European labour law and the EU Charter of Fundamental Rights

— summary version —

edited by
Brian Bercusson
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With contributions by

Brian Bercusson
Thomas Blanke
Niklas Bruun
Stefan Clauwaert
Antoine Jacobs
Yota Kravaritou
Isabelle Schömann
Bruno Veneziani
Christophe Vigneau

European Trade Union Institute (ETUI)
The summary presented here is based on an extensive commentary of those articles of the EU Charter of Fundamental Rights that are of relevance to national and European labour law. The full version of this commentary, available in English only, may be ordered from the ETUI.
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Foreword

The European Union’s Charter of Fundamental Rights proclaimed at the summit at Nice on 7 December 2000 has attracted much attention. If incorporated into the Treaties, it will have an impact not only on the EU’s institutions but, perhaps even more, on the Member States, also bound by the Charter through the doctrine of supremacy of EU law.

The EU Charter includes provisions which are at the heart of labour law and industrial relations in Europe: freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers’ right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), protection of personal data (Article 8), non-discrimination (Article 21), equality between men and women (Article 23), protection in the event of unjustified dismissal (Article 30).

The ETUI Research Group on Transnational Trade Union Rights comprising labour law academics from nine EU Member States: Brian Bercusson (UK) (co-ordinator), Thomas Blanke (Germany), Niklas Bruun (Finland), Patrick Humblet (Belgium), Antoine Jacobs (Netherlands), Yota Kravaritou (Greece), Antonio Ojeda Aviles (Spain), Bruno Veneziani (Italy), and Christophe Vigneau (France), undertook the task of analysing the content and legal potential of the EU Charter on labour law and industrial relations.

The analysis offered by the research group provides an understanding of the potential of the EU Charter to affect labour law and industrial relations in the Member States, and at EU level. At the same time the analysis will certainly contribute to the reflection by the Members of the Convention on the Future of Europe, and others concerned with the future of labour law and industrial relations in Europe.
The Europeanisation of industrial relations is an important prerequisite for the strengthening and further development of the social dimension of the process of European integration. The legally binding incorporation of the EU Charter into a future EU constitution is one of the ETUC’s central demands at the Convention and the intergovernmental conference scheduled for 2004 and the critical commentary of the EU Charter articles of relevance to the further Europeanisation of industrial relations serves to support the ETUC in this demand. A binding legal framework is required not only at national but also at European level.

I should like to take this opportunity to thank the contributors to this publication for their efforts. The summary of their work presented here is an important contribution to the public discussion of the future of Europe.

Emilio Gabaglio
General Secretary of the ETUC

Brussels, October 2002
Chapter 1

Introduction
Interpreting the EU Charter in the context of the social dimension of European integration

Brian Bercusson

1. Introduction: the historical context

Two important lessons should be remembered when considering the social and labour provisions in the EU Charter of Fundamental Rights adopted at Nice in December 2000. First, fundamental labour and social standards are determined by the economic and political context. Their content changes with economic and political circumstances. Secondly, social and labour rights develop when linked to policies promoting European integration, when they find a place on the Community’s integration agenda.

These two lessons lead to two specific questions regarding the EU Charter. First, to what extent do the EU Charter’s social and labour rights reflect the current social, political and economic context? Secondly, how did the EU Charter in general, and social and labour rights in particular, reach the European integration agenda?

2. Political context

The EU Member States were preparing for an Intergovernmental Conference (IGC) in December 2000 aiming at enlargement and institutional reforms. A social agenda was remarkable by its absence. It was argued, however, that the failure to incorporate a social policy dimension into the IGC 2000 agenda endangered the enlargement of the EU and undermined institutional reforms.
3. The debate over (and meaning of) EU “social” citizenship

A Convention on the Future of Europe is considering a European constitution, including the concept of EU citizenship. Article 17 of the EC Treaty creates a new status of “EU citizenship”. But the rights of EU citizens are meagre. The EU Charter confers EU “citizenship” rights going beyond traditional national civil and political rights to include a wider set of “social” rights. The EU confers these rights on individuals regardless of Member State nationality; for example, workers are protected regardless of nationality. The inclusion in the EU Charter of social and economic rights related to working life confirms that these are to be considered fundamental to the EU social model, what it means to be an EU citizen.

