

De directe werking van de grondrechten van de Europese Unie

Citation for published version (APA):

de Mol, M. (2014). *De directe werking van de grondrechten van de Europese Unie*. [Doctoral Thesis, Maastricht University]. Wolf Legal Publishers. <https://doi.org/10.26481/dis.20141002mm>

Document status and date:

Published: 01/01/2014

DOI:

[10.26481/dis.20141002mm](https://doi.org/10.26481/dis.20141002mm)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
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SUMMARY

THE DIRECT EFFECT OF THE FUNDAMENTAL RIGHTS OF THE EU

1. Research Questions

This thesis investigates in which situations, according to the case law of the Court of Justice of the European Union (hereinafter ‘the Court’), Union fundamental rights have direct effect and whether this can be considered to be legitimate, particularly in the light of the principle of allocation of powers. Three sub-questions are answered:

- (i) In which situations, according to the case law of the Court, Union fundamental rights have direct effect (state of the law)?
- (ii) To what extent can this case law be considered to be legitimate, particularly in the light of the principle of allocation of powers (legitimacy and judicial activism)?
- (iii) On which points is further clarification needed (outstanding questions and concerns)?

2. Scope and Structure

The research focuses on Union fundamental rights deriving from the ‘court-made’ general principles of Union law (Article 6 (3) TEU) and the Charter of Fundamental Rights of the European Union (Article 6 (3) TEU) (hereinafter: the Charter). The concept of direct effect is used to describe the way in which Union law influences proceedings before national courts. This effect will be considered as ‘direct’ if Union law applies as an autonomous ground for legal review before a national court. The use of Union law as an autonomous ground for review can be contrasted with the use of Union law as a tool of interpretation of national legislation (indirect effect).

The legitimacy of the Court’s case-law is evaluated in the light of the following factors: clarity and soundness of the reasoning, consistency and coherence and legal certainty. Particular attention is paid to the principle of allocation of powers. This concept can be subdivided into the horizontal and vertical allocation of power. The horizontal allocation of powers, also known as ‘institutional balance’ or ‘the principle of separation of powers of the Union’, is enshrined in Article 13 (2) TEU:

“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.”

The vertical allocation of powers deals with the division of powers between the Union and its Member States and is laid down in Article 5 (2) TEU:

“Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

The research is divided into two main parts: the direct effect of Union fundamental rights in proceedings initiated by private parties against public parties (vertical direct effect) and the direct effect of Union fundamental rights in proceedings initiated by private parties against another private party (horizontal direct effect) of Union fundamental rights. Both parts contain a mapping of the relevant case law of the Court and an evaluation of that case law in the light of the principle of allocation of powers.

3. Findings on Vertical Direct Effect

3.1 Stand of the Law

The vertical direct effect of Union fundamental rights was recognized by the Court already some time ago. The landmark cases are *Wachauf*¹ and *ERT*². These cases involve the vertical direct effect of Union fundamental rights as general principles of Union law. Since then, vertical direct effect has been recognized in a considerable number of cases. The existence of vertical direct effect of Union fundamental rights has been confirmed in Article 51 (1) of the Charter. According to his provision the Charter is only binding upon the Member States “when they are implementing Union law”. The Explanations relating to Article 51 (1) of the Charter refer to acting within “the scope of Union law”. Article 51 (1) of the Charter already gained substantial attention in the case law of the Court. It turns out that the scope of application of the Charter and of general principles of Union law is the same.

According to the case law on general principles of Union law and to later case law concerning the Charter, the minimum requirement for the application of

¹ CJEU 13 July 1989, case 5/88, *Wachauf*.

² CJEU 18 June 1991, case C-260/89, *ERT*.

Union fundamental rights is that there must be a connection with Union law.³ However, not every connection with Union law suffices to trigger the application of general principles of Union law or the Charter.⁴ The national act at issue must qualify as an act of implementation. The concept of ‘implementation covers all execution (‘mise en œuvre’) of Union law by the Member States. It can be divided in two main forms of implementation: implementation à la *Wachauf* and implementation à la *ERT*. I consider these two main categories as exhaustive.

