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de Direito da União Europeia:
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RIGHTS AND PRINCIPLES IN THE CHARTER AND THE GENERAL PRINCIPLES OF EU LAW:

‘WE’RE ONE, BUT WE’RE NOT THE SAME’?

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Resumo: Os princípios gerais de direito da UE são uma fonte de direito largamente usada na jurisprudência do TJUE. Contudo, em acórdãos na área dos direitos fundamentais, a sua aplicação tem vindo a despertar críticas e acusações de ativismo judicial. Com a proclamação da Carta de Direitos Fundamentais da UE enquanto direito primário, a codificação de direitos e princípios neste instrumento apresentou uma oportunidade de conseguir maior certeza jurídica. Contudo, os princípios gerais de direito da UE não parecem ter sido postos de lado, mantendo o seu lugar na hierarquia das fontes primárias de direito da UE. Cabe pois à futura jurisprudência do TJUE clarificar o âmbito de aplicação das várias fontes e instrumentos de proteção dos direitos fundamentais.

Palavras-chave: Association de Médiation sociale, Audiolux, Carta, direitos fundamentais, princípios gerais, Glatzel, ativismo judicial, Küçükdeveci, Mangold, direito primário

Sumário: 1. Introdução, 2. Quadro jurídico, 3. Jurisprudência relevante, 3.1 Mangold e Küçükdeveci, 3.2 Audiolux, 3.3 Dominguez e Association de Médiation sociale, 3.4 Glatzel, 4. Implicações legais, 5. Conclusão, Bibliografia

Abstract: General principles of EU law have been widely used in the case-law of the European Court of Justice. In cases involving fundamental rights, however, they have raised especially harsh criticism and accusations of judicial activism. With the Charter of Fundamental Rights of the EU, a codified version of rights and principles seemed to present an opportunity to surmount legal uncertainty. Still, general principles of EU law show no signs of vacating their place in the

1. Former *référéndaire*, ECJ and EFTA Court. This contribution is the result of a presentation done on 27 November 2015 in the framework of the conference “*The EU Charter of Fundamental Rights and the Judicial Activism of the CJEU: A Bill of Rights Under Pressure*” (FDUL, Lisbon), and draws on part of the research conducted in the ambit of the PhD thesis ‘*A Matter of Principle: The Interaction of General Principles of EU law with other Legal Sources in the Case-Law of the CJEU*’, EUI 2015. The usual disclaimer applies.

hierarchy of sources of primary law, and only future case-law of the Court will be able to clarify the scope of application of all available tools for fundamental rights' protection.

Key words: *Association de Médiation sociale*, 9; *Audiolux*, 7; Charter, 15; fundamental rights, 1; general principles, 1; *Glatzel*, 13; judicial activism, 1; *Kücük-deveci*, 5; *Mangold*, 5; primary law, 5

1. Introduction

Advocate General Mazák once stated that “[general principles are] a source of law which may embrace rules of widely varying content and degree of completeness, ranging from interpretative maxims to fully fledged norms”.² To this very day, although the topic of general principles of EU law has been largely dissected in academic writing, their precise definition remains vague. Tools for judicial activism, legitimate primary EU law, praised by many and criticised in equal measure, they are certainly controversial instruments in the case-law of the European Court of Justice (hereafter ‘ECJ’ or ‘the Court’).

Albeit well known in national legal systems,³ their transposition to the functioning of the EU legal order has not always been easy. In the aftermath of the consolidation of the Charter of Fundamental Rights of the European Union (hereafter ‘the Charter’) as part of primary EU law, another challenge has appeared: how to harmonise the existence of general principles of EU law with the new distinction between rights and principles enshrined in this written instrument?

This contribution starts with a brief overview of the relevant legal provisions, followed by an analysis of the case-law where the Court has developed a ‘general principle’ based reasoning. Finally, some questions will be raised in relation to the existing situation and potential future developments.

2. The legal framework

The Charter, enacted in 2000 as a result of the difficult path that led eventually to the failure of the EU Constitutional Treaty, started off as a soft law instrument, providing guidance to the EU judiciary in case resolution.⁴ However, with the entry into force of the Treaty of Lisbon, in 2010, the Charter saw its legal value ascend to that of the Treaties, becoming fully fledged primary EU law. Notwithstanding that fact, many doubts subsist in relation to the normative content of this instrument, not only in what comes to the specificities of its provisions, but also, and importantly, in relation to its scope of application.

