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AEL 2010/6

ACADEMY OF EUROPEAN LAW
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**THE CHARTER OF FUNDAMENTAL RIGHTS OF THE
EUROPEAN UNION AFTER LISBON**

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EUI Working Paper **AEL** 2010/6

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Distinguished Lectures of the Academy are delivered by eminent scholars and practitioners in the fields of Human Rights law and European Union law during the Academy of European Law's summer courses each year.

ISSN 1831-4066

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This working paper examines the legal nature, interpretation and scope of application of fundamental rights in the European Union in light of the Charter of Fundamental Rights. The authors review the sources of fundamental rights protection and confirm that this protection, as applied prior to the Charter coming into force, remains in effect. In spite of the Charter, due regard should continue to be given to the shared constitutional traditions and the case-law of the Strasbourg Court, in particular when it comes to the interpretation of the Charter. The paper also addresses issues that arise with regard to the future accession of the Union to the European Convention of Human Rights. Additionally, close examination of the position of EU fundamental rights in the legal order of the Union reveals that Member States are bound by these rights only when they act within the scope of application of EU law. The Charter does not alter this system either. Finally, following discussion of the opt-outs from the Charter, it is concluded that the overall impact of the Charter is likely to be anything but revolutionary. Moreover, the paper offers a special perspective on EU fundamental rights: it suggests that the *Küçükdeveci* case reaches beyond the Charter in that it introduces direct horizontal application of an EU fundamental right in cases of age discrimination. However, the authors also caution that this judgment should not be overrated, as it seems unlikely that the Court intended to systematically extend the effect of EU fundamental rights.

Keywords

Lisbon Treaty - EU Charter of Fundamental Rights - sources of fundamental rights - EU accession to the ECHR - opt-outs – *Küçükdeveci* case

The Charter of Fundamental Rights of the European Union after Lisbon

JULIANE KOKOTT* AND CHRISTOPH SOBOTTA**

1. Introduction

The Court of Justice has developed the protection of fundamental rights by means of judge-made law. This is because neither the European Economic Community nor the European Community had a legally binding catalogue of human and fundamental rights. The Treaty of Lisbon has not only turned the Community into a Union, it has also equipped it with such a catalogue: the Charter of Fundamental Rights of the European Union.

The Charter dates back to the year 2000. Then, Parliament, Council and Commission solemnly proclaimed this document,¹ which had been drafted by the European Convention but was not legally binding. The Charter contains a comprehensive list of rights, freedoms and principles and is linked to explanations describing the sources of each individual article.

Despite the absence of legal force, the Advocates General soon drew upon the Charter as a source of inspiration.² It was only with great reluctance that the Court of Justice followed.³ The first occasion arose when it came for the Court to interpret the directive on the right to family reunification, the recitals of which directly referred to the Charter. Later, the Court also drew upon the Charter, although there was no clear reference to it, in a directive's recitals, in emphasizing that it reaffirmed certain rights which were already recognized.⁴

The Treaty of Lisbon changed this. Henceforth, Article 6(1) of the EU Treaty states that the Union recognizes the rights, freedoms and principles set out in the Charter. Furthermore, it is stated that the Charter and the Treaties have the same legal value. The Court has already referred to this clause in recent decisions.⁵

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¹ OJ C 364, 18.12.2000, at 1-22.

² Cf. Opinions of Advocates General Alber in Case C-340/99 *TNT Traco* [2001] ECR I-4109, point 94; Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, point 28; Léger in Case C-353/99 P *Hautala* [2001] ECR I-9565, points 82 and 83; Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] I-7411, point 126; Poiars Maduro in Case C-181/03 P *Nardone* [2005] I-199, point 51 and Kokott in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] I-3565, point 83.

³ Cf. Cases C-540/03 *Parliament v Council* [2006] I-5769, para. 38 and C-275/06 *Promusicae* [2008] I-271, para. 64.

⁴ On the principle of judicial protection, see Case C-432/05 *Unibet* [2007] I-2271, para. 37, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* [2008] I-6351 (henceforth referred to as *Kadi*), para. 335, Case C-47/07 P *Masdar (UK)* [2008] I-9761, para. 50, Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland v Commission* [not yet published in the ECR], para. 179, Case C-12/08 *Mono Car Styling* [not yet published in the ECR], para. 47. See also Case C-303/05 *Advocaten voor de Wereld* [2007] I-3633, para. 46 on the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination, Cases C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] I-10779, paras 43 *et seq.* and C-341/05 *Laval un Partneri* [2007] I-11767, paras 90 *et seq.* on the right to collective action, Case C-244/06 *Dynamic Medien* [2008] I-505, para. 41 on protecting children and Case C-450/06 *Varec* [2008] I-581, para. 48 on the right to privacy.

⁵ Cases C-555/07 *Küçükdeveci* [not yet published in the ECR], para. 22 and Case C-578/08 *Chakroun* [not yet published in the ECR], para. 44.

The Charter has without question an important symbolic meaning.⁶ Moreover, it contains rights, freedoms and principles, which the Court has not yet discussed. One only has to think about the right of access to placement services (Article 29) or the protection in the event of unjustified dismissal (Article 30). But, in this paper, I rather want to concentrate on the sources of fundamental rights protection, as well as the stipulations concerning the application and effects of fundamental rights. All in all, they confirm the Court's jurisprudence up to the present day. The recent decision in the *Küçükdeveci* case,⁷ however, is one which, in my opinion, goes beyond the Charter.

2. On the Sources of Fundamental Rights Protection in the Union

The Court based the judicial development of EU fundamental rights as general principles of European Union law on a two-pronged foundation:⁸

- the shared constitutional traditions of the Member States and
- international treaties common to the Member States, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention).