In a *Wachauf* situation, a Member State is acting as ‘agent’ of the EU. The *Wachauf* implementation covers a wide range of situations. I classified the case law in four subcategories of national acts that cover the existing case law of the Court:

- i. Classic acts of implementation⁵:
This category covers national acts that are taken on the ground of a specific duty of implementation, e.g. the implementation of a Directive.
- ii. The exercise of the powers conferred by Union law⁶:
An example of this category are decisions made by the Member States on the basis of a discretion or exception available to them under EU legislation.
- iii. Acts falling within the scope of Union legislation⁷:
This category essentially concerns the omission of implementation.
- iv. Remedies, sanctioning and enforcement⁸:
This category can be seen as measures implementing the duty of sincere cooperation laid down in Article 4 (3) TEU. According to this principle, in absence of relevant EU rules, Member States are obliged to ensure the effectiveness of EU rights and duties of Union law. Measures falling within the national procedural autonomy are an example of this category.

³ See e.g. CJEU 1 March 2011, Case C-457/09, *Chartry*, paras. 22-25.

⁴ See e.g. CJEU 11 November 2010, Case C-20/10, *Vino I*, paras 53, 54, 56, 57 and 64 and CJEU 22 June 2011, C-161/11, *Vino II*, paras. 38 en 39.

⁵ See e.g. CJEU 10 July 2003, Joines Cases C-20/00 en C- 64/00, *Booker Aquaculture*; CJEU 12 September 2006, Case C-300/04, *Eman en Sevinger*.

⁶ See e.g. CJEU 6 December 2012, Joined Cases C-356/11 en C-357/11, *O. and S*; CJEU 22 October 2013, Case C-276/12, *Sabou*.

⁷ See e.g. CJEU 19 January 2010, Case C-555/07, *Küçükdeveci*.

⁸ See e.g. CJEU 10 November 2011, Case C-405/10, *Garenfeld*; CJEU 26 February 2013, Case C-617/10, *Åkerberg Fransson*; CJEU 26 September 2013, Case C-418/11, *Texdata Software*.

I do not consider it likely that future case law will result in additional *Wachauf* subcategories, but this cannot be excluded

The second main category, *ERT* implementation, concerns the situation in which a Member State uses an exception provided for by EU law in order to justify a national act that falls *a priori* under a prohibition of Union law. The *ERT* route applies, in any case, to measures qualifying as restrictions of the free movement. It is likely that it will also apply outside free movement situations, for example in *Zambrano* situations that concern national measures having the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (Article 20 TEU).⁹ With regard to the application of the *ERT* route, it is important to make a distinction between, on the one hand, the qualification of a national measure as ‘restriction of free movement’ or as a ‘deprivation of citizen rights’ and, on the other hand, the question whether the restriction or deprivation can be justified on grounds of a derogation of Union law. Vertical direct of Union fundamental rights is only legitimate at the second stage, and, therefore only after an assessment that the national act at issue qualifies as a ‘restriction’ or deprivation’. Only in that scenario will the national acts fall within the scope of Union law. In addition to this, it is possible that fundamental rights pop up at the first stage, namely as relevant factors in the qualification of a measure as a ‘restriction’ or deprivation’.

Union fundamental rights do not have direct effect in situations that cannot be brought under the two main categories of *Wachauf* and *ERT*, even though it is possible to discern some sort of EU link. Examples of the case law in which the EU connection is not sufficient to trigger the application of Union fundamental rights are:

- i. The sole existence of Union powers in the field of the situation at issue¹⁰;
- ii. The situation at issue concerns a Union citizen from another Member State;
- iii. The national act qualifies as ‘more stringent protective measures of domestic law’ (acts going beyond the minimum requirements laid down by Union)¹¹;
- iv. The sole fact that the claimant in the main proceedings relies on Union law;¹²

⁹ CJEU 8 March 2011, Case C-34/09, *Ruiz Zambrano*; CJEU 8 May 2013, Case C-87/12, *Ymeraga*.

