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CASE NOTES

THE RIGHT TO INFORMATION AND CONSULTATION IN ARTICLE 27 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Less than a Right and Less than a Principle, just an Ordinary Provision Lacking Direct Effect?

Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, Judgment of 15 January 2014

FILIP DORSSEMONT*

§1. INTRODUCTION

On 15 January 2014, the Grand Chamber of the Court of Justice (CJEU) delivered a judgment on a request for a preliminary ruling in Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*.¹ The fact that the CJEU was composed as a Grand Chamber suggests that the case was ‘of exceptional importance’.² The reference related to the interpretation of Article 27 of the Charter of Fundamental Rights of the European Union (the Charter), which recognizes a workers’ ‘right of information and consultation within the undertaking’. Despite the existence of an impressive body of directives in the field of worker involvement, a request for a preliminary reference concerning Article 27 of the Charter is unprecedented. More importantly, the judgment sheds light on the question whether and to what extent Charter principles, as opposed to genuine Charter rights, are ‘judicially cognizable’.

However, a reference to the distinction between a Charter principle and a Charter right, which lays at the heart of Article 54(5) of the Charter, has been scrupulously

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¹ Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, Judgment of 15 January 2014, not yet reported.

² See Article 16 of Protocol (No 3) on the Statute of the Court of Justice of the European Union, [2010] OJ C 83/210.

avoided. The judgment does not encourage domestic judges to take an activist stance in the face of statutory provisions implementing EU directives, where these statutory provisions are manifestly incompatible with the provisions of the directive they seek to implement. Apparently, the mere fact that such directives can be viewed as implementing the Charter principles did not make any difference. The judgment is relevant as far as labour law directives come into play which define the personal scope of application by way of a reference to the law of the Member States. In these directives, there is no autonomous concept of an employee. The judgment puts a restriction on the leeway offered to the Member States. It restricts the ability of Member States to preclude workers under a contract of employment according to the law of a Member State from the scope of statutory provisions implementing these directives. In this respect, the Grand Chamber confirms an older judgment in *CGT and others v. Premier Ministre de l'Emploi, de la Cohésion sociale et du Logement*.¹

The fact that the French Republic seems to have a bad record, in circumventing the application of Framework Directive 2002/14/EC on Informing and Consulting Employees² did not stimulate the CJEU to empower the French tribunals envisaging to uphold European Union law to disapply statutory provisions incompatible with Directive 2002/14/EC. In the end, the French employees have been abandoned by their national legislator as well as by their Constitutional Court (*Conseil constitutionnel*). A reference to the CJEU proved not to be helpful, in allowing the Supreme Court (*Cour de Cassation*) to safeguard the employees' right to information and consultation. The dialogue between these various courts has not proven to be very beneficial to the rights of employees, although the right to information and consultation has a constitutional status in both the French and the European legal order.

In this article, I will describe the facts of the case and the legal proceedings surrounding the preliminary reference. After analysing the CJEU's judgment, I will focus on a number of issues that make up the core of the judgment.

§2. THE FACTS OF THE CASE

The *Association de Médiation Sociale* (AMS) is a non-profit organization active in Marseille. The name refers to its most prominent activity, which pertains to the field of 'social mediation'. Through the presence of so-called 'mediators' in critical areas of Marseille, its goal is to contribute to the prevention of crime. The AMS seeks to provide

¹ Case C-385/05 *CGT and others v. Premier Ministre de l'Emploi, de la Cohésion sociale et du Logement* [2007] ECR I-634.

² Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, [2002] OJ L 8/29.

job opportunities for unemployed persons or persons with social and professional difficulties, in order to promote their reintegration into working life. Under French law, the '*contrat d'accompagnement dans l'emploi*' (the accompanied employment contract) is the most appropriate tool available for that purpose. The French Labour Code (*Code du Travail*) makes it abundantly clear that such a contract needs to be qualified as an employment contract (*contrat de travail*).³ At the time of the proceedings, AMS had thus recruited between 120 and 170 employees under accompanied employment contracts. If a threshold of 50 employees is reached, the French Labour Code provides for a dual channel system of workers' representation.⁴ The employer is required to recognize a trade union representation (*une section syndicale*) designated by a representative trade union as well as to organize elections for the establishment of a works council (*comité d'entreprise*). However, there is a caveat. Under French law, workers under a '*contrat d'accompagnement*' are not taken into account for the calculation of the threshold of 50 employees.⁵ This rule allowed AMS to claim that the threshold of 50 employees had not been reached, since only 8 employees could be taken into account.

The French trade union CGT decided to designate one of the permanent workers as a member of a *section syndicale* under construction at AMS. Opposing the trade union's decision, AMS argued that the threshold of 50 employees had not been reached and, thus, worker's representation pursuant to French Labour Code was not triggered. Subsequently, AMS suspended the employment contract of the designated permanent worker and challenged the proposed formation of the *section syndicale* in court (*Tribunal d'Instance de Marseille*).

§3. THE PROCEDURE OF THE CASE

The *Tribunal d'Instance* had doubts regarding the constitutionality of the statutory provisions, which seem to differentiate between employees based on the nature of their employment contract. For this reason, it referred a preliminary question to the French Constitutional Court in order to determine whether the provisions did not violate the constitutional principle of equality as well as the fundamental right to organize (*liberté syndicale*) and the right to worker involvement at enterprise level (*la participation des travailleurs à la détermination collective des conditions de travail et à la gestion des entreprises*). However, the French Constitutional Court⁶ considered that neither of

³ See Article L 5134–24 of the French Labour Code.

⁴ See in this respect, P. Lokiec, *Droit du travail. Les relations collectives de travail* (1st edition, PUF, 2011), p. 13–146; and P. Lokiec, 'Trade Union representation in France', in C. La Macchia, *Representing employee interests: trade union systems within the EU* (Editorial Bormarzo Albacete, 2013), p. 135–152.