Article 6 of the Treaty on the European Union (hereafter ‘TEU’) reads as follows:

2. Opinion of Advocate General Mazák in *Palacios de la Villa*, C-411/05, EU:C:2007:106.

3. The reference to general principles of law as a way to avoid judicial activism and hence limit the judicial power can already be encountered in the *Code Napoléon*.

4. The first time the Court referred to the Charter was in case *Parliament v Council*, C-540/03, EU:C:2006:429.

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

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.

(...)

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

This article refers to both principles and general principles, emphasizing that fundamental rights necessarily integrate the latter category. The Charter provisions, however, add to the confusion. Indeed, in the so-called horizontal clauses (the general provisions contained in Chapter VII of the Charter), the distinction between the concepts becomes blurred. These provisions read as follows:

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. *The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

Article 52

Scope and interpretation of rights and principles

(...)

4. *In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*

5. *The provisions of this Charter which contain 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.*

The terminology is unclear. In fact, if one were to assume that the Charter is composed of but fundamental rights, such assertions could mean that all Charter contents were to equally be protected as general principles of EU law.⁵ The practice, however, has shown that the Court does not read it in this way.

3. Relevant case-law

The ECJ, in referring to the origin of general principles of EU law, tends to bind them to the constitutional traditions of the Member States. In this sense, the formulation of Article 52(4) of the Charter seems to be in line with the understanding of fundamental rights protected as general principles. However, this paragraph makes a further specification in relation to ‘principles’: the provisions of the Charter which contain the latter ‘*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*’.

5. See Hilson, C. (2008), at p.196. Contra, see Rosas, A., and Armati, L. (2012), at p.178.

thus points at the fact that these Charter principles do not necessarily correspond to general principles of EU law, albeit many of the fundamental rights which are protected under this instrument are understood as being part thereof.

A first instinct could be to equate these principles with the social and economic rights, seen as programmatic rights in some national constitutional traditions⁶. However, Lenaerts and Gutiérrez-Fons note that the justiciability of all social rights is in no way excluded by this provision, since the Court has stated otherwise in relation to some of them.⁷ The Explanations of the Charter do not bring clarity to the distinction, especially since they qualify as a ‘principle’ the precautionary principle, for example, which has been considered by many as a fully-fledged general principle of EU law (with *per se* primary law status).⁸ It is as such left to the Court to develop the status and regime of the different articles, on a case-by-case basis.⁹ But even the Court seems struggle to make the distinction between rights and principles in the Charter and general principles of EU law.

Two controversial cases can shed a light on this, *Mangold* and *Kücükdeveci*, two references for preliminary ruling relating to age discrimination.¹⁰

3.1. *Mangold* and *Kücükdeveci*

In 2003, Mr. Mangold, aged 56, had signed a fixed-term employment contract with a lawyer. German law at the time prescribed that fixed-term contracts had to be accompanied by a justification, unless the said contract concerned a worker 52 years old, or older. Such limit had been temporarily lowered from 58 to 52, until the end of 2006. Mr. Mangold contested the terms of his contract before the local Employment Court, alleging that the law was in breach of Directives 1999/70/EC (on fixed-term contracts) and 2000/78/EC (the Framework Directive)¹¹. The Court replied that, while the Directive did not itself lay down the principle of equal treatment (its source is rather to be found in constitutional traditions of

6. As is the case, for example, of the Portuguese Constitution, which has separate titles: Title II, ‘Direitos, Liberdades e Garantias’, and Title III, ‘Direitos e deveres económicos, sociais e culturais’.

7. Lenaerts, K. and Gutiérrez Fons, JA. (2014), 1577.

8. See, for example, Heyvaert, V. (2006), who speaks of a ‘dual characterisation’ of the principle, ‘as a central plank of Community policy and a General principle of Community law’ (p.189). The categorisation was proposed by the General Court, although the Court of Justice seems to be reluctant in adopting it: see General Court judgment in *Artogodan v Commission*, T-74/00, EU:T:2002:283, at paragraphs 181 and ff, especially.

9. Lenaerts, K. (2012), at p.400.

10. Judgments in *Mangold*, C-144/04, EU:C:2005:709 and *Kücükdeveci*, C-555/07, EU:C:2010:21.

11. Council Directive 1999/70/EC of June 28, 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175 and Council Directive 2000/78/EC, of 27 November 2000, establishing a General Framework for Equal Treatment in Employment and Occupation.

Member States and in international instruments), merely providing a framework for its application,¹² the principle of non-discrimination on grounds of age was a general principle of Community law,¹³ to be applied even if the measures in question were not designed to implement the Directive.

