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Provisional text

OPINION OF ADVOCATE GENERAL

BOT

delivered on 29 May 2018 (1)

Joined Cases C-569/16 and C-570/16

Stadt Wuppertal

v

Maria Elisabeth Bauer (C-569/16)

and

Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e. K.

v

Martina Broßonn (C-570/16)

(Requests for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling — Social policy — Organisation of working time — Annual leave — Directive 2003/88/EC — Article 7 — Employment relationship terminated by the death of the employee — Loss of entitlement to paid annual leave — National legislation making it impossible for the deceased's heirs to be paid an allowance in lieu of outstanding paid annual leave — Charter of Fundamental Rights of the European Union — Article 31(2) — Obligation to interpret national law in conformity with EU law — Possibility of relying directly on Article 31(2) of the Charter of Fundamental Rights in a dispute between individuals — Obligation to disapply contrary national legislation)

1. The present requests for a preliminary ruling concern the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (2) and of Article 31(2) of the Charter of Fundamental Rights of the European Union. (3)

2. These requests were made in proceedings brought by Mrs Maria Elisabeth Bauer and Mrs Martina Broßonn against the former employers of their late husbands, that is to say, respectively, Stadt Wuppertal (Germany) and Mr Volker Willmeroth, in his capacity as the owner of the undertaking TWI Technische Wartung und Instandsetzung Volker Willmeroth e. K. ('Mr Willmeroth'), concerning those employers' refusals to pay the widows an allowance in lieu of the paid annual leave not taken by their spouses before their deaths.

3. Labour law is undoubtedly one of the main fields in which EU rules may be relied on in disputes between private individuals. (4)

4. At the same time, the lack of direct horizontal effect of directives, which stems from the settled case-law of the Court, (5) may appear to be such as to undermine the practical effectiveness of fundamental social rights in the disputes which national courts are called upon to resolve. (6)

5. That difficulty may, however, be eased or even neutralised where a provision of primary EU law, and more specifically a provision of the Charter, possesses the qualities needed to be relied on directly in a dispute between individuals.

6. Like other fundamental social rights recognised by the Charter, the right of every worker to an annual period of paid leave, enshrined in Article 31(2) thereof, is intended to govern employment relationships, which are largely private law relationships. Having regard, on the one hand, to the abovementioned settled case-law of the Court relating to the lack of direct horizontal effect of directives, of which there are many in EU social law, and, on the other hand, to the recent case-law of the Court seeming to favour the possibility in disputes between individuals of relying directly on provisions of the Charter which are mandatory and sufficient in themselves, (7) it is hardly surprising that the Court is seised of the question whether Article 31(2) of the Charter may be relied on directly in a dispute between individuals in order to disapply national provisions which are contrary to that article.

7. I consider that the starting point for the examination to be carried out in that regard is that it must, in principle, be possible before the national courts to protect, and therefore directly rely on, the fundamental rights recognised by the Charter, so that they do not remain a dead letter. However, it should also be noted that not all the provisions of the Charter are equally enforceable. Accordingly, when determining whether or not a provision of the Charter may be relied on directly before a national court for the purpose of disapplying national provisions which are contrary to that provision of the Charter, the Court must take into account the wording of that provision, read in conjunction with the explanations relating thereto. (8)

8. The present cases will lead me primarily, in what follows, to explain the reasons why I consider that Article 31(2) of the Charter possesses the qualities needed to be relied on directly in a dispute between individuals, so as to exclude the application of contrary national provisions.

I. **The legal framework**

A. **EU law**

9. Under Article 31(2) of the Charter, ‘every worker has the right … to an annual period of paid leave’.

10. Article 7 of Directive 2003/88, entitled ‘Annual leave’, is worded as follows:

‘1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

11. Article 17 of that directive provides that Member States may derogate from certain provisions of that directive. However, no derogation is allowed with regard to Article 7 thereof.

B. **German law**

12. Paragraph 7(4) of the Bundesurlaubsgesetz (Federal Law on paid leave) (9) of 8 January 1963, in the amended version of 7 May 2002, (10) provides:

‘If, because of the termination of the employment relationship, the leave can no longer be authorised in full or in part, an allowance in lieu thereof shall be paid.’

13. Paragraph 1922(1) of the Bürgerliches Gesetzbuch (Civil Code) (11) provides, under the heading ‘Universal Succession’:

‘Upon the death of a person (devolution of an inheritance), that person’s property (inheritance) passes as a whole to one or several other persons (heirs).’

II. **The dispute in the main proceedings and the questions referred for a preliminary ruling**

14. Mrs Bauer is the sole beneficiary of her husband, who died on 20 December 2010 and was employed by Stadt Wuppertal, a body governed by public law. Stadt Wuppertal rejected Mrs Bauer’s request for compensation of EUR 5 857.75, corresponding to the 25 days of annual leave outstanding to which her husband was entitled at the date of his death.

15. Mrs Broßonn is the sole beneficiary of her husband, who had been employed by Mr Willmeroth since April 2003 and had died on 4 January 2013, having been unable to work since July 2012 due to illness. Mr Willmeroth rejected Mrs Broßonn’s request for compensation of EUR 3 702.72, corresponding to the 32 days of leave outstanding to which her husband, having an entitlement to 35 days’ annual leave, remained entitled at the date of his death.

16. Mrs Bauer and Mrs Broßonn each brought an action before the Arbeitsgericht (Labour Court, Germany) having jurisdiction, seeking payment of that compensation. Those actions were upheld and the appeals brought by Stadt Wuppertal and by Mr Willmeroth against the judgments delivered at first instance were subsequently dismissed by the Landesarbeitsgericht (Higher Labour Court, Germany) having jurisdiction. Stadt Wuppertal and Mr Willmeroth brought appeals on a point of law against those decisions before the Bundesarbeitsgericht (Federal Labour Court, Germany).

17. In the orders for reference in each of those two cases, the referring court points out that the Court has already held, in its judgment of 12 June 2014, *Bollacke* (C-118/13, '*Bollacke*', EU:C:2014:1755), that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation or practice which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, where the employment relationship is terminated by the death of the worker. That court asks, however, whether the same applies where national law prevents such financial compensation from forming part of the estate of the deceased. Read in conjunction, Paragraph 7(4) of the BUrlG and Paragraph 1922(1) of the BGB have the effect that the deceased's entitlement to leave is extinguished upon death and cannot, therefore, be converted into a right to an allowance in lieu or form part of the estate. That court states, in that regard, that any other interpretation of those provisions would be *contra legem* and therefore cannot be accepted.

18. Moreover, since the Court has recognised that entitlement to paid annual leave could be extinguished after 15 months had elapsed from the end of the leave year, because it was no longer possible to achieve the purpose of that entitlement, that is to say to enable the worker to rest and to enjoy a period of relaxation and leisure, (12) and since it no longer seems possible to attain that purpose once the person concerned has died, the referring court asks whether loss of entitlement to leave or to an allowance in lieu of outstanding paid annual leave is truly excluded or whether the paid minimum annual leave guaranteed by Directive 2003/88 and by the Charter must be regarded as also intended to ensure protection for the deceased worker's heirs.

19. In that context, the referring court seeks to ascertain whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter may, in themselves, have the effect of compelling the employer to pay an allowance in lieu to the worker's heirs. Noting that in *Willmeroth* (C-570/16) the dispute is between two individuals, that court also enquires whether the possible direct effect of those provisions also applies in relations between individuals.

20. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling. The first question is raised, in identical terms, in *Bauer* (C-569/16) and *Willmeroth* (C-570/16), while the second is raised only in *Willmeroth* (C-570/16):

'(1) Does Article 7 of [Directive 2003/88] or Article 31(2) of the [Charter] grant the heir of a worker who died while in an employment relationship a right to financial compensation for the worker's minimum annual leave prior to his death, which is precluded by Paragraph 7(4) of the [BUrlG], read in conjunction with Paragraph 1922(1) of the [BGB]?

