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The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle

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Abstract
This article analyses the main debates over the application of the Charter to disputes between private parties and assesses the ways in which the case law over the last ten years has responded to them. The article goes on to propose an alternative schema, whereby horizontality can be understood as a structural principle of EU fundamental rights adjudication on its own terms, rather than as an extension of the direct effect doctrine. It is argued that a self-standing principle of horizontality with equally valuable—yet operationally distinct—direct, indirect, and state-mediated manifestations, could respond more coherently to the conceptual, procedural, and remedial challenges displayed in the case law.

Keywords: Charter, fundamental rights, horizontal effect, direct effect, consistent interpretation, state liability, *Drittwirkung*

I. INTRODUCTION

The horizontal effect doctrine has seen a recent revival in the case law of the European Court of Justice ('CJEU'). A series of key rulings on the horizontal effect of the Charter of Fundamental Rights of the European Union (hereafter 'Charter') have addressed important methodological (*Egenberger*) and substantive (*Bauer*) issues in respect of the application of fundamental rights to disputes between private parties.[1] In turn, these cases have renewed the possibility of a coherent approach towards the horizontal effect doctrine under the Charter and justify a closer look at its present state of development and possible future directions. This article aims, firstly, to analyse the application of horizontal effect to the Charter and, then, to offer a tentative structural framework for addressing its remaining challenges. It is

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[1] *Egenberger*, C-414/16, EU:C:2018:257; *Bauer*, C-569/16 and C-570/16, EU:C:2018:871; *IR*, C-68/17, EU:C:2018:696; *Cresco*, C-684/16, EU:C:2019:43. *Max-Planck*, C-684/16, EU:C:2018:874; *CCOO*, C-55/18, EU:C:2019:402. For a detailed account of the case law see also E Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*' (2019) 12(2) *REAL* 185.

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argued that constitutional space can be carved out for a self-standing principle of horizontality as an essential part of EU fundamental rights adjudication, rather than as an extension to private parties of the direct effect formula.

At a first stage, the article discusses the key qualities of the horizontality debate in human rights and comparative constitutional law and highlights the ways in which this debate informed the interpretation of the Charter (Part II). It then goes on to provide the reader with an overarching narrative for what may at times appear to be a casuistic and highly technical line of case law over the last ten years (Part III). Through an analysis of recent judgments, it will be argued that the binding Charter has significantly improved the *Mangold* jurisprudence regarding the horizontal direct effect of EU fundamental rights.[2] However, the case law also reveals that the CJEU continues to use a justificatory apparatus which is unduly reliant on the direct effect concept, with problematic side-effects for fundamental rights of three kinds: conceptual (Section IV.A), procedural (Section IV.B), and remedial (Section IV.C).

The end of a decade of binding application of the Charter provides an opportunity to reflect on the case law and to recalibrate our understanding of horizontality in response to its shortcomings. To this end, Part V argues that there is an independent role for horizontality as a structural principle of constitutional adjudication, which would enable a more principled organisation under the Charter of the key ways in which fundamental rights infiltrate intersubjective disputes: state-mediated effect (strong protective duties on public authorities); indirect effect (comprising both consistent interpretation by national courts and the interpretation of other fields of EU law in the light of fundamental rights by the CJEU); and direct effect. It is argued that this view of horizontality would support a fuller commitment to the application of the Charter in horizontal cases, not merely based on the principles of effectiveness and uniformity traditionally associated with the direct effect concept, but also based on the normative identity that might eventually be ascribed to horizontality as a constitutional principle in its own right.

II. THE HORIZONTAL DIRECT EFFECT OF THE CHARTER AND THE BROADER CONCEPTUAL CHALLENGE OF THE HORIZONTAL EFFECT OF HUMAN RIGHTS

The case law relating to the binding Charter has so far revealed that at least three provisions thereof can have horizontal direct effect:[3] Article 21 (non-discrimination);[4] Article 31 (the right to fair working conditions including paid annual leave);[5] and Article 47 (the right to effective judicial protection).[6] By contrast, Articles 26, 27,

[2] *Mangold*, C-144/04, EU:C:2005:709.

[3] Case law last revised 1 May 2020.

[4] *Kücükdeveci*, C-555/07, EU:C:2010:21; *Egenberger*, note 1 above; *IR*; *Cresco*, note 1 above.

[5] *Bauer*, note 1 above; *Max-Planck*, note 1 above; *CCOO*, note 1 above.

[6] *Egenberger*, note 1 above; *IR*, note 1 above.

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and 38 (respectively, respect for people with disabilities,[7] the right to information and consultation within the undertaking,[8] and consumer protection[9]), lack the possibility of producing horizontal direct effect as such. The status of other rights remains undecided, with the position being particularly abstruse in certain cases. For example, while Article 28 on collective bargaining and action has been analysed in Opinions of Advocates General in horizontal situations, no specific pronouncement has been made on its potential to generate horizontal direct effect, in a final ruling.[10]

That only three provisions of the Charter have been found to be horizontally directly effective is in some respects underwhelming, yet not entirely surprising, when taking into account the relevant constitutional context. The question of the Charter's horizontality occupied an important place in the academic commentary following the entry into force of the Lisbon Treaty and there was extensive debate over the Charter's potential to produce direct effect in disputes between individuals, in the same way as Treaty provisions.[11] In particular, while the *Defrenne* jurisprudence had already promised that certain rights, such as the right to equal pay, could be invoked in horizontal disputes, there was vehement opposition both within and outside the CJEU to the idea that the rights protected in the Charter should give rise to obligations for private parties because Article 51(1) of the Charter, which regulates the Charter's scope of application, is addressed to 'the EU institutions and to the Member States only when they are implementing EU law' and does not mention private entities.[12]

The textual reason for this initial rejection of horizontality was not convincing in itself. Such arguments had never resonated with the CJEU, which had famously found in *Defrenne* that:

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[7] *Glatzel*, C-356/12, EU:C:2014:350, para 78. *Glatzel* is a vertical case, but it is clear from the CJEU's reasoning in this paragraph that the provision is uninvocable altogether (ie in both vertical and horizontal situations).

[8] *Association de Médiation Sociale ('AMS')*, C-176/12, EU:C:2014:2, paras 45–49.

[9] *Smith*, C-122/17, EU:C:2018:631, para 49. See also the Opinion of Advocate General Bot in this case, EU:C:2018:223.

[10] See eg Opinion of Advocate General Mengozzi in *Laval un partneri*, C-341/05, EU:C:2007:291, paras 76, 191; Opinion of Advocate General Cruz Villalón in *Prigge*, C-447/09, EU:C:2011:321, paras 41–46; cf Opinion of Advocate General Trstenjak in *Rosenbladt*, C-45/09, EU:C:2010:227, para 27.

[11] *Defrenne*, C-43/75, EU:C:1976:56, para 39.

[12] C Ladenburger, 'FIDE Conference 2012 Institutional Report' (2012) XXV FIDE Congress, Tallinn, 30 May–2 June 2012, pp 34–35; Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, paras 80–83; M De Mol, '*Kücükdeveci*: *Mangold* Revisited – Horizontal Direct Effect of a General Principle of EU Law' (2010) 6 *EuConst* 302; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EuConst* 375, para 11; A Bailleux, 'La Cour de justice, la Charte des droits fondamentaux et l'intensité normative des droits sociaux' (2014) 3 *Revue de droit social* 283, p 305. For an overview, see Opinion of AG Bot in *Bauer*, C-569/16, EU:C:2018:337, para 77.

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> The fact that certain provisions … are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down. … In fact, since Article [157 TFEU] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.[13]

The weakness of the textual argument against horizontal direct effect was compounded by the absence of its explicit refutation in the Charter, at a time when the doctrine was already a well-established facet of the direct effect of EU law. As Advocate General Cruz Villalón would later note in his seminal Opinion in *AMS*, 'since the horizontal effect of fundamental rights is not unknown to European Union law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse'.[14] Indeed, the Charter reproduces rights that were previously found to have horizontal direct effect, such as the right to equal pay now protected in Article 23 thereof, while its preamble can also be interpreted as embracing the potential for horizontality in a general sense, insofar as it states that the enjoyment of the rights protected in this instrument 'entails responsibilities and duties with regard to other persons, to the human community, and to future generations'.