⁵ See Article L 5134–66 of the French Labour Code.

⁶ Conseil constitutionnel, Decision n°2011–122, QPC of 29 April 2011, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2011-122-qpc/decision-n-2011-122-qpc-du-29-avril-2011.96630.html.

these constitutionally anchored principles had been violated. If it would have judged otherwise, no reference for a preliminary ruling to the CJEU would have been necessary at a later date. The French Constitutional Court adopted a rather insular approach to the questions submitted. No reference at all was made to the very existence of any EU directives. There is no trace of an intellectual assessment whether the outcome of the preliminary reference could affect the implementation of Directive 2002/14/EC and whether this could have been prevented by a more activist interpretation of the constitutional principles concerned.

The French Constitutional Court ruled that the principle of equality was not violated. It did not deny the existence of a different treatment between workers based on the nature of their employment contract, but it considered that employment policy objectives constitute a legitimate and proportionate justification.⁷ As far as the right to organize and the right to worker involvement were concerned, the French Constitutional Court adopted a rather formalistic approach. It argued that the provisions did not deprive the employees with a *contrat d'accompagnement à l'emploi* of their right to represent or to be represented once the threshold had been reached.⁸ Finally yet importantly, the Court considered that the statutory provisions did not formally prevent these workers from establishing or joining a trade union.⁹

Since a constitutional pathway in order not to apply the statutory provisions had thus been blocked, the *Tribunal d'Instance* adopted another avenue. It considered that the French statutory provisions were *not* in conformity with Directive 2002/14/EC.¹⁰ Such an assessment does not come as a big surprise, since Directive 2002/14/EC is applicable to any person benefitting from protection as an employee under employment law in accordance with national practice in the Member States.¹¹ It was not disputed that persons bound by a *contrat d'accompagnement dans l'emploi* were in fact bound by a general employment contract (*contrat d'emploi*). Furthermore, although Article 3(1) of Directive 2002/14/EC provides that the Member States shall determine the method for calculating the thresholds of employees, this provision 'precludes national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers within the meaning of that provision'.¹² The *Tribunal d'Instance* decided

⁷ Ibid., para. 5: 'que les différences de traitement qui peuvent en résulter entre catégories de travailleurs ou catégories d'entreprises répondent à ces fins d'intérêt général et ne sont pas, dès lors, contraires au principe d'égalité'.

⁸ Ibid., para. 8: 'qu'il ne leur interdit pas, en particulier, d'être électeur ou éligible au sein des instances représentatives du personnel de l'entreprise dans laquelle ils travaillent; que, par suite, il ne porte pas atteinte, en lui-même, au principe de participation des travailleurs à la détermination collective des conditions de travail ainsi qu'à la gestion des entreprises'.

⁹ Ibid., para. 9: 'que la disposition contestée ne fait pas obstacle au droit des salariés mentionnés à l'article L. 1111-3 du code du travail de constituer librement une organisation syndicale ou d'adhérer librement à celle de leur choix'.

¹⁰ Directive 2002/14/EC.

¹¹ Article 2(d) of Directive 2002/14/EC.

¹² Case C-385/05 *CGT and others v. Premier Ministre de l'Emploi, de la Cohésion sociale et du Logement*.

that the lack of conformity empowered the French judiciary to disapply the statutory provisions of the French Labour Code providing for the exclusion of the workers under a *contrat d'accompagnement dans le travail* in matters concerning employee participation.

As a result, AMS had far exceeded the threshold of 50 employees. For this reason, the *Tribunal d'Instance* considered that the appointment of the permanent worker was indeed valid. There was no reason to declare the designation null and void.

AMS brought an appeal before the *Cour de Cassation*. The legal consequence which the Tribunal attached to the assessment that the statutory provisions were contrary to the Framework Directive is the non-applicability of these provisions to a dispute between a trade union and an employer. This approach challenges the established case law of the CJEU that EU directives have no horizontal effect between private individuals.¹³ However, in its preliminary reference, the *Cour de Cassation* seems to contemplate whether Article 27 of the Charter could serve as a catalyst to empower the judiciary to disapply the French statutory provisions, which are clearly at odds with Directive 2002/14/EC. The Framework Directive raises a fundamental rights issue. It explicitly refers to the Community Charter of Fundamental Social Rights of Workers in its recitals. In an explanatory note on Article 27 of the Charter, the Community Charter of Fundamental Social Rights for Workers is quoted as a source of inspiration in the drafting of that article.¹⁴

§4. PRELIMINARY QUESTIONS

The *Cour de Cassation* refers two questions to the CJEU:

- (1) May the fundamental right of workers to information and consultation, recognised by Article 27 of the [Charter], and as specified in the provisions of Directive [2002/14], be invoked in a dispute between private individuals in order to assess the compliance [with European Union law] of a national measure implementing the directive?
- (2) In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with [assisted] contracts?

In essence, the preliminary procedure is about the interpretation of *primary law*, that is, the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties.

¹³ See P.J.G. Kapteyn and P. Verloren Van Themaat, *Introduction to the Law of the European Communities* (Kluwer Law International, 1998), p. 547. See Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-08835, para. 109; and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre*, para 42.

¹⁴ F. Dorsemont, 'Article 27', in S. Peers et al., *The EU Charter of fundamental rights* (Hart Publishing, 2014), p. 750–752.

Thus, the first question explicitly refers to Article 27 of the Charter. The second question, to the contrary, refers to the provisions of the Directive 2002/14/EC. Indeed, in the first question a distinction is drawn between articles and provisions. What seems to be at stake in the second question is rather whether Article 27 of the Charter can be used to permit the judiciary to disapply statutory provisions that are not in conformity with the Directive 2002/14/EC. In sum, both questions essentially deal with the issue whether articles of the Charter can be invoked in a dispute between individuals in order to disapply incompatible statutory provisions which implement a directive into national law.