¹⁰ CJEU 18 December 1997, Case C-309/96, *Annibaldi*.

¹¹ CJEU 17 December 1998, Case C-2/97, *Borsana*.

- v. The situation concerns a subject matter that is covered in a broad manner by Union law;¹³
- vi. Voluntary references in national law to Union law¹⁴;
- vii. Voluntary provisions of national law providing for compensation for damage sustained as a result of the adoption of national protection measures in accordance with EU law;¹⁵
- viii. A purely hypothetical prospect of exercising free movements rights.¹⁶

3.2 Legitimacy and Judicial Activism

The vertical direct effect of Union fundamental rights in *Wachauf* and *ERT* settings is legitimate as a necessary corollary of the principle that the Union is bound by ‘the rule of law’, since the implementation and application of Union law often takes place at the national level. Moreover, the duty for Member States to respect fundamental rights when implementing Union law has been confirmed in Article 51 (1) of the Charter. The ultimate test for the legitimacy of vertical direct effect of a Union fundamental right in a specific situation is the question whether the application of Union law in conformity with fundamental rights is at issue. When this is the case, vertical direct effect is justified. When this is not the case, the situation is a purely internal situation in which Union fundamental rights do not apply.

The pre and post Charter case law of the Court regarding vertical direct effect of fundamental rights shows judicial restraint. The Court generally respects the limits of Article 51 (1) of the Charter in the sense that the applicability of Union fundamental rights is indeed confined to situations in which the application of Union law in conformity with fundamental rights is at stake. An exception to this overall picture was established in the *Chatzi* case in which the equality principle was applied outside the context of Union law.¹⁷

It must be furthermore noted that sometimes the Court applies Union fundamental rights in spite of strong opposing views of Member States and even of the European Commission, for example in the *Åkerberg Fransson, Sabou*

¹² CJEU 8 May 2013, Case C-87/12, *Ymeraga*. The sole reliance on Union law might however trigger the application of Art. 47 of the Charter.

¹³ CJEU 15 September 2011, Joined Cases C-483/09 en C-1/10, *Gueye and Sanchez*.

¹⁴ CJEU 21 December 2011, Case C-482/10, *Cicala*.

¹⁵ CJEU 22 May 2014, Case C-56/13, *Érsekcsanádi Mezőgazdasági*.

¹⁶ CJEU 29 May 1997, Case C-299/95, *Kremzow*

¹⁷ CJEU 16 September 2010, Case C-149/10, *Chatzi*.

and *Toshiba* cases.¹⁸ In my view, these cases fit the Article 51 (1) of the Charter criterion. However, numerous and strong opposing views call for extra precise reasoning. *Toshiba* is an example in which the Court failed to carry out this extra precise reasoning. Another point of attention is the reasoning of judgments that fit in the line *ERT*. As mentioned earlier, the vertical direct effect of Union fundamental rights is in principle legitimate, but this is only after the national act at issue is qualified as a ‘restriction of free movement’ or as a ‘deprivation of citizen rights’. The Court seems to apply this classification, but there are two cases that might be confusing: the *Karner* and *Dereci* cases.¹⁹ These cases could be read as the possibility of granting of vertical direct effect of a Union fundamental right to national acts that do not *a priori* qualify as a ‘restriction’ or ‘deprivation’. In my view, however, this is not what the Court intended to do. I do not think the Court overstepped its purview, but the cases are unfortunate and do exemplify the necessity of clear and precise reasoning.

I consider the case law regarding the vertical direct effect of Union fundamental rights legitimate in the light of the principle of allocation of powers, as the Court generally respects the limits of Article 51 (1) of the Charter. In the meantime I note that even though it is possible to explain the majority of the cases in the light of Article 51 (1) of the Charter, the cases often lack such explanation. The overall legitimacy of the approach would strengthen if the different situations of (non-) implementation and their doctrinal underpinnings would be more explicit. In the next section concrete recommendations will be made.

