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by Schulze / Lehmann

International and European Labour Law

Article-by-Article Commentary

edited by

Edoardo Ales
Mark Bell
Olaf Deinert
Sophie Robin-Olivier

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tion of Union law, 'it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be "implementation of Union law"'. In other words, on the basis of this explanation, the lack of Union competences prevents that the right to take collective action (for the fact that it is a right and not a principle)[25] may be invoked by individuals in the transposition of EU law, as it would happen in the event that the national legislation implementing the Directive concerning the posting of workers were contrary to art 28 CFREU.

The situation is dissimilar, even with reference to the national legal systems, in case of the right to negotiate and conclude collective agreements, which is also provided for in art 28, thanks to the fact that the Union competences are present in that matter. So that if the legislation which implements whatever Directive expressly infringes such right, it would be possible for an individual worker to invoke art 28 in a dispute between individuals in order to disapply that national legislation. **15**

Also with regard to art 15 and to part-time work, the legislation implementing Council Directive 1997/81/EC must comply with the principle which is provided for in the Article of the Charter and is promoted by the aforementioned secondary source of EU law. **16**

IV. List of cases

17

Date	Case no	Court	Parties	ECLI
10 January 2010	C-555/07	CJEU	*Kücükdeveci* v *Swedex GmbH & Co. KG*	ECLI:EU:C:2010:21
26 February 2013	C-617/10	CJEU	*Åklagaren* v *Hans Åkeberg Fransson*	ECLI:EU:C:2013:280
18 January 2014	C-176/12	CJEU	*Association de médiation social v Union Local des Syndicats CGT*	ECLI:EU:C:2014:2.
8 May 2014	C-483/12	CJEU	*Pelckmans Turnhout NV* v *Walter Van Gastel Balen NV and Others*	ECLI:EU:C:2014:304
5 February 2015	C-117/14	CJEU	*Grima Janet Nisttahuz Poclava* v *Jose María Ariza Toledan*	ECLI:EU:C:2015:60
6 October 2015	C-650/13	CJEU	*Thierry Delvigne* v *Commune de Lesparre Médoc, Préfet de la Gironde*	ECLI:EU:C:2015:648
13 June 2017	C-258/14	CJEU	*Eugenia Florescu, Ioan Poiană, Cosmina Diaconu, Anca Vidrighin, Eugenia Elena Bădilă* v *Casa Județeană de Pensii Sibiu, Casa Națională de Pensii și alte Drepturi de Asigurări Sociale, Ministerul Muncii, Familiei și Protecției Sociale, Statul roman, Ministerul Finanțelor Publice*	ECLI: EU:C:2017:448.
14 May 1974	C-4/73	CJEU	*J. Nold* v *Commission of the European Communities*	ECLI:EU:C:1974:51
10 May 2011	C-147/08	CJEU	*Jürgen Römer* v *Freie und Hansestadt Hamburg*	ECLI:EU:C:2011:286
18 July 2013	C-426/11	CJEU	*Mark Alemo-Herron and Others* v *Parkwood Leisure Ltd*,	ECLI:EU:C:2013:521.
18 January 2014	C-176/12	CJEU	*Association de médiation social v Union Local des Syndicats CGT*	ECLI:EU:C:2014:2
22 May 2014	C-356/12	CJEU	*Wolfgang Glatzel* v *Freistaat Bayern*	ECLI:EU:C:2014:350.