4. Economic context

At the Lisbon summit in March 2000, the emphasis was on employment policy. Two broad labour market concerns dominate the EU’s employment policy: changing demography (an aging workforce and declining birthrate) and unemployment (a low employment rate averaging 60%, compared with 70% in the US and Japan). Many of the EU Charter’s provisions on social and labour rights focus on employment. For example, issues of equal opportunities (facilitating women’s labour force participation) and social protection (tackling social exclusion and its consequences for employment), regulation of working time, of new (“atypical”) forms of work, of work organisation, of vocational training. The EU Charter also promotes the institutional involvement of the social partners through collective labour rights, information and consultation and collective bargaining.

5. Institutional context

At EU level, the institutional architecture includes a Social Chapter (Articles 136-139 of the EC Treaty) and a new Employment Title (Articles 125-130). In contrast with their central “social dialogue” role in the Social
Chapter's legislative procedure, in the Employment Title's “open method of coordination”, the social partners are only marginally situated. Yet the EU social dialogue (inter-sectoral or sectoral) could make a major contribution to the EES. In turn, the EES could reinforce EU social dialogue by institutionalising the social partners' involvement in the open method of co-ordination.

The fundamental rights, including those of the social partners, guaranteed by the EU Charter could influence the institutions and actors involved at EU and national levels in the direction of mutual reinforcement of the institutions of social dialogue and employment policy co-ordination.

6. Legal context

The “hard law” *acquis communautaire* of EC labour law prescribes a framework of substantive conditions which regulate or restrict the ways in which job creation can take place in Europe. In contrast, the Employment Title is usually characterised as a typical soft law co-ordination measure. The innovative role of the social partners in developing framework agreements and binding directives through the EU social dialogue is of potentially great significance in accommodating hard and soft law in the EU, as evident in the recent “voluntary” agreement on telework.

Similar debates over hard and soft law arose in discussions over whether social and economic rights, as contrasted with civil and political rights, should be included in the EU Charter. Again, it will be suggested that the social partners may play an innovative role in developing and implementing fundamental social and labour rights.

7. The outcome at Nice, December 2000

On the one hand, the Charter breaks new ground by including in a single list of fundamental rights not only traditional civil and political rights,
but also a long list of social and economic rights. On the other hand, although the EU Charter was approved by the European Council, it was limited to a political declaration. It was not given a formal legal status. A second “Convention on the Future of Europe” is presently considering whether and, if so, how the Charter should be integrated into the Treaties.

There are two outstanding questions. First, in the short term, what are the legal prospects of the political declaration by the European Council of an EU Charter of Fundamental Rights? Secondly, in the longer term, what are the legal effects of an EU Charter integrated into the Treaties?

This Commentary attempts to answer these questions, and other questions of the meaning and interpretation of the Charter, by analysing the articles in the EU Charter establishing fundamental trade union, social and labour rights.
Chapter 2
Legal prospects and legal effects of the EU Charter
Brian Bercusson, Stefan Clauwaert, Isabelle Schömann

1. Legal prospects of the political declaration of the EU Charter

As a political declaration, the EU Charter is not part of Community “hard” law. The Community Charter of 1989 also only had declaratory status. But it had three effects which may also emerge for the EU Charter.

First, the Preamble to the Treaty on European Union (TEU) confirms the Member States “attachment to fundamental social rights as defined in the 1989 Community Charter”, and again in Article 136 of the EC Treaty. It would seem anomalous if the new EU Charter was not accorded the same status.

Secondly, following the declaration of the Community Charter in 1989, the Commission produced a Social Action Programme with legislative proposals based on the Charter. The Commission may come under similar pressure to make proposals implementing social rights guaranteed by the new EU Charter.

Finally, the EU Charter may be used by the European Court of Justice as an interpretative guide in litigation concerned with social rights.

2. Legal effects of the EU Charter if incorporated into the EC Treaty

The EU Charter would become legally binding if it was incorporated into the Treaty. The legal consequences of such incorporation could be significant.
First, as with equal pay for men and women (Article 141, ex 119 EC), the Court could attribute binding direct effect to provisions of the Charter which were considered sufficiently clear, precise and unconditional.