Furthermore, such a reading of the Charter would be in line with a broader tendency towards setting up human rights obligations for non-state actors within international, regional, and national legal systems over the last three decades.[15] For example, questions of private ownership and horizontal effect now feature centrally in analyses of the practice of UN treaty bodies,[16] while attempts at holding multinational corporations to account have largely coincided with the Charter's drafting and development as a binding instrument.[17] Similarly, a remarkable proliferation

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[13] *Defrenne*, note 11 above, paras 31–39.

[14] Opinion of Advocate General Cruz Villalón in *Association de médiation sociale*, C-176/12, EU:C:2013:491, paras 34–35.

[15] See eg P Alston 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005), p 3; A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); JH Knox, 'Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law* 1; H Dagan and A Dorfman, 'Interpersonal Human Rights' (2018) 51 *Cornell International Law Journal* 361.

[16] See eg M Scheinin, 'How to Improve the Human Rights Committee Draft General Comment on Freedom of Assembly' (*Just Security*, 23 February 2020), https://www.justsecurity.org/68559/how-to-improve-the-human-rights-committee-draft-general-comment-on-freedom-of-assembly; L Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (2018) 5(1) *European Journal of Comparative Law and Governance* 5.

[17] See eg the history of the draft treaty on business and human rights, recently culminating in the 'Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', 16/07/2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf; J

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of horizontal effect in regional human rights instruments and national constitutions both within and outside Europe can be observed since the 1990s and early 2000s, ie around the time of the Charter's proclamation.[18] While these parallel constitutional conversations admittedly do not feature in accounts of the drafting process,[19] it would be puzzling to assess the horizontal effect of the Charter as if it were wholly separable conceptually from these developments. Indeed, the insistence upon scope limitations, such as Article 51(1) of the Charter,[20] can be seen as exemplifying a foundational concern with the horizontal effect of fundamental rights at large, which has been evident in its application across different legal orders and, as such, deserves somewhat lengthier attention. This broader disenchantment with horizontality could be described in a twofold manner as a fear of excessive judicialisation, on the one hand, and as a fear of 'rights inflation', on the other.[21] These strands of critique are not conceptually sourced in the Charter, but the Charter provides fertile ground for reviving, in the first case and, in the second case, applying them to EU law.

As the first aspect of the critique of horizontality goes—the fear of excessive judicialisation—horizontal effect taps into a judicial tendency to 'totalise' and to expand into the political realm.[22] This concern raises questions of legal uncertainty and legitimate expectations, prejudice to autonomy and private freedom and, crucially, judicial interventionism on account of rights. It is predicated, in other words, upon the argument that horizontal effect encourages judges to leave the

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(F'note continued)
Ruggie, 'Protect, Respect and Remedy: A Framework for Business And Human Rights' (2008) 3 *Innovations: Technology, Governance Globalization* 189.

[18] On regional systems, see eg: D Spielmann, *L'effet Potentiel de la Convention Européenne des Droits de l'Homme entre Personnes Privées* (Bruylant, 1995); F Coomans, 'The *Ogoni* Case Before the African Commission on Human and Peoples' Rights' (2003) 52 *International & Comparative Law Quarterly* 749; TM Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Columbia Journal of Transnational Law* 351. For comparative analyses of national laws, see eg: G Brüggemeier, A Colombi Ciacchi, and G Comandé (eds), *Fundamental Rights and Private Law in the European Union* (Cambridge University Press, 2010); S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102(3) *Michigan Law Review* 387. The horizontal effect of the UK Human Rights Act 1998 in particular coincided with the Charter. For a restatement and analysis of this debate, see: G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *The Modern Law Review* 878.

[19] L Goldsmith, 'A Charter of Rights, Freedoms, and Principles' (2001) 38 *Common Market Law Review* 1201, pp 1209–13, where only Council of Europe instruments are discussed.

[20] The broader competence limits enshrined in Article 52(1) of the Charter and the distinction between rights and principles made in Article 52(5) would also fall within this category of overarching 'scope' objections.

[21] I borrow the term from K Möller, 'Proportionality and Rights Inflation' in G Huscroft, B Miller, and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014), p 155.

[22] M Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) *German Law Journal* 341, pp 350–69. Kumm explains the critique, before rebuking it.

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realm of interpretation and to enter the realm of arbitrary law-creation. This critique has applied to horizontal effect in both its direct and in its indirect manifestations and has transcended nearly all constitutional contexts in which horizontality is employed.[23] It is perhaps most tellingly encapsulated in its earliest contemporary iteration: a body of critical literature from the 1960s that lamented the German Constitutional Court's development of its own version of horizontal or 'third party' effect (*Drittwirkung*) since the *Lüth* judgment.[24] As EW Böckenförde's famous critique of that judgment goes, the infiltration of private law with fundamental rights—or the 'conflation of law with values'—is problematic because it necessarily involves the development of constitutional priorities going beyond the scope of legitimate judicial choices.[25] As recently put in his obituary, 'should liberty always be prioritized over equality? Could one develop reliable criteria for exceptions to this rule?' If no reliable means can be found to assess and re-apply the relevant hierarchies between competing rights, the result is nothing but 'judge-made law'.[26]

This line of critique of horizontality is not unknown to EU law or traceable to the creation of the Charter *per se*. Rather, it has been strongly present in EU case law on horizontal direct effect, if not already since *Defrenne* (a judgment considered so far-reaching that the CJEU took the unusual step of limiting its temporal effect), at least since *Mangold*.[27] In affirming the right not to be discriminated against on grounds of age in a private employment context through a values-based language of rights *qua* general principles of EU law—despite the absence of textual basis for this point and the fact that earlier case law had excluded this possibility—*Mangold* gave special ammunition to the critique of judicialisation. The critique was, indeed, voiced in terms as strong as calls to 'Stop the European Court of Justice!',[28] while even those more sympathetic to the bearing of the ruling lamented the incoherence of the case law[29] and the resulting prejudice for private individuals wishing to plan their lives cognisant of the legal consequences of their actions.[30]

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[23] Gardbaum, note 18 above, pp 387–410.

[24] *Lueth* – BverfGE 7, 198 (1958), 205.

[25] E W Böckenförde, 'Grundrechte als Grundsatznormen' in E W Böckenförde (ed), *Staat, Verfassung, Demokratie* (Suhrkamp, 1991), p 185; See further J Van Der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Greuter, 2014), pp 361–62.

[26] M Künkler and T Stein, 'An Obituary for Ernst-Wolfgang Böckenförde (1930–2019)' (*International Journal of Constitutional Law Blog*, May 11 2019), http://www.iconnectblog.com/2019/05/an-obituary-for-ernst-wolfgang-bockenforde-1930–2019.

[27] See note 2 above.

[28] R Herzog and L Gerken, 'Stop the European Court of Justice' (*EU Observer*, 10 September 2008), https://euobserver.com/opinion/26714.

[29] M Dougan 'In Defence of *Mangold*?' in A Arnull et al (eds), *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), p 219; Editorial comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?' (2006) 43(1) *Common Market Law Review* 1.

[30] PP Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349, p 355. See also PP Craig, 'The ECJ and *Ultra Vires* Action: A Conceptual Analysis' (2011) 48(2) *Common Market Law Review* 395.