3.3 Questions and concerns

The case law on vertical direct effect is settled. The two main categories, *Wachauf* and *ERT*, and the refinement of the *Wachauf* spectrum into four subcategories offers considerable clear insight. However, the case law could be clarified and refined on the following points:

Clarification of the Wachauf subcategory iv (remedies, sanctioning and enforcement)

This subcategory could be more explicit. It could be clarified in these kinds of cases that Union fundamental rights apply because the national acts at stake could be considered as the implementation of Article 4 (3) TEU (the duty of

¹⁸ CJEU 26 February 2013, Case C-617/10, *Åkerberg Fransson*; CJEU 22 October 2013, Case C-276/12, *Sabou*; CJEU 14 February 2012, Case C-17/10, *Toshiba*.

¹⁹ CJEU 25 March 2004, Case C-71/02, *Karner*; CJEU 15 November 2011, Case C-256/11, *Dereci*.

sincere cooperation). In addition, it would be helpful to identify explicitly which duty is at issue by virtue of Article 4 (3) TEU.

Consistency with regard to national acts falling within the national procedural autonomy

The fundamental rights of the Union also apply to national acts falling within the national procedural autonomy. The case law is however not consistent with regard to the relationship between, on the one hand, the *Rewe* principles of equivalence and effectiveness and, on the other hand, the fundamental rights.²⁰ In some cases, such as *Allassini* and *Ecotrade*, the fundamental rights review takes place separately.²¹ In other cases, like in *Pohotovost*, fundamental rights are examined as part of the *Rewe* principle of effectiveness.²² In *VEBIC* and *H.N.* the Court only examined in the light of fundamental rights without referring to the *Rewe* principles. Consistency is needed.²³ I would opt for a clear separation between, on the one hand, the application of fundamental rights and, on the other hand, the *Rewe* principles of equivalence and effectiveness.

Minimum harmonization, gradual harmonization and standstill

According to *Borsana*, *Eiterköpfe* and *Dominquez*, Union fundamental rights do not seem to apply to national acts going beyond minimum requirements laid down by Union legislation ('more stringent protective measures of domestic law').²⁴ However *Chatzi* causes confusion, as it seems to be a case in which the Court did apply fundamental rights to more stringent protective measures of domestic law.²⁵ An explicit confirmation that fundamental rights, in principle,²⁶ do not apply to more stringent protective measures of domestic law would be useful. In addition to that, it could be clarified why those measures fall outside the scope of Union law and how they differ from measures under *Wachauf* subcategory ii (the exercise of the powers conferred by Union law). In my view, the distinction is that more stringent protective measures of domestic law are not taken on the basis of powers *created* by Union law but on the basis of powers in relation to which Union law confirms that they *remained* powers of the Member States. The same kind of questions arise with regard to national

²⁰ CJEU 16 December 1976, Case 33/76, *Rewe-Zentralfinanz en Rewe-Zentral*.

²¹ CJEU 18 March 2010, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Allassini*; CJEU 8 May 2008, Joined Cases C-95/07 and C-96/07, *Ecotrade*.

²² CJEU 27 February 2014, Case C-470/12, *Pohotovost*.

²³ CJEU 7 December 2010, Case C-439/08, *VEBIC*; CJEU 8 May 2014, Case C-604/12, *H.N.*

²⁴ CJEU 17 December 1998, Case C-2/97, *Borsana*; CJEU 14 April 2005, Case C-6/03, *Eiterköpfe*; CJEU 24 January 2012, Case C-282/10, *Dominquez*.

²⁵ CJEU 16 September 2010, Case C-149/10, *Chatzi*.

²⁶ See for a possible exception: CJEU 18 July 2013, Case C-234/12, *Sky Italia*.

measures that are (still) allowed under gradual harmonization legislation or standstill clauses.