The CJEU has thus integrated both questions as followed:

The referring court seeks to ascertain, in essence, whether Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter can be invoked in a dispute between individuals in order to disapply that national provision.¹⁵

§5. JUDGMENT

Despite its intention to combine the two questions, the CJEU in fact follows a three-step approach. First, it assesses the compatibility of the French provisions with Directive 2002/14/EC. Second, it examines to what extent Article 3 of Directive 2002/14/EC meets the conditions to have a 'direct effect', and to what extent the defendants in the main proceedings may rely on that direct effect against AMS. Third, the CJEU assesses whether Article 27 of the Charter can be invoked in the dispute in order to preclude the application of the statutory provisions deemed incompatible with Directive 2002/14/EC.

The CJEU clearly recognizes that the encouragement of recruitment constitutes a legitimate aim of social policy.¹⁶ The Court does not indicate whether it refers to domestic or European social policy, however, it clarifies that the margin of discretion the Member States have in fulfilling such policy cannot be used as a justification to frustrate the implementation of fundamental principles of European Union law or of a provision of EU law.¹⁷ Thus, it reiterates the dictum in *CGT and others*¹⁸ that Article 3 of Directive 2002/14/EC (the provision of EU Law concerned) precludes statutory provisions that exclude a specific category of workers from the calculation of staff members. By doing so, the CJEU has in fact given an answer to the second question raised by the *Cour de Cassation*.

In the case at hand, it is not the direct effect of the provisions concerned which raises a problem, but rather the question whether the French trade unions and the designated

¹⁵ Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, para. 4.

¹⁶ *Ibid.*, para. 26.

¹⁷ *Ibid.*, para. 27.

¹⁸ Case C-385/05 *CGT and others v. Premier Ministre de l'Emploi, de la Cohésion sociale et du Logement*.

representative could invoke these provisions against a purely private employer. According to the Court, Article 3(1) of Directive 2002/14/EC, which defines the personal scope of the Directive and urges the Member States to determine the method for calculating the threshold of employees, is sufficiently precise and clear to have direct effect. Indeed, although this provision does not indicate the manner in which Member States should calculate employees, it does require that the employees concerned are taken into account.¹⁹ This conclusion is not surprising since the previous assessment illustrated that the French provisions were not compatible with Directive 2002/14/EC.

Concerning the question whether the defendants could rely on Article 3(1) of Directive 2002/14/EC to have direct effect against the private employer, the CJEU reiterates its well-known case law that defendants cannot rely on the provisions of a directive having a direct effect against a private individual, such as an association. The best way to remedy the lack of such a horizontal effect is a proper implementation of a directive or an interpretation of the implementation which is in conformity with the objectives of a directive. Hence, the Court states that the existence of a directive has an impact on the judicial interpretation of the domestic law implementing a directive. Thus, the domestic judges need

to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.²⁰

The CJEU stresses that there is a limit to such judicial activism, insofar as such ‘an obligation cannot serve as the basis for an interpretation of national law *contra legem*’.²¹

According to the CJEU, in the case at hand, there was no leeway for the *Cour de Cassation* to interpret French law in a way to achieve an outcome which was consistent with the objective pursued by Directive 2002/14/EC. In fact, the contradiction between the French implementation provision and Directive 2002/14/EC was unambiguous and beyond repair.

Hence, the CJEU examines whether Article 27 of the Charter can be invoked by itself or in conjunction with the provisions of Directive 2002/14/EC in order to preclude the application of those national provisions. According to the Court, the Charter is applicable, insofar as the facts of the case show that the dispute was ‘governed by European Union Law’.²² This criterion is fulfilled as the reference to Article 27 of the Charter falls in the scope of the deficient implementation provisions of Directive 2002/14/EC.

¹⁹ Ibid., para. 34.

²⁰ Ibid., para. 38.

²¹ Ibid., para. 39.

²² Ibid., para 42.

The legal precedent to consider here is *Kücükdeveci*.²³ In this case, the CJEU ruled that the principle of non-discrimination on the basis of age permitted the domestic judges to disapply domestic provisions implementing Directive 2000/78,²⁴ since the principle was 'sufficient in itself to confer on individuals an individual right which they make invoke as such'.

According to the CJEU, contrary to the provisions of Directive 2002/14/EC, Article 27 of the Charter is deprived of such a kind of direct effect. This conclusion is based on an analysis of Article 27 of the Charter read in isolation, disregarding Directive 2002/14/EC. Furthermore, the CJEU explicitly states that this finding 'cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14'.²⁵

The CJEU recalls that the party injured as a result of domestic law not being in conformity with European Union law can claim for compensation of the loss sustained on the basis of state liability (*Francovich and Others*)²⁶.²⁷

§6. COMMENTS

A. THE CONCEPT OF AN 'EMPLOYEE' IN DIRECTIVE 2002/14/EC

As is quite common for directives in the field of EU social policy, the notion of an employee in Directive 2002/14/EC is defined by reference²⁸ to domestic labour law. Such reference can also be found in the Transfer of Undertaking Directive 2001/23/EC which deals with the issue of worker involvement.²⁹ This notion can be distinguished from a more autonomous approach concerning the notion of employee, which has been prompted by the CJEU in a number of fields relevant to labour law. The most striking examples of this autonomous approach concern the personal scope in the context of the

²³ Case C-555/07 *Kücükdeveci* [2010] ECR I-635.

²⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

²⁵ Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, para. 49. Joined Cases C-6/90 and C-9/90 *Frankovitch and Others* [1991] ECR I-5367.

²⁶ Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, para. 51.