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The second objection identified above, that of rights inflation, emerges in EU law primarily because of the Charter's recognition of social and economic rights in addition to civil and political rights. Like the critique of judicialisation, the expansion of constitutional protection to social and economic rights is at times perceived as a direct attack on the principles of autonomy and private freedom that civil and political rights seek to guarantee.[31] Thus, as Nolan has observed, the liberal objection to the horizontal application of fundamental rights and the incorporation into bills of rights of social and economic rights have strikingly similar undertones.[32] Justiciable social and economic rights involve 'redistribution and the alteration of the *status quo* both in terms of the allocation of power and other resources and in terms of pre-existing legal frameworks and relationships'.[33] For this reason, particularly in horizontal cases, social and economic rights 'raise similar concerns for those who argue that decisions in relation to distribution and law-making should be the sole preserve of democratically elected representatives'.[34]

Moreover, beyond the idea that human rights should remain limited to negative freedom, concerns over the inflationary potential of horizontality have been voiced from another angle of human rights theory, too. The inclusion of social and economic considerations in human rights adjudication is seen as objectionable because it is thought to trivialise human rights with matters of material welfare, such as better working conditions, annual leave or, as Letsas has provocatively put it, 'the right to sleep well'.[35] Such inclusion contributes, as this argument goes, to unwarranted questioning of the foundation of human rights in dignity and relativises their need for universal protection.[36] This account includes both a critique of the content-based extension of human rights to matters of material wellbeing through social and economic rights and their *ad personam* extension to certain non-state actors, more generally. Unlike states (or, at least, well-meaning states), most non-state actors operate on the basis of private, rather than public, interests. As such, extending human rights obligations horizontally requires safeguards against self-interest considerations that could commoditise the application of human rights.[37]

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[31] See eg J Matthews, *Extending Rights' Reach: Constitutions, Private Law, and Judicial Power* (Oxford University Press, 2018).

[32] A Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) *International Journal of Constitutional Law* 61, p 64.

[33] Ibid.

[34] Ibid.

[35] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), p 129. See also JW Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30(4) *Human Rights Quarterly* 984, pp 991ff.

[36] See further Möller, note 21 above, for a detailed account and rebuttal.

[37] S Besson, 'Comment Humaniser le Droit Privé sans Commodifier les Droits de l'Homme' in F Werro (ed), *Convention Européenne des Droits de l'Homme et le Droit Privé* (Stämpfli, 2006), p 30; J Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015), pp 5–7, ch 5.

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The former side of the inflation critique was expressed most powerfully in respect of the Charter by Advocate General Trstenjak in her Opinion in *Dominguez*, where she pleaded with the CJEU not to expand its horizontal effect case law through the Charter to social rights, thus circumventing the basic contract that fundamental rights create between a state and its citizens.[38] The latter concern—that of commoditisation—was carefully highlighted by Advocate General Jääskinen in his Opinion in *Google Spain*, where he pointed out the difficulties of allowing corporate actors, such as private search engines, to conduct the balancing exercise between different rights, such as one person's right to private data over another's freedom of expression and information (respectively protected in Articles 8 and 11 of the Charter).[39]

In short, then, while the horizontal direct effect of the Charter might at first glance appear to be a niche or technical matter of EU law, the broader constitutional intricacies of horizontality in the field of fundamental rights can be recognised in two of its most contested aspects: its scope of application and the status of social and economic rights. Along with the well-known (but not necessarily settled) parameters of the EU direct effect doctrine, these issues form the conceptually trying background against which the last ten years of case law on the Charter must be read.

III. THE DEVELOPMENT OF HORIZONTAL DIRECT EFFECT IN THE CJEU'S CASE LAW

The CJEU was first asked to clarify its case law on horizontal direct effect in *Kücükdeveci*, one of the first cases it decided after the entry into force of the binding Charter.[40] There, the CJEU emphatically reaffirmed its position in *Mangold*, finding that fundamental rights are not sourced in directives. While they may acquire 'specific expression' therein, they are in themselves non-derogable, primary sources of EU law, requiring observance by public and private parties alike.[41] Nevertheless, *Kücükdeveci* was in some respects a cautious ruling, rather than a big proclamation of a constitutional moment for the Charter. As the case concerned non-discrimination in the calculation of financial compensation for dismissal, thus bearing significant similarities with *Mangold*, it was difficult to see how the CJEU could have decided this case differently. Moreover, as Peers has noted, to go in a different direction would have been substantively 'absurd', as it would have created a hierarchy between gender and other protected characteristics, such as age.[42] Yet, continuing to be couched in the language of general principles of EU law,[43] the case did not do

[38] Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, paras 128–35.

[39] Opinion of AG Jääskinen in *Google Spain*, C-131/12, EU:C:2013:424, paras 133–34.

[40] Albeit that the facts pre-dated it.

[41] *Kücükdeveci*, note 4 above, para 21.

[42] S Peers, 'Supremacy, Equality and Human Rights: Comment on *Kücükdeveci* (C-555/07)' (2010) 35(6) *European Law Review* 849, pp 855–56.

[43] On general principles, see further Emily Hancox's contribution in this volume. pp 251ff below.

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much to clarify the impact of the Charter on horizontal direct effect and, particularly, whether it could extend to other provisions.

As highlighted in Part II, the debate about the Charter's horizontality was never primarily *about* non-discrimination. It was the question of whether horizontal direct effect would apply to other rights and, particularly, to provisions that may not have previously held the status of general principles, such as the social and economic rights of the Solidarity chapter of the Charter, which was most clearly at stake. But while the CJEU was asked early on about the horizontal direct effect of social and economic rights—most notably, the right to paid annual leave in *Dominguez*—it did not address the matter head-on until *Association de Médiation Sociale* ('*AMS*').[44] In the *AMS* judgment, the CJEU confirmed in unequivocal terms that certain provisions of the Charter, such as Article 21, could be applied horizontally, but found that provisions such as the one at issue in this ruling, Article 27 on the right to information and consultation within the undertaking, could not. The relevant directive did not lend this right sufficiently specific expression to allow its invocation conjunctively, either.[45]

The ruling in *AMS* was critically received.[46] Not only had it sidestepped a detailed and technically elaborate Opinion by Advocate General Cruz Villalón coming to the opposite conclusion, but it had seemingly internalised the inflation critique whilst displaying thin human rights reasoning to support the distinction between Article 27 and Article 21. The legacy of *AMS* was deeply felt in subsequent case law, which continued to rely extensively on the general principles terminology, rather than using the Charter as the key source of rights protection.[47] It meant that whereas a step had been taken towards affirming horizontal direct effect for some of the Charter's provisions within the first five years of its application as a binding instrument, both the contours of horizontal direct effect and the process whereby it could

[44] See note 8 above.

[45] Ibid, para 49.

[46] See eg E Uría Gavilán, '¿Los principios de la Carta de Derechos Fundamentales de la Unión Europea pueden ser invocados en litigios entre particulares?: Comentario a la Sentencia del Tribunal de Justicia (gran sala) de 15 de enero de 2014 en el Asunto C-176/12 *Association de médiation sociale*' (2014) 34 *Revista General de Derecho Europeo*; 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' (2014) 10 *European Constitutional Law Review* 332; N Lazzerini, 'Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, Judgment of the Court of Justice (Grand Chamber) of 15 January 2014' (2014) 51 *Common Market Law Review* 907; C Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after *Association De Médiation Sociale*' (2014) *European Human Rights Law Review* 170; S Platon, 'L'Invocabilité Horizontale des Normes de Droit de l'Union Européenne: Un Pas sur Place, Un Pas en Avant, Deux Pas en Arrière - (CJE, grande chambre, 15 janv. 2014, aff. C-176/12)' (2015) 584 *Revue du marché commun* [online version].

[47] As Ward rightly points out, references to the Charter have been routinely omitted even in respect of non-discrimination. See eg the ruling in *Dansk Industri (DI)*, C-441/14, EU:C:2016:278. Tellingly, even Article 23 on equal pay has not been mentioned, with Article 157 TFEU continuing to be used instead: A Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?' (2018) *Cambridge Yearbook of European Legal Studies* 32, p 42.

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be claimed remained unclear. Nevertheless, a turn in the case law can be identified from 2018 onwards, which marks a more thorough and consistent position. Through cases such as *Egenberger* and *Bauer*,[48] the CJEU has in my view clarified the case law in two important respects, albeit that it has not fully revised it.