Article 52 CFREU
Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

[25] See comment on Art 52 in this book.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
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.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Literature: Anna Alaimo and Bruno Caruso, 'Dopo la politica i diritti: l'Europa 'sociale' nel Trattato di Lisbona', (2010) 82, WPMD International; Edoardo Ales, 'Libertà e "Uguaglianza solidale": il nuovo paradigma del lavoro nella Carta dei diritti fondamentali dell'Unione europea', [2001] DL 122; Massimiliano Delfino, 'EU Rules on Individual Dismissals: a Roar or a Meow?', (2013) 4 EJSL, 303; Massimiliano Delfino and Daniela Savy, 'Articolo 32', in R Mastroianni, O Pollicino, S Allegrezza, F Pappalardo and O Razzolini (eds), *La Carta dei Diritti Fondamentali dell'Unione Europea. Le Fonti del Diritto italiano* (Giuffrè, Milano 2017); Fabio Ferraro and Nicole Lazzerini, 'Articolo 52 – Portata dei diritti e dei principi', in R Mastroianni, O Pollicino, S Allegrezza, F Pappalardo and O Razzolini (eds), *La Carta dei Diritti Fondamentali dell'Unione Europea. Le Fonti del Diritto italiano* (Giuffrè, Milano 2017); Bob Hepple, 'Dismissal law in context', [2012] ILJ, 207; Jeffrey Kenner, 'Article 30 – Protection in the Event of Unjustified Dismissal', in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart, Oxford 2014) 805; Silvana Sciarra, 'Considerazioni conclusive. Metodo e linguaggio multilivello dopo la ratifica del Trattato di Lisbona', in B Caruso and M G Militello (eds), *I diritti sociali tra ordinamento comunitario e Costituzione italiana: il contributo della giurisprudenza multilivello*, (2011) 1 WPMD Collective Volumes, 8; Steve Peers and Sacha Prechal, 'Article 52 – Scope and Interpretation of Rights and Principles', in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart, Oxford 2014) 1455; Bruno Veneziani, 'Del contenuto essenziale dei diritti dei lavoratori: spunti per una ricerca' [2016] DLM, 229; Lorenzo Zoppoli, *Flex/insecurity* (Editoriale scientifica, Napoli 2012).

I. Article 52 from a labour law perspective

1 Probably art 52 is one of the most heterogeneous norms of the Charter, since it contains provisions regarding many different issues. It is not possible to deal with all of

them and it is worth selecting those which are more important than others from a labour law point of view. For that reason, attention is focused on the following topics: A) the difference between principles and rights, B) the essence of the rights and freedoms, C) fundamental rights and the constitutional traditions common to the Member States, and D) the explanations as guidance in the interpretation of the Charter.

II. The difference between 'principles' and 'rights'

As far as the distinction between fundamental rights and principles is concerned, it is useful to start with the Opinion of Advocate General Cruz Villalón, in *AMS* case,[1] which contains wide-ranging reflections that can be extended to at least all the provisions of Title IV – *Solidarity* of the Charter. According to Cruz Villalón, there would be a strong presumption that the fundamental rights set out in Title IV belong to the category of 'principles'. The Advocate General points out that, first, 'the principles imply a mandate to the public authorities, unlike … the rights, the object of which is the protection of a subjective legal situation that has already been defined'. Secondly, 'the public authorities, and in particular the legislature, are called to promote and transform the principle in a knowable legal reality'.[2] This promotion and transformation can be carried out by acts of 'implementation' to which Article 52(5) refers, i.e. 'legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law'.[3] **2**

Therefore, according to Cruz Villalón, a principle must be implemented through a secondary source of EU law. A good example of 'acts giving specific substantive and direct expression to the content of a "principle"',[4] with reference to Article 27 CFREU, is the provision of Council Directive 2002/14/EC on the scope of the right to information and consultation.[5] Therefore, the Advocate General asserts that a principle should be implemented by a secondary source of the European Union and by an act of the Member States if and when they transpose EU law. **3**

Indeed, the reconstruction proposed by Cruz Villalón proves to be problematic, not with reference to the distinction between rights and principles which is consolidated, but as regards their operation, mainly if the protected legal situations are evaluated as principles. As a matter of fact, the qualification as principles of the right to negotiate and conclude collective agreements, and of the right to take collective action (including strike), both recognised by Article 28 CFREU would be significant, albeit for different reasons. In fact, it would be necessary that the right to negotiate collective agreements be implemented by legislative and executive acts taken by the Union, in order to give substantive and direct expression to that provision. Unfortunately, there has been no sign of such acts thus far. Moreover, even if the right to take collective action were to be understood as a principle, its implementation in the European Union would be impossible, since, as it is well known, the Union cannot 'legislate' on the matter of strikes. **4**

[1] Case C-176/12, 18 January 2014, *Association de médiation social v Union Local des Syndicats CGT* ECLI:EU:C:2014:2.