(2) If the first question is answered in the affirmative: Does this also apply where the employment relationship is between two private persons?'

III. **My analysis**

21. By its first question, worded in the same way in the two joined cases, *Bauer* (C-569/16) and *Willmeroth* (C-570/16), the referring court asks, in essence, whether Article 7 of Directive 2003/88 must be interpreted as precluding national legislation or practice, such as that at issue in the main proceedings, which provides that, where the employment relationship is terminated by the death of the worker, the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, and which therefore makes it impossible for the deceased's heirs to be paid such an allowance.

22. If that first question is answered in the affirmative, the referring court then wishes to ascertain whether the heir of the deceased worker can directly rely on Article 7 of Directive 2003/88 or Article 31(2) of the Charter against the employer, whether the latter is a person governed by public law or by private law, in order to obtain payment of an allowance in lieu of outstanding paid annual leave.

23. I would recall that the Court has already ruled in *Bollacke*, regarding the same provisions of German law, that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation or practice, such as that at issue in the main proceedings, which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, where the employment relationship is terminated by the death of the worker.

24. The referring court considers, however, that the Court did not rule on the question whether the entitlement to financial compensation forms part of the estate of the deceased even where this is precluded by national inheritance law. It is clear from German law, as interpreted by the referring court, that the deceased's entitlement to annual leave was extinguished upon his death and therefore could not be converted after his death into an entitlement to an allowance in lieu of leave within the meaning of Paragraph 7(4) of the BUrlG, since such entitlement to an allowance in lieu of outstanding paid annual leave could not form part of the deceased's estate under Paragraph 1922(1) of the BGB. Accordingly, Paragraph 7(4) of the BUrlG, read in conjunction with Paragraph 1922(1) of the BGB, could not be interpreted as meaning that the entitlements to annual leave of a worker who died while in an employment relationship are transferred to his heirs. I would point out that this is how German law now stands, according to the case-law of the Bundesarbeitsgericht (Federal Labour Court), as evidenced by that court's citation of its own judgments(13)

25. Moreover, that court does not exclude the possibility that the case-law of the Court concerning entitlement to an allowance in lieu of outstanding paid annual leave in the event of the worker's death might develop based on the idea that the entitlement of the worker's heir to such an allowance may not reflect the purpose attributed by the Court to the entitlement to paid annual leave. (14)

26. In my view, those factors are not such as to call into question the solution adopted by the Court in *Bollacke*.

27. Quite the contrary, if it is not to be rendered ineffective in its practical application, that solution necessarily implies the transfer by inheritance of the right to an allowance in lieu of outstanding paid annual leave to the heirs of the deceased worker. In other words, since the Court has held, first, that entitlement to annual leave and entitlement to a payment on that account constitute two aspects of a single right, (15) secondly, that the allowance in lieu of outstanding paid annual leave is intended to compensate for the fact that the worker cannot actually enjoy his right to paid annual leave(16) and is essential to ensure the effectiveness of that right (17) and, thirdly, that, accordingly, entitlement to paid annual leave is not lost because of the worker's death, (18) it must be inferred that the heirs of that worker must be able to claim an allowance in lieu of the paid annual leave accrued by that worker. A contrary solution would have the effect of retroactively depriving the deceased worker of his entitlement to paid annual leave, on the basis of 'an unintended occurrence, beyond the control of both the worker and the employer'. (19)

28. Moreover, there are several elements which show that considerations relating to inheritance were taken into account by the Court in the solution which it established in *Bollacke*.

29. Accordingly, it must be pointed out that both Paragraph 7(4) of the BUrlG and Paragraph 1922(1) of the BGB are cited in that part of *Bollacke* which is concerned with German law. The reference to national legislation in the operative part of that judgment is thus a reference to those two provisions. (20)

30. Moreover, it follows from the description of the facts in *Bollacke* that the Court was well aware that the dispute in the main proceedings was based on the rejection by the employer of Mrs Bollacke's application for an allowance in lieu of the paid annual leave not taken by her husband, on the ground that there were doubts on the part of that employer that an inheritable entitlement could exist.(21)

31. Furthermore, it was already clear at the stage of *Bollacke* that what was at issue was the case-law of the Bundesarbeitsgericht (Federal Labour Court) according to which entitlement to an allowance in lieu of outstanding paid annual leave at the end of the employment relationship does not arise where that relationship is terminated by the death of the employee. Accordingly, the Landesarbeitsgericht Hamm (Higher Labour Court, Hamm, Germany) expressed doubts as to the validity of that national case-law in the light of the case-law of the Court relating to Article 7 of Directive 2003/88. (22)

32. Lastly, the wording of the second question referred by the Landesarbeitsgericht Hamm (Higher Labour Court, Hamm) expressly raised the issue of whether the right to an allowance in lieu of outstanding paid annual leave attaches to the person of the worker, in such a way that he alone is able to claim it, allowing him, albeit at a later date, to achieve the objectives of rest and relaxation connected with the granting of paid annual leave.

33. I infer from those findings that the issues giving rise to the present reference for a preliminary ruling were already present in the case which gave rise to *Bollacke*. When delivering its judgment, the Court therefore took into account the considerations relating to inheritance existing in that case.

34. It is therefore necessary to confirm the Court's interpretation in *Bollacke* that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation or practice, such as that at issue in the main proceedings, which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, and which therefore makes it impossible for the deceased's heirs to be paid such an allowance, where the employment relationship is terminated by the death of the worker.

35. It is now necessary to identify the conclusions which must be drawn by the referring court from that finding of incompatibility between Article 7 of Directive 2003/88 and the national law at issue in the cases before it.

36. As regards, in the first place, the obligation of national courts to make every effort to give an 'interprétation conciliatrice' ('compatible interpretation') because of the possibility of relying on an interpretation in conformity with EU law in order to 'désamorcer l'incompatibilité' ('neutralise the incompatibility') found to exist, (23) it is appropriate to note the position put forward by the Bundesarbeitsgericht (Federal Labour Court), according to which it was impossible for it to interpret Paragraph 7(4) of the BUrlG and Paragraph 1922(1) of the BGB in a manner which is consistent with Article 7 of Directive 2003/88 as interpreted by the Court. The referring court considers that it has thus reached the limit of interpretation in conformity with EU law represented by an interpretation *contra legem*, following an assessment which, it recalls, is to be made by the national courts alone. (24)

37. In that regard, it should be recalled that the Court has repeatedly held that 'the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts'. (25)

38. According to the Court, 'it follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU'. (26)

39. It is true that the Court has stated that 'this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem*'. (27)

40. However, in that connection, the Court has clearly stated that 'the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive'. (28)

41. Accordingly, the Court considers that a national court cannot validly claim that it is impossible for it to interpret a national provision in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law(29)

42. In the light of that reminder of the case-law of the Court, it is for the referring court to ascertain whether the national provisions at issue in the main proceedings, namely Paragraph 7(4) of the BUrlG and Paragraph 1922(1) of the BGB, lend themselves to an interpretation which is in conformity with Directive 2003/88. In that regard, it should take into account, on the one hand, that those national provisions are formulated in a relatively broad and general manner (30) and, on the other hand, that the orders for reference themselves seem to indicate that the incompatibility of the national legislation with EU law is based on the interpretation by the Bundesarbeitsgericht (Federal Labour Court) of those provisions. (31) It therefore appears to me that it is on the basis of the interpretation given by the Bundesarbeitsgericht (Federal Labour Court) of the national rules at issue in the main proceedings that the worker is, owing to his death, deprived of the right to paid annual leave, in the financial form intended as compensation for the fact that the worker could not actually enjoy that right before the termination of his employment relationship.