²⁷ See for the notion of 'employee' in Directive 2002/14/EC, the observations of J. Heuschmid in his annotation to the *AMS* judgment: J. Heuschmid, 'Horizontalwirkung von Art 27 Europäische Grundrechtscharta Fehlannonce?', 4 *EuZA* (2014), p. 514–515. For a more general overview: S. Borelli, 'The concept of employee and quality of employment', in S. Borelli and P. Vielle, *Quality of Employment in Europe* (PIE Peter Lang, 2012), p. 112–123.

²⁹ See inter alia, Council Directive of the European Parliament and of the Council of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L 82/16.

free movement of workers, the Framework Directive on Health and Safety,³⁰ and non-discrimination in the field of employment and occupation. The Court controls in an autonomous way whether work under subordination as a counterpart of remuneration is being performed. The genesis and the qualification of the employment relation under national law are immaterial.

The question arises whether the holdership of the right to information and consultation in Article 27 of the Charter should be interpreted autonomously as well. Article 27 of the Charter indicates that the holders of the right to information and consultation are workers *or* their representatives. The heading of the Article exclusively designates workers as the holders of such a right, thus apparently precluding workers' representatives. However, the Court has recently adopted a rather collectivist approach to the issue of the holdership of the right to information and consultation. In *Mono Car Styling*,³¹ the CJEU ruled that the right to information and consultation as fleshed out in the Collective Redundancy Directive³² is addressed to workers representatives and not to employees individually. Here, no reference was made to the Charter.

The title of Article 27 of the Charter does contain an element which could narrow the scope of such a right, since information and consultation is confined to workers in an 'undertaking'. The concept of an 'undertaking' is not defined. The lack of definition is in my view consistent with the fact that neither the level nor the object of the information is defined. In my view, the concept of an 'undertaking' needs to be defined in relation to the level and the object.

On the one hand, there is no indication whatsoever to assume that the concept of worker in the Charter would need to be interpreted in another way than an 'autonomous way'. Since the Charter is not applicable to the Member States 'as such', it hardly makes sense to assume that the notion would have a different meaning depending on the Member State concerned. The idea that Member States could define the personal scope of a Charter recognizing fundamental rights does not make sense. This would deprive such a recognition of its useful effect.

On the other hand, since the Charter only applies to Member States implementing Union law, in practice, the application of these rights risks being dependent on the personal scope of a given instrument of European Union law. To the extent that an instrument adopts an approach following the concept of work by means of a *renvoie* (reference) to the law of Member State, this will boil down to a restriction of the effective application of the Charter. The present case sheds no light on this issue, since it was undisputed that the workers concerned fell within the ambit of both Directive 2002/14/EC

³⁰ Council Directive 89/391 of the European Parliament and of the Council of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, [1989] OJ L 183/1.

³¹ Case C-12/08 *Mono Car Styling SA, in liquidation v. Dervis Odemis and Others* [2009] ECR I-06653.

³² Council Directive 98/58 of the European Parliament and of the Council of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L 225/16.

and the Charter. In the case at hand, it was abundantly clear that the employees working under a *contrat d'accompagnement dans le travail* were employees according to French law. The Court considered that the Charter did apply to the facts of the case concerned, 'since the national legislation at issue in the main proceeding was adopted to implement Directive 2002/14'.³³ For the Court, there is an obvious link between the French statutory provisions, Directive 2002/14/EC and the right to information and consultation in the Charter. In fact, the only reasons why the *Travaux préparatoires* of the Charter did not refer to Directive 2002/14/EC is that they predate the adoption of the Directive. They have not been updated at a later stage, prior to the conclusion of the Lisbon Treaty.

It is however questionable whether the European legislator can still continue to delegate to the Member States the issue of defining the notion of worker within the framework of a directive that elaborates fundamental workers' rights enshrined in the Charter.

The fact that employees under a *contrat d'accompagnement dans le travail* fall within the scope of Article 27 of the Charter might be at variance with the standing case law of the CJEU with regard to the free movement of workers. In the past, the Court has indeed accepted national provisions which were at odds with substantive provisions on the free movement of workers, since it considered that the persons concerned were not engaged in a 'genuine and effective economic activity'.³⁴ For this reason, they did not fall within the personal scope of the free movement rules. In the case concerned, work undertaken as a part of a drug rehabilitation program was not considered as being performed under the normal conditions to qualify as such a genuine and effective economic activity.³⁵ Hence, in the same vein, the question whether persons which are employed in order to be reintegrated into the labour market fall under the rules for free movement of workers and under Article 15(2) of the Charter, in my view, remains an open question. In my view, the issue is not of immediate relevance to this case. The concept of a worker within the meaning of Article 27 and Article 15(2) of the Charter does not necessarily need to be identical.

B. PRECLUDING WORKERS FROM THE SCOPE OF THE IMPLEMENTATION OF DIRECTIVE 2002/14/EC: A DÉJÀ VU?

The Grand Chamber extensively referred to and confirmed the previous case *CGT and others*.³⁶ In both cases, workers who were considered as employees on the basis of an employment contract were precluded from the scope of application of the legislation

³³ Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, para. 43.

³⁴ See C. Barnard, *EU Employment Law* (4th edition, Oxford University Press, 2012), p. 149.

³⁵ Case C-344/87 *Bettraye v. Staatssecretaris van Justitie* [1989] ECR I-1621, para. 17 and 18 See C. Barnard, *EU Employment Law* (4th edition, Oxford University Press, 2012), 149_150.

³⁶ For an extensive annotation of the Case C-385/05 *CGT and others v. Premier Ministre de l'Emploi, de la Cohésion sociale et du Logement*, see F. Dorssemont, 'Eens Franse werknemer, altijd Europese werknemer', 2 *Arbeidsrechtelijke annotaties* (2007), p. 102–122.

implementing into national the directives concerning worker involvement. In the older case, the union attacked the temporary preclusion in an administrative decree (*Ordonnance*) of workers under a so-called *contrat de nouvelles embauches* from statutory thresholds implementing Directive 2002/14/EC as well as from the reference period for the calculation of collective redundancies before the *Conseil d'Etat*.