First, these cases mark a beneficial methodological shift. Unlike *Mangold* and *Kücükdeveci*, where little attention was paid to the duty of consistent interpretation, the CJEU has now clarified that, even in cases where direct effect is available, the correct approach for national courts is to consider consistent interpretation as far as possible in line with *Pfeiffer*, in the first instance.[49] Only where this is impossible should resort to direct effect be had. This is undoubtedly correct from a procedural point of view, particularly within a composite constitutional order. In practice, the difference between direct and indirect effect is minimal for the individuals claiming the relevant right.[50] However, starting from indirect effect allows the basic structure of private law to be retained by being infiltrated with, rather than superseded by, constitutional law. This is especially significant when it comes to directives, as indirect effect enables national courts to represent within national implementing measures the provisions of the Charter and to offer effective reparation in the manner that national law most suitably provides for without short-circuiting domestic systems of remedies with the direct effect of the constitutional instrument, unless this is necessary.

The second important change effectuated by this line of case law is substantive, as the *Bauer* ruling explained the CJEU's position regarding the status of social and economic rights. In *Bauer*, Advocate General Bot sought to bridge the gap that had emerged between *Egenberger* and *AMS*. He urged the CJEU not to allow fundamental social rights to become 'a mere entreaty',[51] regretting that his own earlier Opinion in *Kücükdeveci* had been reinterpreted in the *AMS* judgment in a manner that restricted the invocability of these rights. He thus suggested that *AMS* should be confined to its facts, or at least to rights which are conditional on 'national laws and practices'.[52] In turn, the CJEU should affirm in unequivocal terms the possibility of any of the other fundamental rights protected in the Charter to produce horizontal direct effect, where necessary.[53] In its judgment in *Bauer*, the CJEU agreed, clarifying that the *AMS* ruling should not be read as generalised scepticism over social and economic rights. Rather, all Charter provisions that are framed in a mandatory and unconditional manner can in principle be invoked as such, both vertically and horizontally. While this was not the case for Article 27 in *AMS* because

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[48] See note 1 above.

[49] *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:584, para 115.

[50] S Drake, 'Twenty Years After *Von Colson*: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30(3) *European Law Review* 329; E Engle, 'Third Party Effect of Fundamental Rights (*Drittwirkung*)' (2009) 5(2) *Hanse Law Review* 165, pp 169–70.

[51] Opinion of Advocate General Bot in *Bauer*, note 12 above, para 95, citing R Tinière, 'L'invocabilité des principes de la Charte des droits fondamentaux dans les litiges horizontaux' (2014) 14 *Revue des droits et libertés fondamentaux*.

[52] Opinion of Advocate General Bot in *Bauer*, note 12 above, paras 74–76.

[53] Ibid.

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that provision is subject to national laws and practices, this did not apply to Article 31, which could therefore enjoy horizontal direct effect.[54]

Some questions remain open. Most importantly perhaps, it is unclear whether further legislation or prior general principle status could redress the 'deficiency' in the invocability of rights which are conditional on further legislation and principles under Article 52(5) of the Charter.[55] The question is not settled with *Bauer* and would be worth clarifying, in view of the fact that *Bauer* did not address the *extent* to which such provisions engage the duty of consistent interpretation and did not expressly associate the qualification by national laws and practices with Article 52(5). The conditionality category indeed appears to be wider than the principles category, covering nearly all of the social and economic rights protected in the Solidarity chapter (other than Article 31), but also provisions such as Article 9 on the right to marry and Articles 10(2) on conscientious objection and 16 on the freedom to conduct a business. Since some of these rights may have had general principle status in the past and were, substantively, involved in aspects of recent case law,[56] explaining the effects of conditionality would be important in order to maintain consistency.[57]

But while some issues naturally require further elaboration, it follows from the above discussion that, overall, the CJEU has begun addressing two core problems that initially plagued the application of the Charter to private parties: internal methodological inconsistencies and the status of social and economic rights. The case law today contains several statements affirming that Article 51(1) of the Charter does not preclude the possibility of horizontal direct (or indirect) effect.[58] Further, all those provisions of the Charter which set out a mandatory right can enjoy horizontal direct effect, provided they meet a key criterion of the direct effect formula: that of *unconditionality* (although it is, of course, clear that this qualification still adversely impacts social and economic rights). Thus, to some extent, the CJEU's position has started to speak neatly to the immediately reactive aspects of the critiques identified in Part II, which had largely followed *Mangold*, *Dominguez*, and, more recently, *AMS*. Whatever one's views might be about the merits of horizontal direct effect, there are undeniable benefits in terms of legal certainty to knowing that the

[54] *Bauer*, note 12 above, paras 84–86.

[55] Article 52(5) provides that principles 'may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. *Glatzel*, note 7 above, paras 74–78 and *AMS*, note 8 above, paras 45–47, had suggested that principles and conditional rights could be invoked if implemented in further legislation, but seemed to set a particularly high threshold for this to happen (not met in either case).

[56] See eg *IR*, note 1 above, where the right to marry was involved, even though the CJEU only dealt with the case via Article 21 of the Charter.

[57] See further on this the pending cases in *MH Müller Handel*, C-341/19, and *Bosolar*, C-366/19, which concern the application of 16 of the Charter.

[58] Eg *Egenberger*, note 1 above, para 77; *Max Planck*, note 1 above, para 77; *Bauer*, note 12 above, para 87.

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Charter has the potential to enjoy it, following a reasonably clear method of consistent interpretation in the first instance, and disapplication if required. However, it is questionable whether the case law addresses the deeper layers of the judicialisation and inflation critiques, as Part IV goes on to show.

IV. ONGOING CHALLENGES FOR HORIZONTALITY UNDER THE CHARTER

The starting point of direct effect created important possibilities for horizontality in the field of EU fundamental rights, becoming a key part of the discourse of rights and obligations that individuals derive from EU law.[59] Nevertheless, in my view, this starting point presents three overarching challenges that justify questioning its structural appropriateness for the Charter, despite the advances made in the case law over the last few years. The first of these challenges is conceptual and concerns the narrow remit of the EU understanding of the horizontal effect of fundamental rights—a point that relates not just to direct effect, but to the interpretation of different provisions of the Charter and, as such, the relationship between direct and indirect effect (Section A). Secondly, being set up based on a content-based attribution process (the direct effect conditions), the horizontal effect of the Charter can appear devoid of addressee-based factors, such as causality and private power (Section B). Finally, a remedially problematic interrelationship has emerged between the principles of direct/indirect effect/state liability, on the one hand, and the right to an effective remedy under Article 47 of the Charter, on the other (Section C).

A. A Constitutional Picture Bigger than Direct Effect

Whereas the question of horizontality has historically been treated as separate from statutory interpretation, this understanding risks underplaying the broader effects that the Charter has had on non-state actors as part of the CJEU's interpretation of secondary legislation. Could we not also describe re-readings of EU secondary law *in the light* of fundamental rights and applied in a dispute between private actors as 'horizontal', even if these do not strictly concern the direct effect formula? This was, perhaps most illustratively, the bearing of the CJEU's ruling in *Google Spain*. The CJEU found:

> Inasmuch as the activity of a search engine is … liable to affect significantly … the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure … that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.[60]

[59] *Van Gend en Loos*, C-26/62, EU:C:1963:1.

[60] *Google Spain*, note 39 above, para 38.

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For this reason, Articles 6, 7, 12, 14, and 28 of Directive 95/47, which did not explicitly lay down a right for the data subject to request that the data processor remove their personal data, nevertheless had to be interpreted *as if* that right had been written into the legislation, in order to ensure the effective protection of the fundamental rights to privacy and the protection of private data enshrined respectively in Articles 7 and 8 of the Charter. Indeed, the CJEU also found that in assessing a data removal request, 'a fair balance should be sought in particular between [the legitimate interest of the public in accessing information] and the data subject's fundamental rights under Articles 7 and 8 of the Charter'.[61] The case thus resulted in significant obligations being placed on the data processors to accommodate and to balance the relevant rights appropriately in their interactions with individuals.

