The Court of Justice of the EU and the Philosopher's Stone: the Independent Horizontal Direct Effect of Article 47 of the Charter in *K.L.* v *X*

ECJ 22 March 2024, Case C-715/20, X *(Absence de motifs de résiliation)*

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INTRODUCTION

> [T]he Charter has proved to be of exceptional practical importance, becoming – to use the jargon of alchemists – the philosophers' stone of EU law enabling base norms (directive provisions that do not have a horizontal effect) to be transmuted into precious ones (those that do).[1]

Few topics in the EU legal scholarship have sparked a longer-lasting, more contentious, or more voluminous debate than the effectiveness of directives in horizontal situations.[2] While ruling out the possibility for directives to have

[1]Opinion of A.G. Szpunar in ECJ 15 July 2021, Case C-261/20, *Thelen Technopark*, para. 70.

[2]*See*, amongst others, L. Squintani and J. Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', 38 *Yearbook of European Law* (2019) p. 18; E. Muir, 'Of Ages in – And Edges of – EU Law', 48 *Common Market Law Review* (2011) p. 39; M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy',

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horizontal direct effect in *Marshall*,[3] the Court's tendency to map out avenues rendering directives effective in horizontal situations, in spite of that prohibition, served as powerful fuel for that debate. One of these avenues, as developed in *Mangold*[4] and *Kücükdeveci*,[5] consists of the possibility to rely on the horizontal direct effect of a general principle of Union law in order to make possible the disapplication of national legislation contravening a directive giving specific expression to that general principle. The *Mangold*/*Kücükdeveci*-method was later on transplanted to the Charter in *Egenberger*[6] and *Bauer*,[7] rendering directives effective in horizontal situations when invoked in combination with Charter provisions given specific expression by that directive. From that point onwards, the Charter became a powerful catalyst for the effectiveness of directives in horizontal situations, moving Advocate General Szpunar to compare its ability to render directives effective in horizontal situations to the metamorphosing powers of the philosopher's stone.

That mythical ability, however, seemed limited to certain provisions of the Charter, those capable of horizontal direct effect, and for certain directives, namely those displaying an intrinsic link to the Charter provision ultimately relied upon in the horizontal dispute.[8] The Court's judgment in *K.L.* v *X* qualifies these limitations, clarifying that: (i) Article 47 of the Charter can be relied upon in a horizontal situation without recourse to a subjective right guaranteed by Union law; and (ii) no intrinsic link is, in fact, required between the directive bringing the case within the scope of application of the Charter, and the Charter provision whose horizontal direct effect renders the disapplication of contravening national legislation possible.

This case note aims to provide an overview of the *status quo* regarding the effectiveness of directives in horizontal situations when relied upon in combination with the Charter, and to assess and evaluate the contributions made by the Court's judgment in *K.L.* v *X* to that ever-elusive doctrine.

44 *Common Market Law Review* (2007) p. 931; K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31 *European Law Review* (2006) p. 287; T. Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited', 21 *Yearbook of European Law* (2002) p. 327.

[3]ECJ 26 February 1986, Case 152/84, *M. H. Marshall* v *Southampton and South-West Hampshire Area Health Authority*.

[4]ECJ 22 November 2005, Case C-144/04, *Werner Mangold* v *Rüdiger Helm*.

[5]ECJ 19 January 2010, Case C-555/07, *Seda Kücükdeveci* v *Swedex GmbH & Co. KG*.

[6]ECJ 17 April 2018, Case C-414/16 *Vera Egenberger* v *Evangelisches Werk für Diakonie und Entwicklung e.V.*

[7]ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal* v *Maria Elisabeth Bauer and Volker Willmeroth* v *Martina Broßonn*.

[8]Opinion in *Thelen Technopark Berlin*, *supra* n. 1, paras. 71-72.

Legal context and questions before the Court

The facts of the dispute are as follows. K.L. was employed by X under a fixed-term contract. A year before the worker's contract was due to end, X issued a written declaration of notice of termination of the employment contract, without stating any reasons for the termination.[9]

K.L. brought an action against his employer before the referring court, the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Krakow-Nowa Huta in Krakow, Poland), claiming compensation on the basis that the aforementioned declaration of notice of termination contained formal errors. In the second order, K.L. claimed that in not stating the reasons for his termination, even when such a statement is not required for the termination of fixed-term contracts by Article 30(4) of the Labour Code,[10] the notice of termination contravened the principle of non-discrimination on the basis of type of employment contract under EU law, as well as under national law.[11]

Article 30(4) of the Labour Code stipulates that when an employment contract of indefinite duration is terminated by the employer by virtue of a declaration of notice of termination, such a declaration must be accompanied by a statement of reasons justifying that notice of termination. No such statement of reasons is required under Polish law when a fixed-term employment contract is terminated in the same manner. The Polish Constitutional Court declared this provision to be compatible with the democratic rule of law principle enshrined in Article 2 of the Polish Constitution and with the principle of equality laid down in Article 32 of the same Constitution.[12]

Clause 4 of the Framework Agreement on fixed-term work, annexed to Directive 1999/70,[13] lays down the principle of non-discrimination, providing that 'in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds'.

Entertaining doubts as to the compatibility of the Polish national legislation with the principle of non-discrimination as enshrined in the Framework Agreement, the referring court turned to the Court to enquire, with its first

[9]ECJ 22 March 2024, Case C-715/20, *X (Absence de motifs de résiliation)*, paras. 17-19.

[10]Kodeks pracy (Law establishing the Labour Code) (Dz. U. of 2020, item 1320, as amended).

[11]*X (Absence de motifs de résiliation)*, *supra* n. 9, para. 20.

[12]Ibid., paras. 23-24.

[13]Framework Agreement on fixed-term work concluded on 18 March 1999 (the Framework Agreement), annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. 1999, L 175/43.

question, whether Article 1 of Directive 1999/70 and clauses 1 and 4 of the Framework Agreement preclude provisions of national law that require employers to provide written reasons when terminating indefinite employment contracts through the issuing of a notice of termination, thus allowing judicial review of the well-foundedness of the termination's justification, while not imposing a similar requirement for fixed-term contracts, thereby limiting judicial review to the compliance of the notice of termination with the provisions of the contract.[14]

The second question submitted to the Court concerns the consequences of a possible incompatibility between Article 30(4) of the Labour Code and Article 1 of Directive 1999/70 and clauses 1 and 4 of the Framework Agreement. Citing the Court's case law in *Cresco Investigation*[15] and *DI*,[16] yet noting that these cases concerned grounds for discrimination explicitly mentioned in Article 21 of the Charter, the referring court asked whether parties in a horizontal dispute may rely on clause 4 of the Framework Agreement and the general principle of non-discrimination as laid down in Article 21 of the Charter before a national court, and thus, in other words, whether these rules have horizontal direct effect.[17]

Opinion of the Advocate General and Judgment of the Court

The Court commenced its analysis by reformulating the questions referred. While the act of reformulating preliminary questions is not remarkable in itself, the manner in which the Court did so in the present case merits a closer look. The Court bundled the two questions referred so that the novel question became:

> whether clause 4 of the Framework Agreement must be interpreted as precluding national legislation under which an employer is not required to state, in writing, the reasons for the termination of a fixed-term employment contract with a notice period, although it is bound by such an obligation in the event of termination of an employment contract of indefinite duration, and whether that clause may be relied on in a dispute between individuals.[18]

In bundling the two questions originally referred by the national court, the Court omitted the reference to Article 21 of the Charter entirely. Its justification for doing so is quite minimal, amounting to a mere declaration of the irrelevance of

[14]Ibid., para. 29.