Secondly, the doctrine of “indirect effect”, which requires national courts to interpret national laws consistently with EC law, would apply with great force to the rights guaranteed in a Charter incorporated into the Treaty.

Thirdly, the violation by the EU or a Member State of a fundamental right guaranteed by the Charter in the Treaty would very likely constitute a breach of EU law giving rise to liability under the *Francovich* principle.

Fourthly, despite Article 51(2) of the Charter, the competences of the Community and the Union are frequently a subject of litigation between those seeking to extend, or to limit them. It is likely that in such cases the ECJ will prefer to give an expanded interpretation of the powers and tasks of the Community and Union where these are necessary in order to safeguard the EU Charter rights.

Finally, social rights guaranteed by the Treaty would put pressure on the Commission to make proposals for their implementation.

### 3. The EU Charter and minimum standards

The European Court’s formulation of fundamental rights need not necessarily seek the lowest common denominator or minimum standard. As in Case C-84/94, there is reason for the Court to interpret the fundamental trade union rights in the EU Charter as not reflecting “the lowest level of protection established by the various Member States”.

### 4. The Court’s fundamental rights jurisprudence

As stated in Case 11/70: “…respect for fundamental rights forms an integral part of the general principles of Community law protected by the European Court of Justice… inspired by the constitutional traditions common to the Member States…”. Future interpretations of the fundamental
trade union rights in the EU Charter will look to the legal and constitutional practices protecting these rights in the laws of the Member States.

5. The potential impact of the EU Charter in the case law of the European courts

The EU Charter of Fundamental Rights is an obvious source of inspiration for the European Court of Justice in clarifying the content of fundamental rights, which are to be respected as general principles of Community law. In effect, the EU Charter can become mandatory through the Court’s interpretation of it as part of the general principles of Community law.

6. The actual impact of the Charter in the case law of the ECJ

In the period of just over 20 months from 7 December 2000 to 20 August 2002, every one of the eight Advocates General of the Court has referred to it in one or more Opinions, as has the Court of First Instance in five judgments.

For example, the Opinion of Advocate General Tizzano in Case 173/99, dated 8 February 2001, refers directly to the EU Charter (paragraph 28): “…we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved…”. He describes the EU Charter as “the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right”. Again, in its decision of 30 January 2002 in Case T-54/99, the Court of First Instance twice referred to provisions of the EU Charter.

The Advocates General make it clear that they do not base the existence of a right on the Charter. They use the Charter as confirming the status of a fundamental right by referring to the Charter’s content, not its formal status. The Advocates General are unanimously sending a clear message to the judges of the European Court to engage in a process of judicial recog-
nition of the EU Charter. This has already been acted on by the Court of First Instance.

7. Explaining the European Court of Justice’s response, or lack of it, to the EU Charter

The encouraging references to the Charter found in the Opinions of all eight Advocates General, have heretofore been ignored by the Court. At least four arguments may be put forward to explain this.

First, the uncertain legal status of the Charter, in particular, the non-integration of the EU Charter into the Treaties is the main reason. A second, controversial, argument is that many provisions of the Charter cannot be used on their own as the basis for judicial review. A third argument is that for the Court to enforce fundamental rights based on the EU Charter would be regarded as the Court’s assuming a constitutional role. This is controversial. Finally, a more prosaic reason why the Court has not yet referred to the Charter may be its decisional procedures, which require unanimity. The eight Advocates General are free to give their own individual views. The judges of the Court have to produce a single judgment. One or more judges in the Court may be resisting a reference to the Charter for any of the arguments cited above. The question is whether, and how long can this last.

8. Potential future developments in the case law of the ECJ

The dynamism shown by the Court over the past 30 years as regards the recognition of fundamental rights as general principles of Community law, allows for the hope that the same judicial dynamism will eventually be applied to promote the fundamental rights in the EU Charter.
9. Lessons of the experience of the EU Charter before the ECJ

There are limits and drawbacks to relying on judicial recognition of fundamental rights to give legal effect of the Charter. The ECJ’s case law emerges slowly, and depends on haphazard claims brought before it. The Court’s dilemma may be resolved by other EU institutions, and social actors, taking up the burden of enforcing fundamental social rights.