43. In the second place, in the event that that court continues to consider that it is indeed impossible for it to interpret national law in conformity with Article 7 of Directive 2003/88, it is necessary to examine whether that article has direct effect and, if so, whether Mrs Bauer and Mrs Broßonn can rely on it against the respective employers of their deceased husbands.

44. In that regard, it is clear from the settled case-law of the Court that, 'whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly'. (32)

45. In its judgment of 24 January 2012, *Dominguez*, (33) the Court held that Article 7 of Directive 2003/88 fulfilled those criteria 'as it imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four weeks' paid annual leave'. (34) Moreover, as the Court states in that judgment, 'even though Article 7 of Directive 2003/88 leaves the Member States a degree of latitude when they adopt the conditions for entitlement to, and granting of, the paid annual leave which it provides for, that does not alter the precise and unconditional nature of the obligation laid down in that article'. The Court notes in that regard that 'Article 7 of Directive 2003/88 is not one of the provisions of that directive from which Article 17 thereof permits derogation'. It is therefore possible, as the Court has held, 'to determine the minimum protection which must be provided in any event by the Member States pursuant to that Article 7'. (35) In paragraph 36 of its judgment of 24 January 2012, *Dominguez*, (36) the Court thus states that 'Article 7(1) of Directive 2003/88 fulfils the conditions required to produce a direct effect'.

46. With regard, in particular, to Article 7(2) of Directive 2003/88, recognition of the direct effect of that provision appears to me to follow from *Bollacke*, in which the Court noted that that provision 'lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended'. (37) Moreover, as the Court pointed out in the same judgment, the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88 'is conferred directly by [that] directive'. (38)

47. It is now necessary to examine whether, in each of the present joined cases, the heir of the deceased worker can directly rely on Article 7 of Directive 2003/88 against the employer, whether the latter is a person governed by public law or by private law, in order to obtain payment of an allowance in lieu of outstanding paid annual leave, that is to say enjoyment of the entitlement to paid annual leave in its financial form.

48. It is clear that, in view of the Court's consistent case-law refusing to hold that directives have horizontal direct effect, (39) Mrs Bauer and Mrs Broßonn do not have equal status for the purpose of ensuring effective protection of the right to the paid annual leave which their deceased husbands had accrued.

49. Since Mrs Bauer's husband was employed by Stadt Wuppertal, which is a body governed by public law, she can without difficulty rely, as against that body, on her right to an allowance in lieu of outstanding paid annual leave, which, it should be recalled, is directly conferred on her by Article 7(2) of Directive 2003/88. It should also be recalled that, 'where a person is able to rely on a directive not as against an individual but as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with European Union law'. (40) On the basis of those considerations, the Court has held that 'provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, not only against a Member State and all the organs of its administration, such as decentralised authorities …, but also … against organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals'. (41)

50. Accordingly, in *Bauer* (C-569/16), the answer which should be given to the Bundesarbeitsgericht (Federal Labour Court) is that a national court hearing a dispute between an individual and a body governed by public law is obliged, where it is not possible for it to interpret

the applicable national law in conformity with Article 7 of Directive 2003/88, to ensure within its jurisdiction the judicial protection deriving for individuals from that article and to guarantee the full effectiveness thereof by disapplying if need be any contrary provision of national law.

51. Mrs Broßonn's dispute is more complicated, however, as her husband was employed by a person governed by private law. The Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual before a national court or tribunal. (42) Thus, despite the fact that, according to Article 1(3) thereof, Directive 2003/88 is intended to apply to all sectors of activity, both public and private, it is by a more tortuous route, which is not without obstacles, that EU law directly ensures that Mrs Broßonn is granted an allowance in lieu of outstanding paid annual leave. However, I shall attempt to mark out that route in a manner which is sufficiently clear for individuals to follow in future, so as to ensure effective protection of the fundamental right consisting of entitlement to paid annual leave.

52. In that regard, it should be recalled that it is settled case-law that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law'. (43) Since Paragraph 7(4) of the BUrlG implements Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time(44) which was codified by Directive 2003/88, Article 31(2) of the Charter is intended to apply in the main proceedings.

53. That clarification having been made, I consider that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 7 of Directive 2003/88, to ensure within its jurisdiction the judicial protection deriving for individuals from Article 31(2) of the Charter and to guarantee the full effectiveness of that article by disapplying if need be any contrary provision of national law. In my view, Article 31(2) of the Charter possesses the qualities needed for it to be relied on directly in a dispute between individuals in order to disapply national provisions which have the effect of depriving a worker of his right to an annual period of paid leave. I therefore propose that the Court adopt a solution similar to that which it adopted with regard to the general principle prohibiting discrimination on grounds of age(45) and then in relation to Articles 21 and 47 of the Charter. (46)

54. I would recall that, according to Article 31(2) of the Charter, 'every worker has the right … to an annual period of paid leave'. As the Court has already pointed out, the right to paid annual leave is thus expressly set out in that article of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties. (47)

55. It is apparent from the explanations relating to Article 31(2) of the Charter that that provision 'is based on Directive 93/104 …, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers'. (48) I would recall that Directive 93/104 was subsequently codified by Directive 2003/88 and that, as is apparent from the wording of Article 7(1) of Directive 2003/88, (49) a provision from which that directive permits no derogation, every worker is entitled to paid annual leave of at least four weeks. As the Court has repeatedly held, that right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself. (50)

56. It follows from the body of law thus described that the right to paid annual leave constitutes a particularly important principle of EU social law, now enshrined in Article 31(2) of the Charter and given concrete expression in Directive 2003/88.

57. The present cases afford the Court the opportunity to decide, by giving a ruling based on the need to ensure the effectiveness of fundamental social rights, that the right to paid annual leave is to be treated not only as a particularly important principle of EU social law, but also and above all as a fundamental social right in itself. (51) I therefore invite the Court to strengthen the enforceability of the fundamental social rights which possess the qualities that allow them to be relied on directly in disputes between individuals.

58. By following the analytical approach established by the Court in *Association de médiation sociale*, it seems to me legally justified to recognise that Article 31(2) of the Charter may be relied on directly in disputes between individuals in order to disapply national provisions having the effect of depriving workers of their right to an annual period of paid leave.

59. In that judgment, the Court reiterated its refusal to recognise directives as having horizontal direct effect, recalling its settled case-law that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. (52)

60. The referring court stated that it was impossible to utilise the palliative for the lack of direct horizontal effect of directives, that is to say interpretation of its national law in conformity with the directive in question. The Court therefore had to ascertain, by analogy with its ruling in the judgment of 19 January 2010, *Kücükdeveci*, (53) whether Article 27 of the Charter, (54) alone or in conjunction with the provisions of Directive 2002/14/EC, (55) could be relied on in a dispute between individuals in order not to apply, where appropriate, the national provision which is not in conformity with that directive.

61. Having stated that Article 27 of the Charter was indeed applicable to the dispute in the main proceedings, the Court emphasised that, as is clear from the wording of that article, it must, to be fully effective, be given more specific expression in European Union or national law. (56)

62. The Court points out, in that regard, that ‘it is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation’. (57)

63. This then allows the Court to note that ‘the facts of the case may be distinguished from those which gave rise to [the judgment of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21),] 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’. (58)

64. The Court infers from this that ‘Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied’. (59)

65. The Court adds that ‘that finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive’. (60)

66. A party injured as a result of domestic law not being in conformity with European Union law must therefore be content with the palliative of being able to 'rely on the judgment [of 19 November 1991,] *Francovich and Others* [(C-6/90 and C-9/90, EU:C:1991:428),] in order to obtain, if appropriate, compensation for the loss sustained(61)

67. In *Association de médiation sociale*, the Court thus gave the signal that it is not possible, in disputes between individuals, to rely directly on all the provisions of the Charter in Title IV, entitled 'Solidarity'. As a result, the Court was able to alleviate certain concerns as regards its supposed propensity broadly to accept, in disputes between individuals, the possibility of relying directly on the fundamental social rights recognised by the Charter.