Refinement of the Küçükdeveci criterion on the scope of Union law

In *Küçükdeveci*, the prohibition of discrimination based on age applied, because the national act at issue concerned a subject matter (dismissal) that was covered by a non-discrimination Directive (Directive 2000/78).²⁷ Even though I agree that the national act at issue falls within the scope of Union law (namely as a measure that can be considered as a failure to implement Directive 2000/78), the criterion that is used to define the ‘scope of Union law’ is too broad. In *Vino I* and *Vino II*, the Court is more precise by considering both whether the relevant directive (Directive 1999/70) covers the subject matter of the national act at issue and whether the alleged discrimination falls under that directive.²⁸

Reasoning in the twilight zone

In *Sindicato dos Bancários do Norte*, the Court considered that the national measure at issue could not be considered to be implementation in the sense of Article 51 (1) of the Charter.²⁹ The Court just stated that there was no concrete element. However, the preliminary reference mentions that the Portuguese measure had been taken to consolidate public finances in a serious economic and financial crisis with a view to general obligations deriving from the Stability and Growth Pact. It is unfortunate that the Court did not explain why the connection with the Stability and Growth Pact was insufficiently concrete.

Application of Article 47 of the Charter

As a general rule Union fundamental rights only apply in disputes actually falling within the scope of substantive Union law. Possibly there is an exception to this rule with regard to Article 47 of the Charter (Right to an effective remedy and to a fair trial). It seems that this provision applies as soon as the applicant in the main proceedings relies on a substantive rule of Union law.³⁰ Future case law will have to clarify whether this assumption is correct.

Application of ERT route outside of free movement situations

It is likely that the *ERT* route not only applies in free movement situations, but it applies in all situations in which a Member State needs to benefit from the

²⁷ CJEU 19 January 2010, Case C-555/07, *Küçükdeveci*.

²⁸ CJEU 11 November 2010, Case C-20/10, *Vino I*, paras 53, 54, 56, 57 and 64 and CJEU 22 June 2011, C-161/11, *Vino II*, paras. 38 en 39.

²⁹ CJEU 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte*.

³⁰ CJEU 7 February 2013, Case C-498/12, *Pedone*; CJEU 7 February 2013, Case C-499/12, *Gentile*; CJEU 14 March 2013, Case C-555/12, *Loreti*; CJEU 30 March 2013, Case C-73/13, *T*.

exceptions provided for by EU law in order to justify a measure that would otherwise be prohibited. However, this has not been considered in a clear cut way in the Court's case law. Future case law has to give a decisive answer.

4. Horizontal direct effect

4.1 State of the Law

The horizontal direct effect of Union fundamental rights is a given in the current state of the law but with a great amount of unknown factors. The landmark cases for the existence of horizontal direct effect of Union fundamental rights are *Mangold* and *Kücükdeveci*.³¹ In these cases, the horizontal direct effect of the prohibition of discrimination based on age was recognized (*Mangold* and *Kücükdeveci*). In addition, these cases implicitly revealed that the *Mangold*/*Kücükdeveci* horizontal direct effect applies to all Article 19 TFEU grounds of non-discrimination: sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. *AMS* clarified that other fundamental rights can also be capable of having horizontal direct effect and that the *Mangold*/*Kücükdeveci* approach in principle applies both to fundamental rights as general principles of Union law and as fundamental rights under the Charter.³²