10. General conclusion: A balance sheet

On balance, it is suggested that the EU Charter is a positive contribution to the promotion of trade union rights in the EU for a number of reasons. The EU Charter is an independent source of rights and is not limited to national practice in individual Member States. National provisions which reflect Charter rights may achieve higher legal ranking in the national system; perhaps even constitutional status. The EU Charter will reflect international sources of trade union rights, and may go beyond these. In the EU Charter, social and economic rights are recognised as having the same status as civil and political rights. The Charter puts pressure on EU institutions to promote a European social model.

This positive assessment should not overlook the potential risks. The EU Charter might be exploited by employers and others to re-open many fundamental principles established in national systems.

Implementation of the Charter aims to build a bridge between programmatic (social and economic rights) and justiciable (civil and political) rights. Justiciable rights equate to effective and enforceable rights. The challenge is to establish clearly justiciable trade union rights: e.g. trade union freedom of association, information and consultation, collective bargaining and collective action, and, further, to develop implementation of programmatic social and economic rights: e.g. health, education, etc.
The tasks of an implementation strategy are three-fold. First, with respect to justiciable rights, to develop effective implementation, looking to effective sanctions, preventing regressions, removing qualifications, thresholds, exclusions, modifications. Secondly, moving more social and economic rights towards justiciability; formulating them as positive and enforceable rights; including effective sanctions. Thirdly, with respect to programmatic rights, implementation through effective monitoring of government policy and actions, with possible judicial review of consistency and powers of nullification.

The EU Charter opens a new chapter in the legal enforcement of trade union rights, both at transnational and national levels. All efforts should be made to secure and reinforce these rights as the Convention on the Future of Europe prepares for the Intergovernmental Conference in 2004.
Chapter 3
The EU Charter and trade union rights
Brian Bercusson

Fundamental trade union rights are on at least three legal agendas of the European Union: the constitutional agenda, the legislative agenda and the agenda of the European Court of Justice.

1. The legislative agenda
Legislation at EU level is encroaching on areas of fundamental trade union rights.

2. The European Court of Justice
The European Court of Justice is making decisions with important consequences for fundamental trade union rights.

3. The EU Charter and constitutional trade union rights
The EU Charter of Fundamental Rights includes at least three articles on fundamental trade union rights: Article 12: Freedom of assembly and of association, Article 27: Workers’ right to information and consultation within the undertaking and Article 28: Right to collective bargaining and action.

Their inclusion in the Charter may well confer on them a constitutional status within national legal orders.
4. Interpreting the EU Charter in light of Member States experience: trade union rights

The ECJ may be willing to recognise as protected by the EU Charter those fundamental trade union rights which all, or most, or even a critical number of Member States insist should be protected.

5. Interpreting the EU Charter in light of international labour standards

The Court may regard it as necessary to remedy any deficiencies in the articles of the EU Charter on fundamental trade union rights by interpreting them consistently with other international labour standards.

6. Illustrations of how the EU Charter may promote trade union rights

Trade union collective action has often been restricted, allegedly to protect public and/or essential services. The ILO’s Freedom of Association Committee has established international standards on collective action in public/essential services. Relying on Article 28 of the EU Charter (right to collective action), trade unions could promote challenges to more restrictive national laws.

Article 12(1) of the Charter on freedom of association could be interpreted as guaranteeing rights which go beyond what is provided in some national laws, for example, regarding interference in a union’s internal affairs, rights to recognition by an employer, access to union members at the workplace, or to take part in union activities.

7. Conclusion

In interpreting the EU Charter, the ECJ will be sensitive to where national laws have protected trade union rights. Carefully selected cases could
enable trade unions to encourage the European Court of Justice to adopt a more expansive interpretation of the trade union rights guaranteed by the EU Charter.
Chapter 4

Protection of personal data (Article 8)

Christophe Vigneau

Article 8: 1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

1. Introduction

Article 8, “Protection of personal data” does not as such establish a right to privacy in the Charter.