Kücükdeveci reiterated *Mangold*. Ms. Kücükdeveci had started working in Sweden when she was 18 years old. Dismissed ten years later, she was confronted with German law which disregarded employment taken under the age of 25 for the calculation of the notice period. Before the Landesarbeitsgericht, she argued that such treatment was clearly discriminatory on grounds of age. The preliminary reference made to the ECJ hence raised not only the discrimination issue but also the applicability of EU law in the case (the Framework Directive), since two private parties were involved. The Court reaffirmed the existence of a general principle of non-discrimination on grounds of age, with precise contours being laid down in the Framework Directive. The latter's purpose was to lay down a general framework for, and give specific expression to, the general principle.¹⁴

Again, the national measures in question were not aimed at implementing the instrument; however, since they affected the conditions of dismissal, they should 'be regarded as laying down rules on the conditions of dismissal.'¹⁵ The national court had further asked whether the matter was to be analyzed by reference to primary law, or to the directive. To this the Court replied that the general principle, as given expression in the directive, should be the basis for examination, since the Directive itself could not impose obligations in relationships between private individuals.¹⁶ Nonetheless, it then reiterated the interpretation should be made in the light of the Directive, its wording and purpose, so as to ensure full effectiveness to the general principle of non-discrimination on grounds of age¹⁷.

The Court referred, this time, not only to the constitutional traditions common to the Member States and to international instruments, but also to Article 21 of the Charter.¹⁸ This reference is, however, striking: the Court chose to apply the general principle enshrined in the Directive, instead of a right clearly recognized in a written instrument with the same legal value as the Treaties. Whereas in *Mangold* the Charter was not available yet with the same legal force, here this was not the case.

12. *Mangold*, at paragraph 74.

13. See Basedow, J. (2012), at p.78.

14. *Kücükdeveci*, cit. supra, at paragraph 21.

15. *Ibid.*, at paragraphs 24 to 26.

16. *Ibid.*, at paragraphs 46 and 50.

17. *Ibid.*, at paragraph 48.

18. *Kücükdeveci*, paragraph 74. See Laulom, S. (2010), at p.6.

3.2. *Audiolux*

Nuances were brought about by the ruling in *Audiolux*.¹⁹ The ECJ was questioned as to the existence and contours of a general principle of equality of minority shareholders, based mainly on the preamble and articles of two Directives (Directive 77/91/EEC and Directive 2004/25). First of all, it started by denying that the existence of such a principle could be inferred from these legislative references.²⁰ The reasoning was then developed, putting forward some characteristics a principle should bear so as to be considered a ‘general principle of EU law’. The Court stated that ‘the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain’, adding that the scope of the invoked directives is limited to ‘well-defined situations’.²¹

The Court added that, being limited to very specific situations, the provisions at stake did not ‘possess the general, comprehensive character which is otherwise naturally inherent in general principles of law’.²² Such a general character does not allow them to be applicable to a circumscribed number of situations, which would entail a limitation in scope. In addition, general principles of EU law cannot give rise to particular obligations (albeit, as was seen in relation to the principle of equal treatment, for example, they may have specific expressions in written instruments for certain areas of EU law).

The Court furthermore stated that ‘it should be pointed out that the general principle of equal treatment cannot in itself either give rise to a particular obligation on the part of the dominant shareholder in favor of the other shareholders or determine the specific situation to which such an obligation relates’. It cannot be so specific as to determine the choice between different means of protection.²³ The contrary would amount to assuming that the general principle could presuppose certain legislative choices. The Court clearly stated that general principles do not require any legislative instrument of secondary law to be drafted or enacted to specify their details: their formulation cannot be so specific as to determine a legislative choice.²⁴ A general principle of protection of minority shareholders does not, as such, exist: it lacks, in light of the above, both the constitutional character inherent to general principles, as well as an independence which detaches their existence from written legislation.²⁵

19. Judgment in *Audiolux and Others*, C-101/08, EU:C:2009:626.

20. *Ibid.*, at paragraph 34.

21. *Ibid.*, paragraphs 34 and 35.

22. *Ibid.*, paragraph 42.

23. *Ibid.*, at paragraphs 57 and 61.

24. *Ibid.*, at paragraph 63.

25. Semmelmann characterizes this move of the Court as an unbound exercise of the adjudicatory powers by the Court. See Semmelmann, C. (2014), at p.303.