The shared constitutional traditions of the Member States were and still are the primary substantive legal reference.⁹ They have to be deduced by means of a method that in German is called '*wertende Rechtsvergleichung*', which has been translated as valuing or evaluative comparative law.¹⁰

But how does this work in practice? The Court analyses all the Member States' constitutions, if they include the right in question. Even if a certain right is common to all Member States, there may be differences in the degree of protection. These can only be reconciled by a value judgement of the Court of Justice. If the fundamental right is not shared by all Member States, the Court must nevertheless make a value judgement as to whether the right is to be recognized. With 27 Member States now this is a difficult task. Although the Court benefits from the fact that each Member State is represented by a judge and it can also rely upon the know-how of a scientific research service, the evaluation process leading to a rule of general application remains a challenge.

Since all Member States have ratified the European Convention this task has become easier because the Convention can be used as a second fundamental source in identifying shared legal positions and the scope of their application. Since its ratification, the Court increasingly refers to the Convention¹¹ to determine the basis and scope of fundamental rights. Furthermore, the Court has explicitly recognized that the EU Courts have to take the case-law of the European Court of Human Rights in Strasbourg into account in interpreting fundamental rights.¹²

⁶ See especially *Pernice*, 'Treaty of Lisbon and Fundamental Rights', in S. Griller and J. Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (2008), at 235 *et seq.*

⁷ See *supra* note 5.

⁸ Case C-144/04 *Mangold* [2005] I-9981, para. 74.

⁹ Case 11/70 *Internationale Handelsgesellschaft* [1970] at 1125, para. 4, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi* [2005] I-3565, paras 68 *et seq.*. See also Opinions of Advocate General Poiares Maduro in Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies v. Council and Commission* [2008] I-6513, points 55 and 56.

¹⁰ Opinions of Advocate General Roemer in Joined Cases 63/72 to 69/72 *Werhahn Hansamühle and Others v. Council and Commission* [1973], at 1229, 1258. On the methods, see C. Sobotta, *Transparenz in den Rechtsetzungsverfahren der Europäischen Union* (2001), at 290 *et seq.*

¹¹ Cases 4/73 *Nold* [1974], at 491, para. 13 and 222/84 *Johnston* [1986], at 1651, para. 18.

¹² Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij v. Commission* [2002] I-8375, para. 274 and C-301/04 P *Commission v. SGL Carbon* [2006] I-5915, para. 43.

This jurisprudence was explicitly reaffirmed in the Maastricht Treaty.¹³ It introduced the claim that the Union recognizes the fundamental rights, as guaranteed by the Human Rights Convention and as they result from the constitutional traditions common to the Member States, as general principles of the Union's law.

The Treaty of Lisbon has not changed anything to that accord, but clearly acknowledges both methods in Article 6(3) TEU. And they are both still being used. As recently as 2005, the Court recognized a new general principle of European Union law, namely the principle of non-discrimination in respect of age, in the *Mangold* case.¹⁴ On the one hand, it is to be noted that only a few Member States explicitly¹⁵ acknowledged this expression of the general principle of non-discrimination in their respective legal orders.¹⁶ On the other hand, this general principle had already found expression in a specific power of the Union to combat discrimination based on age (Article 19 TFEU, ex-Article 13 TEC), a power that had been exercised by means of a directive.¹⁷ The principle also expresses a growing trend in the field of fundamental rights protection at the European level, a trend that all Member States sustained through the solemn declaration of the Charter, including the prohibition of age discrimination in Article 21.

The *Mangold* case could possibly be considered to be an anticipatory effect of the Charter.¹⁸ This hypothesis appears to be confirmed by the *Küçükdeveci* case. In this judgment, handed down after the entry into force of the Lisbon Treaty, the Court explicitly based the principle of non-discrimination in respect of age on the Charter,¹⁹ although the facts of the case still had to be judged under the old law.

With this, the judicial development of fundamental rights has possibly not yet been exhausted. Even as late as March 2010 in a judgement on the independence of national supervisory authorities of personal data protection, the Court specified the principle of democracy, taking into account the different laws of the Member States.²⁰ The case dealt with the question whether the principle of democracy required that a national supervisory authority for data protection be included in the national administrative hierarchy. The Court of Justice rejected this notion as it appeared to be an isolated expression of the principle of democracy and not really necessary for ensuring democratic control.

The Court must currently deal with the question whether the recognized legal professional privilege protecting communications between lawyers and their clients²¹ is applicable only to independent lawyers or whether it applies to in-house lawyers as well. The underlying question is whether in competition cases the Commission not only must refrain from using communications between companies and external lawyers, but must also refrain from searching the respective legal department of the company in question. In my recent opinion of 29 April 2010, I arrived at the conclusion that the internal communications with in-house lawyers do not enjoy the fundamental rights protection of

¹³ Cases C-415/93 *Bosman* [1995] I-4921, para. 79 and C-274/99 P *Bernard Connolly v. Commission* [2001] I-1611, para. 38.

¹⁴ Case *Mangold*, *supra* note 8, para. 74 *et seq.*. See also Kokott, 'Auslegung europäischer oder Anwendung nationaler Rechts?', *Recht der Arbeit Sonderbeilage zu Heft 6* (2006) 30, at 35 *et seq.*

¹⁵ But see the Opinions of Advocate General Sharpston in Case C-427/06 *Bartsch* [2008] I-7245, points 42 *et seq.* and of Advocate General Kokott in Case C-540/03 *Parliament v. Council* [2006] I-5769, points 108 *et seq.* on considering age when applying the general principle of equal treatment.

¹⁶ The prohibition of age discrimination is set down in Article 6 of the Finnish Constitution as well as – regarding professional life – in Article 59(1) of the Portuguese Constitution.

¹⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, at 16-22; see also Case *Küçükdeveci*, *supra* note 5, para. 21.

¹⁸ Kokott, *supra* note 14, at 36.

¹⁹ Case *Küçükdeveci*, *supra* note 5, para. 22.

²⁰ Case C-518/07 *Commission v. Germany* [not yet published in the ECR], para. 42.

²¹ Cf. Case 155/79 *AM & S Europe v. Commission* [1982], at 1575, paras 18-27.

communications between lawyers and clients.²² One of the reasons for this finding was that only three Member States recognized such a professional privilege of in-house lawyers.

