/03, *My,* ECLI: EU:C2004:821.
22. Case C-447/18, *UB,* ECLI:EU:C:2019:1098.
23. Case C-284/15, *M,* ECLI:EU:C:2016:220.
24. Case C-350/20*,* ECLI:EU:C:2021:659.
25. Case C-571/10, ECLI:EU:C:2012:233.

was contrary to Article 11(1)(d) of Directive 2003/109 concerning the status of long-term residing third-country nationals, which provides that these persons shall enjoy equal treatment with nationals as regards social security, social assistance and social protection as defined by national law.

The Court considered that even though Member States still have the power to define their national system, as is expressly mentioned in the Directive, according to its third recital the fundamental rights and principles have to be observed. Article 34(3) of the Charter requires Member States to 'ensure a decent existence for all those who lack sufficient resources'. Consequently, the national court had to assess, taking this into account, whether housing benefits fell within one of the categories of Article 11(1)(d).

Suppose however, the Court of Justice continued, that the national court found that the answer to the latter question was in the affirmative. In such a case the argument of the province that Article 11(4) allows Member States to limit equal treatment in respect of social assistance and social protection to *core benefits* would still have to be examined. The Court made another reference to Article 34(3) Charter, since it requires recognition and respect of the right to social and housing assistance so as to ensure a *decent existence* (emphasis added). The Court concluded, in a double negation, that in so far as the benefit in question fulfilled the purpose set out in that Article, it could not be considered, under EU law, as not being part of the core benefits within the meaning of Article 11(4). Finally, it was for the referring court to decide the case.

4. The relevance of non-specific provisions for exclusion of EU citizens from social assistance

4.1 The CG judgment

Like *Dano*, the *CG* case[26] also concerned an economically inactive person who claimed access to social assistance, but this time the Court applied provisions of the Charter to the case. The judgment concerned a dispute that took place during the transitional period following the departure of the United Kingdom from the EU. Since EU law still had to be applied to this case, the judgment is part of general EU law and thus also of general relevance.

CG was a Dutch-Croatian woman and a mother of two young children, who moved to Northern Ireland in 2018. She had never carried on an economic activity in the United Kingdom. She experienced domestic violence and applied for Universal Credit, a UK welfare benefit. Since she had resided in the UK for less than five years at that time, she would have a right of residence under Directive 2004/38 only if she had sufficient means of subsistence, as discussed in Section 3.2.

In this case the right to residence was not based on the Directive but on the basis of the EU Settlement Scheme. Although the name suggests otherwise, this was a national UK law, which granted EU citizens who had lived in the UK for less than five years a temporary right of residence of five years, which was not subject to a condition relating to means of subsistence. For her claim to Universal Credit, however, it was relevant that the Universal Credit Regulation provided that persons with a residence permit under the Settlement Scheme were not entitled to this benefit.

CG argued that the fact that benefit was refused on the ground that her (temporary) residence status was not considered as 'habitual residence' as required by the UC Regulation, constituted

26. Case C-709/20, ECLI:EU:C:2021:515. See also O'Brien (2021).

discrimination on basis of nationality forbidden by Article 18 TFEU. The Court of Justice replied that Article 18 TFEU applies independently only to situations governed by EU law with respect to which the Treaty does not lay down specific rules on non-discrimination. Also, Article 20(2) TFEU and Article 21 TFEU make the rights conferred on EU citizens subject to the limitations and conditions laid down in the Treaties and measures adopted to give them effect, in particular Article 24 of Directive 2004/38. Therefore, the latter provision has to be applied. As a result, an EU citizen can claim equal treatment on the basis of Article 18 only if his or her residence in the host State complies with the conditions of Directive 2004/38.

In fact, this reasoning followed that of the *Dano* judgment and thus excluded recourse to the non-discrimination provisions in order to access social assistance.[27] The Court added that this assessment could not be called into question by the fact that CG had a right to temporary residence under the British national scheme.

Hereupon, the judgment took a special turn, when the Court considered that by their decision the UK authorities recognised the right to reside freely within the territory conferred on EU citizens by Article 21(1) TFEU, without relying on the conditions and limitations of that right laid down in Directive 2004/38. It follows, it continued, that when granting that right in those circumstances, the authorities of the host Member State have implemented the provisions of the TFEU on the right to free movement of EU citizens and must also comply with the provisions of the Charter.