The Court thus seems not to accept that general principles are so specific as to require detailed tailoring by the EU legislator, although it admits to the using of legislative instruments to make the underlying value operate. In her opinion in *Audiolux*, Advocate-General Trstenjak had noted that the fundamental importance of general principles is proved by the fact that they find ‘expression in primary law and in many rules of secondary Community law.’²⁶ Bengoetxea claims, on the contrary, that creating a test of importance based on the expression in positive law would amount to contradicting the widely proclaimed unwritten nature of general principles.²⁷ In this, the Advocate-General Trstenjak’s Opinion seems to indeed be reductive: ‘finding expression’ does not necessarily entail a specific written rule, especially not when it comes to the case-law of the CJEU.

Although the reasoning is more detailed on the characteristics of a general principle, it is not completely enlightening. The Court is known to refer to primary and secondary EU law as a ‘specific expression’ of the principles applied; the important question is hence which type of ‘triggers’ are found to make it operate through a certain legal instrument. In many cases, indeed, the secondary law instrument which provides the basis for the principle application will be the one dictating the regime applicable to the parties, albeit it is the general principle which, in theory, at least, underlies the decision.

3.3. *Dominguez and Association de Médiation sociale*

More recently, the rulings in *Dominguez* and *Association de Médiation sociale*²⁸ appear to indicate that not all the rights enshrined in the Charter are to be equated with general principles of EU law, despite the fact that many of them are.²⁹

Dominguez related to the organization of working time. Ms. Dominguez had claimed entitlement to paid annual leave not taken in respect of a period when she was absent from work (the right to annual paid leave was raised with reference to article 31(2) of the Charter). The Advocate-General analyzed the nature of the right enshrined in this provision, noting that it should be recognized ‘as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by the directive

26. Opinion of Advocate General Trstenjak in *Audiolux and Others*, EU:C:2009:410, at paragraph 74.

27. Bengoetxea, J (2010), at p.1180.

28. Judgment in *Dominguez*, C-282/10, EU:C:2012:33 and in *Association de médiation sociale*, C-176/12, EU:C:2014:2.

29. Wimmer notes that ‘even certain principles enshrined in the Charter of Fundamental Rights may fall outside the scope of the definition of general principles of EU law. (...) by declining to apply the right to paid annual leave in horizontal situations, the Court gave a hint that this principle does not rank as a general principle within the EU legal system, despite the fact that the right to paid annual leave is also provided for by article 31 of the Charter.’ Wimmer, M. (2014), at p.336.

itself³⁰. This right being consistently given expression by the provisions of an instrument of secondary legislation, the question becomes whether incompatible national legislation can be excluded in light of it, by direct application of the Charter article, or by means of principle-based approach of the *Küçükdeveci*-type.

According to the Advocate-General, this particular right seems to be a fundamental right, due to its inclusion in the Charter; however, she furthers, it possesses a deeper intensity of protection, since the other rights contained in the Solidarity chapter require ‘a guarantee of objective law in that the rights granted there are ‘recognised’ or ‘respected’ (‘principles’ in the sense of article 51(1)).³¹ When looking at the possibility of horizontal direct effect, however, she notes that the binding force of this article lays rather in a ‘guarantee element’, which would translate in the adoption of safeguard rules by the Member States³². She further stated that it is ‘questionable’ whether such a right can have the force of a general principle of EU law, recalling that the latter ought to be ‘substantively unconditional and sufficiently precise’.³³

The Court seemed to have a different approach in mind. The first step was thus an attempt to equate the right contained in article 31(2) either with articles 20 to 23, or article 27 of the Charter. Then, it was considered whether it was a right or a principle, and whether it was sufficiently clear and precise to follow the regime attributed to the principle of equality and be invoked before a national court. The ruling decided it was not.

It has been claimed, as a consequence, that a general principle of EU law will be the result of a ‘legally perfect rule’, applicable on its own.³⁴ However, this assertion should be questioned, since the general principles applied directly by the Court to certain situations were not legally perfect nor would lend themselves to isolated application – but rather, as discussed above, in combination with other norms.

30. Literal wording of paragraph 48 of judgment in *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177. See Paragraph 42 (and footnote 11) of the Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, with reference also to *BECTU*, C-173/99, EU:C:2001:356, paragraph 43, and *Merino Gómez*, C-342/01, EU:C:2004:160, paragraph 29. She further adds a reference to *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 22; *Vicente Pereda*, C-277/08, EU:C:2009:542, paragraph 18; and *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 28, with regard to Directive 2003/88 EC.

31. Opinion of Advocate General Trstenjak in *Dominguez*, cit. supra, paragraphs 75/76.

32. *Ibid*, at paragraph 81.