68. It has been pointed out that the solution adopted by the Court in that judgment is not without its disadvantages as regards the effective protection of fundamental social rights. (62) It is also permissible to consider that Article 52(5) of the Charter not only did not rule out, but expressly permitted, the possibility before the national courts of directly relying on a provision of the Charter recognising a 'principle' for the purpose of reviewing the legality of national measures implementing EU law.

69. That said, it is also understandable that the Court, in its role as interpreter of the Charter and in full compliance with the principle of the separation of powers, considers itself bound by the wording of the provisions of the Charter, particularly where they recognise a right or principle whilst referring, as does Article 27 of the Charter, to the 'cases and … the conditions provided for by Union law and national laws and practices'.

70. According to that logic, it is possible to take the view that, in *Association de médiation sociale*, the Court respected, without a clear statement to that effect, the *summa divisio* between the principles proclaimed by the Charter, the enforceability of which is limited and indirect, and the rights recognised by the Charter, which, for their part, are fully and directly enforceable.

71. Be that as it may, I shall not enter into the debate concerning the respective effects of the rights and principles recognised by the Charter and their respective degrees of enforceability, as it seems to me indisputable, in the light of the actual wording of Article 31(2) of the Charter, that an annual period of paid leave constitutes a right for workers. (63)

72. I prefer to focus on what is expressly stated in *Association de médiation sociale*, that is to say that neither Directive 2002/14 nor Article 27 of the Charter, whether considered alone or together, may confer on individuals a right which they may directly rely on as such in a horizontal dispute.

73. In other words, the juxtaposition of the Charter provision concerned and a rule of secondary EU law intended to clarify it cannot make it possible to rely directly on that provision. (64) At the same time, it follows from the reasoning of the Court in *Association de médiation sociale* that the possibility of relying directly on provisions of the Charter in horizontal disputes is not excluded from the outset. Such a possibility of reliance on a provision may exist if the article of the Charter at issue is sufficient in itself to confer on individuals an individual right which they may invoke as such. (65) According to the Court, that is not the case with Article 27 of the Charter, which, as is clear from its wording, must be 'given more specific expression in European Union or national law' (66) in order to produce its effects in full.

74. The logic inherent in the reasoning of the Court in *Association de médiation sociale* thus appears to me to be based on the idea that a directive giving concrete expression to a fundamental right recognised by a provision of the Charter cannot confer on that provision the qualities needed

for it to be relied on directly in a dispute between individuals, where it is found that that provision cannot in itself, either in the light of its wording or in the light of the explanations relating thereto, be recognised as having such qualities. According to that logic, it is impossible for a directive which does not have direct horizontal effect to impart that quality to a provision of the Charter.

75. *Association de médiation sociale* therefore put an end to any ambiguity arising from the wording of the judgment of 19 January 2010, *Kücükdeveci*, (67) which referred to the possibility of relying on the 'principle of non-discrimination on grounds of age as given expression in Directive 2000/78[/EC (68)]'. (69) Was not that wording tantamount to calling into question the well-established case-law concerning the lack of direct horizontal effect of directives or even the hierarchy of norms? (70) On those points, it is clear from *Association de médiation sociale* that the rule arising from the judgment of 19 January 2010, *Kücükdeveci*, (71) is confirmed and that it is only the provision of primary law which can, where appropriate, be relied on in a dispute between individuals. (72) That judgment may, therefore, in so far as it recognises the potential possibility of relying directly on provisions of the Charter in horizontal disputes, be regarded as establishing an additional palliative for the lack of direct horizontal effect of directives. (73)

76. The Court further developed that rule of case-law in its judgment of 17 April 2018, *Egenberger*, (74) by acknowledging the possibility, in a dispute between private individuals, of relying directly on Article 21 of the Charter, in so far as it prohibits all discrimination on grounds of religion or belief, (75) and on Article 47 of the Charter, concerning the right to effective judicial protection. (76)

77. Contrary to what has sometimes been argued, recognition of the potential possibility of relying directly on provisions of the Charter in horizontal disputes, which in my view constitutes the major contribution in *Association de médiation sociale*, is not contrary to Article 51 of the Charter, since that recognition is intended to ensure that Member States, to which the provisions of the Charter apply, respect the fundamental rights recognised therein when implementing EU law. The fact that those rights are relied on in the context of a horizontal dispute is, from that point of view, not decisive and cannot in any event enable the Member States to avoid a finding that they have infringed the Charter in their implementation of EU law. (77)

78. Accordingly, it is appropriate definitively to remove any obstacle which Article 51(1) of the Charter constitutes to the possibility of relying directly on the provisions of the Charter in disputes between individuals. Although that article provides that the provisions of the Charter 'are addressed to the institutions, bodies, offices and agencies of the Union ..., and to the Member States only when they are implementing Union law', that article does not expressly exclude any effect of the Charter in relations between private individuals. (78) It should be added that the Court has held that several provisions of primary EU law have horizontal direct effect, although, in the light of their wording, those provisions are addressed to the Member States. (79)

79. It follows from the foregoing that, in *Association de médiation sociale*, the Court established an analytical approach to the relationship between the protection afforded by directives and by rules protecting fundamental rights. (80) The present cases offer the Court the opportunity to supplement and clarify that analytical approach, on this occasion in relation to an article of the Charter, namely Article 31(2), which, contrary to Article 27 thereof, possesses, in my view, the qualities needed to be relied on directly in a dispute between individuals in order to disapply, where appropriate, contrary national rules.

80. In order for there to exist such a possibility of relying on it directly, the relevant provision of the Charter must, on the basis of its inherent qualities, as clearly expressed in its wording, be mandatory and sufficient in itself. (81)

81. The fundamental right to an annual period of paid leave, as set out in Article 31(2) of the Charter, is undoubtedly mandatory in nature. The Court has consistently emphasised in its case-law both the importance and the mandatory nature of the right to paid annual leave, by stating that it is 'a particularly important principle of European Union social law from which there can be no derogations'. (82) That right must therefore apply not only to the action of public authorities, but also to employment relationships established between private individuals. That criterion was taken into account by the Court in its judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56). (83)

82. Moreover, as I have already stated, the relevant provision of the Charter must be sufficient in itself, (84) which means that it must not be necessary to adopt a supplementary provision of EU or national law to render applicable the fundamental right recognised by the Charter. (85) In other words, the relevant provision of the Charter requires no supplementary measure to be adopted in order directly to produce effects as regards individuals.

83. Indeed, I consider that, in the light of its wording, Article 31(2) of the Charter requires no supplementary measure to be adopted in order directly to produce effects as regards individuals. In such circumstances, the adoption of an act of secondary EU law and/or implementing measures by the Member States may certainly be useful to allow individuals to benefit in practice from the fundamental right concerned. That said, the adoption of such measures, which is not required by the wording of the relevant provision of the Charter, is not necessary in order for that provision directly to produce its effects in disputes which must be resolved by national courts. (86)

84. It follows from the foregoing that, in so far as it recognises the right of every worker to an annual period of paid leave, Article 31(2) of the Charter possesses the qualities needed to be relied on directly in a dispute between individuals in order to disapply national provisions having the effect of depriving a worker of that right. That is the case, as I have already stated, with national legislation or practice which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, and which therefore makes it impossible for the deceased's heirs to be paid such an allowance, where the employment relationship is terminated by the death of the worker. As the Court stated, in essence, in *Bollacke*, such national legislation or practice has the effect of 'retroactively leading to a total loss of the entitlement to paid annual leave itself'. (87)

85. Consequently, I suggest that, in *Willmeroth* (C-570/16), the Court's answer to the question referred by the Bundesarbeitsgericht (Federal Labour Court) should be that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 7 of Directive 2003/88, to ensure within its jurisdiction the judicial protection deriving for individuals from Article 31(2) of the Charter and to guarantee the full effectiveness of that article by disapplying if need be any contrary provision of national law.