However, in the broad area covered by the Charter, the Court no longer has to rely on judge-made law, but can directly base its decisions on the explicitly laid down fundamental rights. Nevertheless, questions on the judicial development of the law may still occur when it comes to the precise contents of a fundamental right, the range of its application and when it is weighed against conflicting interests. But in these cases the Charter also gives good orientation. First of all, the wording of the provision in question will serve as a foundation. It quite often provides very detailed specifications. The text is supplemented by the explanations of the Charter provisions, which are directly attached to it. They primarily mention the sources of the respective right. Under Article 6(1) TEU, due regard must be given to these explanations in the interpretation of the Charter. It is self-evident that these sources, i.e. the European Social Charter, and the materials connected to them can be helpful in interpreting the respective right in question.

Furthermore, the Charter is deemed to leave unchanged those fundamental rights which have already been recognized, and in any case not to lessen their protection. According to Article 52(4) of the Charter, fundamental rights resulting from the constitutional traditions common to the Member States shall be interpreted in harmony with those traditions. And according to the article's paragraph 3, the fundamental rights corresponding to the rights guaranteed by the Convention are to have at least the same content as in the Convention itself, though the provision also allows fundamental rights to be extended beyond the level guaranteed by the Convention.

This means in particular that the entire case-law of the Court concerning fundamental rights remains in effect. At the same time, it is both allowed and necessary to draw upon the shared constitutional traditions and the case-law of the Strasbourg Court when the Charter has to be interpreted.

3. Accession to the European Convention on Human Rights

In relation to the European Convention on Human Rights, another development should be noted, which is set forth in the Treaty of Lisbon: according to Article 6(2) TEU and Protocol no. 8, the Union shall accede to the Convention. The modalities of this accession have not yet been determined, but according to the Protocol they shall preserve the specific characteristics of the Union and Union law. Therefore, it might be advisable to provide for a co-defendant mechanism, ensuring that both the European Union and the Member State concerned may, where appropriate, be parties in any proceedings before the European Court of Human Rights.²³

There is also discussion of whether there can be a guarantee that a case be examined by the Luxembourg Court before it is decided by the Court in Strasbourg.²⁴

²² See Opinions of Advocate General Kokott in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v. Commission and Others* [not yet published in the ECR].

²³ See the presidency note 'Accession of the European Union to the European Convention on Human Rights', Council document 6582/10 of 17 February 2010, at 3; accessible through the public register at <http://register.consilium.europa.eu/>.

²⁴ See the discussion document of the Court of Justice, 'Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms', available at http://curia.europa.eu/jcms/jcms/P_64350/, and the presidency note 'Accession of the EU to the ECHR and the preservation of the ECJ's monopoly on the interpretation of EU law: options under discussion', Council document 10568/10 of 2 June 2010. *Timmermans*, Opinion of 18 March 2010 in view of the parliamentary hearing of the European Parliament's Committee on Constitutional Affairs, available at <http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71235/20100324ATT71235EN.pdf>, who proposes that the Commission be given the opportunity of requesting a declaratory judgment in front of the ECJ, if domestic Courts did not request a preliminary ruling in cases which later on become one before the ECtHR.

In cases exclusively concerning national law such subsidiarity of the Strasbourg system is guaranteed because a complaint to the Strasbourg Court is only admissible after domestic remedies have been exhausted. However, cases raising issues of European Union law that are dealt with by Member State courts do not necessarily reach the Luxembourg Court. The ECJ will only become involved if a national court requests a preliminary ruling. Although courts of last instance are in principle under an obligation to make such a request if a question of EU law is raised, parties to the proceedings cannot enforce this obligation. Therefore, in such cases domestic remedies can be exhausted without any contribution by the Luxembourg Court.

The purpose of the domestic remedies rule is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to an external body, the Strasbourg Court.²⁵ Obviously, from the perspective of EU law it would be extremely frustrating if the Strasbourg Court found an infringement of fundamental rights in relation to the application of EU law without any participation of the Court of Justice that could potentially have prevented the infringement.

Moreover, the exhaustion of domestic remedies ensures that a case is properly investigated before it reaches the Strasbourg system. This includes the definite resolution of all questions of domestic law. However, as long as questions of EU law have not yet been clarified by the ECJ it may be that the case before the Strasbourg Court is based on an erroneous understanding of the applicable law.

There have been several proposals to redress this issue. First of all, the applicants should be required to have demanded or at least suggested that the national court refer the case to the ECJ to demonstrate the exhaustion of remedies. For cases where such initiatives were not successful different solutions are offered.

One option would be to allow the Strasbourg Court to make a reference to the ECJ. However, there is no precedent for such a procedure in the Strasbourg system. Another option, proposed by former ECJ Judge Timmermans, is to create a new procedure to allow the Commission to initiate a case before the Luxembourg Court, if a case that is pending in Strasbourg raises questions of EU law that have not yet been addressed by the ECJ. For the duration of this procedure in the Luxembourg Court, the Strasbourg Court should suspend its procedure. This would require a special procedure under EU law that could – perhaps – be introduced in connection with the accession agreement.

However, in my opinion, a similar approach could already be implemented under the current system: In such cases the Commission could initiate infringement procedures because the national court of last instance failed to make a reference to the Court of Justice.²⁶ If the Commission additionally claimed that the decision by the national court infringed EU law with regard to the issue before the Strasbourg Court, the ECJ could make a pronouncement on the issue. In contrast, if the Commission considered that the national decision in substance complied with EU law it could abstain from the action.

It should be noted that all mechanisms to ensure a participation of the Luxembourg Court would add further delays to the case and complicate its treatment. Moreover, without additional measures they would only resolve the question of EU law at issue. But they would not correct the decision of the original case and remedy a possible specific infringement of fundamental rights. Therefore, it remains to be seen whether the accession negotiations and future practice will take these concerns into account.

4. On the Scope of Fundamental Rights in Light of the Charter

²⁵ ECtHR of 6 November 2007, *LEPOJIĆ v. SERBIA*, 13909/05 § 51.