33. *Ibid*, at paragraph 99.

34. ee Ellis, E., and Watson, P. (2012), with reference to paragraph 135 in *Dominguez*, at p.103.

Association de Médiation Sociale again stirred the controversy, this time in relation to article 27 of the Charter³⁵. *Association de Médiation Sociale* is a private association, working on the prevention of delinquency in the area of Marseille, France. It employs young people through a system of ‘support employment contracts’, with view to their social and professional reinsertion. To undertake its activity, it has eight other workers, these with permanent contracts. Only the latter are taken into account in the calculation of its workforce, in accordance with article L. 1111-3 of the Code du travail, which has influence in the regime of representation of workers in the association (the minimum number of 50 workers is required for the application of the directive establishing a general framework for informing and consulting employees in the European Community (Directive 2002/14) is hence not met). Nonetheless, the local trade union decided to create a division within the association, nominating Mr. Laboubi, one of the permanent workers, as its representative. The association opposed it, arguing that it was not obliged by law to have such representation; it further proceeded to suspend Mr. Laboubi’s contract. The Cour de cassation made a reference to the ECJ, asking the latter, essentially, whether the fundamental right to information and consultation of workers, recognized by article 27 of the Charter and given expression by Directive 2002/14, can be invoked in a dispute between private individuals in order to establish the conformity of a national transposing measure.

Advocate-General Cruz Villalón treated the reference as being essentially the question of whether the Charter, when its content is given specific expression by a Directive, may be relied upon in relations between individuals. In his view, the fact that the wording of the Charter points to its application by Member States and EU institutions in nothing lessens its capacity of having horizontal applicability, which would restrict ‘the effectiveness of fundamental rights between individuals.’³⁶ He thus concluded that article 27 of the Charter may be relied on in such disputes;³⁷ however, he added, it is important to consider whether it is a right or rather a principle.

In his view, the qualification as ‘fundamental right’ relates to the entire content of the Charter; he further added that ‘the fact that specific substantive content of the Charter is described as a ‘right’ elsewhere in the Charter does not in itself prevent it from potentially belonging to the category of ‘principles’ within the meaning of Article 52(5)’. Indeed, he acknowledged that social rights seem to be ‘rights by virtue of their subject matter’ but ‘principles by virtue of their operation’, criticizing the wording of the Charter in that it should have followed the expression used in article 51(1).³⁸

35. For a more in depth analysis of this case, see Lourenço, L. (2013).

36. Opinion of Advocate General Cruz Villalón in *Association de médiation sociale*, C-176/12, EU:C:2013:491, at paragraph 28.

37. *Ibid.*, at paragraph 41.

38. *ibid.*, at paragraphs 44 and 45.

Looking at article 27, he considered that the public authorities are forced to determine the objective content to be protected, the article containing a principle, in the sense of articles 51(1) and 52(5). Having said so, the Advocate-General proceeded to examine the regime applied to principles under the latter article: the need for implementing consists has to mean a ‘specifically legislative implementation.’³⁹ He further affirmed that ‘it is possible to identify, from among the legislative implementing acts referred to in the first sentence of Article 52(5) of the Charter, particular provisions which can be said to give specific substantive and direct expression to the content of the ‘principle’. That differentiation is essential, since, otherwise, in areas as extensive as social policy, the environment or consumer protection, the ‘implementation’ of a ‘principle’ would consist of nothing less than an entire branch of the legal system (...). That result would render insignificant and disruptive the function which the Charter confers on ‘principles’ as a criterion for interpreting and reviewing the validity of acts, since it would be impossible to carry out that function’.

At this point, the Advocate-General made a key statement: ‘Article 3(1) of Directive 2002/14 provides the content of the ‘principle’ with substantive and direct expression: the personal scope of the right to information and consultation.’ As such, ‘it may be referred to as an example of the substantive and direct expression of Article 27 of the Charter and, therefore, is capable of forming part of the content of Article 27 which may be relied on before the courts.’⁴⁰

The Court did not follow the Advocate-General’s daring suggestion, pointing out that, as its wording indicates, Article 27 lacks the conditions to full effectiveness, for ‘it must be given more specific expression in European Union or national law’. It then marked a stark contrast with the mode of operation of the principle of non-discrimination on grounds of age: the latter, enshrined in article 21(1), ‘is sufficient in itself to confer on individuals an individual right which they may invoke as such’, as proved by *Küçükdeveci*. The difference seems to reside in the nature of the right: the analysis focused on whether the right, considered there a general principle, needs a detailed instrument of secondary legislation to be put into practice.⁴¹ The Directive applies the principle of equality to the field of employment law – arguably, it could have a simple provision stating its objective as such, and the right could be respected and applied directly.