86. I shall further point out that the finding that Article 31(2) of the Charter is, in so far as it provides for the right of every worker to an annual period of paid leave, sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law does not exhaust the issue of determining the normative content of that provision.

87. In that regard, I note that one of the lessons to be learned from *Association de médiation sociale* is that the Explanations relating to the Charter must be taken into account in order to determine whether a provision of the Charter is capable of being relied on directly in a dispute between individuals. (88) Accordingly, those explanations must, in my view, be taken into consideration in order to identify the normative content of the directly applicable legal rule contained in Article 31(2) of the Charter. Such consideration of the Explanations relating to the Charter is, moreover, dictated by the third subparagraph of Article 6(1) TEU, according to which 'the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions'. In accordance with Article 52(7) of the Charter, 'the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'. (89)

88. It is apparent from the explanations relating to Article 31(2) of the Charter that Directive 93/104 is one of the bases on which the drafters of the Charter relied when drafting that article. In fact, I would recall that, according to those explanations, Article 31(2) of the Charter 'is based on Directive 93/104 ...'. Directive 93/104 was subsequently codified by Directive 2003/88 and, as is apparent from the wording of Article 7(1) of Directive 2003/88, (90) a provision from which that directive permits no derogation, every worker is entitled to paid annual leave of at least four weeks. Thus, Directive 93/104 lies at the very heart of Article 31(2) of the Charter, since that article enshrines and consolidates what appears most essential in that directive. (91)

89. I infer from that interrelationship between the provisions, as reflected in the recent case-law of the Court, (92) that Article 31(2) of the Charter guarantees to every worker the right to an annual period of paid leave of at least four weeks. (93) In other words, in order to identify the normative content of Article 31(2) of the Charter and to determine the obligations arising from that provision, it is not possible, in my view, to disregard Article 7 of Directive 2003/88 and the case-law of the Court which, on that basis, has, in the succession of cases brought before the Court, specified the content and the scope of the 'particularly important principle of EU social law' (94) consisting of the right to paid annual leave(95)

90. It is also because of that interrelationship between the provisions that the entitlement to an allowance in lieu, which must be available to any worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, as derived from Article 7(2) of Directive 2003/88 and as recognised and given specific expression by the Court, (96) must be regarded as being an entitlement protected by Article 31(2) of the Charter. (97)

91. It seems to me to be consistent with the recent case-law of the Court to take into account the provision giving specific expression to the fundamental right at issue in order to determine the obligations deriving from the Charter. (98)

92. In conclusion, I note that in *Association de médiation sociale* the Court seems to have drawn the inference that the Charter contains provisions which do not all have the same capacity to be relied on directly in disputes between individuals. If it is found that a provision of the Charter has weak normative value, the protection of the fundamental right recognised therein requires action by the EU legislature and/or the national legislatures, with the result that it cannot in itself have legal effects which directly apply in a national dispute. In that situation, the Court must necessarily take into account the stated intention of the drafters of the Charter to entrust the EU legislature and/or

the national legislatures with the task of specifying the content of the fundamental rights recognised therein and the conditions for their implementation.

93. Although this position of the Court is understandable, in particular in view of the principle of the separation of powers, it must nevertheless, in my view, be balanced against a more flexible approach to provisions which, like Article 31(2) of the Charter, recognise a right without expressly referring to the adoption of provisions of EU law or national law.

94. It is also necessary not to underestimate the potential of other instruments for the protection of fundamental rights — such as the European Social Charter — to be given direct effect by national courts. In that regard, the Court's refusal to hold that Article 31(2) of the Charter has direct effect seems to me to run counter to the tendency of national courts to be more open to holding that the European Social Charter has direct effect. (99)

95. I therefore suggest that the Court not adopt an excessively restrictive approach to Article 31(2) of the Charter and give a balanced ruling to the effect that, while not every provision of the Charter recognising fundamental social rights possesses the qualities needed for it to be held to have direct horizontal effect, the provisions which are mandatory and sufficient in themselves do possess those qualities. In a word, the present cases provide the Court with an opportunity to ensure that the recognition of fundamental social rights is not a '*simple incantation*' ('mere entreaty'). (100)

IV. **Conclusion**

96. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) in Joined Cases *Bauer* (C-569/16) and *Willmeroth* (C-570/16):

(1) Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national legislation or practice, such as that at issue in the main proceedings, which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, and which therefore makes it impossible for the deceased's heirs to be paid such an allowance, where the employment relationship is terminated by the death of the worker.

(2) Moreover, in *Bauer* (C-569/16), I propose that the answer to be given to the Bundesarbeitsgericht (Federal Labour Court) should be that:

A national court hearing a dispute between an individual and a body governed by public law is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 7 of Directive 2003/88, to ensure within its jurisdiction the judicial protection deriving for individuals from that article and to guarantee the full effectiveness thereof by disapplying if need be any contrary provision of national law.

(3) Lastly, in *Willmeroth* (C-570/16), I propose that the Court should rule that:

A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 7 of Directive 2003/88, to ensure within its jurisdiction the judicial protection deriving for individuals from Article 31(2) of the

Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of that article by disapplying if need be any contrary provision of national law.

1 Original language: French.

2 OJ 2003 L 299, p. 9.

3 'The Charter'.

4 See Walkila, S., *Horizontal Effect of Fundamental Rights in EU Law*, Europa Law Publishing, Groningen, 2016, who states that 'an unequal relation of the parties tends more easily to justify recourse to fundamental rights in an effort to strengthen the position of the weaker party. Since this is a common situation and characteristic of many employer-employee relations, the field of employment law has proved a fruitful area for the evolution of the horizontal effect of fundamental right norms of EU law' (p. 199).

5 See, inter alia, judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 31 and the case-law cited).

6 See, in that respect, Van Raepenbusch, S., *Droit institutionnel de l'Union européenne*, 2nd edition, Larcier, Brussels, 2016, who notes that that case-law constitutes 'une restriction importante à l'effectivité des droits conférés par l'ordre juridique de l'Union, particulièrement dans le domaine social dans la mesure où le droit social de l'Union se moule principalement dans la forme de directives, conformément à l'article 153, paragraphe 2, sous b), TFUE. En d'autres termes, alors même que les dispositions sociales de l'Union en cause ont vocation à protéger les travailleurs et seraient suffisamment précises et inconditionnelles pour être directement appliquées par un juge, ces derniers ne peuvent s'en prévaloir à l'encontre de leur employeur privé, même aux fins d'écarter une règle de droit national contraire (effet d'éviction)' ('an important restriction on the effectiveness of the rights conferred by the EU legal order, particularly in the social field in so far as EU social law mainly takes the form of directives, in accordance with Article 153(2)(b) TFEU. In other words, even though the EU social provisions at issue are intended to protect workers and are sufficiently precise and unconditional to be directly applied by a court, workers cannot rely on them against their private employer, even for the purpose of disapplying a contrary rule of national law (exclusionary effect)') (p. 480).

7 See, most recently, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257).

8 Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17, 'the Explanations relating to the Charter').

9 BGBl. 1963, p. 2.

10 BGBl. 2002 I, p. 1529 ('the BUrlG').

11 'The BGB'.

12 See judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761, paragraph 44).

13 See orders for reference in the two joined cases (paragraph 14).

14 See, for a similar position, Vitez, B., 'Holiday Pay: Now also to Be Enjoyed during the Afterlife', *European Law Reporter*, Verlag radical brain SA, Luxembourg, 2014, No 4, p. 114.

15 See *Bollacke* (paragraphs 16 and 20 and the case-law cited).

16 See, to that effect, *Bollacke* (paragraph 17).

17 See *Bollacke* (paragraph 24).

18 See *Bollacke* (paragraph 26).

19 See *Bollacke* (paragraph 25).

20 See *Bollacke* (paragraphs 6 and 7).

21 *Bollacke* (paragraph 11).