This interpretation of the condition for application of the Charter that a Member State 'is implementing Union law' fits with the broad approach, mentioned in Section 2.2, that 'acting of a Member State within the scope of EU law' is included by this term. Consequently, the situation of CG fell within the scope of EU law because she exercised the right to free movement and the UK recognised the right to free movement by granting her a right of residence. Thus, implicit recognition of a Treaty provision by granting a national authorisation, outside the framework of the applicable Directive, to reside in the host State, also gives access to the Charter.

4.2 The application of the Charter in CG

In line with its approach that when the Charter is applicable, all of its provisions have to be respected, the Court first referred to Article 1 of the Charter, which states that human dignity must be respected and protected. The host Member State must therefore ensure, according to the Court, that a Union citizen who has exercised his right to freedom of movement and has a right of residence on the basis of national law and who is in a vulnerable situation, can live under dignified conditions. The Court further mentioned Article 7 of the Charter, which recognises the right to respect for private and family life; and Article 24(2), which requires the best interests of the child to be taken into account in all activities involving children.

The Court added that the person concerned was a mother of two young children and had no means of supporting herself or her children. In such a situation, the competent national authorities may reject a request for social assistance only after they have ascertained that that refusal does not expose the citizen concerned and the children for which he or she is responsible to a specific and real risk of breaching their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter. It

27. Wollenschläger (2021) criticises this argument on the ground that the Court did not apply a proportionality test when applying Article 18, even though proportionality is an important principle of EU law, also codified in the Charter itself (Article 52(1)).

is for the referring court to determine whether the persons concerned are actually and immediately eligible for assistance other than Universal Credit. If that is not the case, this allowance must not be refused.

4.3 *Dano* revisited?

The *CG* judgment shows that terms such as 'respect' in Charter provisions like Articles 1 and 7 do not prevent these provisions from actually being applied in a case. Although the wording of the Articles is very important, in particular when it is to be examined whether Charter provisions have horizontal effect (see Section 6), when Charter provisions are invoked to interpret particular laws, 'weakly-formulated' fundamental rights are also relevant.

Secondly, it is also clear that Charter provisions such as mentioned in *CG* do not have an independent meaning in the sense that there is a right to a certain minimum subsistence. Ultimately, it is for the national court to assess whether means other than Universal Credit exist to respect the relevant fundamental rights. However, if there is no such safety net, the applicable social assistance allowance, Universal Credit, must not be refused, which is a clear outcome of the case.

Thirdly, the Court considered that even though the UK did not implement Directive 2004/38, the Charter was applicable, since the UK authorities granted CG a right of residence on their territory conferred on EU citizens by Article 21(1) TFEU.[28] Could there be another conclusion than that when Directive 2000/34 is actually implemented, the Charter is also applicable? Otherwise, the reasoning in *CG* cannot be understood: an approach according to which the Charter is applicable when the relevant implementing instrument is not used, and is not applicable when the instrument is applied, does not make sense.

The Court's considerations in *Dano* that the Charter is not applicable are therefore not compatible with *CG*, or do not, in any case, apply outside the response to the German court's question on how high the benefit should be for Ms Dano. It can be concluded that the argument that since neither Regulation 883/2004 nor Directive 2004/38 define the conditions for benefits, Member States, when laying down the conditions for the grant of special non-contributory cash benefits, are not implementing EU law is not decisive for the relevance of the Charter in a case where social assistance is refused to economically inactive persons. Since in *Dano* the referring court also requested an interpretation of non-specific rights (i.e., Articles 1, 20 and 51 of the Charter), it remains difficult to understand why the Court considered that it could not answer this question in *Dano*, whereas it did so in *CG*, even though the referring court did not mention these Articles in its questions.

One can wonder why the Court argued, in *CG*, that the UK did not implement Directive 2004/38 in this case and still acted within the scope of EU law. The fact that the UK did not make use of a particular condition of the Directive (i.e., on sufficient resources) is not a very useful criterion. There may be numerous examples of Member States not implementing all conditions of a Directive when they do not have to; are these all instances of not implementing Directives? Moreover, Directive 2004/38 leaves it to the Member States to set out more favourable provisions (Article 37), so why is the non-implementation of the condition decisive for deciding that the instrument is not implemented?