The workers’ right to information and consultation within the undertaking, as enshrined in article 27 of the Charter, is thus incomplete, not capable of being invoked on its own. Further definition is needed as regards the conditions for such a right to be exercised in relation to the undertaking, precisely to guarantee its enforceability. Horizontal direct effect would, in light of this ruling, depend

39. *Ibid.*, at paragraphs 54 to 62.

40. *Ibid.*, paragraph 66.

41. Judgment in *Association de Médiation Sociale*, paragraph 45 ff.

on the nature of the instrument vesting the right (in the case, as it was directive, it did not render the right applicable per se).⁴²

Against this background, perhaps one could better understand the criteria advanced by the Court in *Audiolux*. On the other hand, it is still not clear what the role of the legislative instrument is: the Directive seems to endow the principle with a framework for application. Would it suffice for it to state the application of such principle to relationships in a certain area so as to make a general principle applicable?⁴³ The instrument seems to serve as a basis for assessing concrete situations, as is suggested by the wording in *Test-Achats*, when the Court stated that ‘the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question (...) that distinction is made by Article 5(2) of Directive 2004/113.’⁴⁴

3.4. *Glatzel*

The recent ruling in *Glatzel* is the first development of the *Association de médiation sociale* ruling.⁴⁵ In this case, related to the rights of persons with disabilities as protected by article 26 of the Charter, the Court further takes a stand, albeit implicitly, on the difference between rights and principles in light of the Charter. It started by acknowledging the principle of equal treatment as a general principle of EU law, of which the principle of non-discrimination, as enshrined in article 21(1) of the Charter, is a particular expression.⁴⁶ It then proceeded to consider article 26 in combination with article 52(5), stating that, as stems from the latter and the explanations to the Charter, reliance on the first ‘is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article, namely the integration of persons with disabilities’.⁴⁷ It is clear here that this right, although representing

42. In this light, it is useful to make reference to a footnote in Advocate General Trstenjak’s Opinion in *Dominguez*, cit. supra, where she points that Bauer, J.-H./von Medem, A., in ‘Küçükdeveci = Mangold hoch zwei? Europäische Grundrechte verdrängen deutsches Arbeitsrecht’, *Zeitschrift für Wirtschaftsrecht*, Vol 11, 2010, p. 452, ‘are against applying the approach in *Küçükdeveci* to the case of employees’ fundamental rights under Article 27 et seq. of the Charter because of the **differences between these kinds of fundamental rights and prohibitions on discrimination**. They point out that in many of the material areas stated in Title IV of the Charter (‘Solidarity’) there are directives in existence which, on a traditional interpretation, are incapable of superseding national law to the contrary in disputes between private individuals. The authors also expressly refer here to the working time directive, which gives specific expression to the entitlement to paid annual leave under Article 31(2) of the Charter, for example.’ (emphasis added).

43. See contra Tridimas, T. (2006), at p.66.

44. See judgment in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100, paragraph 29, referring to the application of the principle of equal treatment.

45. Judgment in *Glatzel*, C-356/12, EU:C:2014:350.

46. *Ibid.*, at paragraph 43.

47. *Ibid.*, at paragraph 74.

one of the sub-divisions of the prohibition of discrimination, is not self-standing enough to represent a right on its own. The classification as principle is furthered with an assertion anchored on *Association de médiation sociale*: ‘although Article 26 of the Charter requires the European Union to respect and recognize the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such’.⁴⁸ Principles in the sense of the Charter thus do not require any sort of positive action by the Union, something which is aligned with the provision in article 19 of the Treaty on the Functioning of the European Union.

The contrast of reasoning in these cases still fails to produce a clear distinction between rights and principles and, moreover, of ‘whether a provision is rights-conferring or not’, an additional distinction to the already problematic one.⁴⁹ Arguing that rights, such as the right to annual paid leave, are not sufficiently precise due to the fact that they require legislative configuration would imply accepting the same reasoning for other rights previously qualified as general principles. If the decisive factor is that the implementation depends on the existence of a legislative instrument or, in general, a written framework for the application of the principle, then some of the statements made by the Court in this area may appear odd.⁵⁰