[15]ECJ, 22 January 2019, Case C-193/17, *Cresco Investigation GmbH* v *Markus Achatzi*.

[16]ECJ, 19 April 2016, Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S* v *Estate of Karsten Eigil Rasmussen*.

[17]*X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 27-29.

[18]Ibid., paras. 30-32.

ruling upon the request for an interpretation of that article, without disclosing its exact reasoning for arriving at that conclusion.[19]

The Opinion of Advocate General Pitruzzella might provide more clarity in this regard. The comprehensive argumentation developed by the Advocate General stands in stark contrast to the single line dedicated to the exclusion of Article 21 of the Charter by the Court itself. In considering the pertinence of Article 21 of the Charter in relation to the second question referred, the Advocate General relied on the three following arguments to refute such pertinence. First, the Advocate General said that while it is indeed the case that the list of grounds of discrimination referred to in Article 21 of the Charter is not intended to be exhaustive, the fact that the list is preceded by the wording 'such as' (or 'notamment' in Italian, 'insbesondere' in German), delineates at least the type of discrimination that falls within the scope of Article 21 of the Charter, discrimination affecting human dignity. The type of contractual relationship between a worker and his or her employer, being a ground of socio-economic nature, does not fit within this category, and thus falls outside of the scope of Article 21 of the Charter.[20] Second, the Advocate General noted that it follows from the Explanations to the Charter that Article 21 of the Charter applies in compliance with Article 14 of the European Convention on Human Rights. The European Court of Human Rights (ECtHR) has, in reference to that article, equally not interpreted the 'any other condition' clause enshrined therein as including factors not relating to the dignity of the person.[21] As a last supporting argument, the Advocate General invoked the fact that the Court itself does not consider discrimination based on professional category to be covered by Directive 2000/78.[22]

On the national legislation's compatibility with the Framework Agreement

The Court commenced its substantive analysis by assessing the compliance of the Polish national legislation with the principle of non-discrimination as laid down in clause 4 of the Framework Agreement. In order to do so, the Court first affirmed that the legislation at hand does indeed fall within the scope of the Framework Agreement, as the latter applies to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to

[19]Ibid., para. 32.

[20]Opinion of A.G. Pitruzzella in ECJ 30 March 2023, Case C-715/20, *X (Absence de motifs de résiliation)*, paras. 62-77.

[21]Ibid., para. 80.

[22]Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16; *X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, para. 82.

their employer.[23] Subsequently, the Court came to the conclusion that clause 4 of the Framework Agreement also applies to the national legislation at issue. An interpretation to the contrary, which excludes conditions relating to the termination of a fixed-term employment contract from the scope of clause 4(1) of the Framework Agreement, would run counter to the objective assigned to that provision in restricting the scope of protection of fixed-term workers against less favourable treatment.[24] Once the application to the present case of both the Framework Agreement in general, as well as its clause 4 in particular, were established, the Court was able to determine the compatibility of the Polish national legislation with the prohibition of discrimination as laid down in clause 4 of the Framework Agreement through the classic three-step verification: the comparability between fixed-term and permanent workers in this situation; the existence of less favourable treatment; and the presence of an objective justification.

With regard to the first step, the Court stipulated the comparator against which the treatment of fixed-term workers must be judged, i.e. permanent workers, as well as the factors which must be taken into account by the referring court when assessing the comparability of the situations in question with the purposes of the Framework Agreement. According to its settled case law in, among others, *Vernaza Ayovi*,[25] these factors include the nature of the work, training requirements and working conditions. As the referring court is the sole entity able to assess the facts, the Court left it to that court to decide on the comparability of the applicant's situation to permanent workers employed by the defendant during the same period.[26]

The second step of the verification then pertained to the existence of less favourable treatment of fixed-term workers as compared to permanent workers. On this point, the reasoning of the Court diverges from the line of argumentation put forward by the Advocate General. The Advocate General rejected the proposition that, in not laying down an obligation for an employer to state the reasons for termination when a fixed-term contract is terminated with notice, the Polish legislature intended to differentiate the protection against unjustified dismissal offered to fixed-term workers from that offered to permanent workers. Union law, and more particularly, the mandatory content of Article 30 of the Charter, enshrining the protection for workers against unlawful dismissals, or the effectiveness of Directive 1999/70, does not require member states to oblige

[23]*X (Absence de motifs de résiliation)*, *supra* n. 9, para. 33.

[24]Ibid., paras. 39-40.

[25]ECJ 25 July 2018, Case C-96/17, *Gardenia Vernaza Ayovi* v *Consorci Sanitari de Terrassa*, para. 29.

[26]*X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 42-49.

the employer to produce a written statement of reasons upon the dismissal of a fixed-term worker. However, he pointed out that it *does* follow from these provisions that a worker must be granted protection against the unjustified nature of the dismissal, essentially requiring that judicial review of the reasons underlying the dismissal be possible.[27] For the Advocate General the question of 'whether or not it is possible for a national court to review the justifiability of the dismissal of a fixed-term worker' was to be the decisive factor determining the national legislation's compatibility with Union law.[28] After analysing the system of protection for fixed-term workers put in place by the Polish legal order, the Advocate General opined that it could be possible to interpret that system as compatible with the 'effective judicial protection for fixed-term workers which is not substantively less favourable than for permanent workers',[29] which he deems the purpose of the prohibition of discrimination contained in clause 4 of the Framework Agreement. That interpretation is then dependent on the presence of several elements, including:

> proceedings managed by a specialised court with effective ex officio powers to require an employer, following a mere allegation by a worker that the dismissal is discriminatory, to prove the lawfulness of the reasons for the notice of termination; and access to a court free of charge, without any particular formalities or obligations.[30]

The Court, instead, contended that even if one assumes that the validity of the reasons for dismissal can be subject to judicial review, the very fact that fixed-term workers, unlike permanent workers, are not being provided with those reasons beforehand amounts, in itself, to less favourable treatment.[31] The fact that the worker might still contest the possible discriminatory or unlawful nature of the dismissal, did not alter the Court's conclusion. The written statement of reasons is crucial information for a worker to establish the validity of those reasons. A worker entertaining doubts thereon is obliged to lodge proceedings challenging the termination of his contract, is unable to judge the chances of success of such an action, and must in doing so show that his termination can *prima facie* be considered to be discriminatory or abusive. While the lodging of such an action itself is free, its preparation and follow-up can be accompanied by certain costs.[32]

[27] *X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, paras. 36-42.
[28] Ibid., para. 36.
[29] Ibid., para. 55.
[30] Ibid.
[31] *X (Absence de motifs de résiliation)*, *supra* n. 9, para. 53.
[32] Ibid., paras. 50-56.