[2] See para 55 of the Opinion of Advocate General.

[3] Para 50 of the Opinion.

[4] Para 64 of the Opinion.

[5] Art 3, Council Directive 2002/14/EC [2000] OJ L80/29.

III. Moving away from the presumption that Title IV fundamental rights belong to the category of 'principles'

5 The *AMS* case suggests recognising the rights and principles on the basis of the wording of the rules, distinguishing between two categories of provisions. The first category includes the precise and unconditional provisions of the Charter that confer on individuals an individual right which they may invoke as such. The second one includes those provisions with a more indeterminate content, which, in order to produce effects, require to be specified through the provisions of European Union law or of national laws implementing Union law.

6 The judgment does not agree with the interpretation of the Advocate General on the presumption of the presence of only principles in Title IV of the Charter, and indeed suggests indications to the contrary. You can see the differentiation, highlighted in the *AMS* case, between the contents of Article 21 and of Article 27. As a matter of fact, 'the principle of non-discrimination on grounds of age …, laid down in Article 21 paragraph 1 of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such',[6] provided that, however, the case to which this provision is referred 'must fall within the scope of Union law'.[7] On the contrary, the Court of Justice has established that Article 27 is a principle,[8] to which Article 52(5) is applicable, and therefore for Article 27 'to be fully effective, it must be given more specific expression in European Union or national law'.[9]

7 According to the interpretation of the Court of Justice which is based on the wording of the articles, the following Labour law provisions belong to the category of rights: Article 29, which declares that 'everyone has the access to a free placement service'[10] and Article 30. Article 33(2) is even clearer, since 'everyone has the right to protection from dismissal for a reason connected with maternity'. This provision is peremptory, does not need further explanation, and leaves no room for doubt about the classification as a right and not as a principle. On the contrary some articles contain both rights and principles, such as Article 32, which contains a right in paragraph 1 and some principles in paragraph 2.

8 Not all the provisions concerning, directly or indirectly, Labour law are contained in Title IV CFREU, as shown again by the *AMS* case that, as said, deals with the principle of non-discrimination protected in Article 21. Moreover, there are also some other articles belonging to different Titles of the Charter which regard, even indirectly, Labour law. One of those is Article 26, which, in the opinion of the Court of Justice, 'enshrines the principle of integration of persons with disabilities'.[11] Therefore, since the protected situ-

[6] *AMS* case para 47. For the analysis of such principle, the Court of Justice refers to Case C-555/07, 19 January 2010, *Kücükdeveci* v *Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21 (hereafter referred to as the *Kücükdeveci* case).

[7] *Kücükdeveci* case, para 23. See Anna Alaimo and Bruno Caruso, 'Dopo la politica i diritti: l'Europa 'sociale' nel Trattato di Lisbona', (2010) 82, WPMD International.

[8] 'Article 27 of the Charter cannot, as such, be invoked in a dispute … in order to conclude that the national provision which is not in conformity with Directive 2002/14/EC should not be applied.' Para 48 of the *AMS* case.

[9] Para 45 of the *AMS* case.

[10] The same opinion is expressed by Silvana Sciarra, 'Considerazioni conclusive. Metodo e linguaggio multilivello dopo la ratifica del Trattato di Lisbona', in B Caruso and M G Militello (eds), *I diritti sociali tra ordinamento comunitario e Costituzione italiana: il contributo della giurisprudenza multilivello*, (2011) 1 WPMD Collective Volumes, 8.

[11] Case C-356/12, 22 May 2014, *Wolfgang Glatzel* v *Freistaat Bayern*, ECLI:EU:C:2014:350, para 40.

ation is expressly qualified by the Court as a *principle*, 'that article does not require the EU legislature to adopt any specific measure'.[12]

IV. The essence of the rights and freedoms

It is time to deal with the second topic concerning Article 52 CFREU which can be dealt under a Labour law perspective, i.e. one of the three elements as regards the justification for limiting rights: the need to 'respect the essence' of the Charter's rights and freedoms.[13] **9**