²⁶ Cf. Kokott, Henze and Sobotta, 'Die Pflicht zur Vorlage an den Europäischen Gerichtshof und die Folgen ihrer Verletzung', *JZ* (2006) 633, at 640 *et seq.*

But let me get back to the Charter: How will it be applied in practice? One could dare to think that it might harmonize the fundamental rights for the entire European Union.²⁷ In this case all of its rights, freedoms and principles could benefit any citizen of the Union under any circumstance. However, it is exactly this comprehensive application which is not intended.

In fact, according to the first sentence of Article 51(1), the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

Overall, this provision corresponds to the existing case-law of the Court which can be deduced from the rank of fundamental rights in the hierarchy of EU norms. Respect for human rights is a condition of the lawfulness of Union acts.²⁸ And measures incompatible with respect for human rights are not acceptable in the Union.²⁹ Accordingly, Article 6 (1) of the EU Treaty provides that the Charter is on the highest possible level of European Union law equal to the Treaties. Therefore, the Charter is at least part of EU primary law but an even more elevated position is also possible.

An indication for such higher rank of the Charter can be found in the *Kadi* case. There, the Court included the principle that all Community acts must respect fundamental rights among the constitutional principles of the Treaty.³⁰ This could indicate a possible distinction from rules of primary law that are not constitutional in nature. The German Basic Law makes a similar distinction called the ‘eternity-clause’ (*Ewigkeitsklausel*) because it does not allow amendments that would affect the core principles of the German Constitution, in particular democracy, federalism, human dignity and the rule of law (Article 79(3) of the *Grundgesetz*). In EU law such a distinction would probably be most important for the interpretation of the Treaty. Provisions that are not constitutional in nature would be interpreted as to be in conformity with the constitutional provisions, such as fundamental rights. In contrast, it is both not foreseen and difficult to imagine that the Court would annul non-constitutional Treaty provisions because of conflicts with constitutional core principles.

In practice, the rank of fundamental rights is mostly expressed in relation to secondary law and Member State activities that come within the scope of EU law.

First of all, the elevated rank of the Charter means that secondary law, such as regulations, directives or decisions are to be annulled if they are incompatible with fundamental rights. For example, in the *Kadi* case³¹ the Court annulled a regulation inasmuch as it concerned the applicant. This regulation froze their funds and economic resources because the UN Security Council suspected that they were terrorists or at least funded terrorist actions with these funds. Neither were the accused heard on this charge, nor were they given any chance to challenge the assessment of the Security Council in court. This is incompatible with the rights of the defence and the right to property.³²

In many cases concerning possible contradictions between secondary law and fundamental rights a margin for interpretation can be identified. One could imagine an interpretation not compatible with fundamental rights, but it would also be possible to interpret the provision in question in a way that fundamental rights are respected. In such cases it would not necessarily impair the stability of EU law to annul the provision. In fact, according to a general principle of interpretation, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures

²⁷ This is how Kirchhof, ‘Die Kooperation zwischen Bundesverfassungsgericht und Europäischem Gerichtshof: Addierung oder Optimierung des Grundrechtsschutzes?’, in *Festschrift für Roman Herzog* (2009), 155, at 164 and 166 in particular, could be understood.

²⁸ Opinion of the Court of 28 March 1996 [1996] I-1759, para. 34 and *Kadi*, *supra* note 4, para. 284.

²⁹ Cases C-112/00 *Schmidberger* [2003] I-5659, para. 73 with further references and *Kadi*, *supra* note 4), para. 284.

³⁰ *Kadi*, *supra* note 4), para. 285.

³¹ See *supra* note 4.

³² *Kadi*, *supra* note 4), paras 333-371.

that the provision retains its effectiveness and which does not detract from its validity.³³ It should be assumed that the Union's legislature really did have a provision in mind, which was compatible with fundamental rights. Therefore, actions of secondary law are to be interpreted in accordance with fundamental rights.³⁴

Such an interpretation applies to every addressee of the provision in question. This can be the institutions, for example in their relationship with their employees,³⁵ or when the Commission applies competition law.³⁶ But also the Member States have to apply EU law in accordance with EU fundamental rights.³⁷ One only has to think about regulations that have to be applied directly by the administration of the Member States in the fields of agriculture³⁸ or customs rules.³⁹ This situation most closely corresponds with the definition of the scope of the Charter in the first sentence of Article 51(1) of the Charter's German version, which speaks about '*Durchführung*', that is 'execution' of European Union law by the Member States.

However, according to the Court's case-law, the effect of EU fundamental rights on Member States goes beyond this mere execution of EU law. In principle, it is sufficient that national measures fall within the scope of European Union law to trigger the application of the Union's fundamental rights.⁴⁰ Therefore, some German authors consider that the wording of the first sentence of Article 51(1) of the Charter aims to reduce the application of the Union's fundamental rights.⁴¹ But the Court's case-law on the application of EU fundamental rights within the scope of the Union law is explicitly mentioned in the explanations relating to the provision. Therefore, it should not be understood as a restriction. Incidentally, other languages come closer to the Court's terminology: the Spanish version uses '*aplicar*', which can be translated as 'apply', the French uses '*mise en oeuvre*' and the English version relies on the term 'implementation' – both terms describe much broader concepts than mere execution.

Let me rule out any possible misunderstanding: the application of the Union's fundamental rights does not aim at an overall harmonization of fundamental rights in the Member States, but rather to ensure a uniform application of other European Union law. This is why the Union's fundamental rights are not applied when the Member States are acting outside the scope of application of European Union law. The only question is: How to define the scope of application of EU law?

The effect of EU fundamental rights is particularly contentious, when it comes to implementing directives and when Member States invoke an exception to the fundamental freedoms of the Treaty that is the free movement of goods, services, persons, enterprises and capital. Another area of doubt that exists, for example, with regard to environmental law (Article 193 TFEU), concerns stronger

³³ See also in general Cases C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] I-2443, para. 20, and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [not yet published in the ECR], para. 47.

³⁴ Cases C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] I-8075, para. 22 with further references and C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] I-4951, para. 174.

³⁵ Cases C-274/99 P *Connolly v Commission* [2001] I-1611, para. 53 and C-340/00 P *Commission v Cwik* [2001] I-10269, para. 18.