Furthermore, the Court refuted that such less favourable treatment might be objectively justified. The Court reiterated its case law in *Lufthansa CityLine*,[33] stating that grounds able to justify the established difference in treatment cannot be of a general nature, but must amount to:

> precise and specific factors, characterising the employment condition to which they relate, in the specific context in which it occurs and based on objective and transparent criteria, to ascertain that that difference in treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.[34]

The Polish Government had claimed that the objective pursued by the national legislation was a 'national social policy aimed at full productive employment', for the purposes of which flexibility is essential. Such an argument, in relying solely on the duration of the employment itself, is of a general and abstract nature and thus failed, in the eyes of both the Advocate General[35] and the Court, to show that the difference in treatment in question corresponds to a genuine need. If the duration of the employment contract itself was to be accepted as a justification for less favourable treatment of fixed-term workers as compared to permanent workers, the objectives of the framework would be rendered void.[36]

On the consequences of such incompatibility

Next, the Court moved to discuss the consequences that must be given to a finding of incompatibility between a national provision and clause 4 of the Framework Agreement. The outset of this analysis entails no surprises, following the classic formulation that a national court must ensure the effectiveness of EU law through the duty of consistent interpretation where possible and, if not, disapply the national legislation contravening a provision of Union law if the latter has direct effect.[37] Coming back to the specific characteristics of the case at hand, the Court reiterated the inability for directives to have horizontal direct effect, as most recently reaffirmed in *Popławski II*[38] and *Thelen Technopark Berlin*.[39] As such, it arrived at the conclusion that while clause 4(1) of the Framework Agreement as annexed to Directive 1999/70 is precise and unconditional, it

[33]ECJ 19 October 2023, Case C-660/20, *Lufthansa CityLine*, para. 57.
[34]*X (Absence de motifs de résiliation)*, *supra* n. 9, para. 59.
[35]*X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, paras. 58-61.
[36]*X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 57-67.
[37]Ibid., paras. 69-72.
[38]ECJ 24 June 2019, Case C-573/17, *Criminal proceedings against Daniel Adam Popławski*.
[39]ECJ 18 January 2022, Case C-261/20, *Thelen Technopark Berlin GmbH* v *MN*.

cannot be relied upon in a horizontal dispute in order to generate the disapplication of the national legislation contravening that clause.[40]

However, in adopting legislation specifying and giving specific expression to the employment conditions governed by clause 4 of the Framework Agreement, Poland was effectively implementing Union law. This triggered the application of the provisions of the Charter to the dispute by virtue of its Article 51(1), including the right to an effective remedy as laid down in Article 47 of the Charter.[41]

In his Opinion, the Advocate General had opposed the applicability of Article 47 of the Charter to the present case. While the Court had indeed confirmed the horizontal direct effect of that provision in *Egenberger*, the Advocate General suggested that the Court had only applied Article 47 of the Charter with Article 21 of the Charter. The Advocate General opined that it is inherent to the regulatory structure of Article 47, granting an effective remedy for violations of rights and freedoms guaranteed by Union law, that it must be applied in combination with another subjective right guaranteed by Union law. As the fixed-term worker cannot derive a right from the Framework Agreement itself, the Advocate General concluded that Article 47 of the Charter could not find application in this case.[42]

Once again, the Court's reasoning provided an entirely different result. It held that in providing that a fixed-term worker, unlike a permanent worker, is not given a written statement of the reasons for their termination and thus not allowing him access to information crucial to determine whether or not to challenge the dismissal, the national legislation limits the access of a fixed-term worker to legal proceedings as guaranteed by Article 47 of the Charter. As such, the Court ruled that the difference in treatment introduced by the national legislation in contravention of clause 4 of the Framework Agreement undermines Article 47 of the Charter. That article is 'sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right on which they may rely as such', and thus capable of horizontal direct effect. The Court then formulated its final answer to the questions referred, concluding that clause 4 of the Framework Agreement precludes national legislation such as that *in casu*, and that the effectiveness of Article 47 of the Charter must be guaranteed by the national court by, if need be, disapplying any contrary provision of national law in so far as necessary.[43]

[40] *X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 72-76.
[41] Ibid., para. 77.
[42] *X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, paras. 97-102.
[43] *X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 77-82.

Effectiveness of directives in horizontal situations in combination with the general principles and the Charter: a brief history of time

In order to be able to properly assess the consequences of the judgment of the Court in *K.L.* v *X* for the doctrine of the effectiveness of directives in horizontal situations when applied in combination with the Charter, the complexity, as well as the longevity of that doctrine merits a sketch of the road that brought us here. That road is guided by the question of whether individuals in a horizontal dispute can rely directly on provisions of not, or incorrectly, implemented directives before a national court. The starting point of this reflection can then be pinpointed to some thirty-odd years ago, when the Court denied such a possibility in its (in)famous judgment in *Marshall*, asserting the now (in)famous prohibition on the horizontal direct effect of directives. The reasoning underpinning this prohibition, which appears virtually unchanged three decades later,[44] rests on two main premises: the text of Article 189 EEC (now Article 288 TFEU) which references only the 'member state to which it is addressed', to the exclusion of individuals of the binding nature of a directive;[45] and the ability for the Union legislator to enact obligations for individuals with immediate effect only through regulations, to the exclusion of its power to do so through directives.[46]

From the effectiveness of directives in horizontal situations in combination with a general principle of Union law . . .

Many a roadmap discussing the effectiveness of directives in horizontal situations could be drawn from this point forward. Since proclaiming the so-called prohibition on the horizontal direct effect of directives in *Marshall*, the Court has not shied away from identifying various avenues around that prohibition in subsequent case law.[47] The avenue most relevant for the present case note found

[44]*X (Absence de motifs de résiliation)*, *supra* n. 9, para. 37.

[45]*Marshall*, *supra* n. 3, para. 48.

[46]ECJ 14 July 1994, Case C-91/92, *Paola Faccini Dori* v *Recreb Srl*, para. 24. The present article will not attempt to evaluate the soundness of the *Marshall* prohibition on the horizontal direct effect of directives, nor of the premises which underpin that prohibition. For a critical evaluation of these premises, *see* P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions', 34 *European Law Review* (2009) p. 351-355.