This provision means that it is legitimate to limit the exercise of a fundamental right but it is unlawful to suppress a right. A good example of it comes from a judgment of the Court of Justice concerning labour law. In *Alemo-Herron*,[14] the Court rules that, in the event of transfer of undertakings, the freedom of contract, included in the freedom to conduct a business recognised by Article 16 CFREU, is a fundamental right of the transferee which cannot prevent it from asserting 'its interests effectively in a contractual process to which it is party' and from negotiating 'the aspects determining changes in the working conditions of its employees with a view to its future economic activity'.[15] **10**

V. Fundamental rights and the constitutional traditions common to the Member States

Coming to the third topic mentioned at the beginning of this contribution, Article 52(4) establishes that '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'. One of the major problems to be solved is to understand which rights and principles of the Charter are interested by the mentioned provision. In order to do that, it is necessary to have a look at the explanations on the other single articles and at the case law of the Court of Justice. According to the explanations, you can find that no provisions concerning Labour law would result from the constitutional traditions common to the Member States, while the Court of Justice is clear in ruling that some labour law norms correspond to general principles reconstructed on the basis of the above-mentioned traditions, such as Article 15 (Freedom to choose an occupation), Article 16 (Freedom to conduct a business),[16] and, above all, Article 23, which ensures equality between women and men also in the areas of employment, work and pay. In *Römer*,[17] the Court expressly declares that 'the principle of **11**

[12] Ibid para 78.

[13] On this element, see Bruno Veneziani, 'Del contenuto essenziale dei diritti dei lavoratori: spunti per una ricerca' (2016) DLM, 229. The other two elements as regards the justification for limiting rights are: the 'principle of proportionality' and the requirement that any limitations must be 'necessary' and 'genuinely meet' the objectives or other rights being protected. See Steve Peers and Sacha Prechal, 'Article 52 – Scope and Interpretation of Rights and Principles', in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart, Oxford 2014) 1480.

[14] Case C-426/11, 18 July 2013, *Mark Alemo-Herron and Others* v *Parkwood Leisure Ltd* ECLI:EU:C:2013:521.

[15] *Alemo-Herron* case, para 33.

[16] 'The right to the free pursuit of business activity' is one of the fundamental rights which 'form an integral part of the general principles of law' and 'constitutes … one of the guarantees recognized by Community law which … is based on the constitutional traditions of Member States'. Case 4/73, 14 May 1974, *J. Nold* v *Commission of the European Communities*, ECLI:EU:C:1974:51.

[17] Case C-147/08, 10 May 2011, *Jürgen Römer* v *Freie und Hansestadt Hamburg* ECLI:EU:C:2011:286.

equal treatment in the field of employment and occupation … derives … from the constitutional traditions common to the Member States'.[18]

VI. The explanations as guidance in the interpretation of the Charter

12 As it is evident from what has been said so far, the importance of the explanations relating to the Charter is relative, despite the wording of the preamble to the Charter itself, which declares that 'the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of Convention'. Moreover, Article 6(1) TEU provides that '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'. The relative importance or, better to say, the irrelevance of the explanations is argued by some labour law scholars[19] and by the Court of Justice, including some judgments regarding the area of labour law. An example of that case law is given again by the *AMS* case where, as seen above, the Court rules that the principle of non-discrimination, laid down in Article 21(1) CFREU, is sufficient in itself to confer on individuals an individual right, despite the fact that explanation on the same article seem to argue otherwise.[20]

VII. List of Cases

13 See Article 51 CFREU in this commentary.

Article 53 CFREU
Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

[18] Ibid para 59.

[19] Silvana Sciarra, 'Considerazioni conclusive. Metodo e linguaggio multilivello dopo la ratifica del Trattato di Lisbona' and Giuseppe Bronzini, 'Happy Birthday; il primo anno di "obbligatorietà" della Carta di Nizza nella giurisprudenza della Corte di giustizia', both in B Caruso and M G Militello (eds), *I diritti sociali tra ordinamento comunitario e Costituzione italiana: il contributo della giurisprudenza multilivello*, (2011) 1 WPMD Collective Volumes, respectively, 85 and 41.

[20] This is the text of explanation on Art 21:'The provision in Article 21 para 1 does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law'.