2. Historical interpretation

During the course of its elaboration, Article 8 added content, scope and greater detail.

3. Sources of inspiration

International standards mainly refer to the protection of private life in general, as in the European Convention on Human Rights, Article 8(1). Most EU Member States have legislation concerning data protection, mainly to comply with EU Directive 95/46. The EU Charter elevates this right to a constitutional rank.
4. Meaning and content

There is growing concern about individual privacy in light of new technologies, particularly within the employment relationship, raising the issue of a right to privacy at work.

4.1. A fundamental right to protection of personal data

The protection applies to “Everyone”, not only to EU citizens, but to any individual. Article 7, which establishes the right for everyone to respect for private and family life, is limited only to private life, not to privacy in any circumstances and in any place. Article 8’s right to protection of personal data has a stronger meaning and scope, implying active legal intervention. The data protected is wide: personal data, not private data.

4.2. The conditions for processing personal data

There is no indication that only processing by computers is covered. Fairness is the first mandatory requirement, and in practice covers also the collection phase.

Fair processing includes a specific purpose and the individual’s consent: both must be sufficiently clear and accurate. But even clearly specified reasons may be considered unfair. When the purpose ceases to exist, processing stops and data is to be destroyed. A right to access to data collected is implied in the Charter.

4.3. The control of the protection

Article 8(3) establishes a constitutional requirement for an independent agency to control compliance with the rules protecting personal data.
Article 12: 1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at European level contribute to expressing the political will of the citizens of the Union.

1. Introduction

Article 12 makes two references to trade unions, the only reference to trade unions in the Charter.

2. Evolution of Article 12

The references to trade unions were initially included among the collective social rights of labour. However, at a later stage, they were transferred to another Article and Chapter of the Charter, separated from the other collective social rights of labour.

3. Sources of inspiration

Ratification by all Member States of ILO Convention No. 87 of 1948 (Freedom of Association and Protection of the Right to Organise) and Convention No. 98 of 1949 (Application of the Principles of the Right to Organise and to Bargain Collectively) has produced a foundation of
trade union rights common to all EU Member States. Freedom of association in trade unions right has also acquired constitutional status in some Member States. The right of association granted may be specific to trade unions.

4. The substance of the right to freedom of association

There are elements of trade union rights which all, or most, Member States agree are protected. These elements, on which there is consensus, can be assembled into a principle of “freedom of association” at EU level, a common core of elements of a right of “freedom of association” which is shared by all, or a majority of the Member States.

There is a unanimous consensus among all EU Member States in favour of five trade union rights: of association/to join trade unions, not to join trade unions, to autonomous organisation, to trade union activity (including in works councils) and to a legal status for collective agreements. Beyond this common core, there is a substantial majority (10-11 Member States) in favour of trade union rights regarding legal definition (11), information and consultation (including works councils) (10), and extension of agreements (11). There is also a substantial majority (11 Member States) in favour of trade union rights regarding financial autonomy (11) and elections/decision-making autonomy (11). There is a substantial majority (11 Member States) against the closed shop. Finally, there is a clear majority (9 Member States) in favour of trade union rights regarding the right to strike and to legal personality.

Trade union freedom of association includes the rights listed above which are recognised in all (or most) Member States.

5. Freedom of association in EC law

Freedom of association is explicitly guaranteed in Article 12. But Article 137(6) of the EC Treaty explicitly excludes the right of association. If
there is no EC/EU competence, the EU could not protect this right. To be consistent with the Charter, Article 137(6) will have to be interpreted very narrowly, or deleted.

6. Problems and ambiguities in Article 12 of the EU Charter

The adoption of a formula based on the ECHR threatens conflict with the European Court of Human Rights, which has adopted a minimalist interpretation of the right of association, in contrast with the constitutional courts of some Member States, and the ILO’s Freedom of Association Committee, which have adopted wider interpretations of the right.

The phrase beginning “In particular” arguably gives specific and higher protection to the right to form and join trade unions. A “negative” right of association is absent. The formulation of a “right to… freedom of association in… trade union…. matters” implies also rights to engage in the activities of the protected associations. The reference to the right “at all levels” still does not specify the EU or transnational level.