[47]Several avenues allowing for directives to be effective in a horizontal situation, despite the *Marshall* prohibition on the horizontal direct effect of directives, have been developed by the Court in its case law. Such avenues include an expansive interpretation of what can be considered 'an emanation of the State' and a broad understanding of the duty of consistent interpretation. For a recent overview of these avenues, *see* M. Bobek, 'Why Is It Better to Treat Every Provision of EU

its rather controversial conception in *Mangold*. There, the Court was called upon to decide whether German national legislation permitting the hiring of workers aged 52 and above through successive fixed-term contracts, without thereby requiring the employer to objectively justify that decision, could be compatible with the Equality Framework Directive. Although the transposition period of the directive in question had not then expired, and although both parties to the dispute were private individuals, the Court ordered the national legislation contravening the Equality Framework Directive to be set aside. Its reasoning in coming to this conclusion was as follows. The principle of non-discrimination on grounds of age does not find its origin in the Equality Framework Directive; that directive merely provides for a general framework to combat violations of the principle. Moreover, that principle must be considered a general principle of Community law, the observance of which cannot be conditional upon the expiry of the transposition period of a Union directive. Consequently, when national rules fall within the scope of Union law, a national court deciding upon a dispute involving the principle of non-discrimination on grounds of age must ensure the effectiveness of that principle, by disapplying any conflicting provisions of national law.[48]

To state that the Court's judgment in *Mangold* brought about more questions than answers would be an understatement. The fact that the Court had determined the incompatibility of the provision of national law with Union law on the basis of the content of an unimplemented directive, yet seemed to draw the consequences of such incompatibility from the – up until that judgment, undiscovered – general principle of non-discrimination on grounds of age, brought about uncertainty as to whether it was the general principle, or the Equality Framework Directive, that generated the disapplication of the national legislation.[49]

Directives as Having Horizontal Direct Effect', 39 *International Journal of Comparative Labour Law and Industrial Relations* (2023) p. 211.

[48] *Mangold*, *supra* n. 4, paras. 74-78; A. Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?', 9 *Cambridge Yearbook of European Legal Studies* (2007) p. 81 at p. 106; J. Mazák and M. Moser, 'Adjudication by Reference to General Principles of EU Law: A Second Look at the *Mangold* Case Law', in M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) p. 61 at p. 81; F. Fontanelli, 'General Principles of the EU and a Glimpse of Solidarity in the Aftermath of *Mangold* and *Kücükdeveci*', 17 *European Public Law* (2011) p. 225 at p. 227.

[49] J. Lindeboom, 'Continuïteit en verandering in de rechtspraak over de doorwerking van richtlijnen in de nationale rechtsorde', 9/10 *Nederlands Tijdschrift voor Europees Recht* (2022) p. 1 at p. 5; N. Lazzerini, '(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS', 51 *Common Market Law Review* (2014) p. 907 at p. 912; Muir, *supra* n. 2, p. 49-50.

The Court's judgment in *Kücükdeveci*[50] then served as a welcome clarification to the confusion left by the Court in the aftermath of *Mangold*. The Court was again called to rule upon the incompatibility of national legislation with Directive 2000/78 in a dispute between private individuals concerning age discrimination. In its reasoning, the Court made the roles in its assessment of the compatibility of the provision of national law with Union law attributed to the Equality Framework Directive, and the general principle of non-discrimination on grounds of age, respectively, more clear, by stating that:

> Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment .... In those circumstances it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, ... the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.[51]

From *Kücükdeveci*, it is clear that the directive is merely an expression of the general principle of non-discrimination on grounds of age, and that it is the general principle which must serve as a basis for the examination.[52] Nevertheless, for the substantive verification of the compatibility of the contested national legislation of Union law, the Court turns to the content of that directive. The directive thus serves as the *de facto* yardstick against which the verification of compatibility with Union law must be performed. The legal consequences of such an incompatibility, consisting of the duty of the national judge to disapply the incompatible national legislation at hand, again arise from the general principle of non-discrimination on grounds of age. As such, the general principle itself serves as the *de jure* yardstick. Furthermore, the directive constitutes the trigger for the application of Union law, and consequently the general principle of non-discrimination.[53]

[50]ECJ 19 January 2010, Case C-555/07, *Seda Kücükdeveci* v *Swedex GmbH & Co. KG.*

[51]Ibid., paras. 50-51.

[52]Muir, *supra* n. 2, p. 53.

[53]Fontanelli, *supra* n. 48, p. 230; E. Spaventa 'The Horizontal Application of Fundamental Rights as General Principles of Union Law', in A. Arnull et al. (eds.), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) p. 199 at p. 208; M. de Mol, 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', 6 *EuConst* (2010) p. 293 at p. 300; Muir, *supra* n. 2, p. 53.

. . . to the effectiveness of directives in horizontal situations in combination with the Charter

In reaffirming the status of the principle of non-discrimination on grounds of age as a general principle of Union law *Kücükdeveci* judgment, the Court made a brief reference to the fact that this principle is equally enshrined in Article 21(1) of the Charter.[54] While this reference remained inconsequential for the further reasoning of the Court in that case, it served as an omen for the Court's building of a bridge from the horizontal direct effect of general principles of Union law, to the horizontal direct effect of Charter provisions in a subsequent judgment, *Association de médiation sociale*.[55] There, the Court was asked to rule upon the possibility for Article 27 of the Charter, the right of workers to information and consultation, to be relied upon either by itself or in combination with the provisions of the relevant directive in a horizontal situation so as to generate the disapplication of national legislation that contravened that directive.[56]

The Court rejected that possibility, by distinguishing the case at hand from *Kücükdeveci* 'in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[57] While not the case for Article 27 of the Charter, the Court seemed to indicate that some provisions of the Charter might be able to be relied upon by individuals in a horizontal situation.[58]

Confirmation of this suspicion came in subsequent case law of the Court. In *Egenberger*, the Court had to rule upon the compatibility of national legislation with the Equality Framework Directive in a horizontal case concerning discrimination on the grounds of religion.[59] The Court employed its reasoning in *Mangold* and *Kücükdeveci mutatis mutandis* to the facts of the case. In its assessment in *Egenberger*, the Court found the national legislation at issue to be incompatible with the content of the Equality Framework Directive. Once again,

[54]*Kücükdeveci*, *supra* n. 5, para. 22.

[55]ECJ 15 January 2014, Case C-176/12, *Association de médiation sociale contre Union locale des syndicats CGT e.a*.

[56]Ibid., para. 22; E. Frantziou, 'Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union', 2 *EuConst* (2014) p. 323 at p. 334.

[57]*Association de médiation sociale*, *supra* n. 55, paras. 46-47.