³⁶ *Bertelsmann-Case*, *supra* note 34).

³⁷ See in particular Case 29/69 *Stauder* [1969], at 419, paras 4 and 7, in which the principle of proportionality was applied without explicitly expressing it.

³⁸ Case 5/88 *Wachauf* [1989] 2609, para. 19 *et seq.*

³⁹ Case C-349/07 *Sopropé* [2008] I-10369, para. 38.

⁴⁰ Cases C-260/89 *ERT* [1991] I-2925, para. 42, C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] I-4685, para. 31, and *Sopropé*, *supra* note 39, paragraph 34. See also the Opinions of Advocate General Kokott in Case C-394/07 *Gambazzi* [2009], I-2563, point 43, and C-420/07 *Apostolides* [2009], I-3571, point 108.

⁴¹ *Huber*, *Unitarisierung durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung*, EuR 2008, 190, at 196.

protection clauses. Some argue that in these areas it would be sufficient if Member States respect the fundamental rights of their own respective national constitutions.⁴²

If the fundamental rights of the national constitutions did indeed have the same content as the Union's fundamental rights, this would not pose any problems. But this is not necessarily always the case. Therefore, recourse to the Union's fundamental rights is often necessary to ensure the uniform application and implementation of Union law in all Member States. This I will demonstrate in the following with regard to the implementation of directives and with regard to exceptions to fundamental freedoms. However, with regard to stronger protection clauses the outcome might be different.

A. On the Implementation of Directives

When it comes to the implementation of directives, the data retention directive⁴³ serves as a very illustrative example. According to the directive, certain network and service providers must retain certain user-related traffic and location data for a period of at least six months, so that this information can be made available to law enforcement authorities. It is expected that access to this information will help to prevent or at least prosecute serious criminal offences. Because this information is being retained without any specific cause and because it can provide significant insights into the privacy of affected persons, it is disputed whether the directive is compatible with the fundamental right to personal data protection.⁴⁴

Some Member States apparently already had such provisions for quite some time, without any such doubts having been voiced. Recently, the German Federal Constitutional Court also judged data retention to be constitutional, but within very strict limits: data retained must be effectively protected against unauthorized access, and the use of the information should be strictly limited.⁴⁵ In contrast, the Romanian Constitutional Court found general data retention without specific cause to be a disproportional infringement of the right to personal data protection.⁴⁶ It therefore annulled the law transposing the data retention directive into national law. Thus, the directive cannot be transposed within the entire European Union when using national fundamental rights as a criterion for examination. This evidently endangers the uniform application of European Union Law.

Therefore, the compatibility of EU provisions and their implementation with fundamental rights must be assessed against a uniform standard, namely EU fundamental rights.⁴⁷ This applies not only to questions of validity but also to questions of interpretation in accordance with fundamental rights. Otherwise European Union law could be transposed and interpreted differently in each and every Member State. Such differences would endanger a uniform application. This is the reason why the

⁴² To that end Kirchhof, *supra* note 27, at 166 *et seq.* and Huber, *supra* note 41, at 194.

⁴³ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, at 54-63.

⁴⁴ Cf. Joined Cases before the German Federal Constitutional Court 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08, paras 211 *et seq.*, see also references in para. 82 (an English-language press release is available at www.bundesverfassungsgericht.de).

⁴⁵ *Ibid.*, paras 220 *et seq.*

⁴⁶ Decision no. 1258 of 8 October 2009 in its original Romanian language: www.ccr.ro/decisions/pdf/ro/2009/D1258_09.pdf; English translation available at www.legi-internet.ro/english/jurisprudenta-it-romania/decizii-it/romanian-constitutional-court-decision-regarding-data-retention.html.

⁴⁷ Cases *Internationale Handelsgesellschaft*, *supra* note 9, paras 3 and 4, and 44/79 *Hauer* [1979], at 3727, para. 14. Accepted in principle by senate decision of the German Federal Constitutional Court 1 BvF 1/05 on greenhouse-gas emission-certificates, para. 73 and in the decision of the French Conseil d'État, No 287110 *Arcelor*.

Court was right to decide that the Member States are bound to interpret directives in conformity with EU fundamental rights for purposes of implementation and application. Member States have to make sure they do not rely on an interpretation of the directive which would be in conflict with the fundamental rights protected by the Union's legal order.⁴⁸

With regard to the data retention directive we may be coming closer to a uniform assessment at the European level. Though the ECJ already ruled on an action for annulment criticizing the legal basis of the directive, fundamental rights were not addressed in this case.⁴⁹ This gap is about to be closed, since the High Court of Ireland decided, in May 2010, to submit a reference to the ECJ on the validity of the data retention directive with regard to fundamental rights.⁵⁰

B. On the Exceptions to Fundamental Freedoms of the Treaty

The exceptions to the fundamental freedoms of the Treaty raise different questions. All fundamental freedoms provide for derogations justified on grounds such as public policy, public security or the protection of human life and health. Under well established case-law these exceptions can only apply if the national measure in question is compatible with EU fundamental rights.⁵¹

However, the possibility of restricting the use of fundamental freedoms pays respect to the differences between the Member States. This is why some argue that an obligation to assess such a restriction against the Union's fundamental rights is contrary to the Member States' autonomous discretion.⁵² This thesis is based on the idea that such exceptions are to be seen as excluded from the scope of EU law and would therefore not be subject to EU fundamental rights. A derogation of this type can, in fact, be found when dealing with the freedom of movement for workers: this freedom shall not apply to employment in the public services (Article 45(4) TFEU).