Google Spain exemplifies the operation of a different kind of indirect or 'radiating effect'[62] of fundamental rights (eg of Articles 7 and 8 of the Charter) upon other fields of law (eg the Data Protection Directive 95/47), which shows that the horizontal application of the Charter has been far more wide-ranging and consequential in practice than the case law on horizontal direct effect discussed in Part III might suggest. It may indeed be argued that the obligation of consistent interpretation imposed on national courts appears comparatively weak against this strong, purposive type of indirect effect at the EU level, which openly supplements the legislation with a fundamental rights obligation in order to account for its constitutional significance. To draw a sharp distinction between the application of horizontal direct effect and statutory interpretation would thus hide from view a broader realm of horizontal human rights jurisprudence, which escapes the conundrum of non-horizontality of directives that drove much of the former case law, yet can still result in extensive, immediate, and largely unforeseeable obligations for private actors (often through directives). *Google Spain* is but an illustrative example: the CJEU has interpreted the meaning and relevance of the Charter to EU secondary legislation applicable *in se* or through national implementing measures to private relations in a variety of contexts, concerning privacy more broadly,[63] as well as other rights, such as religious freedom[64] and the freedom to conduct a business.[65]

Presenting a stark contrast to the relatively limited fundamental rights reasoning provided in the case law on horizontal direct effect, this line of cases lays bare a key problem: that seeking to apply horizontal effect to the Charter by patching up the direct effect jurisprudence, thus continuing to refer to the pre-Charter direct effect conditions, can unduly proceduralise the concept of horizontality. Doing so engenders possibilities of incoherence between the outcome of cases concerning statutory

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[61] Ibid, para 81.

[62] I borrow the terminology of the German Constitutional Court in *Lueth*, note 25 above. See further G Helleringer and K Garcia, 'Le rayonnement des droits de l'Homme et des droits fondamentaux en droit privé' (2014) 66(2) *Revue Internationale de Droit Comparé* 283.

[63] Eg *Connolly*, C-274/99P, EU:C:2001:127; *Österreichischer Rundfunk*, C-465/00, EU:C:2003:294.

[64] *Bougnaoui*, C-188/15, EU:C:2016:553; *Achbita*, C-157/15, EU:C:2017:203; *Jehovan todistajat*, C-25/17, ECLI:EU:C:2018:551.

[65] *Bougnaoui*, note 64 above; *Achbita*, note 64 above; *Alemo-Herron*, C-426/11, EU:C:2013:521.

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interpretation and horizontal direct effect for substantively similar issues.[66] Comparing the CJEU's religious freedom cases such as *Egenberger*, *Cresco*, and *IR*—where the direct horizontal effect of Article 21 of the Charter was invoked—and the handling of the same substantive right in case law concerning the interpretation of the Equality Directive—cases concerning indirect or radiating effect *lato sensu*—such as *Bougnaoui* and *Achbita,*[67] provides a clear illustration of this risk. Not only is it difficult to reconcile the CJEU's willingness to affirm non-discrimination against private employers in the former line of cases but to employ a more restrictive interpretation of secondary law protecting the same right in the latter. At the same time, the *Achbita* case in particular embodied balancing exercises between different rights (Articles 10 and 21 of the Charter on the one hand, and Article 16 of the Charter, on the other), which cannot be neatly distanced from the CJEU's findings in its direct effect case law.[68] Can the CJEU's extensive use (or 'abuse', as Weatherill puts it)[69] of the Article 16 protection of contractual freedom in *Achbita* be reconciled with the CJEU's finding in *Bauer* that conditionality upon national laws and practices reduces a right's invocability? While the CJEU has not explicitly made a finding regarding the horizontal direct effect of Article 16, its broader case law suggests significant potential for that provision to produce strong forms of indirect horizontality, with the same practical effects for private actors as direct effect.[70]

This normative incoherence is proving to be a key stumbling block for national constitutional courts having to reconcile these cases at the national level, as the currently pending preliminary reference in *Müller Handel* indicates.[71] The case concerns the compatibility with the Charter of company rules on religious observance (religious attire) set by a private undertaking. After seeking clarification of the reach of Article 10 of the Charter in the light of *Bougnaoui/Achbita*, the national court actively queries how it ought to interpret the relationship of these cases with Article 16 of the Charter, following *Bauer*:

> In the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs, must national rules of constitutional status which protect freedom of religion be set aside because of primary EU law, even if primary EU law, such as, for example, Article 16 of the Charter of Fundamental Rights, recognises national laws and practices?

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[66] See further E Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*' (2019) 12(2) *REAL* 185, p 200ff.

[67] Ibid.

[68] *Achbita*, note 64 above, paras 37–38.

[69] S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 *European Review of Contract Law* 157.

[70] For example, in *Alemo-Herron*, note 65 above, para 31, a purposive interpretation of Article 16 resulted in the invalidation of a collective agreement concluded between a group of employees and their previous employer, for the benefit of a new employer.

[71] See note 57 above.

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It follows that a key tenet of the judicialisation critique of horizontality, namely the uncertainty resulting from the absence of an overarching narrative about the different ways in which fundamental rights reach into intersubjective disputes, remains alive in this field, despite the fact that, as Part III highlighted, its horizontal direct effect has been employed in a relatively limited manner.[72]

B. The Limited Potential of Direct Effect as a Principle of Attribution of Responsibility for Violations of Fundamental Rights

A second important concern is the use of direct effect as the key principle of attribution of responsibility in horizontal disputes. One of the main reasons why horizontal direct effect is controversial is that, unlike its indirect counterpart, it creates a potentially wide-ranging form of 'constitutional tort' under the Charter.[73] Despite allowing national courts to integrate the fundamental right into their interpretation of other private law in the first instance, the availability of direct effect in EU law remains, in comparative terms, wide-ranging. In particular, the method employed by the CJEU still creates an *entitlement* to disapplication whenever consistent interpretation is impossible, thus substituting the law ordinarily applicable to the private relationship with the claim under the Charter—that is, after all, the very nature and special significance of the direct effect concept. However, driven by needs of effectiveness and primacy, the direct effect question as construed in EU law is addressee-blind: it does not concern the type of private actor on whom an obligation may be imposed, but only the legal construction of the right being invoked, eg whether it is unconditional and, as President Lenaerts describes the process, there is a violation of its 'essence'.[74] In turn, while state liability remains a remedy that can be invoked subsequently by the violator to recover losses ensuing from having had to make good the violation of a fundamental right, its application under this schema takes the form of a fallback claim. This raises both practical and symbolic concerns of attributability of a constitutional harm to an appropriate actor within the EU constitutional order: first, the availability of state liability varies substantially across the Member States.[75] Second, the current approach lacks a process for translating into private duties the fundamental rights designated in the Charter.[76]

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[72] K Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 *German Law Journal* 779, pp 788–92.

[73] A Nolan, 'Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) *International Journal of Constitutional Law* 61, p 88; see also M Pieterse, 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2007) 1 *South African Journal on Human Rights* 157, 162–63.

[74] See note 72 above.

[75] B van Leeuwen and R Condon, 'Bottom Up or Rock Bottom Harmonization? Francovich State Liability in National Courts' (2016) 35(1) *Yearbook of European Law* 229, p 231.

[76] J Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015), pp 5–7, ch 5.

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The theme of attributability was compellingly analysed by Advocate General Bobek in *Cresco*.[77] In that case, which concerned discrimination in the workplace through the recognition of only some religious holidays, the Advocate General was mindful of ascribing the violation of Article 21 of the Charter to a private party because the source of their conduct was the national implementing legislation, rather than individual choice. Advocate General Bobek put forward various reasons (moral, structural, and ideological) why the state, rather than private employers, should be considered *primarily* responsible for paying for violations of fundamental rights stemming from poorly drafted national law, arguing that factors such as the source of discrimination, fault for discrimination, and benefit accruing to the employer should be considered before being made responsible for repairing the harm suffered.[78] As he put it, whereas 'individuals may rely on Article 21(1) of the Charter … to have incompatible provisions of national law set aside …, EU law does not require that the costs of State failure to ensure conformity of national law with the Charter be borne in the first instance by private employers applying that national law'.[79] The CJEU did not follow the Opinion, finding the employer liable in line with the method expounded in Part III above. And yet, while there could be problems with the extensive use of the existing means of reparation through state liability upon which the Advocate General relied (a point explored further in Section C below), the suggestions made in the Opinion are noteworthy. Is it satisfactory that the answer EU law gives to breaches of fundamental rights by private parties can in principle always be the same as for a Member State, regardless of whether the addressee is a regulatory entity, corporate employer, or private person, and irrespective of the reasons for their conduct?