[58]Frantziou, *supra* n. 56, p. 339; Lazzerini, *supra* n. 49, p. 921; T. Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter', 16 *Cambridge Yearbook of European Legal Studies* (2014) p. 361 at p. 392.

[59]C. Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights', 15 *EuConst* (2019) p. 294 at p. 296.

the *Marshall* prohibition on the horizontal direct effect of directives dictated that the directive was unable to be relied upon, by itself, in order to conclude the need for the contravening national legislation to be disapplied. The Court, instead, drew the consequences of the incompatibility of the national legislation with Union law from the general principle of discrimination on grounds of religion or belief, as laid down in Article 21(1) of the Charter. That provision was then deemed 'sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them'.[60] The same was held true for Article 47 of the Charter. The horizontal direct effect of Article 21(1) and Article 47 of the Charter rendered these provisions able to be relied upon by the private individual within the horizontal dispute *in casu* in order to generate the disapplication of the national legislation contravening the Equality Framework Directive. In subsequent case law in *Bauer* and *Max-Planck*,[61] the Court recognised the right to annual paid leave, as enshrined in Article 31(2) of the Charter to be equally capable of such horizontal direct effect.[62] As a result, national legislation conflicting with the provisions of the Working Time Directive,[63] which lays down a general framework for the protection of the right to annual paid leave as enshrined in Article 31(2) of the Charter,[64] had to be disapplied in a horizontal situation.

This is where the roadmap brings us back to the *status quo* before the judgment in *K.L.* was made. As reiterated by Advocate General Szpunar in *Thelen Technopark Berlin*, for a Charter provision to be able to be applied in a horizontal situation in order to generate the disapplication of national legislation contravening a Union directive, the following conditions seem to need to be fulfilled:

(i) the Union directive *in casu* must display an intrinsic link with a provision of the Charter, amounting to the directive giving specific expression to that provision of the Charter;[65]
(ii) the provision of the Charter in question must be 'self-executing', meaning that it must be mandatory and unconditional, making it 'sufficient in itself to confer

[60] *Egenberger*, *supra* n. 6, para. 76.

[61] ECJ 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* v *Tetsuji Shimizu*.

[62] *Bauer*, *supra* n. 7, para. 85; *Max-Planck*, *supra* n. 61, para. 74. *See* E. Muir, 'The Horizontal Effects of the Charter Rights Given Expression to in EU Legislation, from Mangold to *Bauer*', 12 *Review of European Administrative Law* (2019) p. 185 at p. 199; E. Leinarte, 'EU Fundamental Rights and Their Enforcement', 78 *Cambridge Law Journal* (2019) p. 31 at p. 33.

[63] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

[64] *Bauer*, *supra* n. 7, para. 51; Muir, *supra* n. 62, p. 197.

[65] Opinion in *Thelen Technopark Berlin*, *supra* n. 1, para. 72.

> upon individuals a right on which they can rely in disputes with other individuals'.[66] Thus far, only Article 21(1) of the Charter, Article 31(2) of the Charter and Article 47 of the Charter have been confirmed to fulfil these conditions.[67]

The fulfilment of these conditions grants the Charter the power of a philosopher's stone, rendering it possible for provisions of directives to generate consequences normally reserved for provisions of Union law having direct effect in horizontal situations.

The judgment in *K.L.*: limiting the Charter's limitations

Contrasting the findings above with the judgment in *K.L.*, two seeming points of diversion from the *status quo* come to the fore. First, although the Court has since *Mangold* seemed to require an intrinsic link to be present between the directive contravened by the disputed national legislation *in casu* on the one hand, and the general principle or Charter provision generating the disapplication of that national legislation on the other,[68] no such link exists between the Framework Agreement annexed to Directive 1999/70 and the right to effective judicial protection arising from Article 47 of the Charter. Second, while it is true that the Court has recognised the horizontal direct effect of Article 47 of the Charter in earlier case law, *K.L.* represents the first time that it has relied on that right in an independent manner.

Effectiveness independent of an intrinsic link with the directive triggering the Charter

In clarifying *Mangold* in *Kücükdeveci*, the Court established that the Equality Framework Directive gave specific expression to the general principle of non-discrimination on grounds of age, before asserting that national legislation contravening that directive could be disapplied in a horizontal dispute on the basis of that general principle.[69] The affirmation of an intrinsic link between the

[66]Ibid., para. 71.

[67]S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU', 66 *Revista de Derecho Comunitario Europeo* (2020) p. 407 at p. 414.

[68]Opinion in *Thelen Technopark Berlin*, *supra* n. 1, para. 71; B. De Witte, 'The *Thelen Technopark Berlin* judgment: the Court of Justice sticks to its guns on the horizontal effect of directives', *REALaw Blog*, 6 May 2022, https://realaw.blog/2022/05/06/the-thelen-technopark-berlin-judgment-the-court-of-justice-sticks-to-its-guns-on-the-horizontal-effect-of-directives-by-bruno-de-witte/, visited 30 September 2024.

[69]*Kücükdeveci*, *supra* n. 5, para. 21; Prechal, *supra* n. 67, p. 422-423.

directive that would serve as the *de facto* yardstick for the Court's verification of the compatibility of national legislation with Union law, and the general principle which ultimately generated the disapplication of that national legislation by virtue of that principle's direct effect, can equally be detected in the Court's case law affirming the horizontal direct effect of (certain provisions of) the Charter. In *Egenberger*, the Court determined that the Equality Framework Directive is 'a *specific expression*, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter', before confirming that the Charter provision can be applied in combination with the Equality Framework Directive in the horizontal dispute *in casu*.[70] In *Bauer*, the Court can also be seen to establish such an intrinsic link, stating that the provision of the Charter in question, Article 31(2), was based on a directive which the directive at stake in that case served to codify.[71] These frequent references to an intrinsic link between the directive in question and the general principle or Charter provisions seemed to indicate that the intrinsic link was a precondition for the general principle or Charter provision to apply in combination with a Union directive in a horizontal situation, in order to generate the disapplication of the contravening national law.[72] In *K.L.* v *X*, this pattern seems to be interrupted. Nowhere in the judgment does the Court assert that Directive 1999/70 gives expression to, or otherwise entails an intrinsic link to, Article 47 of the Charter. Nevertheless, Article 47 of the Charter is ultimately relied upon in combination with that Directive in order to generate the disapplication of national legislation contravening the Directive. Could the Court be stepping away from the requirement of the presence of an intrinsic link, or was such a link never required begin with?