However, the other exceptions, for example, derogations based on public policy, public security and public health, are of a different structure. The corresponding provisions (i.e., Articles 36, 45(3), 52 and 65(1)(b) TFEU) explicitly only allow measures which are justified. This means that a restriction on the fundamental freedoms can only be permitted where it serves overriding reasons of general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.⁵³ Moreover, the impact of the measure on the freedom may not be disproportional to the objective pursued.⁵⁴

Therefore, it is necessary to balance the objective against the restriction of the fundamental freedom. Fundamental rights are part of this balancing process. Obviously, an exception to the fundamental freedoms of the internal market serving the purpose of implementing fundamental rights⁵⁵ is easier to

⁴⁸ Cases C-101/01 *Lindqvist* [2003] I-12971, para. 87, *Parliament v Council*, *supra* note 3, para. 105, C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2005] I-5305, para. 28 and *Promusicae*, *supra* note 3, paragraph 68. According to Von Danwitz, 'Grundrechtsschutz im Anwendungsbereich des Gemeinschaftsrechts nach der Charta der Grundrechte', in *Festschrift für Roman Herzog*, *supra* note 27, at 23, this observation is self-evident. See Huber, *supra* note 41, at 191 does not constitute any problem herein.

⁴⁹ Case C-301/06 *Ireland v European Parliament and Council* [2009] I-593.

⁵⁰ High Court of Ireland, Case 2006/3785 P *Digital Rights Ireland*, available at <http://www.scribd.com/doc/30950035/Data-Retention-Challenge-Judgment-re-Preliminary-Reference-Standing-Security-for-Costs>, paras 110 *et seq.*

⁵¹ Cases *ERT*, *supra* note 40, para. 43 and C-368/95 *Familiapress* [1997] I-3689, paras 24 *et seq.*

⁵² Huber, *supra* note 41, at 192 *et seq.*

⁵³ Cases C-19/92 *Kraus* [1993] I-1663, para. 32 and C-222/07 *UTECA* [2009] I-1407, para. 25.

⁵⁴ Case C-88/07 *Commission v Spain* [2009] I-1353, para. 88 with further references.

⁵⁵ See Cases *Schmidberger*, *supra* note 29, para. 74 and C-36/02 *Omega* [2004] I-9609, para. 34.

justify than an exception to fundamental freedoms, which not only restricts the freedom but also infringes a fundamental right.⁵⁶

One could imagine that in this regard only the respective national fundamental rights come into play. But this would, in the end, lead to a non-uniform application of European Union law – in this case the exceptions to the fundamental freedoms – in each Member State. Member States that provide stronger protection than others with regard to certain rights could adopt stronger restrictions to fundamental freedoms. Even worse: if an action in accordance with the Member State's fundamental rights were to violate the Union's fundamental rights, the European Union would have to implicitly recognize such a violation as legal. Finally, the Court would be deprived of its function to control the scope of application of fundamental freedoms. It would not be able to rule on the balance between national fundamental rights and European fundamental freedoms. Therefore, it is only consistent that the Union's fundamental rights are to be applied when defining exceptions to the fundamental freedoms.

C. On Stronger Protection Clauses

Another issue is whether EU fundamental rights apply to Member State measures that come under stronger protection clauses. Such clauses exist for labour law (Article 153(4) TFEU), consumer protection (Article 169(4) TFEU) or environmental law (Article 193 TFEU). The last provision is perhaps the most well known. It applies to EU measures that are adopted under the specific competence for environmental law, i.e. Article 192 TFEU.⁵⁷ Such measures shall not prevent any Member State from maintaining or introducing more stringent protective measures. Protective measures must be compatible with the Treaties and shall be notified to the Commission. The other clauses on labour law and consumer protection are phrased in similar terms.

At first glance, more stringent protective measures adopted by the Member States clearly come within the scope of the stronger protection clause. However, does this mean that such measures must comply with EU fundamental rights? Is it for the ECJ to assess whether they respect the principles of equal treatment and proportionality as well as other fundamental rights?

The Court has addressed this issue in the *Eiterköpfe* case.⁵⁸ It concerned legislation on landfills of waste. The landfill directive⁵⁹ requires that a certain percentage of the waste deposited in a landfill is inert. This means that the substances are not or no longer biologically or chemically reactive and therefore pose only very limited risks to the environment. Moreover, if waste is rendered inert by treatment, its volume normally is reduced significantly. In practice, household waste is turned into inert waste by incineration. The remaining ash can be put into a landfill under the quota for inert waste.

Germany significantly increased the percentage of waste that must be inert. For the final stage the legislation foresees that only inert waste can be put into a landfill. These rules were contested by the operator of a landfill. It questioned whether the landfill directive and EU law in general allowed the German legislation because it wanted to continue to deposit waste that had not been incinerated.

The Court considered that the measure did not run counter to the landfill directive but that it provided for more stringent protection of the environment. However, the national court also asked for an assessment whether the measure was compatible with the EU principle of proportionality. In order to

⁵⁶ See Case C-60/00 *Carpenter* [2002] I-6279, paras 40 *et seq.*

⁵⁷ Measures based on other powers, e. g. Art. 114 TFEU on the internal market, protecting the environment but with other objectives as well, do not fall under the stronger protection clause.

⁵⁸ Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] I-2753.

⁵⁹ Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ, L 182, 16.7.1999, at 1.

apply this principle the Court had to check whether the German measure fell within the scope of EU law.

According to the Court, it is clear from the broad logic of the stronger protection clause that in adopting stricter measures Member States still exercise powers governed by EU law, given that such measures must in any case be compatible with the Treaty.⁶⁰ This appears to indicate that EU fundamental rights and in particular the principle of proportionality do apply.⁶¹

However, the Court continued by claiming that the EU principle of proportionality is not applicable insofar as it concerns more stringent protective measures of domestic law adopted by virtue of the stronger protection clause and going beyond the minimum requirements laid down by the directive.⁶²

I am not convinced by this line of reasoning because it seems to be contradictory. On the one hand measures come within the scope of application of EU law; on the other hand the EU principle of proportionality does not apply. Moreover, the extent of the exception remains open: Does it only apply to the principle of proportionality or are all EU law principles, notably fundamental rights, excluded?