22 *Bollacke* (paragraph 12).

23 I have borrowed these expressions from Simon, D., ‘La panacée de l’interprétation conforme: injection homéopathique ou thérapie palliative?’, *De Rome à Lisbonne: les juridictions de l’Union européenne à la croisée des chemins, Mélanges en l’honneur de Paolo Mengozzi*, Bruylant, Brussels, 2013, pp. 279 to 300, in particular p. 299.

24 See orders for reference in the two joined cases (paragraph 16).

25 See, inter alia, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited).

26 See, in particular, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 31 and the case-law cited).

27 See, in particular, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 32 and the case-law cited).

28 See, in particular, judgments of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 33 and the case-law cited), and of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 72).

29 See judgments of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 34), and of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 73).

30 This fact, incidentally, explains why other German courts which have had to rule on this issue have in fact been able to hold that an interpretation in conformity with EU law was possible.

31 See orders for reference in the two joined cases (paragraph 14).

32 See, in particular, judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited).

33 C-282/10, EU:C:2012:33.

34 See paragraph 34 of that judgment.

35 See judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35 and the case-law cited).

36 C-282/10, EU:C:2012:33.

37 See *Bollacke* (paragraph 23). See, also, judgment of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 27).

38 See *Bollacke* (paragraph 28).

39 See, inter alia, judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 37 and the case-law cited).

40 See, inter alia, judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited).

41 See, in particular, judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 33 and the case-law cited).

42 See, in particular, judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 37 and the case-law cited).

43 See, in particular, judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, '*Association de médiation sociale*', EU:C:2014:2, paragraph 42 and the case-law cited).

44 OJ 1993 L 307, p. 18.

45 See, in particular, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraphs 35 to 37 and the case-law cited).

46 See judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 79).

47 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 33 and the case-law cited).

48 See explanation on Article 31 (OJ 2007 C 303, p. 26).

49 As also from the wording of Article 7(1) of Directive 93/104.

50 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 32 and the case-law cited).

51 Can the social rights recognised by the Charter truly be described as 'fundamental' if most of them do not have horizontal direct effect? See, on that question, Fabre, A., 'La "fondamentalisation" des droits sociaux en droit de l'Union européenne', *La protection des droits fondamentaux dans l'Union européenne, entre évolution et permanence*, Bruylant, Brussels, 2015, pp. 163 to 194.

52 Judgment in *Association de médiation sociale* (paragraph 36 and the case-law cited).

53 C-555/07, EU:C:2010:21.

54 That article, entitled ‘Workers’ right to information and consultation within the undertaking’, provides that ‘workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices’.

55 Directive of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29).

56 Judgment in *Association de médiation sociale* (paragraph 45).

57 Judgment in *Association de médiation sociale* (paragraph 46).

58 Judgment in *Association de médiation sociale* (paragraph 47). See, to the same effect, with regard to the prohibition of any discrimination on grounds of religion or belief, enshrined in Article 21(1) of the Charter, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 76).

59 Judgment in *Association de médiation sociale* (paragraph 48).

60 Judgment in *Association de médiation sociale* (paragraph 49).

61 Judgment in *Association de médiation sociale* (paragraph 50 and the case-law cited). This has been described, not without reason, as a ‘maigre palliatif’ (‘inadequate palliative’) in view of the difficulties which the injured party will face in bringing a successful action for damages against the Member State in question: see Van Raepenbusch, S., *Droit institutionnel de l’Union européenne*, 2nd edition, Larcier, Brussels, 2016, p. 486.

62 See, in particular, Tinière, R., ‘L’invocabilité des principes de la Charte des droits fondamentaux dans les litiges horizontaux’, *Revue des droit et libertés fondamentaux*, 2014, Chronicle No 14, who points out that it is apparent from *Association de médiation sociale* that ‘les droits sociaux garantis par la Charte sous forme de principes ne peuvent pas être invoqués par les particuliers dans le cadre de litiges horizontaux. Or, la plupart des relations de travail se nouant entre particuliers, cette solution revient implicitement à les priver de tout effet juridique hormis lorsque la relation de travail implique l’autorité étatique ... C’est ainsi tout un pan des droits sociaux et de la [Charte] qui passent du domaine du droit positif à celui de la simple incantation’ (‘the social rights guaranteed by the Charter in the form of principles cannot be relied on by individuals in horizontal disputes. However, since most employment relationships are between individuals, that solution implicitly deprives those rights of any legal effects except where the employment relationship involves a State authority ... Accordingly, a wide range of social rights and a large part of the [Charter] fall outside the domain of positive law and become mere entreaty’) (p. 6). The author deplores the lack of ‘garantie effective d’un droit fondamental — qu’il s’agisse d’un principe n’enlève rien à son caractère fondamental — dont la violation est dans le même temps dûment constatée’ (‘an effective guarantee of a fundamental right (its being a principle in no way detracting from its fundamental nature), the infringement of which is at the same time duly established’) and also points to the danger which the Court’s approach represents to national courts and to the European Court of Human Rights from the perspective of the ‘reconnaissance d’une protection équivalente’ (‘recognition of equivalent protection’) (p. 7). See, also, Van Raepenbusch, S., *Droit institutionnel de l’Union européenne*, 2nd edition, Larcier, Brussels, 2016, who observes, with regard to the solution adopted by the Court in *Association de médiation sociale*, that, ‘en raison du recours obligatoire à la directive comme mode de régulation sociale à l’échelle de l’Union, elle revient à limiter significativement les possibilités mêmes d’invocation des dispositions sociales de la Charte par un justiciable victime d’une incompatibilité du droit national applicable’ (‘because of the mandatory use of directives as the method of social legislation at EU level, it amounts to a significant restriction on the very possibility of reliance on the social provisions of the Charter by an individual who suffers because the applicable national law is incompatible with EU law’) (p. 485).

63 See, to that effect, Lenaerts, K., ‘La solidarité ou le chapitre IV de la charte des droits fondamentaux de l’Union européenne’, *Revue trimestrielle des droits de l’homme*, Larcier, Brussels, 2010, No 82, pp. 217 to 236, who is inclined to classify as ‘des droits, avec les conséquences qui s’y attachent, notamment en termes d’invocabilité, ... le droit à des conditions de travail justes et équitables (article 31)’ (‘rights, with the effects attaching thereto, in particular in terms of the possibility of relying on them, ... the right to fair and just working conditions (Article 31)’ (p. 227, § 28). See, also, to the same effect, Bogg, A., ‘Article 31: Fair and just working conditions’, in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford, 2014, pp. 833 to 868, in particular p. 849, § 31.34 and § 31.35, and Bailleux, A., and Dumont, H., *Le pacte constitutionnel européen, Tome 1: Fondements du droit institutionnel de l’Union*, Bruylant, Brussels, 2015, p. 436, § 1030. See, finally, Opinion of Advocate General Tanchev in *King* (C-214/16, EU:C:2017:439, point 52).

64 Thus, ‘principles’, within the meaning of the Charter, ‘ne pourraient jamais se départir de leur incomplétude normative congénitale. Celle-ci serait rédhibitoire, toutes les directives possibles, aussi claires, précises et inconditionnelles soient-elles, n’y pouvant rien changer’ (‘can never shed their innate normative incompleteness. This would appear to be an insurmountable obstacle, incapable of being altered by any possible directive, no matter how clear, precise and unconditional

that directive might be'), see Fabre, A., 'La "fondamentalisation" des droits sociaux en droit de l'Union européenne', *La protection des droits fondamentaux dans l'Union européenne, entre évolution et permanence*, Bruylant, Brussels, 2015, pp. 163 to 194, in particular p. 185. As observed by Cariat, N., 'L'invocation de la Charte des droits fondamentaux de l'Union européenne dans les litiges horizontaux: état des lieux après l'arrêt Association de médiation sociale', *Cahiers de droit européen*, Larcier, Brussels, 2014, No 2, pp. 305 to 336, in that judgment, the Court reasoned 'en partant d'un cadre d'analyse propre aux directives, en séquençant l'examen des effets des directives et de la Charte, et en refusant toute plus-value à leur invocation conjointe' ('on the basis of specific framework for the analysis of directives, by sequentially examining the effects of the directives and of the Charter, and refusing to hold that they possessed additional force when relied on together') (p. 310).