As a preliminary remark, it must be pointed out that the formulation employed by the Court in assessing the ability of a Charter provision to have horizontal direct effect seems to contradict the requirement for such an intrinsic link to be established. The Court consistently verifies whether a Charter provision is '*sufficient in itself* to confer upon individuals a right on which they can rely in disputes with other individuals' (emphasis added). The precondition that a Charter provision be given body, or specific expression, by a directive, before it can be relied upon in a horizontal situation would run directly counter to the requirement for a Charter provision to be *sufficient in itself* in order to have horizontal direct effect.[73] In other words, a requirement for a Charter provision to be given specific expression by virtue of a directive before that Charter provision

[70] *Egenberger*, *supra* n. 6, para. 47; Muir, *supra* n. 62, p. 211.

[71] *Bauer*, *supra* n. 7, paras. 54-57; H. Kraus, 'Horizontal Effect of the EU Charter of Fundamental Rights: *Bauer* and Willmeroth, MPG', 58 *Common Market Law Review* (2021) p. 1173 at p. 1198-1199.

[72] Opinion in *Thelen Technopark Berlin*, *supra* n. 1, paras. 71-72.

[73] Prechal, *supra* n. 67, p. 422-423.

could be horizontally directly effective is internally inconsistent. Why would the Court then refer so consistently to the existence of such an inherent link, that the existence thereof is perceived as a requirement? And, moreover, why was such a link then not required in *K.L.* v *X*?

It is posited that a directive invoked in combination with the Charter in a horizontal situation can fulfil two functions: it can serve as a *trigger* for the application of the Charter to a dispute,[74] and as a *substantive yardstick* against which the compatibility of the disputed national legislation with the Charter is verified.[75] Only when a directive is employed to fulfil the second function is an intrinsic link between the directive and the relevant Charter provision required.

The scope of application of the Charter, as defined in its Article 51(1), extends to situations where member states can be considered to be implementing Union law. As is well-established, this includes the (incorrect) implementation of a Union directive.[76] As such, a directive can have the function of bringing the dispute within the scope of Union law, triggering the application of the Charter.[77] The directives at issue in the earlier case law of the Court served not only to bring the dispute within the scope of application of the general principles and the provisions of the Charter,[78] but equally played a role as a substantive yardstick against which the Court could assess whether those provisions of primary law were infringed.[79] In order for these directives to be able to serve as a substantive yardstick for the compatibility of the national legislation with the general principle or Charter provision at stake, and thus for a violation of the content of that directive to be equated to a violation of the general principle or Charter provision, the presence of an intrinsic link between the two instruments at play is essential.[80] For example, the assertion that the Equality Framework Directive gave specific expression to the principle of non-discrimination as laid down in Article 21(1) of the Charter, allowed the Court to employ the content of that directive in order to determine the national legislation's compatibility with the Charter provision. While the Court might have consistently employed the referenced directives as a substantive yardstick for the compatibility of the national legislation with the Charter provision in question, this does not *have to be the case*.[81]

[74]Lindeboom, *supra* n. 49, p. 8.

[75]Muir, *supra* n. 63, p. 211.

[76]ECJ 26 February 2013, Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*; S. Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?', in C. Paulussen et al. (eds.), *Fundamental Rights in International and European Law* (Springer 2016) p. 143 at p. 146.

[77]Lindeboom, *supra* n. 49, p. 8.

[78]Lindeboom, *supra* n. 49, p. 6; Prechal, *supra* n. 67, p. 422.

[79]Prechal, *supra* n. 67, p. 422; Muir, *supra* n. 62, p. 211.

[80]De Witte, *supra* n. 68.

[81]Lindeboom, *supra* n. 49, p. 6.

However, when the directive *in casu* does not display an intrinsic link to the Charter provision ultimately relied upon, the verification of the compatibility with the content of the directive cannot be equated to a verification of compatibility with the Charter provision.

The dual function attributed to a directive, when invoked in combination with the Charter in a horizontal situation, can then shed light on the lack of a requirement of an intrinsic link between Directive 1999/70, and the Charter provision ultimately relied upon, Article 47 of the Charter. The fact that the dispute concerned the implementation of Directive 1999/70 triggered the application of the Charter, and its Article 47.[82] However, since Directive 1999/70 does not give specific expression to Article 47 of the Charter, it cannot be employed as a substantive yardstick, the incompatibility of which equates to the incompatibility of Article 47 of the Charter. Indeed, in *K.L.* v *X*, the Court does not automatically derive from its conclusion on the incompatibility of national legislation with clause 4(1) of the Framework Agreement annexed to Directive 1999/70, that Article 47 of the Charter can be considered to be infringed. It is only because of the fact that in infringing the prohibition of discrimination laid down in clause 4 of the Framework Agreement, the national legislation infringes the right to judicial protection of the fixed-term workers, that the Court deems the national legislation to be incompatible with Article 47 of the Charter, and thus that the provision can ultimately be relied upon to generate the disapplication of the national legislation. In other words, while the application of the Charter was made possible by the role of the Directive within the dispute at hand, it was not preconditioned upon an intrinsic link between Directive 1999/70 and Article 47 of the Charter, since the Court does not derive the incompatibility of the national measure with Article 47 of the Charter directly from its incompatibility with the prohibition of discrimination laid down in clause 4 of the Framework Agreement.

Effectiveness through the independent use of Article 47 of the Charter

A second perceived divergence of the Court's judgment in *K.L.* from its earlier case law on the effectiveness of directives in horizontal situations in combination with the Charter is that Article 47 of the Charter is applied independently. In his Opinion, Advocate General Pitruzzella argued against such an independent application of Article 47 of the Charter, stating that: (i) while it is true that the Court in *Egenberger* has recognised the horizontal direct effect of that provision, it has only done so in combination with other horizontally directly effective rights;

[82]With regard to the question of whether or not the application of Art. 47 of the Charter also necessitates the presence of an individual subjective right, in addition to the requirements set out in Art. 51(1) of the Charter, *see infra*.

and (ii) that the regulatory structure of Article 47 of the Charter demands the applicability of another subjective right or freedom guaranteed by Union law.[83]

Neither of these premises appear entirely sound. First, the Court's recognition of the horizontal direct effect of Article 47 of the Charter in *Egenberger* took place independently from its assertion of the horizontal direct effect of Article 21(1) of the Charter. This is, again, supported by the formulation employed by the Court in recognising the horizontal direct effect of Article 47 of the Charter, as that provision is '*sufficient in itself* and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such' (emphasis added),[84] excluding the requirement that Article 21(1) of the Charter must equally apply.[85]

The second objection formulated by the Advocate General pertaining to the application of Article 47 is the requirement of a 'right or freedom guaranteed by Union law'. Indeed, while it was outlined in the previous section that the applicability of the Charter requires the case at hand to fall within the scope of Union law, the applicability of Article 47 in particular is deemed by the Advocate General to be dependent on the presence of a right or freedom guaranteed by Union law. That very notion has been the cause of considerable debate centring around the questions of whether or not the application of Article 47 of the Charter presupposes an *individual subjective right*, and whether a concrete right needs to be established *at all*.[86]

While the Advocate General contends that the application of Article 47 requires that 'the private individual concerned is the holder of a right or a freedom, guaranteed by the law of the Union, on which he or she may rely in legal proceedings',[87] previous case law of the Court suggests that this might not necessarily be the case. In *Berlioz*,[88] a Luxembourg-based stock company was fined for not complying with an information order, issued after a request for information by the French tax administration on the basis of Directive 2011/16. After an action brought by Berlioz regarding the well-foundedness of the information order was refused, it contended that its inability to challenge the

[83]*X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, paras. 97-101.