28. Wollenschläger (2021) criticises the conclusion that CG made use of the right to free movement of Article 21, since this right is subject to the limitation and conditions of the Treaty. This criticism seems to be a little farfetched: even though a right is subject to conditions and limitations, it exists as a right.

Moreover, why is this relevant? After all, regardless of the distinction, the Charter is applicable in *CG*. An explanation may be that the argument that Directive 2004/38 was not implemented in *CG*'s situation was used in order not to examine the issue in the light of the Directive. This allowed the Court to invoke Articles 1 (dignity), 7 (family life) and 24(2) (the interests of the child), non-specific Articles which functioned as a backdoor to ensuring access to social assistance. Since the UK had not included a condition on sufficient resources, the Court apparently felt free enough to invoke Charter provisions that could lead to the decision that social assistance had to be granted. Still, the question remains why the Court did not refer to Article 34(3), as it did in *Kamberaj*. By doing so, the Court would have given this Article a particular meaning in cases like *CG* (and *Dano*), but apparently, that was a bridge too far.

Since we have to conclude that the Charter is not excluded from being relevant in cases like *Dano*, the question arises as to what this could mean. Suppose that the legislation implementing the right to reside of economically inactive persons makes them subject to forced labour; makes distinctions on basis of sex, religion or ethnic descent; or requires payment for placement services. It is indisputable that non-specific provisions of the Charter address such situations.

But what about equal treatment and access to social assistance? Following the approach that when a provision of the Charter is implemented in an EU instrument, the issue concerned has to be examined by means of that instrument only, it is likely that if Directive 2004/38 is implemented, the right to social assistance must, in the view of the Court, be assessed in the light of that Directive only. Therefore, in *Dano*-like cases the Court will probably be reluctant to open the backdoor of Charter provisions, such as on the right to human dignity, to give access to social assistance. However, it remains problematic for the Court to give a convincing argument that the Charter provisions mentioned in *CG* - dignity, family life and the rights of the child - are not to be examined in *Dano*-like cases. Moreover, although it is undisputable that Member States have retained the competence to define the conditions and levels of their benefit systems, they must observe EU law, as was confirmed, *inter alia*, in *Kamberaj*. Therefore, the question of why the standard of 'decent existence' of Article 34(3) is not relevant in *Dano*-like cases must also still be answered.[29] These remain important questions to be asked in future preliminary procedures before the Court of Justice.

5. The relevance of non-specific provisions in discrimination cases

5.1 The YS judgment

The *YS* judgment[30] is an example of a case where questions on a whole range of Charter provisions were asked. The answers of the Court show which criteria are relevant for their interpretation. The case concerned a breach of a pension commitment by an employer. The company in question was 51% owned by an Austrian *Land* and was therefore considered to be a public undertaking. As is consistent with case law, even if a Member State implements EU law in the form of a public undertaking, it is considered 'implementation of EU law by a Member State'. The company concerned

29. Absenger and Blank (2018: 161 ff) describe how several German courts sought, after the *Dano* judgment, a basis in the German Constitution and the European Convention on Social and Medical Assistance on which to grant subsistence benefits to persons in the position of Ms Dano. Apparently, they felt that these EU citizens should not be excluded from protection.

30. Case C-223/19, *YS,* ECLI:EU:C:2020:753.

levied additional contributions on the basis of Austrian legislation that was meant to ensure the financial sustainability of pensions, and this resulted in a limitation of the annual increase in occupational pensions. This affected older people more than young people, and women more than men. Therefore, it was challenged for being indirectly discriminatory on grounds of age and gender. Since these discriminations fall within the scope of Directives 2000/78 (age discrimination) and 2006/54 (sex discrimination), the implementation of EU law was at stake. Since EU law imposes specific obligations on the Member States to combat discrimination and these Directives correspond to Article 21 of the Charter, the *Hernández* criterion for applicability of the Charter was fulfilled.[31]

First of all, the Court examined the non-discrimination provision, Article 21. It ruled, however, in line with the case law mentioned in Sections 2.3 and 3, that since the national legislation falls within the scope of Directives 2004/56 and 2000/78, the questions on Article 21 of the Charter relating to age and sex discrimination must be examined solely from the point of view of these Directives. Consequently, the application of Article 21 did not constitute an additional test of the disputed scheme against the Charter and the Court further argued that the scheme did not constitute discrimination on the aforementioned grounds.