These points relate to the inflation critique of horizontality, insofar as they question the appropriateness of outsourcing the protective duties of the Member States to private actors, as well as to the judicialisation critique, insofar as they seek to carve out a space of private freedom within the remit of national law. They are neither abstract nor unlikely. On the contrary, they have seeped through important preliminary references that challenge the authority of the CJEU to make a finding of direct effect, such as *Dansk Industri*,[80] while forming the basis of a 2019 preliminary reference request in *Bosolar* in which the national court asks: in a situation where a violation of Article 16 is likely to be found, should the violation be invocable against another private party directly, even if that party acted pursuant to the legitimate expectation that national law would be followed?[81] These queries remind us anew of the problematic absence of a coherent doctrine of civil liability in EU law, already pointed out by

[77] Opinion of AG Bobek in *Cresco*, C-193/17, EU:C:2018:614; see also A Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-discrimination Law: More a Whimper than a Bang?' (2018) *Cambridge Yearbook of European Legal Studies* 32, pp 55–56 and Opinion of Advocate General Cruz Villalón in *AMS,* note 14 above, para 79, where a parallel argument is made.

[78] Opinion of AG Bobek in *Cresco*, note 77 above, paras 173–85.

[79] Ibid, para 196.

[80] See note 47 above.

[81] See note 57 above.

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Reich, as well as of EU law's restricted notion of state liability as a public law remedy.[82]

C. *Effective Reparation for Violations of Fundamental Rights in Horizontal Disputes and the Role of Article 47 of the Charter*

In addition to the broader conceptual and procedural challenges that arise as a result of the equalisation of the principle of horizontality with horizontal direct effect, a remedial question also arises concerning provisions that do not enjoy the possibility of direct effect.

All fundamental rights require a set of appropriate and adequately deterrent remedies to avoid becoming 'theoretical and illusory',[83] even though not all rights are directly actionable against all actors. This principle is well-established in EU law.[84] The Charter specifically enshrines it in Article 47, which provides that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'. Thus, the limitations otherwise built into the content of certain rights, such as conditionality upon national laws and practices or the restrictions on the justiciability of unimplemented principles set out in Article 52(5) of the Charter might *shift* the meaning of remedial effectiveness for these provisions, but do not wholly pre-empt the possibility of effective judicial protection. Nevertheless, since *Egenberger*, the CJEU has started unduly to associate the application of Article 47 with direct horizontal effect, with problematic side-effects.

While Article 47 is one of only three rights that have been found to be horizontally directly effective, none of the cases in which it was mentioned concerned it specifically. For example, in *Egenberger*, which involved discrimination against a non-believer applicant for a job with the Evangelical Church in Germany, the CJEU raised Article 47 of its own motion, following the Opinion of Advocate General Tanchev, where the point had first been made.[85] The CJEU found that Article 47 of the Charter applied to a dispute between private persons,[86] was invocable 'as such',[87] and the applicable provisions of the Charter—non-discrimination and the right to an effective remedy—required that non-discrimination be protected by any necessary means, including the disapplication of incompatible national law.[88] As this is an area already occupied in substance by Article 21, though, why was Article 47 of the Charter considered essential for this finding?

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[82] N Reich, 'The Interrelation between Rights and Duties in EU Law: Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is There a Need for a More Coherent Approach in European Private Law?' (2010) 29(1) *Yearbook of European Law* 112, p 113.

[83] *Airey v Ireland* (Application no 6289/73) (1979) 2 E.H.R.R. 305, para 24.

[84] *Rewe-Zentralfinanz*, C-33/76, EU:C:1976:188.

[85] Opinion of Advocate General Tanchev in *Egenberger*, note 1 above, para 54.

[86] *Egenberger*, note 1 above, para 49.

[87] Ibid, para 78.

[88] Ibid, paras 59, 81.

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Safjan and Düsterhaus offer a convincing answer, which is that the CJEU is interpreting Article 47 as enshrining a positive obligation for the Member States to legislate for the protection of fundamental rights.[89] However, effective judicial protection is normally a supplementary claim prompted by the failure to protect substantive rights.[90] It could, of course, be engaged in a scenario such as the one above once it became clear that the violation of Article 21 would not be effectively remedied, eg because of procedural bars to claiming it. In *Benkharbouche*, for instance, where Article 47 was applied by a national court, the procedural aspect was relevant: the case related to violations of fundamental employment rights by a foreign state, which was considered a private employer for the purposes of UK labour law but was at the same time immune from prosecution, so that the applicant's substantive rights could not be affirmed.[91] Yet, in the absence of such an element, the state duty to protect fundamental rights relates to each of the Charter's substantive provisions. To associate this duty with Article 47 of the Charter alone could end up diluting the character of Article 47 as a procedural right, while at the same time giving the impression that non-directly effective provisions of the Charter are not subject to the principle of effective judicial protection at all.

Indeed, the most significant drawback in the CJEU's use of Article 47 does not lie in cases like *Egenberger*, but in the (non-)application of Article 47 to different aspects of the Charter. When it comes to provisions that are not directly effective, the CJEU has continued to rely on state liability in damages, without referencing state liability as a subset of the effective remedies required under Article 47, as well without acknowledging the limitations of state liability in rectifying certain violations of fundamental rights. For example, in *Smith*, a case that concerned the implementation of EU law on consumer protection in the field of insurance policies (the principle of consumer protection being enshrined in Article 38 of the Charter), the CJEU did not refer to Article 47, pointing instead to state liability in damages under the *Francovich* formula.[92] But while state liability might have been appropriate on the facts of *Smith*,[93] it should not be assumed to be an effective remedy for all provisions of the Charter, including provisions for which no other remedy has been made available. Due to the strictness of the relevant conditions on causal link and measurability, state liability in damages is not always a secure remedy compared to direct and indirect effect.[94] While it can work for some pecuniary losses, it does not translate well to cases where the violation is difficult to quantify, such as cases concerning associational rights. This problem is exemplified in *AMS*, where

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[89] M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU?' (2014) 33(1) *Yearbook of European Law* 3, p 17.

[90] *Klass and Others v Germany* (Application no 5029/71) (1978), 2 E.H.R.R. 14, para 69; *Kudla v Poland* (Application no 30210/96) (2000) 35 E.H.R.R. 198, para 151.

[91] *Benkharbouche* [2015] EWCA Civ 3, [2015] 3 WLR 301, at 80ff.

[92] *Smith*, note 9 above, para 56.

[93] Opinion of Advocate General Bot in *Smith*, note 9 above, paras 48ff.

[94] S Prechal 'EC Requirements for an Effective Remedy' in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (Wiley, 1997), p 11.