[84]*Egenberger*, *supra* n. 6, para. 78.

[85]E. Frantziou, 'The Binding Charter Ten Years on: More than a "Mere Entreaty"?', 38 *Yearbook of European Law* (2019) p. 73 at p. 101-102; Prechal, *supra* n. 67, p. 415-416.

[86]For an overview of this debate and the Court's case law thereon, *see* M. Tecquemenne, 'Turning "Public Interest Litigation" into a Positive Obligation Deriving from Article 47 of the Charter: *Deutsche Umwelthilfe*', 69 *Common Market Law Review* (2023) p. 1745; M. Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature', 12 *Review of European Administrative Law* (2019) p. 35; Frantziou, *supra* n. 85, p. 99-105.

[87]*X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, para. 99.

[88]ECJ 16 May 2017, Case C-682/15, *Berlioz Investment Fund*.

validity of the information order before a court violated its right to an effective remedy. The *Cour administrative* of Luxembourg turned to the Court, inquiring whether Berlioz could rely on Article 47 of the Charter. Despite Directive 2011/16 not conferring any subjective rights on individuals, pertaining instead to the cooperation between national tax authorities, the Court answered in the affirmative. It identified a general principle of protection against arbitrary or disproportionate intervention by public authorities, from which Berlioz could derive a right able to be relied upon within the meaning of Article 47 of the Charter, rendering it possible to invoke its right to an effective remedy.[89] While the Court did not go as far as reiterating the Opinion of Advocate General Wathelet in that case, who contended that Article 47 should be considered to be 'automatically applicable', independently from an alleged violation of a right or freedom guaranteed by the law of the Union,[90] the Court did affirm the applicability of Article 47 even where 'it is not at least immediately clear if EU law confers any other right to an individual'.[91]

A further confirmation that the Court entertains a conception of the notion of a 'right', for the purposes of the application of Article 47 of the Charter, which goes far beyond a mere individual subjective right, can be identified in *Deutsche Umwelthilfe*.[92] In that case, the Court asserted that despite the fact that the environmental provisions at stake contained no discernable individual subjective rights for Deutsche Umwelthilfe, a German environmental protection organisation, the right to effective judicial protection as outlined in Article 47 of the Charter applied nevertheless.[93]

Having shown that the Court does not require an individual subjective right to be at stake, one can equally call into question whether a concrete right deriving from Union law, individual and subjective or not, needs to be established at all or whether, for the applicability of Article 47, the applicability of the Charter in general could suffice. Support for the conception of Article 47 of the Charter as

[89]Tecquemenne, *supra* n. 87, p. 1753-1755; Bonelli, *supra* n. 87, p. 44-45.

[90]Opinion of A.G. Wathelet in ECJ 10 January 2017, Case C-682/15, *Berlioz Investment Fund SA* v *Directeur de l'administration des contributions directes*, para. 51 as cited in Bonelli, *supra* n. 86, p. 45.

[91]Bonelli, *supra* n. 86, p. 54-55 as cited in Tecquemenne, *supra* n. 86, p. 1755. *See also* ECJ 8 November 2016, Case C-243/15, *Lesoochranarske zoskupenie VLK* v *Obvodny urad Trencin and Biely potok a.s. (Brown Bears II)*, para. 59.

[92]ECJ 8 November 2022, Case C-873/19, *Deutsche Umwelthilfe eV* v *Bundesrepublik Deutschland*, para. 65; Tecquemenne, *supra* n. 86, p. 1759.

[93]Tecquemenne, *supra* n. 86, p. 1759-1760.

self-standing, or 'automatically applicable' can be identified both in the literature,[94] as well as the case law of the Court. In *Texdata Software*,[95] the Court did not concern itself with the presence of a 'right or freedom guaranteed by Union law' before establishing the applicability of Article 47 of the Charter.[96] Instead, it stated that the applicability was dependent only on the applicability of the Charter itself. Furthermore, while the Court in *Berlioz* did ascertain the existence of a right before confirming the applicability of Article 47, that right was invoked neither by the referring court, or the private party, but instead arose out of an unwritten general principle put forward by the Court itself.[97]

It is clear that the Court in *K.L.* did not presuppose the existence of a subjective right able to be relied upon by the private individual for Article 47 of the Charter to be considered applicable. The *Marshall* prohibition, i.e. the inability for individuals to directly, and independently, rely on provisions of directives in horizontal situations, made it impossible for K.L. to discern such individual subjective rights directly from the prohibition of discrimination included in the Framework Agreement. In affirming the applicability of Article 47 despite the absence of such an individual subjective right, the Court furthers the approach it developed in *Berlioz* and *Deutsche Umwelthilfe*. Less obvious is *K.L.*'s contribution to the second question, namely whether or not the Court can be considered to require the existence of a right or freedom arising from Union law needing to be protected at all.[98] Indeed, the Court repeatedly emphasises the link between the difference in treatment installed through national law, and Article 47 of the Charter, holding, *inter alia*, that: 'the difference in treatment introduced by the applicable national law ... undermines the fundamental right to an effective remedy enshrined in Article 47 of the Charter'.[99] However, one might call the validity of that link into question.[100] It is not the fact that – in the event of a termination of a contract with notice – a statement of reasons is given to permanent workers but not to fixed-term workers that brings the Court to the conclusion that the latter's right to an effective remedy is violated. Instead, it is merely the absence of such a statement of reasons, which according to the Court impedes the access to justice of fixed-term workers. Therefore, it is not the *difference in treatment* in contravention of clause 4 of the Framework Agreement,

[94]Bonelli, *supra* n. 86, p. 43; Prechal, *supra* n. 76, p. 148.

[95]ECJ 26 September 2013, Case C-418/11, *Texdata Software GmbH*.

[96]Bonelli, *supra* n. 86, p. 44.

[97]Ibid., p. 44-45.

[98]Prechal, *supra* n. 76, p. 148.

[99]*X (Absence de motifs de résiliation)*, *supra* n. 9, para. 79.