65 It is therefore permissible to think that *Association de médiation sociale* involves 'une petite révolution en matière de protection des droits fondamentaux en consacrant implicitement, sous certaines conditions, l'effet direct horizontal de la Charte' ('a small revolution in the protection of fundamental rights by implicitly establishing, under certain circumstances, the direct horizontal effect of the Charter'): see Carpano, E., and Mazuyer, E., 'La représentation des travailleurs à l'épreuve de l'article 27 de la Charte des droits fondamentaux de l'Union: précisions sur l'invocabilité horizontale du droit de l'Union', *Revue de droit du travail*, Dalloz, Paris, 2014, No 5, pp. 312 to 320, in particular p. 317.

66 Judgment in *Association de médiation sociale* (paragraph 45).

67 C-555/07, EU:C:2010:21.

68 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

69 See, in particular, paragraph 51 of that judgment.

70 See, in that regard, Bailleux, A., 'La Cour de justice, la Charte des droits fondamentaux et l'intensité normative des droits sociaux', *Revue de droit social*, La Charte, Bruges, 2014, No 3, pp. 283 to 308, in particular p. 293.

71 C-555/07, EU:C:2010:21.

72 See, in that regard, Bailleux, A., ‘La Cour de justice, la Charte des droits fondamentaux et l’intensité normative des droits sociaux’, *Revue de droit social*, La Charte, Bruges, 2014, No 3, pp. 283 to 308, in particular pp. 294 and 295. See also, to that effect, Carpano, E., and Mazuyer, E., ‘La représentation des travailleurs à l’épreuve de l’article 27 de la Charte des droits fondamentaux de l’Union: précisions sur l’invocabilité horizontale du droit de l’Union’, *Revue de droit du travail*, Dalloz, Paris, 2014, No 5, pp. 312 to 320, who state, with regard to the principle of non-discrimination on grounds of age, that the possibility of relying directly on the latter ‘ne résulte pas tant de la combinaison d’un principe général avec la directive que de l’autosuffisance du principe général lui-même. ... Autrement dit, l’effet d’exclusion potentiel n’est pas rattaché à l’effet de la directive mais seulement à l’effet du principe ou du droit fondamental qui doit se suffire à lui-même’ (‘does not stem so much from the combination of a general principle with the directive as from the self-sufficient nature of the general principle itself. ... In other words, the potential exclusionary effect is not attached to the effect of the directive but only to the effect of the fundamental principle or right which must be sufficient in itself’) (p. 319).

73 See, to that effect, Cariat, N., ‘L’invocation de la Charte des droits fondamentaux de l’Union européenne dans les litiges horizontaux: état des lieux après l’arrêt Association de médiation sociale’, *Cahiers de droit européen*, Larcier, Brussels, 2014, No 2, pp. 305 to 336, in particular p. 316, § 8.

74 C-414/16, EU:C:2018:257.

75 In order to establish that recognition, the Court noted that, ‘as regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals’ (judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 77), which cites the judgments of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 39); of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraphs 33 to 36); of 3 October 2000, *Ferlini* (C-411/98, EU:C:2000:530, paragraph 50); and of 11 December 2007, *International Transport Workers’ Federation and Finnish Seamen’s Union* (C-438/05, EU:C:2007:772, paragraphs 57 to 61)). That is in line with the observation made by Carpano, E., and Mazuyer, E., ‘La représentation des travailleurs à l’épreuve de l’article 27 de la Charte des droits fondamentaux de l’Union: précisions sur l’invocabilité horizontale du droit de l’Union’, *Revue de droit du travail*, Dalloz, Paris, 2014, No 5, pp. 312 to 320, concerning *Association de médiation sociale*, according to which, ‘en reconnaissant l’effet direct horizontal potentiel des dispositions de la Charte, la Cour ne ferait que tirer les conséquences de l’assimilation de la Charte au droit primaire de l’Union consacrée par le traité de Lisbonne’ (‘in recognising the potential direct horizontal effect of the provisions of the Charter, the Court is merely drawing conclusions from the assimilation of the Charter to primary EU law, as established in the Treaty of Lisbon’) (p. 320).

76 According to the Court, 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 which they may rely on as such’ (judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 78)).

77 See, in that respect, Bailleux, A., ‘La Cour de justice, la Charte des droits fondamentaux et l’intensité normative des droits sociaux’, *Revue de droit social*, La Charte, Bruges, 2014, No 3, pp. 283 to 308, in particular, p. 305.

78 See, to that effect, Robin-Olivier, S., ‘Article 31 — Conditions de travail justes et équitables’, *Charte des droits fondamentaux de l’Union européenne, Commentaire article par article*, Bruylant, Brussels, 2018, pp. 679 to 694, in particular p. 693, § 29.

79 Ibid.

80 See Cariat, N., ‘L’invocation de la Charte des droits fondamentaux de l’Union européenne dans les litiges horizontaux: état des lieux après l’arrêt Association de médiation sociale’, *Cahiers de droit européen*, Larcier, Brussels, 2014, No 2, pp. 305 to 336, in particular p. 311 et seq.

81 See, to that effect, Lenaerts, K., ‘L’invocabilité du principe de non-discrimination entre particuliers’, *Le droit du travail au XXIe siècle, Liber Amicorum Claude Wantiez*, Larcier, Brussels, 2015, pp. 89 to 105, who observes, with regard to the principle of non-discrimination on grounds of age, that ‘une lecture combinée des arrêts Mangold, Kücükdeveci et AMS suggère que l’invocabilité horizontale [de ce principe] est, en premier lieu, fondée sur son caractère impératif. ... En second lieu, l’autosuffisance normative dudit principe a joué un rôle déterminant dans le raisonnement de la Cour de justice. Cette autosuffisance permet de distinguer les normes opérationnelles au niveau constitutionnel de celles qui ont besoin d’une intervention législative pour leur opérabilité. Ainsi, ladite autosuffisance normative permet d’octroyer un effet direct horizontal au principe de non-discrimination sans bouleverser la répartition constitutionnelle des pouvoirs voulue par les auteurs des traités. Dès lors que ledit principe “se suffit à lui-même pour conférer aux particuliers un droit subjectif invocable en tant que tel”, il n’empiète pas sur les prérogatives du législateur de l’Union ou national. En revanche, l’article 27 de la Charte ayant besoin de l’intervention du législateur, tant au niveau de l’Union que des États membres, pour son opérabilité, il ne saurait produire un tel effet direct’ (‘a combined reading of the judgments in *Mangold*, *Kücükdeveci* and *AMS* suggests that the possibility of relying on the horizontal direct effect [of that principle] is, in the first place, based on its mandatory nature. ... In the second place, the normative self-sufficiency of that principle played a decisive role in the reasoning of the Court of Justice. That self-sufficiency makes it possible to distinguish between applicable rules at the constitutional level and those which need legislative action in order to apply. Thus, that normative self-sufficiency makes it possible to confer horizontal direct effect on the principle of non-discrimination without disturbing the constitutional division of powers desired by the authors of the Treaties. Since that principle “is sufficient in itself to confer on individuals an individual right which they may invoke as such”, it does not encroach on the prerogatives of the EU or national legislatures. On the other hand, since Article 27 of the Charter requires action by the legislature, both at EU and Member State level, in order to apply, it cannot have direct effect’) (pp. 104 and 105).