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the same approach was followed.[95] The damage suffered by failing to secure information and consultation within the undertaking cannot easily be measured, as it is not causally traceable in materially inferior working conditions (this would entail proving that there would have been *successful* information and consultation and not mere exercise of the right). It would have been impossible to claim damages before French courts following the *AMS* judgment,[96] even though France takes a relatively generous attitude towards state liability, compared to other Member States.[97]

The case law thus problematically represents state duties to ensure the effective reparation of some Charter provisions in horizontal disputes, which resonates with concerns of inconsistency and, particularly, with the debate on social and economic rights, as the set of rights most deeply affected by uninvocability. While, in view of Article 52(5) and/or their conditionality on national laws and practices, some of these rights may entail thinner core obligations, they are still subject to the Article 47 need of *some* judicial protection—a feat in which the principle of state liability can fail. Due to the way in which the CJEU reads Article 47, it appears to refrain from stipulating positive duties for these provisions, in line with their limitations. However, this overlooks other pertinent considerations, eg the possibility and extent of judicial scrutiny of the relevant national laws and practices by national courts. Could there then not be a role for Article 47 in respect of these violations of the Charter, too, albeit in a manner that accommodates their conditionality? It is indeed noteworthy that, while the CJEU's reliance on Article 47 in *Egenberger* seemed to follow the letter of the Advocate General's analysis, AG Tanchev has in fact consistently sought the observance of Article 47, even for provisions that may not meet the direct effect conditions as such. In his Opinion in *OTP Bank*, for instance, he refers to *Egenberger*, arguing that Article 38 of the Charter should act as a minimum interpretive guide for secondary legislation and that it 'would also be in tension with the right to effective judicial protection under Article 47 of the Charter, which confers rights on individuals which they may rely on before Member State courts, including the context of disputes between private parties' if an interpretation compatible with that right were not found.[98] A similar note was made by AG Bobek in *TÜV*.[99] However, the right to an effective remedy was not used in either of these judgments.

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[95] *AMS*, note 8 above, para 50. State liability is set up in *Francovich*, C-6/90, EU:C:1991:428, paras 31–35,40; *Brasserie du Pecheur*, C-46/93, EU:C:1996:79, para 4. Some of these drawbacks of state liability have already been identified in B van Leeuwen, 'An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State Liability after *Laval*' (2012) *Cambridge Yearbook of European Legal Studies* 453.

[96] S Platon, 'L'invocabilité Horizontale des Normes de Droit de l'Union Européenne: Un Pas sur Place, Un Pas en Avant, Deux Pas en Arrière - (CJE, grande chambre, 15 janv. 2014, aff. C-176/12)' (2015) 584 *Revue du marché commun* [online version], p 7; R Tinière, 'L'invocabilité des principes de la Charte des droits fondamentaux dans les litiges horizontaux' (2014) 14 *Revue des droits et libertés fondamentaux.*

[97] B van Leeuwen and R Condon, note 75 above, pp 239–44.

[98] Opinion of AG Tanchev in *OTP Bank and OTP Faktoring*, C-51/18, EU:C:2018:750, para 64.

[99] Opinion of AG Bobek in *TÜV,* C-581/18, EU:C:2020:77, para 106.

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V. HORIZONTALITY AS A STRUCTURAL CONSTITUTIONAL PRINCIPLE OF EU LAW WITH DIRECT, INDIRECT, AND STATE-MEDIATED DIMENSIONS

The preceding analysis argued that important steps have been taken under the Charter, when looked at from the angle of internal coherence of the *Mangold*/non-horizontality of directives case law. However, the case law continues to display foundational challenges, when looked at from the angle of broader constitutional coherence, qua legitimacy of the interpretive and remedial implications of the CJEU's findings. This Part proposes an alternative structure for horizontality as a constitutional principle with direct, indirect, and state-mediated manifestations that could address some of these ongoing problems.

The principle of horizontality rests upon a unitary conceptual foundation, namely that rights protected as 'fundamental' are legally relevant in intersubjective disputes. Yet, the principle is operationally varied. More specifically, in ideal theory, horizontality can operate on three main tiers: state-mediated effect; indirect effect of varying intensities; and, ultimately, direct effect.[100] These three constructions are mostly 'outcome-neutral' for applicants, in that they all have the potential of resulting in effective reparation.[101] However, none of them is in itself conceptually complete and each captures a distinct aspect of the operation of fundamental rights within the legal system: direct horizontality is addressed to private actors themselves, indirect horizontality is addressed to courts in their interpretive function, and state-mediated horizontality is addressed to state authorities bound to ensure ensuring that non-state action does not endanger the protection of fundamental rights.[102]

Further distinctions can be drawn within the above schema, with commentators such as Alison Young having previously identified as many as seven sub-types.[103] These further distinctions, which principally define the stronger and weaker types of indirect horizontality in more detail, could prove useful in a multi-level constitutional order like the EU, so as to further elucidate the role of the CJEU and of national courts in applying the principle. As my purpose here is to sketch a broad systematisation of horizontality, though, I shall confine my analysis to the direct, indirect, and state-mediated effect categories. While these three dimensions are loosely present in the three main doctrines of EU law in this field (direct and indirect effect and state liability), as Part IV has shown, these doctrines do not currently succeed in representing the interpretive aspects of the principle of horizontality nor do they appropriately set up protective duties for the Member States. Recognising the self-standing value of each of the dimensions, ie reversing the prevalent narrative whereby horizontality is conceptualised as part of the direct effect meta-norm, could facilitate an important conversation about which constitutional actor(s)

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[100] R Alexy, *A Theory of Constitutional Rights* (tr J Rivers, Oxford University Press, 2002), pp 358–65.

[101] Ibid, p 358.

[102] Ibid, p 485.

[103] AL Young 'Horizontality and the Human Rights Act 1998' in K Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart, 2007), p 35.

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ought to be imbued with horizontal obligations and how these obligations should be delivered.

First, while a three-tiered vision of horizontality still includes direct effect, ie the disapplication of incompatible law and its supersession with fundamental rights vis-à-vis other private actors, it does not operate automatically where indirect effect is unavailable, but as a question of suitability. In other words, the difference between the CJEU's current approach and the proposed three-tiered system is that the latter looks to the structure of the duty, and not just to the content of the right. It thus distinguishes the normative question of horizontal applicability from the remedial one (horizontal application through one or more of the three dimensions). A finding that I should not suffer pay discrimination on account of gender, for instance, would require reparation through the fiat of one or more of the dimensions of horizontality mentioned above, but it need not amount to a finding that I am entitled to claiming this right *against* any employer at any time, even if this norm remains in principle capable of delivery in any of the three ways. Rather, an assessment of how the finding of horizontality would operate through each of the tiers by situating it within the type of private relationship in which the right is invoked would be necessary in order to identify which actor could best carry the burden of repairing the damage suffered and why.

This approach would tackle the concerns of attributability raised by AG Bobek in *Cresco*, explained in Section IV.B above, as well as some of the broader questions of judicialisation and inflation discussed in Part II. For example, rendering direct effect limitable for actor-based and not just norm-based reasons would allow for considerations such as private autonomy and legitimate expectations to feature more centrally in the CJEU's reasoning, in line with a clearer understanding of core principles of civil liability for violations of fundamental rights.[104] At the same time, recognising the exceptional character of direct effect in the fundamental rights context (as opposed to affirming its availability for only some rights) would avoid routinising the emancipatory symbolism direct horizontal effect has, whenever it is affirmed. Horizontal direct effect can, indeed, be a powerful means of redressing *de facto* inequalities in the enjoyment of *de jure* equally attributed rights—a key concern in instances of long-standing social subjugation of vulnerable groups (eg for reasons of gender or other protected characteristics) and in cases that involve ungovernable forms of private power, more generally. It is perhaps less convincing if habitually used as a means of responding to legislative errors or reinterpreting existing rights in light of changing social circumstances, where the state-mediated and indirect manifestations, respectively, may offer constitutionally more harmonious alternatives.

Secondly, most provisions of the Charter might be thought to have some—albeit varying—indirect or radiating horizontal effect, whether it be in the CJEU's interpretation of secondary legislation (what I have argued already amounts to strong indirect effect at the EU level) or through the duty of consistent interpretation at the national level (a weaker form of indirect effect). The recognition of an

[104] See eg N Reich, *General Principles of Civil Liability* (Intersentia, 2013), albeit primarily from the angle of market freedoms and associated provisions of the Charter.

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EU-defined principle of indirect effect, which combines statutory interpretation in cases concerning private action as well as its consistent interpretation counterpart at the national level, might not in itself resolve the inconsistencies in the treatment of substantively similar cases discussed in Section IV.A, but it would render such inconsistencies clearer, allowing them to be exposed, debated and, ultimately, resolved as the subject-specific case law on different Charter provisions builds up. Moreover, rather than viewing indirect horizontal effect as a step that national courts must take before unleashing the fully fledged potential of *Mangold* actions, it would enable a more rounded view of indirect horizontality as a shared judicial duty across EU courts at all levels.