5.2 The application of the non-specific provisions of the Charter

Subsequently, the questions of the referring court on some non-specific provisions of the Charter were examined. One was the prohibition of discrimination on grounds of property (also mentioned in Article 21). The national court asked whether national rules that only place a small group of pension recipients under the obligation to make financial payments to their former employer are discriminatory on the basis of property. In its reply the Court implicitly accepted that such treatment could be regarded discrimination on ground of property. It is interesting to note that there are no EU Directive provisions dealing with this ground, so the Court had to develop its own criteria for justifying the distinction. It used the same grounds of justification as in the case of unequal treatment on the basis of sex: in this situation there was a legitimate aim, namely, to ensure sustainable financing and the reduction of differences in levels of publicly-funded pensions; the measures were appropriate to achieve the objective; and did not go beyond what is necessary for that purpose.

The freedom to conduct a business, mentioned in Article 16 of the Charter, was another non-specific Article that was addressed by the referring court. This fundamental right led to a different test than the application of the discrimination provisions. Freedom to conduct a business includes freedom of contract, as had been decided in previous case law,[32] and this includes the freedom to fix or agree the price for a service. It follows that legislation such as the Austrian legislation constitutes a limitation on the freedom of contract in so far as it requires the undertakings concerned to pay a pension lower than the contractually agreed amount.[33] However, the freedom to conduct a business does not constitute an unfettered prerogative, the Court added, but must be examined in the light of its function in society. It may thus be subject to interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. In addition, in accordance with

31. See Section 3.
32. Case C-283/11, *Sky Österreich,* ECLI:EU:C:2013:28.
33. It is remarkable that this fundamental right, which is aimed at the employer,was invoked in this case to assess the claim from the employee's perspective.

Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the latter must be provided for by law, must respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. The Court decided that these criteria were met in *YS*. As a result, it did not find that Article 16 of the Charter was infringed.

Not only discrimination on ground of property was invoked, but also the provision on *protection* of the right to property (Article 17), to which no EU Directive corresponds either. In the view of the Court, the conclusion of a contract relating to an occupational pension generates a proprietary interest with respect to the recipient of that pension. By withholding part of the contractually agreed amount and the non-application of the contractually agreed indexation, the proprietary interest was affected. However, the Court continued that the protection of property is not absolute and can therefore not be interpreted as entitling a person to a pension of a particular amount. Still, any limitation on the right to property must be provided for by law and must respect the essence thereof. In compliance with the principle of proportionality, it must be necessary and actually meet the objectives of general interest recognised by EU. When applying these criteria, the Court considered that the limitations on the pension rights of *YS* were provided for by law and they limited only part of the total amount of the pensions. Therefore, they could not be considered to affect the essence of those rights. Moreover, subject to verification by the referring court, the restrictions appeared to be necessary and to actually meet the objectives of general interest of ensuring the long-term funding of State-funded retirement pensions and narrowing the gap between the levels of those pensions.

Although the tests against the non-specific provisions did not lead to a different outcome than the test on discrimination on ground of age and sex, the criteria for these non-specific rights are not the same. As a result, in circumstances other than in those of *YS*, there may have been a different outcome, and the application of non-specific provisions of the Charter can therefore have an added value.

6. The relevance of the Charter in disputes between private parties

As a general rule, an individual cannot rely on a provision of a Directive in a dispute with another individual, since Directives are addressed to Member States.[34] It is for the national legislature to amend the legislation and, where appropriate, to compensate the person concerned. This may, of course, be unsatisfactory for the individuals concerned.