However, this confirmation of the older case law by the Grand Chamber was not sufficient to bring relief to the trade unions trying to request the French judicature to disapply the statutory provisions deemed incompatible with Directive 2002/14/EC.

There are some major differences between both cases and the way they were dealt with.

In the first case, the trade unions did not request the *Conseil d'Etat* to disapply the provisions, but to annul the provisions of the governmental decree (*Ordonnance*) concerned. Since these provisions were not of a statutory nature, the *Conseil d'Etat* was competent to examine their legality in the light of Framework Directive 2002/14 and the Collective Redundancy Directive 1998/59. In *AMS*, the statutory provisions concerned could only be annulled by the French Constitutional Court. It rejected that request. Apparently, the French *Cour de Cassation* sought to circumvent the judgment of the French Constitutional Court by submitting a preliminary reference to the CJEU regarding Article 27 of the Charter. It wanted the CJEU to examine whether Article 27 of the Charter would actually allow the French judicature to refrain from applying the statutory provisions. In the first case, neither the CJEU nor the Advocate General referred to the Charter. Technically speaking, the Charter did *not* have the status of primary law at that time. It acquired such a character after the entry into force of the Lisbon Treaty.³⁷ Neither was there a technical need to recognize the right to information and consultation as a 'general principle' of EU law. Such a recognition has often been perceived as Trojan horse. As is elucidated by the *Viking* and *Laval* cases, as well as by *Commission v. Germany*, this is often a prelude for a balance operation justifying restrictions of rights alleged to be 'fundamental'.³⁸ Neither in *CGT and others* nor in *AMS* could a case for a balancing operation be made, though the French government tried to put forward an alleged conflict with employment policy objectives.

In casu, the reference to the fundamental character of a collective workers' right is enshrined and suggested in the preliminary questions. The reference does not seek to invite the CJEU to engage in a balancing operation, but to invite it to empower the French judges to disapply statutory provisions deemed incompatible with Directive 2002/14/EC which implement this fundamental right.

³⁷ C. Kollonay-Lehoczky, K. Loercher and I. Schoemann, 'The Lisbon Treaty and the Charter of Fundamental Rights of the European Union', in N. Bruun, K. Loercher and I. Schoemann, *The Lisbon Treaty and social Europe* (Hart Publishing, 2012), p. 61-104.

³⁸ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767; and Case C-271/08 *Commission v. Germany* [2010] ECR I-07091.

As shown above, the CJEU does not really accept that kind invitation.

In both cases, the role of the French Constitutional Court needs to be outlined as well. In both cases, it has refused to validate a request seeking to annul or disapply a statutory provision.³⁹ In 2005, the statute concerned was the law granting extra-ordinary powers to the Government. In 2011, the provision in the French Labour Code that organizes the preclusion of some workers under an employment contract was under attack. In both cases, the Court refused to acknowledge that the constitutional principle of equality had actually been violated by not considering some employees. The French Constitutional Court considered in both cases that there was a differential treatment, but that it could be justified, since the objective of the promotion of employment did constitute a legitimate reason of general interest.⁴⁰

In *CGT and others*, the Advocate General Mengozzi as well as the Commission argued that there was no discrimination. However, they followed another line of reasoning.⁴¹ They both considered that the effect of the preclusion of some categories of workers for the sake of the reference period or for the sake of the thresholds did not discriminate between younger and older workers. Hence, there was no differential treatment. Indeed, if as a result, the amount of workers to be made collectively redundant was not reached or if the threshold of 50 workers was not reached, the information and consultation were not engaged and neither did a worker representative body have to be established. These results affected young and old workers alike. Though the Second Chamber did not dwell in an explicit way on the issue of non-discrimination, it did make it abundantly clear that there was no such thing as a justification in public employment policy allowing for the preclusion of young employees from the scope of Directive 2002/14/EC.

In view of this clear-cut assessment of the French legislation, it is astonishing to read that the French Constitutional Court in its 2011 judgment considers that there is no principle of constitutional value prohibiting the legislator to adopt measures promoting the employment of specific categories of workers.⁴²

Thus, the Constitutional Court completely ignores the impact of Directive 2002/14/EC and makes no effort at all to interpret and apply the existing French constitutional provisions in a way which would in fact allow an outcome that is consistent with the objectives pursued by the Directive. It goes beyond doubt that the outcome generated by the Constitutional

³⁹ See Cour constitutionnel, Decision n° 2005-521, DC of 22 July 2005, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2005-521-dc/decision-n-2005-521-dc-du-22-juillet-2005.970.html, and Cour constitutionnel, Decision n°2011-122, QPC of 29 April 2011.

⁴⁰ S. Sciarra, 'Association de médiation sociale. The Disputed Role of EU Fundamental Principles and the Point of View of Labour Law', in A. Tizzano et al. (eds.), *Scritti in onore di Giuseppe Tesaro* (Editoriale Scientifica, 2014), p. 2436-2438, 2441: the author builds argues that in AMS, there was an unjustified differential treatment or discrimination.

⁴¹ Opinion of Advocate General Mengozzi in Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-00611, para. 27.

⁴² Cour constitutionnel, Decision n°2011-122, QPC of 29 April 2011.

Court did not guarantee that objective. The outcome has been to uphold statutory provisions which violated EU directives. One might argue that the constitutional principle of equality did not provide any leeway for the Constitutional Court to guarantee such an outcome. Still, a less formalistic approach to some of the fundamental rights concerned (the right to information and consultation, the right to organize) might have made a difference.