4. Legal implications

In cases such as *Mangold* and *Kücükdeveci*, where the Court ‘discovered’ a general principle of EU law, the regime of the Directive is the one framing the application of the said principle to the situation at stake. Can one argue that such a ‘principle’ in the sense of the Charter is that different from the general principle of non-discrimination on grounds of age? What does Directive 2000/78 other than represent a specific expression of the principle, exactly as the Court phrases it in *Glatzel*? It has been argued that the classification as ‘principle’ here is limited to the definition of the legal consequences of a norm. It seems strange that the same line of thought does not apply to the use of general principles as independent legal sources in the jurisprudence of the Court.⁵¹

That occurs in other areas, where extensive interpretation of the instruments in question takes place: the fact that, eventually, the Court concedes on the application of a legislative piece’s framework is an antithesis to the assertion that no

48. *Ibid.*, at paragraph 78.

49. Frantziou, E. (2014), at p.344.

50. On the distinction to be made between the legislative framework and the Charter rights/principles, see Lazzerini, N., (2014), at p.924.

51. Contra, Peers, S. and Prechal, S. (2014), at p.1506.

legislative action is needed in those cases. Peers and Prechal suggest that ‘the wording, purpose and the nature of the provision at issue must be looked into’, so as to define what constitutes a principle and a right under the Charter. However, they recognize that ‘what in the Court’s case law and, to an extent, also in the Charter, is called a principle, is not necessarily a principle for the purposes of article 52(5).’⁵² Safjan has defended that general principles of EU law and principles in the Charter are conflated, producing the same effects. His thesis is that if some principles from the Charter (or general principles, for that matter) become sufficiently determined by case-law, be it from the Court of Justice, the European Court of Human Rights or in the constitutional traditions of the Member States, they become equally sufficiently clear and transparent so as to be directly applied. This implies that such principles will hence become a direct basis for judicial protection.⁵³

It appears that, in drafting the Charter, Member States wanted to secure what is generally recognized as ‘social principles’, which depend from legislative intervention and are subject to more conditions for application than fundamental subjective rights. In a way, a type of programmatic rules, which would not be directly applicable to individuals, but entail rather some sort of positive action.⁵⁴ However, the wording chosen and the failure to make the distinction clear with regard to which specific provisions embody rights and which ones embody principles creates more confusion, and opens leeway for the Court to deal with the issue on a case by case basis. This becomes problematic especially when the Court decides not to engage in the classification, as happened in the *YS* case.⁵⁵ Here, albeit recognizing that the right to good administration as enshrined in article 41 of the Charter ‘reflects a general principle of EU law’, the Court does not dwell in the interpretation of such principle, which seems to have a limited effect in what comes to individuals.⁵⁶

52. *Ibid.*, at p.1507.

53. Views expressed at the lecture ‘Some reflections about the methodology and dilemmas of constitutionalization in European private law - Lecture with Marek Safjan’, European University Institute, Florence, May 26th, 2015.

54. See, on this matter, Craig, P. (2012), at p.469/470. He further refers to the words of António Vitorino, who represented the president of the Commission in the Convention responsible for drafting the Charter: ‘rights enforceable in courts and principles that could be relied on against official authorities’ (at p.468). See also *supra* footnote 6.

55. Judgment in *Y S and Minister voor Immigratie, Integratie en Asiel*, C-141/12 and C-372/12, EU:C:2014:2081.

56. *Ibid.*, at paragraph 67: ‘It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (...) Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application. 68 It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN*, C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.’

The distinction between rights and principles in the Charter does not hence seem to represent a clear opposable category to that of general principles. In fact, it stems from Article 6 TEU that fundamental rights are protected as general principles of EU law. Hence, rights in the Charter would similarly be protected as such. However, the Charter, despite representing the codification of the development of fundamental rights reached by case law,⁵⁷ does not exhaust the use of general principles and subsequent protection of fundamental rights under the latter epitome. Fundamental rights can still be protected as general principles of EU law outside the scope of application of the Charter⁵⁸.

This will moreover imply acknowledging that, whilst the Charter does indeed have the value of primary law in an equal standing to the Treaties, general principles have been used before as a way to interpret and superimpose a result not expressly dictated by written primary law,⁵⁹ which might indicate that general principles of EU law will still prevail over the Charter.⁶⁰

Principles in the Charter, on the other hand, are more vague. And even though they can sometimes overlap with general principles, their legal effects are certainly different. Indeed, while general principles are fully fledged, directly applicable, EU primary law, principles per se are conflated with socio-economic rights, which need legislative development. This could indicate that, while general principles can be directly invoked by private individuals in private disputes, as some of the Charter rights, the same is not possible with regard to principles. The latter would thus have a ‘weaker’ legal status.