This criticism does not mean that the outcome of the case must be rejected. But it would be more convincing to reconsider what the stronger protection clause actually means. Contrary to its wording and the understanding of the Court in *Eiterköpfe*, this provision does not create a Member State competence to adopt more stringent measures. As long as Member States do not come into conflict with EU law they are always free to act. The stronger protection clauses therefore could be understood as a declaratory reminder of this fact. In addition, stronger protection clauses indicate that the respective EU measures coming under the clauses should – as a general rule – not be interpreted as providing for a complete harmonization. Under this reading, more stringent protective measures would not come within the scope of application of EU law and EU fundamental rights would not apply.⁶³

D. On the Effects of National Fundamental Rights within the Scope of Application of EU Law

In summary, it follows logically from the position of EU fundamental rights in the legal order of the Union that Member States are bound by these rights when they act within the scope of application of EU law. The Charter does not change this system.⁶⁴ The dogmatic structure of the fundamental rights application is neither extended nor constrained.

The Court can only meet possible concerns regarding Member States' autonomy and their respective national fundamental rights protection systems within this framework. The contents of the framework are rooted in the constitutional traditions of the Member States.⁶⁵ This base creates adequate mechanisms to ensure a broad coherence of fundamental rights protection between the Union and its Member States. The protection of the national identities of the Member States and the principle of loyalty towards the Union in paragraphs 2 and 3 of Article 4 TEU oblige the Court to develop the general principles of EU law on the basis of the fundamental legal principles of all Member States.⁶⁶

⁶⁰ Case *Eiterköpfe*, supra note 58, para. 61.

⁶¹ This seems to be the approach of Advocate General Tizzano in his Opinion in Case C-519/03 *Commission v Luxembourg* [2005] I-3067, point 50 as regards a stronger protection clause concerning labour law.

⁶² Case *Eiterköpfe*, supra note 58, point 63.

⁶³ Cf. the Opinion of Advocate General Mischo in Case C-342/01 *Merino Gómez* [2005] I-2605, point 58.

⁶⁴ For advanced suggestions on how to define the scope of the application of EU fundamental rights law see the Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano*, nyr., points 163 to 170, and on effects of this suggestion on the structure of the EU see points 172 and 173

⁶⁵ Tizzano, 'Der italienische Verfassungsgerichtshof (Corte costituzionale) und der Gerichtshof der Europäischen Union', *EuGRZ* (2010) 1, at 7 *et seq.*

⁶⁶ Sobotta, supra note 10, at 305 *et seq.* with further references.

This obligation is mirrored on the part of the Member States by the requirement that they guarantee a sufficient standard of fundamental rights protection as laid down in Article 2 TEU.

Furthermore, the application of EU fundamental rights does not completely exclude the application of their respective domestic counterparts.⁶⁷ EU fundamental rights only take part in the primacy of Union law inasmuch as they are needed to determine the interpretation and application of Union law. Insofar as Union law, interpreted in conformity with EU fundamental rights, still leaves some margin of appreciation for the Member States, national fundamental rights can be applied.

In this sense, the Court should try to leave some margin of appreciation for Member States – in particular in decisions on the application of EU fundamental rights in their internal legal system – to allow for the expression of differences between Member States. Methodically this could be pinned to the justification of the restriction of a fundamental right. As far as Member States are bound by EU fundamental rights within the scope of EU law, the Court could take into account that parallel domestic fundamental rights apply, therefore providing a wider margin of appreciation than with regard to directly applicable acts by EU institutions. This would increase the space for an autonomous development of domestic fundamental rights and this could in turn benefit the Union's fundamental rights.⁶⁸ In contrast, when the restriction of fundamental rights by the Union is assessed, the objective to leave a margin for the application of domestic fundamental rights is not relevant. As a consequence the Union would be bound more strictly by EU fundamental rights than the Member States.⁶⁹

The *Omega* case can especially be seen in such a way: Although games simulating acts of homicide are seen to be contradictory to human dignity in Germany but not in the United Kingdom, the Court was satisfied with this argument as a justification for the restriction of a company's freedom to bring such games to the German market.⁷⁰ The Court decided similarly in cases involving measures of child protection that restricted the trade in DVDs⁷¹ or the conflict between the protection of personal data and other fundamental rights.⁷²

5. On the Opt-outs

Based on these considerations on the application of EU fundamental rights, it is possible to assess the impact of the so-called 'opt-outs' for Poland and the United Kingdom as laid down in the protocols of one of the Treaties. Contrary to the colloquial expression 'opt-out', this protocol does not aim to achieve an exception, but is explicitly intended to clarify some aspects of the Charter's application. Moreover, the binding nature of the Treaties with regard to both Member States is not called into question by this opt-out. The provisions of the protocol correspond to these objectives.

Article 1(1) of the Protocol emphasizes that neither the Court, nor any court or tribunal of the two Member States, may annul domestic laws, regulations or administrative provisions, practices or action for reason of conflicts with EU fundamental rights. According to paragraph 2 of this Article nothing in

⁶⁷ Well illustrated in Case C-135/08 *Rottmann* [not yet published in the ECR], para. 55.

⁶⁸ On this line of thought see Britz, 'Europäisierung des Datenschutzes?', *EuGRZ* (2010) 1, at 11. Cf. also Papier, 'Die Rezeption allgemeiner Rechtsgrundsätze aus den Rechtsordnungen der Mitgliedstaaten durch den Gerichtshof der Europäischen Gemeinschaften', *EuGRZ* (2007), at 133 *et seq.* See also Timmermans, 'The Court of Justice of the EU, A Human Rights Court?', Manuscript for the King's College Annual Lecture, 2010.

⁶⁹ A comparison of the application of the proportionality test in Case C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and others* [2003] I-4989, para. 82 *et seq.*, and in the opinion of AG Sharpston of 17 June 2010 in Case C-92/09 and C-93/09 *Volker and Markus Schecke*, points 104 *et seq.*, illustrates this effect.

⁷⁰ Case *Omega*, *supra* note 55, para. 37.

⁷¹ Case *Dynamic Medien*, *supra* note 4, para. 44.

⁷² See Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] I-9831, paras 52 *et seq.* on the freedom of speech.