But how, one might ask, could we respond to the difficult cases where indirect effect cannot go far enough and direct effect might not be an appropriate avenue, either? Or, indeed, to cases where these dimensions alone do not capture the complexity of a violation? In this regard, a fully developed understanding of the potential of state-mediated effect is required. Rather than being understood solely as state liability in damages, state-mediated forms of horizontality can act in two further ways. First, state-mediated effect itself entails positive obligations. As Section IV.C highlighted, these obligations are currently brought into horizontal disputes through Article 47 of the Charter, which does not always correspond to the provision's functions. The affirmation of positive obligations as part of the horizontality analysis nevertheless remains important as a supplementary claim to the application of other dimensions, such as direct effect, in recognition of the fact that state and non-state fault can be at play at once. There, the delineation of a protective duty could prove to be key to subsequent violations: where that duty has not been met, reliance could then convincingly be made upon the availability of effective remedies under Article 47 of the Charter against the state. This would also more neatly separate, as Section IV.C suggested, the question of legislative obligations from the question of effective remedies in general, recognising that further triggers might exist under Article 47 for the core or essential content of any Charter provision.[105] Secondly, state-mediated effect offers a meaningful response to situations where horizontality is claimed as a shield against another private actor when both direct and strong forms of indirect effect are impossible. This scenario is reminiscent of *CIA Securities* and *Unilever*.[106] In this type of case, national courts *qua* public authorities are prevented from allowing a benefit to accrue to a private actor because of incompatible legislation. While this outcome is similar to disapplication, it is justified not from within the private relationship, but by the constitutional duty of the courts as public authorities bound to respect the Charter.

In turn, the three-tiered approach described above could reduce the stark difference that has emerged in the horizontal effect case law between Charter provisions that are invocable as such and provisions that cannot be so invoked. Of course, it cannot be denied that limitations such as conditionality on national laws and practices and

[105] Cf Lenaerts, note 72 above.

[106] *CIA Security*, C-194/94, EU:C:1996:172; *Unilever Italia*, C-443/98, EU:C:2000:496.

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Article 52(5) would still be likely to lead the CJEU to exclude mechanisms of disapplication of national law, which could be associated with direct effect and strong forms of indirect effect (such as the reading in of legislative intent) for such provisions. Similarly, whilst some types of state-mediated effect may be possible, they may have to be based on incidental effect or executive inaction, as opposed to positive obligations to legislate, as that would go against the grain of Article 52(5). Still, as the possibility of viable forms of indirect horizontal effect and state liability is missing from the case law on many of the affected rights so far, such as information and consultation within the undertaking and the rights of persons with disabilities, an explicit recognition of even these weaker forms of horizontality could mark an important constitutional change towards effectiveness for these provisions.

Before concluding, it is worth anticipating a potential objection to my proposal, which could be that it avoids the trickier parts of the judicialisation or inflation objections discussed in Part II, rather than addressing them. In offering an overall structure for a self-standing, constitutional principle of horizontality, it is not my intention to suggest that this would *fully* succeed in resolving deep normative disagreements over the desirability of horizontal effect altogether. Making sense of horizontality as a constitutional principle certainly also requires a vision for its conceptual foundation—be it to enhance equality, dignity or, say, market liberalism. While this question cannot be thoughtfully addressed in the remaining space available,[107] this is not to doubt that an assessment of the three dimensions would be pointless unless their application was tested against a legitimate overarching rationale. Indeed, it should not be assumed that horizontality as a principle is inherently positive or negative for the advancement of fundamental rights. One might recall the Irish experience of horizontality, for instance, where albeit initially used to guard individual autonomy (manifested, eg, in not being dismissed on account of a personal choice not to join a trade union),[108] an assumption of a contestable dignitary foundation for all rights took the principle 'out of control', as O'Cinneide notes, when it came to attributing obligations to vulnerable women to protect the right to life of the unborn (a position later overturned by the Supreme Court).[109] In EU law terms, one might look back to the *Viking* saga (resonating more recently with the *TSN* ruling by analogy) as an example of horizontality being used to hamper, rather than to affirm, the protection of fundamental rights for the benefit of other constitutional values.[110] This finding *prima facie* rested only on a re-application of the *Defrenne* conditions,

[107] See further E Frantziou, *The Horizontal Effect of Fundamental Rights in the EU: A Constitutional Analysis* (Oxford University Press, 2019), ch 6, for an argument from political equality. For a sophisticated account from legal theory, see J Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015), ch 7.

[108] *Meskell* [1973] IR 121.

[109] C O'Cinneide, 'Irish Constitutional Law and Direct Horizontal Effect: A Successful Experiment?' in D Oliver and J Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007), pp 234–35.

[110] *Viking Line*, C-438/05, EU:C:2007:772; see also *Terveys- ja sosiaalialan neuvottelujärjestö* ('TSN'), Joined Cases C-609/17 and C-610/17, EU:C:2018:223.

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yet arguably had a different normative undercurrent in respect of the appropriate hierarchy between collective employment rights and market freedoms.

While they perhaps inevitably reveal some of my own preferences for the appropriate foundations of horizontality, these examples highlight the perennial relevance of the questions with which the main normative debates on horizontal effect start: that of which hierarchies of rights are the right ones and how new rights and shifting power relations should be represented within our constitutional order. The reason why, to my mind, a consistently applied structure such as the one suggested above remains significant in addition to these questions is two-fold. First, it would be overly simplistic to divorce the assessment of *whether* horizontal effect is appropriate in principle from that of *which* types of horizontal effect are appropriate. To do so would overlook that while, in abstract terms, challenges such as judicialisation and inflation are typified by direct effect, all forms of horizontality carry such concerns, but with respect to different constitutional interactions.[111] Secondly, and perhaps more importantly, such a structure can embed into a procedurally more stable legal practice the broader inquiry into whether horizontality should be available at all or for which rights—the answer to which, as the above examples indicate, is ultimately likely to remain elusive and changeable across time.

VI. CONCLUSION

At just over ten years after the entry into force of the binding Charter, and nearly forty-five after the CJEU's seminal ruling in *Defrenne*, it is clear that the CJEU is regaining a vigorous stance towards the horizontal effect of fundamental rights. While significant questions remain, the CJEU has offered redress for violations of fundamental rights by following a discernible logic and method. Nevertheless, the emphasis on direct effect and the fragmentation of the idea of horizontality by the relic of the non-horizontality of directives continue to pose problems in this field. In light of these observations, this article suggested a structural re-evaluation of horizontality under the Charter as a self-standing, three-tiered constitutional principle comprising direct, indirect, and state-mediated manifestations. It was argued that understanding horizontality in this manner would lend coherence to the different types of emerging case law on the indirect application of the Charter to disputes between private parties; that it would ensure greater potential for meaningful reparation of horizontal harms for all rights; and, crucially, that it would more succinctly address questions of attribution of duties to different actors.

This article did not attempt to imagine the application of the principle of horizontality for other areas of EU constitutional law. Whilst beyond the scope of the present study, such an analysis would be worthwhile as a means of re-organising the complicated operation of horizontal effect in EU law more generally. The proposal for an alternative constitutional structure of horizontality under the Charter made in

[111] A Nolan, 'Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) *International Journal of Constitutional Law* 61, p 64.

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this article also did not attempt to address the substance of the broader question of justification that the principle of horizontality raises in the field of fundamental rights, namely, for which *purpose* such rights should be applied to private relations. And yet, as Part V sought to explain, removing the focus from horizontal direct effect and placing it upon a principle of horizontality manifested in but not *determined* by its direct, indirect and state-mediated dimensions, could be a first step in assessing whether the overall role of horizontality in protecting fundamental rights is a felicitous one, rather than just being a means of outsourcing human rights or of commoditising them.

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