The crucial question is under which conditions the *Mangold*/*Kücükdeveci* horizontal direct effect applies. Since the approach lacks sufficient reasoning and is controversial from several perspectives, a prudent reading is appropriate. So far, it is only safe to say that *Mangold*/*Kücükdeveci* horizontal direct effect will apply in circumstances that are comparable to those cases. When looking at the *Mangold* and *Kücükdeveci* cases in conjunction with *AMS*, it is possible to distil four conditions for the application of the *Mangold*/*Kücükdeveci* horizontal direct effect. Firstly, the fundamental right at issue should be unconditional and sufficiently precise. This is the usual technical requirement for direct effect. If this requirement is not fulfilled, it is certain that direct effect is out of question. Secondly, the alleged violation of a fundamental right should be a public act. Thus, the horizontal direct effect should result in the examination on the basis of a Union fundamental right of a public act. It is not certain whether purely private acts (such as factual behaviour or contractual clauses) should also be reviewed on the basis of Union fundamental rights. Future case law has to clarify this issue. The third condition is the application of Article 51 (1) of the Charter. The

³¹ CJEU 22 November 2005, Case C-144/04, *Mangold*; CJEU 19 January 2010, Case C-555/07, *Kücükdeveci*.

³² CJEU 15 January 2014, Case C-176/12, *AMS*.

object of review should qualify as ‘the implementation of Union law’. The existence of this condition is a given; horizontal direct effect of Union fundamental rights cannot occur outside the scope of Union law. Finally, the existence of a fourth condition cannot be excluded. This condition would be that it concerns a situation falling within the scope of Union legislation (for example a non-discrimination directive) that expresses the fundamental right at issue and that applies in the private sector. I tend to believe that this condition does not exist. However, the existing case law is not conclusive. Future case law has to clarify this.

The concrete result of *Mangold* and *Küçükdeveci* is that prohibitions of non-discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation contained in non-discrimination directives have ‘de facto’ horizontal direct effect.³³

4.2 Legitimacy and judicial activism

The issue of horizontal direct effect of Union fundamental rights is far more complex and controversial than the issue of vertical direct effect. It involves the application of fundamental rights in the private sphere (third-party effect or ‘*Drittwirkung*’ of fundamental rights or ‘constitutionalisation of private law’) and it therefore deviates from the classic ‘rule of law’ function of fundamental rights as a means to protect private individuals against public authorities. Third-party effect of fundamental rights is a sensitive topic on which the views in the Member States differ. In most Member States, the use of fundamental rights as an autonomous basis of examination in horizontal disputes is not accepted and controversial. Moreover, the limits of Article 51 (1) of the Charter are relevant in this context. According to this provision, the Charter is addressed to the Union and to the Member States. The provision does not mention private individuals. In my view, this means that there is no duty for private individuals to

³³ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJL* 303, 2.12.2000, p. 16–22; Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2002] *OJL* 180/22; Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] *OJL* 204/23; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, [2010] *OJL* 180/1; Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] *OJL* 373/37.

respect Union fundamental rights as such. On the other hand, arguably, certain fundamental rights might also need protection in horizontal situations, for example in the light of their purpose or wording or by virtue of the case law of the European Court of Human Rights. This complex constitutional setting should be reason for judicial restraint and sophistication. The *Mangold/Küçükdeveci* approach, however, seems to be the opposite. In my view, this approach lacks legitimacy due to several reasons.

The *Mangold/Küçükdeveci* approach firstly involves a third-party effect that goes beyond the commonly accepted horizontal function of fundamental rights as a tool of interpretation. It must, however, be noted that *Mangold/Küçükdeveci* involved the review of public acts in a horizontal setting. This is less controversial than the review of private acts in a horizontal setting. As was mentioned in the previous paragraph, it is not certain that the Court is willing to accept horizontal direct effect of fundamental rights in situations involving the review of private acts. The difference between the review of public acts and the review of private acts is that the latter implies the duty for private parties to respect fundamental rights, whereas in the case of the review of public acts, it is still possible to focus on a vertical element. This is also a relevant distinction with a view to Article 51 (1) of the Charter that seems to exclude the possibility of the review of a private act. The review of a public act, on the other hand, does not manifestly violate Article 51 (1) of the Charter.

Secondly, the principle of non-discrimination is expressed in several Directives. This reflects the decision of the Union legislature to render prohibitions of discrimination effective in the private sector through national legislation. After all, directives do not have horizontal direct effect. The *Mangold/Küçükdeveci* approach thwarts this decision, as it leads to *de facto* horizontal direct effect of the prohibitions of discrimination in the directives.