One method for addressing this problem is a requirement of the Court of Justice for national courts to interpret a national provision in conformity with the Directive concerned. In this way, a Directive can indirectly work horizontally. Sometimes judges find that such an EU-law-conforming interpretation is impossible, because it goes against the letter of the national law concerned. A *contra legem* interpretation of national law is not required by the Court of Justice.[35]

However, if a Directive implements a fundamental right with horizontal direct effect, the Directive provision concerned can be invoked against another individual. The fundamental right

34. Including public undertakings, see e.g., the *YS* judgment.
35. Case C-414/16, *Egenberger,* ECLI:EU:C:2018:257.

concerned can then be said to give indirect horizontal effect to that provision. An example from the older case law is that the principle of non-discrimination on grounds of age, which can be found, *inter alia*, in the European Convention on Human Rights, made it possible to disapply, in a private dispute, provisions of national legislation which were contrary to Directive 2000/78.[36]

Since the Charter has become legally binding, the Court has also recognised horizontal effect of some of the provisions of the Charter. Whether this is the case depends on the wording of the provision concerned, so it is certainly not the case for all provisions.

In order to have horizontal effect, the Charter provision concerned must be formulated in a mandatory and unconditional manner. In the *AMS* judgment,[37] for instance, the Court held that Article 27 of the Charter does not satisfy this condition. The Article 27 provision on the right to information and consultation of employees within the undertaking is not formulated unconditionally, but refers to 'the cases and under the conditions provided for by Union law and national laws and practices…'. The wording of Article 27, which is not complete enough to give an unconditional and mandatory right, precludes independent application, which cannot be repaired by reading the Article in conjunction with the provisions of Directive 2002/14 that elaborates it. In other words, a Charter article has to be sufficient in itself to confer a right on individuals in order to be able to rely on in horizontal relationships.

Secondly, in order for a Charter provision to give indirect horizontal effect to a provision of a Directive, the situation must fall within the scope of EU law. This is the case if national legislation implements a Directive or is covered by a Directive; for example, the pension legislation in *YS* was covered by Directive 2000/78.

Thirdly, the dispute in the case at issue, such as the intervention in *YS*'s pensions, must fall within the scope of the Directive.

These conditions were fulfilled in the *Egenberger* case.[38] The Court held that Article 21 of the Charter, which was invoked here, satisfies the requirement of mandatory and unconditional compliance. The prohibition of discrimination on grounds of religion or belief is, as a general principle of EU law, mandatory in nature. The prohibition, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may assert as such in a dispute between them in an area covered by EU law. That is the case, even though the discrimination in *Egenberger* resulted from a wholly private scheme and not from national legislation, since the discriminatory act of the company that was the subject of the dispute fell within the scope of Directive 2000/78 and therefore also of its national implementing legislation.

The horizontal effect of Article 21 can also be relevant in social security cases. Now we are examining horizontal effect, the social security involved is the non-statutory branch, for example, social security based on collective labour agreements or non-statutory pension schemes. An example can be seen in the *HK Danmark* judgment.[39] Employee *HK* was 29 years old and claimed that she was discriminated against on the basis of age, since her employer paid lower contributions to her pension fund than for older workers. Thus, again Directive 2000/78 and Article 21 of the Charter were relevant. The Charter is applicable only if the topic of the dispute falls within the scope of EU law. That was the case in *HK Danmark*, since the disputed

36. Case C-144/04, *Mangold,* ECLI:EU:C:2005:709; Case C-555/07, *Kücükdeveci,* ECLI:EU:C:2010:21.
37. Case C-176/12, ECLI:EU:C:2014:2.
38. See note 35.
39. Case C-476/11, ECLI:EU:C:2013:590.

Danish law was intended to implement Article 6(2) of Directive 2000/78. The Court decided, however, that the distinction between contributions on the basis of age did not constitute prohibited discrimination. As a result, HK herself could not successfully make use of the horizontal effect of Article 21.

It is still unclear whether EU provisions other than Directives that do not have a horizontal effect themselves, such as some Treaty provisions, have indirectly horizontal effect through a connection with a fundamental right. Given that legal uncertainty must be avoided as far as possible for individuals, it is possible that the doctrine of horizontal effect through the Charter is limited to Directives, since they define and communicate rights and obligations. Whether that is indeed the line of the Court is a matter that is still undecided (Table 1).