[100]L. Cecchetti, 'Something New under the Sun: The Direct Effect of Directives Plus Article 47 Charter in Horizontal Situations in the *K.L.* Judgment', 1 *Quaderni AISDUE - Rivista quadrimestrale* (2024) p. 1 at p. 8.

but the *treatment of fixed-term workers itself*, which constitutes a violation of Article 47 of the Charter. In fact, in the hypothesis the Court had not found any discrimination to exist, the identification of which can at least be considered questionable,[101] the national measure would have had nevertheless be found to be in contravention of Article 47 of the Charter, since it would still deprive a fixed-term worker from the possibility to make a prior assessment of the opportuneness of legal action. That consequence, which is ultimately relied upon by the Court in order to assert that the difference in treatment infringed Article 47 of the Charter with regard to fixed-term workers, is independent of the discriminatory nature of the contested national measure.

Moreover, one could argue that it is not necessarily the effective protection of the (indirect) right not to be discriminated against on the basis of the type of employment contract, as laid down in clause 4 of the Framework Agreement, which is rendered more difficult by the contested national measure. Instead, the right liable to be hindered by the lack of a statement of reasons for termination is the right not to be unlawfully dismissed. The Court, however, did not entertain the applicability of a provision of Union law granting such a right.[102] As such, the application of Article 47 of the Charter in *K.L.* does not seem to be founded on the existence of an accessory right guaranteed by Union law in need of protection.

[101]The Court's conclusion as to the discriminatory nature of the national measure appears rather swift, certainly when compared to the arguments against such a classification put forward by A.G. Pitruzzella. Regarding the first step in that analysis, the Court states that it leaves it to the national judge to assess the comparability of permanent and fixed-term workers working for employer X in particular, while in fact already having asserted that comparability for the application of the national measure in general: *X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 47-49; H. De Waele, 'Horizontale werking van EU richtlijnen – meer mooie mogelijkheden na het arrest K.L.?', 6 *Ars Aequi* (2024) p. 555 at p. 557. Moreover, where, in regard to the existence of less favourable treatment, the A.G. exercises caution with regard to his analysis of the Polish legal framework so as to allow for an interpretation in accordance with Union law under well-established conditions, the Court seemingly identifies less favourable treatment, acting on the presumption that those conditions are not met. The Court furthermore posits that it would stay with that conclusion even if the national measure were not to infringe upon the effective judicial protection of the person concerned. This begs the question equally put forward by the A.G., if, when the effective judicial protection of fixed-term workers is guaranteed, the difference in treatment pertaining to the statement of reasons can then be considered substantively less favourable on the ground that it would hinder access to justice? Compare *X (Absence de motifs de résiliation)*, *supra* n. 9, paras. 53-56, and para. 81 and *X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, paras. 29-57.

[102]Both the A.G. and the referring court had made reference to Art. 30 of the Charter pertaining to the right to protection against unjustified dismissal. The A.G., however, referencing the Court's judgment in *Kücükdeveci*, did not consider the Charter provision able to be relied upon by private parties in a horizontal dispute, as it was not 'sufficient in itself to confer on individuals an individual right which they may invoke as such': *X (Absence de motifs de résiliation)* Opinion, *supra* n. 20, paras. 36 and 94-95.

Effectiveness without reference to the general principles of Union law

The recognition in *K.L.* that Article 47 of the Charter had horizontal direct effect not only happened independently from the application of another horizontally directly effective provision of the Charter, but also without any reference to a general principle of Union law being enshrined in that provision. As such, the judgment fits within the trend of diminishing importance of general principles of Union law for the effectiveness of directives in horizontal situations. While in *Egenberger* the Court still had recourse to the principle of non-discrimination on the grounds of religion in order to ascertain that prohibition, as laid down in Article 21(1) of the Charter, the source of Union law that ultimately applied in the case was the Charter provision itself. Moreover, Article 31(2) of the Charter was equally recognised to have horizontal direct effect, without the right enshrined therein having been recognised as a general principle of Union law.[103] In *K.L.* the horizontal direct effect of Article 47 of the Charter, which enshrines the general principle of effective judicial protection, is established without any recourse to that general principle.[104] While instrumental in making it possible for directives to be effective in horizontal situations when invoked in combination with the Charter, *K.L.* shows that that doctrine has matured beyond the need to revert to general principles in order to justify the horizontal application of the Charter.

Concluding remarks: *K.L.* as a powerful clarification for horizontalisation

From *Marshall* to *Mangold*, and *Mangold* to *Egenberger*, the case law surrounding the effectiveness of directives in horizontal situations has been characterised by a certain degree of obscurity. The self-evident manner in which the Court, without much explanation, affirms the effectiveness of directives in horizontal situations when invoked in combination with the Charter, referencing openings it has left to that effect in earlier case law, seems to be at odds with the incremental manner with which that effectiveness is confirmed. If it is truly the case that an intrinsic link between a directive and the Charter provision ultimately relied upon in a horizontal situation was never necessary for national legislation contravening the Charter to be disapplied, and if the application of Article 47 of the Charter never presupposed a(n) (individual subjective) right, one may wonder why conclusions similar to those in *K.L.* were not made in earlier case law in order to overcome the

[103]E. Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et al*', 15 *EuConst* (2019) p. 306 at p. 316.

[104]Bonelli, *supra* n. 86, p. 38; Prechal, *supra* n. 67, p. 176-177.

lack of a horizontally directly effective Charter provision displaying an intrinsic link to the incorrectly implemented directive *in casu*, for the disapplication of national legislation contravening that directive via recourse to Article 47 of the Charter, or any other horizontally directly effective provision of the Charter for that matter.

As the possibilities affirmed in *K.L.* could in hindsight be derived from, or are at least not explicitly contradicted by, earlier case law, it is difficult to consider them 'new' developments. A more fitting statement would be that the Court confirmed certain dormant elements of the effectiveness of directives and the Charter in horizontal situations: (i) the absence of a requirement for an intrinsic link to exist between the directive triggering the application of the Charter, and the provision of the Charter which is ultimately relied upon for the disapplication of the contravening national legislation; and (ii) the lack of a requirement of an individual subjective right to be at stake for Article 47 of the Charter to apply, and arguably, the lack of an accessory right guaranteed by Union law altogether. In more concrete terms, whenever a national measure is the result of a member state acting within the scope of Union law within the meaning of Article 51(1) of the Charter, private individuals in a horizontal dispute will be able to rely on the incompatibility of that national measure with horizontally directly effective provisions of the Charter. Should the national measure be incompatible with Article 47 of the Charter, it will not be necessary for the private individual to show that an individual subjective right guaranteed by Union law is equally at stake, or, arguably, any additional right guaranteed by Union law at all.

The *Marshall* prohibition on the horizontal direct effect of directives is not departed from in *K.L.*, as directives remain unable to be directly relied upon by themselves in horizontal situations. However, in qualifying two of the limitations previously perceived to apply to the power of the Charter as a philosopher's stone, the Court most certainly highlighted the considerable extent of the effectiveness of directives in horizontal situations when invoked in combination with the Charter.

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