C. THE RIGHT TO INFORMATION AND CONSULTATION IN ARTICLE 27 OF THE CHARTER: 'RIGHT' OR 'PRINCIPLE'?

The AMS judgment is one out of many judgments related to the right to information and consultation of workers at the level of an undertaking. However, for the very first time, the CJEU had to refer – and actually did refer – to Article 27 of the Charter. This provision reads as follows:

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

The Court has not elucidated at great length why this provision cannot be invoked in a dispute between private parties. The litmus test seems to be related to the question whether the provision is 'sufficient in itself to confer on individuals an individual right which they make invoke as such'.⁴³ For the Court, Article 27 of the Charter cannot be fully effective, without 'a more specific expression in European Union or national law'.⁴⁴

The Court does not explain why this is the case. It just refers *verbatim* to the text of Article 27 of the Charter. There are two reasons which might explain why the text does not seem sufficient to confer rights to citizens. First, it lacks precision with regard to the level, the object and the holdership of the right. Thus, it does not clearly indicate whether these rights are held by employees or by a representative, let alone how the representative can be identified. Furthermore, the provision explicitly refers to 'cases and conditions provided for by European Union and national law and practices'.

The distinction between provisions which confer 'rights' and those which do not, is reminiscent of a well-known semantic distinction between rights and principles. Astonishingly, the Court has scrupulously avoided referring to the latter.⁴⁵ This

⁴³ Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, para. 47.

⁴⁴ *Ibid.*, para. 45.

⁴⁵ See, D. Dittert, 'Droits fondamentaux européens: vers un effet direct horizontal généralisé?', 1 *R.A.E./L.E.A.* (2014), p. 182. The author argues that it is regrettable that the Court does not refer to this distinction and misses an opportunity to clarify it. E. Dubout, 'Principes, droits et devoirs dans la Charte des droits fondamentaux de l'Union européenne', 2 *Revue trimestrielle de droit européen* (2014), p. 412; and S. Laulom, 'Les seuils d'effectifs: une confirmation et une déception', 1640 *Semaine sociale Lamy* (2014), p. 12.

distinction⁴⁶ made in Article 52(5) of the Charter lays at the heart of the Opinion of Advocate General Cruz Villalón. The Advocate General has argued that Article 27 of the Charter needs to be qualified as a 'principle'. This statement comes close to the thesis that the provision is not sufficiently precise and clear to confer a 'right' to citizens. The Advocate General goes to greater length than the Court to explain why this qualification is indeed warranted. He points out that the right to information and consultation is not fleshed out properly. There is no indication of the holdership, the object, and the geographical scope (levels) of the right concerned. For this reason, the Advocate General construes this provision as an instruction to the competent (European) authorities to elaborate this right. *Obviously*, this suggestion presupposes that the European Union is competent to adopt directives in this field. *In casu*, Article 252 TFEU provides such a basis.

In my view, the mere fact that a reference is made to the law of the European Union and of the Member States is not a sufficient indication to downgrade the legal status of some of the rights enshrined in the Charter. A typical example is the right to collective action, including the right to strike. Amongst the Member States, France and Italy have granted a constitutional status to the right to strike in the aftermath of the Second World War (1946/1948). In both provisions, which are almost identical, an instruction is given to the legislator to determine the conditions under which these rights can be exercised. Up to this day, neither the French nor the Italian legislator adopted a statutory instrument that systematically describes these conditions. Hence, Italian and French law in this context is essentially judge-made law. The French and Italian judges have never refused to consider that these provisions do constitute the necessary legal foundation for conferring a right to citizens.

Furthermore, the Advocate General argues that the mere fact that the right to information and consultation ranked under the heading 'Solidarity' provides a presumption that it constitutes a principle.⁴⁷ In my view, such a presumption is not justified by general considerations because it totally neglects the specific wording of the respective articles under the *Solidarity* title. Such a presumption clearly downgrades rights – often qualified as social, economic and cultural rights – and undermines their justiciability. The presumption is rebuttable. The Advocate General rightly points out that the semantics of the Charter are not conclusive. Indeed, some rights have been phrased as principles, whereas some rights are qualified as principles.

The Opinion of the Advocate General and the judgment of the Court are divergent in respect to the legal consequences attached to the semantic distinction raised above. Whereas the Court has ruled that the lack of precision and clarity precludes citizens from

⁴⁶ See on that distinction, S. Robin-Olivier, 'La contribution de la Charte des droits fondamentaux à la protection des droits sociaux dans l'Union européenne: un premier bilan après Lisbonne', 1 *Journal européen droits de l'homme* (2013), p. 14–116; and E. Dubout, 'Principes, droits et devoirs dans la Charte des droits fondamentaux de l'Union européenne', 2 *Revue trimestrielle de droit européen* (2014), p. 414–416.

⁴⁷ See Opinion of Advocate General Cruz Villalón in Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, delivered on 18 July 2013, para. 55.

invoking these rights in order to disapply a statutory provision implementing Directive 2002/14/EC (in a way which is incompatible with the latter), the Advocate General adopts a much more nuanced stance.

Whereas the CJEU makes no reference at all to Article 52(5) of the Charter, the Advocate General argues that this provision, which is not deprived of ambiguity and obscurity, does not constitute an obstacle to the empowerment of the French judiciary to disapply the French statutory provisions deemed incompatible with Directive 2002/14/EC. The Advocate General elaborated the conditions under which a so-called ‘principle’ can be judicially cognizable. The CJEU makes no reference to this model. In essence, the Advocate General seeks to demonstrate how articles related to principles might come into play and might become judicially cognizable in the meaning of Article 52(5) of the Charter. Unfortunately, the guidance that the Advocate General gives related to this provision is not entirely uncomplicated.⁴⁸ Thus, the Advocate General describes a model with three layers.⁴⁹ He distinguishes the articles of the Charter enshrining a principle, the legislative acts which give ‘specific expression’ to the principle and the legislative acts whose interpretation and review is allowed in the meaning of Article 52(5) of the Charter.