7. Conclusions

Article 34 of the Charter has not created fundamental rights that can be invoked in order to improve the legal position of claimants of social security or of social assistance. In view of the clause in Article 34 that EU and national law has to be taken into account for the interpretation of the Article, and taking into account the general provision that the Charter does not create new powers and tasks for the Union (Article 52(1), this outcome is not surprising.

However, the Charter has, in particular, added value where the scope for its interpretation has not been explicitly curtailed. For social security, this is the case where non-specific provisions are applied. It is worthwhile – for practitioners and national courts also - to continue to examine the possibilities of these provisions for which the Court of Justice has opened the door, since they give room for further development of the meaning of Charter.

Although the Charter does not create new competences, it may thus enable new interpretations of EU law and have an impact on national law. These are effects that did not follow from other EU instruments and give added value to the Charter.

Consequently, it cannot be concluded that Charter has no role to play with regard to national social security legislation on the ground that Member States have retained the competence to define the principles of their social security systems. It is true that as yet there are no EU instruments defining minimum norms for social security systems. However, a particular national scheme can still fall within the scope of the Charter when an EU instrument is implemented that affects a social security or assistance scheme. Although, according to the case law of the Court of Justice, the Article of the Charter that is specific to the situation concerned must be interpreted in the light of the Directive implementing it, non-specific rights can lead to other outcomes than following from the application of the Directive concerned.

Table 1. Conditions for horizontal effect.

A Charter provision confers indirect horizontal effect on a provision of a Directive if the following conditions are fulfilled:	
The Directive in question is an elaboration of the principle underlying that Charter provision	and
the relevant national legislation implements the Directive in question or falls within its scope	and
the situation at issue falls within the scope of the Directive in question	and
the relevant Charter provision is mandatory and unconditional	

Moreover, in *Kamberaj* we saw that Article 34(3) of the Charter has an added value for the conditions and level of benefits when these benefits are referred to in an EU instrument, such as a Directive requiring equal treatment. Even though the benefits remain regulated by the national legislature, they must ensure a decent existence, as follows from Article 34(3), the Court has ruled.

A second added value of the Charter is the doctrine of horizontal effect. This is particularly relevant to non-statutory social security when private parties are involved. In the social security judgments discussed in this contribution, there was no outcome that helped the individual, but it is very well possible that in other situations there may be such a result.

It must have become clear that invoking the Charter successfully requires an in-depth analysis of the required conditions for doing so and is quite complicated. Moreover, since the added value seems to come, in particular, from non-specific provisions, it is hard to predict when and how these will have effect. The possibilities for invoking them and their meaning depend, to a large extent, on the actual circumstances of the case.

Also, the Court of Justice itself seems to have had difficulties in applying the Charter, in any case, in social security and social assistance cases. It is difficult to understand the consistency of the *Dano* and *CG* judgments, where in the former the Court claimed not to be competent to interpret the non-specific provisions in a social assistance case, yet it did so in the latter, without even having been asked to do so. It also is unclear how the selection is made between the non-specific rights, such as why in *CG* Article 1 (human dignity) was mentioned, and not Article 34(3) (decent existence). The Court probably felt that it had to sail between Scylla and Charybdis, that is, between Article 51(2) (Charter rights for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties) and the need to fully respect fundamental rights. It clearly did not want to undermine the condition of Directive 2004/38 that economically inactive citizens must have sufficient resources, whereas it saw more room for manoeuvre in *CG,* after it had concluded that the Directive was not implemented and the UK authorities did not require sufficient resources. Still, it remains unclear that even the fundamental right of respect for human dignity is not addressed in *Dano*-like cases. It seems that the Court's sailing boat hit either the Scylla or Charybdis in this judgment.

However, the area is still in full development, and there are new opportunities following from other judgments to move past this shipwreck. After all, the Court has shown considerable creativity by developing the impact of the non-specific rights and the doctrine of horizontal effect.

So far, certainly not all non-specific provisions have been interpreted and there remains a large area to explore. Some of the non-specific provisions can lead to a connection with the interpretations and case law of the corresponding rights in the ECHR, as Article 52(3) of the Charter requires. As a result, a further development of the added value of the Charter is very possible. In other words, the Charter is still, to a large extent, *terra incognita* and requires a level of creativity from law practitioners preparing a case and from national courts in applying it, and interpretations from the Court of Justice, when required, in order to map this land.

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