Title IV of the Charter, the so-called fundamental social rights, creates rights that can be relied on in the courts of both Member States, with the exception of rights that are foreseen in their respective national law. However, it is unlikely in any case that the Charter could apply in such a way, regardless of the Protocol. The rights, freedoms and fundamental principles of the Charter are only binding on Member States when they implement European Union law, insofar as they determine its interpretation.⁷³

Article 2 of the Protocol deals with a new constellation which results specifically from the Charter. In some provisions, it refers to the rights, freedoms or principles of the respective national law.

Some rights are guaranteed in accordance with the national laws governing the exercise of these rights, namely:

- the right to marry (Article 9),
- the right to conscientious objection (Article 10(2)),
- as well as the freedom to found educational establishments and the freedom of education (Article 14(3)).

Other rights are recognized as provided for in national laws and practices and in accordance with the Treaties. These are:

- the freedom to conduct a business (Article 16),
- the workers' right to information and consultation (Article 27),
- the right of collective bargaining and action (Article 28),
- protection in the event of unjustified dismissal (Article 30),
- the right to social security and social assistance (Article 34),
- the right to health care (Article 35) and
- the right of access to services of general economic interest (Article 36) are recognized as provided for in national laws and practices and in accordance with the Treaties.

Obviously the United Kingdom as well as Poland feared that the Court might use these references to interpret the respective national provisions directly in the light of the respective fundamental right of the Union. This is why Article 2 of the Protocol provides that to the extent that a provision of the Charter refers to national laws and practices, it is only applicable to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom.

However, Article 52(6) of the Charter already addresses this concern. It states that full account shall be taken of national laws and practices. According to the explanations attached to the Charter, this provision was introduced in the spirit of subsidiarity. Furthermore, the Union's fundamental rights according to the Charter are not directly applicable but only inasmuch as a situation falls within the scope of application of European Union law. This is why EU fundamental rights would only indirectly preclude national law, namely by way of provisions implementing the EU fundamental rights.⁷⁴ The workers' right to consultation serves as an example: it is not Article 27 of the Charter but possibly directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community⁷⁵ that could preclude the application of national law.

⁷³ Cf. Mehde, 'Gespalteener Grundrechtsschutz in der EU? / Zur Bedeutung der Sonderregelung für Polen und das Vereinigte Königreich', *EuGRZ* (2008) 269, at 271 *et seq.*

⁷⁴ *Mehde*, *supra* note 73, at 273.

⁷⁵ OJ L 80, 23.3.2002, at 29.

6. Perspectives: On the *Kücükdevici* case

One might now think that the Treaty of Lisbon changed much while everything stayed the same. However, Court observers may be highly doubtful of this assessment.

This is because the judgement in the *Kücükdevici* case of January 2010⁷⁶ contains one aspect which contradicts the Court's established case-law on the limited application of EU fundamental rights. The Court ruled that in a case between private parties, the EU fundamental right on the prohibition of age discrimination must be enforced, if necessary by not applying contradicting national provisions. This prohibition of discrimination therefore directly applies to horizontal legal relationships between private parties.

Article 51 of the Charter, the provision on its application, however, does not provide for a direct effect of the prohibition of age discrimination on private parties. Article 51 only refers to institutions, bodies, offices and agencies of the Union and Member States implementing Union law, but not to private parties. Moreover, the Charter repeatedly emphasizes the limits of the Union's competencies, namely in the first two sentences of Article 51(1) as well as in Article 52(2). Accordingly, the Charter should not be seen as a reason to extend the Union's competencies. This limitation also applies to the Court.

Obviously, the Charter does not prevent the Court from deducing additional fundamental rights from shared constitutional traditions or from international treaties common to the Member States, the European Convention on Human Rights in particular. Nevertheless, in these sources there seems to be no indication of a prohibition of age discrimination that applies directly between private parties. Only directive 2000/78/EC,⁷⁷ specifying the prohibition of age discrimination, may be seen as an indication for such a prohibition. It seems that this directive was not fully transposed into national law and the Court continues to reject the direct effect of directives between private parties.⁷⁸ But the Court possibly considered the directive to be sufficient evidence to extend the EU fundamental right, to not be discriminated against because of age, to a legal situation between private parties.

As a consequence, it might be possible nowadays to read specific additional content into EU fundamental rights, e.g. effects between private parties, if corresponding directives have been passed. The impact of such content would be limited, that is transitory, in practice because it would only be relied upon until the directive in question has been properly transposed. Still, this would constitute an important development of fundamental rights protection within the European Union and a deviation from traditional case-law on the horizontal direct effect of directives. Prior to any further development of that kind, it would be necessary for the Court to explain the dogmatic foundations of that contested horizontal direct effect and its limits.⁷⁹

Still, one should not overrate the judgement. It should not be forgotten that the judgment in the *Kücükdevici* case did not invent the prohibition of age discrimination between private parties, but rather confirmed the earlier *Mangold* judgement,⁸⁰ which was issued before the Charter became legally binding. In the *Mangold* case, the legal basis for the age discrimination prohibition remained unclear, but even then the Court left no doubt concerning the case's outcome – the horizontal application of the prohibition between private parties. Perhaps the judgement in the *Kücükdevici* case was a simple attempt to provide this outcome with a legal basis, but did not signal a general extension

⁷⁶ See *supra* note 5.

⁷⁷ Council Directive 2000/78/EC, *supra* note 17. Contrary to the *Mangold* case, *supra* note 8, the deadline for transposing the directive had already expired in Case *Kücükdevici*, *supra* note 5.

⁷⁸ Case *Kücükdevici*, *supra* note 5, paras 46-48 with further references.

⁷⁹ Cf. on the dogmatic questions e. g. the Opinions of Advocate General Tizzano in *Mangold*, *supra* note 8, points 83, 84 and 100, of Advocate General Mazák in C-411/05 *Palacios de la Villa* [2007] I-8531, points 133-138 and of Advocate General Sharpston in *Bartsch*, *supra* note 15, points 79-93, with further references respectively.

⁸⁰ See *supra* note 8.

of the scope of application of EU fundamental rights. This reading might not be completely satisfying but could at least suspend fears of a fundamental shift and reorientation in the field of fundamental rights application.