82 See, in particular, judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-486/08, EU:C:2010:215, paragraph 28 and the case-law cited). More generally, as stated by Bogg, A., 'Article 31: Fair and just working conditions', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford, 2014, pp. 833 to 868, 'Article 31 speaks to the very purpose of labour law itself, namely to ensure fair and just working conditions, and it transfigures this overarching protective purpose into a subjective fundamental social right. This transfiguration, based in the injunction to respect the human dignity of all workers, marks out Article 31 as the *grundnorm* of the other labour rights in the Solidarity chapter' (p. 846, § 31.27).

83 Paragraph 39. See, also, judgment of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraphs 34 and 35).

84 As noted by Walkila, S., *Horizontal Effect of Fundamental Rights in EU Law*, Europa Law Publishing, Groningen, 2016, 'the core criterion pertains to the question whether a norm may be deemed "sufficient in itself" to serve as a direct basis of a claim before a court. That points to the remedial force of the norm; i.e., whether the norm has a sufficiently ascertainable normative content which enables a judge to apply it in given circumstances. The remedial force of a fundamental right norm may be examined on the basis of content and context based analyses ...'. In that regard, 'the content-based analysis inquires whether the norm enjoys "fully effectiveness" in the sense that its normative content is defined with a requisite degree of specificity and clarity so that the parties to a legal dispute may rely upon it and the courts enforce it' (p. 183).

85 See, in that regard, Van Raepenbusch, S., *Droit institutionnel de l'Union européenne*, 2nd edition, Larcier, Brussels, 2016, who takes the view that following *Association de médiation sociale*, 'il est ... dorénavant clairement établi que les normes protectrices des droits fondamentaux de la Charte, qui répondent à la condition de l'autosuffisance, ce qui revient à leur reconnaître un caractère self-sufficient, pour reprendre la terminologie classique du droit international public, sont susceptibles d'être invoquées de façon autonome, même dans le cadre de relations de droit privé, afin d'écarter une règle de droit national contraire, dès lors que la situation en cause présente un lien de rattachement avec le droit de l'Union' ('it is … now clearly established that the rules protecting fundamental rights contained in the Charter which meet the self-sufficiency requirement — and are thus effectively recognised as self-sufficient, to use the traditional terminology of public international law — are capable of being relied on autonomously, even in the context of relationships governed by private law, in order to disapply a contrary rule of national law, where the situation in question has a connection with EU law') (p. 487). It will be recalled, in that regard, that 'le caractère *self sufficient* désigne ... une applicabilité autonome de la règle internationale, caractéristique de l'aptitude normative qui lui est propre' ('self-sufficient nature denotes ... the autonomous applicability of the international rule, a characteristic of its inherent normative value'), see Verhoeven, J., 'La notion d'"applicabilité directe" du droit international', *Revue belge de droit international*, Bruylant, Brussels, 1985, pp. 243 to 264, in particular p. 248. See, also, Vandaele, A., and Claes, E., 'L'effet direct des traités internationaux — Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme', Working Paper No 15, December 2001, K.U. Leuven,

Faculty of Law, Institute of International Law, available online at: https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP15f.pdf.

86 See, in that regard, Bogg, A., 'Article 31: Fair and just working conditions', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford, 2014, pp. 833 to 868: 'The absence of these limiting formulae means that Article 31 is better understood as a genuinely autonomous fundamental right, a standard against which Union laws and national laws and practices are measured rather than a standard capable of being diluted and weakened by those laws and practices' (p. 846, § 31.27).

87 See *Bollacke* (paragraph 25).

88 See *Association de médiation sociale* (paragraph 46). See, in that regard, Cariat, N., 'L'invocation de la Charte des droits fondamentaux de l'Union européenne dans les litiges horizontaux: état des lieux après l'arrêt Association de médiation sociale', *Cahiers de droit européen*, Larcier, Brussels, 2014, No 2, pp. 305 to 336, in particular p. 323, § 10.

89 See, also, to that effect, the fifth paragraph in the preamble to the Charter.

90 As also from the wording of Article 7(1) of Directive 93/104.

91 See, by analogy, concerning Article II-91 of the European Constitution, Jeammaud, A., 'Article II 91; conditions de travail justes et équitables', *Traité établissant une Constitution pour l'Europe, partie II, La Charte des droits fondamentaux de l'Union européenne: commentaire article par article*, Volume 2, Bruylant, Brussels, 2005, pp. 416 to 425, in particular pp. 419 and 423.

92 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914), which refers to the 'principle established in Article 7 of Directive 2003/88 and Article 31(2) of the Charter, according to which the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave' (paragraph 56).

93 See, to that effect, Bogg, A., 'Article 31: Fair and just working conditions', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford, 2014, pp. 833 to 868, who is of the view that, 'though the duration of paid

annual leave is not specified in Article 31(2), this should be understood as a minimum of four weeks leave per year in line with Article 7 of the Directive' (p. 859, § 31.56). That issue is at the heart of the pending cases *TSN* (C-609/17) and *AKT* (C-610/17), in which the työtuomioistuin (Labour Court, Finland) asks the Court in particular whether Article 31(2) of the Charter protects accrued leave, in so far as the duration of the leave exceeds the minimum annual leave of four weeks provided for in Article 7(1) of Directive 2003/88.

94 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 32 and the case-law cited).

95 See, in that regard, Bogg, A., 'Article 31: Fair and just working conditions', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford, 2014, pp. 833 to 868, according to whom 'it follows from this symbiosis that the reasoning and specific legal conclusions of the CJEU on Article 7 are also reflected in the parameters of the right to a period of paid annual leave under Article 31(2). This interpretative synergy between Article 7 of the Working Time Directive and Article 31(2) means that the rights are so entwined in the CJEU's legal reasoning that it is now difficult to discern where one begins and the other ends' (pp. 858 and 859, § 31.55). In the same vein, see Opinion of Advocate General Saugmandsgaard Øe in *Maio Marques da Rosa* (C-306/16, EU:C:2017:486), in which, after he noted that it was clear from the Explanations relating to the Charter that Article 31(2) thereof is based in particular on Directive 93/104, the Advocate General considered, in relation to the right to weekly rest, that 'the scope of Article 31(2) of the Charter mirrors that of Article 5 of Directive 2003/88'. He inferred from this that that provision of the Charter was 'not capable of providing additional information of use for the purposes of the interpretation of Article 5 of Directive 2003/88 that is sought' (points 43 and 44). See, to the same effect, judgment of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 50).

96 See, in particular, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 61), and of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 52).

97 See, to that effect, Bogg, A., 'Article 31: Fair and just working conditions', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford, 2014, pp. 833 to 868, who is of the opinion that 'the worker's right to a payment in lieu of untaken leave during a leave year on termination of the employment relationship is a fundamental social right that is necessarily implicit in the right to paid annual leave under Article 31(2). This principle was established in [the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18)] in respect of Article 7 and it should apply with equal force to Article 31(2)' (p. 861, § 31.60).

98 See, to that effect, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 81 and the case-law cited).

99 See, in that regard, Nivard, C., ‘L’effet direct de la charte sociale européenne’, *Revue des droits et libertés fondamentaux*, 2012, Chronicle No 28. I would cite, for example, the judgment of the Conseil d’État (Council of State, France), of 10 February 2014, *Mr X*, No 358992, and the judgment of the Cour de cassation (Court of Cassation, France), of 14 April 2010 (Cass. soc. No 09-60426 and 09-60429). I also note that Article 2(3) of the European Social Charter (Revised) refers to the right to a ‘minimum of four weeks’ annual holiday with pay’.

100 The expression used by Tinière, R., ‘L’invocabilité des principes de la Charte des droits fondamentaux dans les litiges horizontaux’, *Revue des droits et libertés fondamentaux*, 2014, Chronicle No 14.