5. Concluding remarks

Krommendijk refers to three categories of principles, which are to be distinguished from the rights and principles in the Charter: ‘founding principles’ of the EU, ‘general principles of EU law’ and ‘particularly important principles of EU social law’.⁶¹ While undeniably some of these will be entwined with the concept of rights, what becomes clear is necessarily that the word ‘principle’ encompasses different concepts, whose fundamental importance or value the Court or the legislator tried to highlight.

It is difficult to say what the regime applied will be without further development in the case-law of the ECJ. One thing, however, seems certain: general principles of EU law are not bound to disappear into oblivion and be replaced by the Charter

57 Rosas, (cit. supra), at p.57.’

58 *Ibid.*, at p.56.

59 See judgment in *Defrenne*, 43/75, EU:C:1976:56, in *Les Verts v Parliament*, 190/84, EU:C:1988:94, and *Parliament v Council*, C-70/88, EU:C:1991:373 (*Chernobyl*), amongst other.

60 One might equally consider the opposite: see Ziller, J. (2012), at p. 667.

61 Krommendijk, J. (2015), at p.328/329.

provisions. Instead, they retain their position as European Union primary law, ready to be applied, alone or in connection with other norms, with potentially important results in different areas subject to EU law application. As to the rights and principles in the Charter, the Court will have the task to develop and solidify them, and most certainly intertwine them with the present European *acquis* of fundamental norms.

References

Basedow, J., 'The Judge's Role in European Integration – The Court of Justice and Its Critics', in Micklitz, H., and de Witte, B. (eds), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge - Antwerpen - Portland 2012, p. 65-82

Bengoetxea, J., 'Case Note on Case C-101/08, *Audiolux SA...*', *Common Market Law Review* 47 (2010), 1173-1186

Craig, P., *EU Administrative Law*, OUP 2012

Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, Oxford EU Law Library, OUP, 2nd edition, 2012

Frantziou, E., 'Case Note: 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', *EUConst* 10 (2014), p.332-348

Heyvaert, V., 'Facing the Consequences of the Precautionary Principle in Community Law', *ELRev* 2006

Hilson, C., 'Rights and principles in EU law: a distinction without foundation?', *15 Maastricht J. Eur. & Comp. L.*, 2008, 193-215

Krommendijk, J., 'Principled Silence or Mere Silence on Principles? The role of the EU Charter's Principles in the case-law of the Court of Justice', *EUConst* 11(2015), 321-356

Laulom, S., 'Non-discrimination en fonction de l'âge: un principe général du droit de l'UE', in *Forum Réflexions – Semaine Sociale Lamy*, n°1432, 08.02.2010, p.5-9

Lizzerini, N., '(Some of) The Fundamental rights granted by the Charter may be a source of obligations for private parties: AMS', Case-Law Note, Case C-176/12, *Association de Médiation Sociale*, *Common Market Law Review* (51) 2014, 907-934

Lenaerts, K., 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, 2012, Volume 8, issue 3, p.375/403

Lenaerts, K. and Gutiérrez Fons, JA., ‘The Place of the Charter in the EU Constitutional Edifice’, in Peers, Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, 2014

Lourenço, L., ‘General Principles of European Union Law and the Charter of Fundamental Rights’ – A Case Note on Case C-176/12 *Association De Médiation Sociale*, *European Law Reporter*, nº 11/12, November-December 2013

Peers, S. and Prechal, S. (2014), ‘Article 52’, in Peers et al. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing

Rosas, A., and Armati, L., *EU constitutional law: an introduction*, Hart Publishing, 2nd edition, 2012

Semmelmann, C., (2014) ‘Legal principles as an expression of a European legal culture between unity and diversity’, in Helleringer, G., Purnhagen, K. and Beck, C.H. (eds.), *Towards A European Legal Culture*, Nomos

Skouris, V., ‘Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance’ (2006) 17 *European Business Law Review*, Issue 2, pp. 225–239

Tridimas, T., *The General Principles of EU law*, OUP

Wimmer, M., ‘The Dinghy’s Rudder: General principles of European Union Law through the lens of proportionality’, *European Public Law*, 2014 Vol. 20(2), p.331-353

Ziller, J., ‘La Constitutionnalisation de la Charte des Droits Fondamentaux et les traditions constitutionnelles communes aux États’, in *Mélanges en l’honneur du Professeur Joël Molinier, Liber Amicorum*, LGDJ Lextenso Éditions, 2012, Paris, 665 ff