In sum, the Advocate General tries to submit the French implementing provisions providing for an exclusion to a test based on Article 27 of the Charter combined with a provision of Directive 2002/14/EC, which he considers ‘capable of giving specific substantive and direct expression to the content of a “principle”’. Article 3(1) of Directive 2002/14/EC is considered to be such a provision. Hence, the Advocate General considers that a principle in combination with such a provision is judicially cognizable. It is judicially cognizable for the sake of the interpretation and the ruling on their legality of a *distinct* provision, being the French statutory provisions implementing Directive 2002/14/EC.

In view of the ambiguity of Article 52(5) of the Charter, it is regrettable that the Court of Justice does not make use of the occasion to provide some guidance. Following the reasoning of the Court, it goes without saying that Article 27 of the Charter cannot be invoked since the article is not sufficiently precise and clear to confer a *right* to EU citizens. In my view, it fails to provide a reason for this.

The refusal of the Court to refer to Article 52(5) of the Charter has been helpful to avoid a semantic discussion on the question whether the right to information and consultation could be qualified as a right or a principle. If the Court had engaged in such an analysis and had qualified that right as a principle, it would, in my view, have been obliged to recognize that the right to information and consultation was judicially cognizable. Indeed, the right has been implemented both by an act of an EU institution

⁴⁸ S. Laulom exercises her diplomatic skills, while stating: ‘Il est vrai que la proposition de l’avocat général pouvait sembler complexe. Néanmoins, cette complexité est issue de la Charte même et de la distinction qu’elle opère entre droits et principes et des effets incertains qu’elle y rattache.’ S. Laulom, 1640 *Semaine sociale Lamy* (2014), p. 13.

⁴⁹ See Opinion of Advocate General Cruz Villalón in Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, Judgment of 15 January 2014, para. 57–80.

(in form of Directive 2002/14/EC adopted by the Council), and by an act of a Member State (through the implementation provision of Directive 2002/14/EC).

In my view, the decision of a judge not to apply a national statutory provision based on its incompatibility with a provision of a directive in combination with a Charter provision, can be qualified as a 'ruling on the legality of an act' (here, the statutory provision) in the meaning of Article 52(5) of the Charter. However, the Court seems to substitute this distinction between rights and principle with the distinction between provisions with direct effect and those without. Therefore, the CJEU seems to have embraced (knowingly or not) a *thesis* previously developed by Prechal, who considers the distinction between rights and principles as rather unimportant and even redundant compared to the characteristic of direct effect as a more appropriate tool to assess the justiciability of EU norms.⁵⁰ Though it is no secret that Prechal had a seat in the Grand Chamber ruling in the *AMS* case, it is impossible for any outsider (and even inappropriate) to estimate the impact of her academic writings on the deliberation. The observations of Prechal have been inspired by 'the fear that positive obligations will be read by courts into provisions which should, for various reasons, be dealt with by other branches of government'. Though it is quite honourable to combat a '*gouvernement des juges*', one might also fail to understand how an obligation *not* to apply a statutory provision could be seen as a positive obligation. Furthermore, it is difficult to understand how a constitutional court like the CJEU can actually ignore an explicit provision of primary law. The applicability of Article 54(4) of the Charter in fact amounts to a more nuanced position. Despite the ambiguity of the distinction between 'rights' and 'principles', and despite the problems surrounding the exact scope of the justiciability of mere principles, it takes into account the interplay between the Charter provisions *and* their implementation in order to assess the issue of justiciability. Furthermore, it avoids depriving provisions which are not considered to have 'direct effect' of any kind of justiciability. In order to avoid any misunderstanding, Prechal has never explicitly argued that her interpretation of Article 52(5) of the Charter would *per se* exclude applying the *Mangold/Kükücedevici* rule to 'implemented principles'.⁵¹

D. A PARADOX: JUDGES MIGHT NEED TO ANNUL BUT CANNOT REFUSE TO APPLY STATUTORY LAW

Some commentators have expressed their discontent or their disappointment with the Court's ruling.⁵² The judgment tends to broaden the gap that the Charter has tried to

⁵⁰ See S. Prechal, 'Article 52', in S. Peers et al., *The EU Charter of fundamental rights*, p. 1510–1511. This contribution has been drafted between the Opinion of the Advocate General and the judgment of the Grand Chamber as is evidenced by note 225 on page 1507 of Prechal's contribution.

⁵¹ No references are made to both judgments in her analysis of Article 52(5) of the Charter.

⁵² See especially J. Heuschmid, 4 *EuZA* (2014); S. Sciarra, in A. Tizzano et al. (eds.), *Scritti in onore di Giuseppe Tesauo*, p. 2444; and S. Laulom, 'Les seuils d'effectifs: une confirmation et une déception', 1640 *Semaine sociale Lamy* (2014), p. 9–15.

overcome between civil and political rights on the one hand, and economic, social and cultural rights on the other hand. Indeed, the distinction between provisions conferring rights and those which do not, or the distinction between provisions enshrining rights and others enshrining ‘principles’ tends to overlap with this historic distinction.

It is obviously acceptable to state that articles allegedly enshrining ‘principles’ cannot *as such* have any direct effect. They do not *as such* confer rights on citizens. They are not *as such* judicially cognizable in a case between individuals. Indeed, in any dispute between citizens, the Charter can only come into play insofar as Member States have actually implemented Union law that can be related to the provisions of the Charter. This basic rule transcends and predates the distinction between rights and principles. From the point of view of private citizens involved in a dispute, no *isolated* Charter provision has a direct – let alone a horizontal – effect. However, an isolated approach is not at all warranted. As is shown by the facts of the case concerned as well as by the proceedings, the right to information and consultation was the objective pursued by Directive 2002/14/EC. In fact, the issue of worker involvement belongs to one of the most developed parts of EU labour law. Over nearly four decades, a set of directives has been established, regulating the right to information and consultation at all appropriate levels (establishment or undertaking and community scale-group of undertakings) in minute detail.⁵³

In the present case, there was no conflict between individuals with regard to the scope of a subjective right (*contentieux subjectif*). The legal conflict at hand is about a conflict between legislative provisions (*contentieux objectif*), although this discussion takes place within a context of a dispute between an employer and a trade union. The conflict is about the interpretation of statutory provisions and about a ruling on the ‘legality’ of these provisions. Article 52(5) of the Charter states that principles are solely judicially cognizable in *this* respect.