Thirdly, there were more sophisticated options available to render the principle of non-discrimination or fundamental rights in general effective in horizontal settings, such as the duty to interpret national and Union legislation in the light of Union fundamental rights or the *Francovich* doctrine of State liability.³⁴ Another possibility would have been classification comparable to that of the national procedural autonomy, according to which Union law would oblige the national judge to enforce a fundamental right at issue in a horizontal dispute, but it would leave it to the domestic legal system of each Member State to designate the applicable judicial techniques and remedies.

³⁴ CJEU 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich*.

Fourthly, by recognizing the possibility of horizontal direct effect in situations that involve the review of public acts, the Court had manoeuvred into an awkward position in which it eventually has to choose between two evils. There will come a moment in which the Court has to rule on the possibility of horizontal direct effect in situations involving the review of private acts. The rejection of that option would amount in a (new) splitting up of the concept of horizontal direct effect between situations that involve the review of a public act (horizontal direct effect possible) and situations that involve the review of a private act (no horizontal direct effect). This would be inconsistent with the case law on the (total lack of) horizontal direct effect of Directives. On the other hand, the acceptance of full horizontal direct effect would, in my view, manifestly violate Article 51 (1) of the Charter, because it implies the duty for private individuals to respect Union fundamental rights.

Finally, *Mangold* and *Küçükdeveci* do not explain why the principle of non-discrimination should be enforced in a private setting. This is not self-evident. The lack of explanation is unsatisfactory, especially in the light of the commotion and resistance after *Mangold*. Thorough reasoning would benefit the acceptance of the approach and therewith its legitimacy.

4.3 Questions and concerns

Foundation of the approach

As mentioned in the previous paragraph, *Mangold* and *Küçükdeveci* do not explain why the principle of non-discrimination should be effective in a horizontal setting. This evokes considerable legal uncertainty, because the foundation of the approach also determines its reach. It is recommendable that the Court unfolds on what grounds the principle of non-discrimination (or other fundamental rights) should be effective in a horizontal setting.

Relevance of the interplay between the principle of non-discrimination and Directive 2000/78

Mangold and *Küçükdeveci* are not conclusive on the question whether the principle of non-discrimination based on age has full horizontal direct effect or that the horizontal direct effect is limited to specific situations falling within the scope of application of non-discrimination directives such as Directive 2000/78. An explanation on this issue would be useful. In my view, it would be best to cut the intense entanglement between Union fundamental rights and secondary law. In particular, it is not desirable to indentify the content of a fundamental right as a general principle of Union law or under the Charter with that of secondary legislation.

Existence of full horizontal direct effect

So far, it is not clear whether horizontal direct effect of a Union fundamental right would be possible if it would function as a basis for the examination of purely private acts. I propose that this option should be denied, because it would lead to a duty for private parties to respect fundamental rights. I consider this to be a manifest violation of Article 51 (1) of the Charter. I realize that this will result in an inconsistency with the Court's case law on the (full denial) of horizontal direct effect of directives, however, with *Mangold* and *Küçükdeveci*, the Court embarked on a path ultimately leading to a choice between two evils. The inconsistency with the doctrine of horizontal direct effect of directives seems to be the best evil.

5. Final conclusion

The doctrines of vertical and horizontal direct effect contrast with each other. The doctrine of vertical direct effect blossomed. Both its existence as well as its elaboration in the case law seems legitimate. It does remain difficult to formulate a concrete test to determine in which situations vertical direct effect of Union fundamental rights occurs. However, thanks to a considerable amount of consistent case law it is possible to classify five situations in which Union fundamental rights do have vertical direct effect. On the contrary, the doctrine the horizontal direct effect of Union fundamental rights is scarcely out of the egg. The little case law is puzzling. The reach of the doctrine is shadowy. Its legitimacy is scant.