The CJEU demands that the judges of the Member States undertake everything in their power to uphold the law of the European Union. Insofar as the French judiciary system allows to declare some statutory provisions unconstitutional and to annul them, it is remarkable that the CJEU refuses to empower French judges to opt for a much lesser evil, being the decision to merely disapply a provision implementing a provision of EU law deemed incompatible with secondary and primary law. Remarkably, the CJEU failed to do what it requires domestic judges to do, namely to utilize every tool it has at its disposal (for the Court of Justice this is European law) ‘to achieve an outcome consistent with the objective pursued by the directive’.⁵⁴ In the case at hand, this would have meant empowering the French judges to disapply statutory provisions at odds with the Framework Directive, which has given form to a right considered ‘fundamental’. Such a

⁵³ F. Dorsemont, in S. Peers et al., *The EU Charter of fundamental rights*, p. 749–771.

⁵⁴ Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others*, para. 119. The Court refers to this paragraph in Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and others*, para. 38.

decision would not have forced the judges to interpret French statutory provisions *contra legem*, but would have allowed them to ignore the bad parts of French law incompatible with European Union law.

One might argue that such a form of judicial activism is at odds with an idea of legal security. However, why should we uphold an ideal of legal security which is unable to protect European citizens against a violation of their fundamental rights and which forces domestic judges to abdicate? Thus, Heuschmid has pointed out that the preclusion of workers from the Framework Directive might raise an issue of compatibility with Article 21 of the revised European Social Charter.⁵⁵ This article has been expressly mentioned in the Explanations. The supervisory body of the revised European Social Charter has in fact sought inspiration in the previous *CGT* judgment to insist on the necessity not to exclude workers from the scope of the right to information and consultation.⁵⁶

Article 52(5) of the Charter states that principles are judicially cognizable. In other words: principles can be invoked by European citizens in legal proceedings. After examining the *AMS* judgment, the question arises to what extent these principles are still judicially cognizable and what might be the added value of such a provision.⁵⁷

Surely, citizens can invoke principles in order to plead for an interpretation of the law of the Member States implementing European Union law in a way that is as consistent as possible with the fundamental rights enshrined in the Charter. In the given case, these ‘nice thoughts’ have no added value at all for two reasons. First, taken on its own, Directive 2002/14/EC was sufficient to warrant the conclusion that the questioned French statutory provisions could not preclude the workers concerned and that the judges had to do everything in their power to interpret French law in a way which would have allowed to include those workers. Second, this was by no means possible, since it would have forced the French judges to rule *contra legem*.

Surely, the CJEU indicates an avenue to pursue for the (defendant) trade union, which was affected by the statutory provisions deemed incompatible with European

⁵⁵ Article 21 RESC: ‘With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and

b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.’

⁵⁶ J. Heuschmid, 4 *EuZA* (2014), p. 520.

⁵⁷ In this respect, see the observations of S. Laulom, who argues that the hypothesis identified in Article 52(5) of the Charter seems to have been fulfilled, id est that of a principle which had been implemented by EU law and thus had to be recognized as judicially cognizable. S. Laulom, 1640 *Semaine sociale Lamy* (2014), p. 13.

Union law. However, the *Francovich*-doctrine on state liability is old news. An isolated view towards Directive 2002/14/EC was sufficient to argue that there was state liability. Hence, this remedy is not related to the existence of principles in the Charter. The question arises to what extent this remedy is dissuasive. It will be extremely difficult to identify, let alone to quantify the damages to the trade union as a litigating party for not being able to appoint a workers' representative. Heuschmid has pointed out that a violation to the right to the defense of collective interests will generate damages that are qualified as moral damages.⁵⁸ Some judges tend to sanction such violations by assessing the damage *ex aequo et bono*. In Belgium, this has amounted to awarding compensation of one Belgian Franc. Fortunately, the introduction of the Euro has prompted the Belgian judges to be more generous and award a symbolic Euro, which however, has not proven very dissuasive either.

Some commentators 'looking at the bright side of life'⁵⁹ have argued that the judgment delineates the conditions under which provisions in the Charter that are implemented into national law by virtue of a directive containing articles with a direct effect, could generate genuine horizontal direct effect. Even though the ability of commentators to engage in damage control is a virtue, it is useful to state that such a conclusion can only be derived very implicitly and is based on a tricky '*a contrario*' way of reasoning. Pertaining to the text of the judgment, one can only state that the words 'horizontal effect' have not made their appearance in the judgment.⁶⁰

⁵⁸ J. Heuschmid, 4 *EuZA* (2014), p. 522.

⁵⁹ D. Dittert, 1 *R.A.E./L.E.A.* (2014), p. 181–182.

⁶⁰ J. Heuschmid, 4 *EuZA* (2014), p. 520–521. For a comprehensive study on the 'horizontal effect' of fundamental rights in a comparative constitutional and European (Council of Europe as well as European Union) perspective, see A. Seifert, 'L'effet horizontal des droits fondamentaux', 4 *Revue trimestrielle de droit européen* (2012), p. 801–826. The author recognizes that the character of a principle restricts (but does not exclude) the horizontal effect. He is reluctant to admit that principles which have not been implemented at all could generate some effect. More positively, he does not exclude that insofar as principles have been implemented, a standstill effect might come into play, precluding a reform *in pejus*. In sum, nothing in the analysis of Seifert seems to suggest that the *Mangold/Kücükdevici* doctrine would not be applicable (p. 824).