7. Potential mutual impact of Article 12 and Member State laws

Article 12 may include rights which go beyond what is provided in national law. Similarly, national laws may provide rights which go beyond what is provided in Article 12.

8. Conclusion

The protection of the work identity of citizens relies heavily, in many cases exclusively, on trade unions. Formulation, implementation and enforcement of the rights of worker-citizens requires collective organisation of the social partners at both national and EU levels. The repre-
sentativeness and efficacy of trade unions, at national and EU levels, requires that they be able to recruit and maintain membership. Insofar as trade union rights in the Member States have failed to secure such levels of membership, or are defeated in their efforts by labour market or other conditions, their rights must be protected and improved. The purpose of Article 12 the EU Charter is to secure the presence and effectiveness of the social partners at all levels.
Chapter 6

Freedom to choose an occupation and right to engage in work (Article 15)

Christophe Vigneau

Article 15: 1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

1. Article 15(1)

Article 15(1) applies to “everyone”, employees and self-employed persons, regardless of the nature of their employment relationship. It is a fundamental human right.

1.1. Historical interpretation

Changes in the early drafts reflected ideological conflicts with the Convention as between a “freedom to enter into work”, or a wider “right to work”. The formula of “the right to engage in work” appears to be a compromise.

A number of international instruments reflect this provision, but there is no express reference to it in ILO Conventions. There is constitutional recognition of this right in many EU Member States, though it is phrased differently. Recognition of the right to work is ideological and political, not normative, as a subjective right of individuals against the State. So many
lawyers consider the right to work irrelevant. This is misleading. As a constitutional right, the right to work does create legal obligations on the State to develop an active employment policy, to guarantee the freedom of work and to organise a functioning free labour market. For example, the constitutional or unconstitutional character of legislation affecting employment, or to support legislation promoting access to jobs of disabled persons, or other positive discrimination at work, or in education and training.

1.2. Meaning and content

Its philosophical origins link the right to work closely to the right to life. Work is a human right. Depriving a person of such a right is to deny that person’s right to life. The importance given to work produced two different interpretations of its significance and scope: a liberal individual freedom to work, and a socialist right for individuals to claim the right to work from the State. The right to work constitutes the cornerstone of the modern conception of both the liberal and the welfare state.

As a compromise, the EU Charter’s “right to engage in work”, while not clear, appears to have a more liberal orientation. A narrow view limits it to giving access to the labour market. A broader view of the right extends to the political commitment of the State to promote integration in employment and stability at work. For example, it could be invoked against national policies that exclude some categories of workers from the labour market. It could act as a constitutional anchor for the EU’s commitment to employment policy.

The right “to pursue a freely chosen occupation” could include a right to pursue an occupation during the work relationship, not only to engage in work; secondly, a right to resign; thirdly, to protect against unilateral modification of the employment contract, and, finally, to prevent an employer requiring continuous re-engagement. If the concept of “occupation” includes more than the term “work”, then Article 15(1) establishes not only the freedom to work or not to work, but also the freedom to choose an occupation. Workers must be given the possibility to choose to pursue their professional activity.
2. Article 15(2)

2.1. Historical interpretation

Article 15(2) reflects the freedom of movement established by the EC Treaty for EU citizens.

2.2. Meaning and content

Article 15(2) gives EU citizens enforceable rights before any national court. This could have implications for the justiciability of Article 15 as a whole, including Article 15(1), despite given its more ideological and political dimension.

Article 15(2) applies to EU citizens and not only to workers, thus going beyond Article 39 of the EC Treaty. It may provide a legal basis for the Court to challenge the remaining limits to freedom of movement.

3. Article 15(3)

3.1. Historical interpretation

Article 15(3) establishes a principle of equal treatment as regards working conditions between non-EU nationals and EU citizens, a principle not evident in the Treaties. Article 15(3) is the consecration at European level of the principle of non-discrimination at work on the basis of nationality.

3.2. Meaning and content

The right is to equivalent working conditions; this is different from identical or equal. Article 15(3) constrains the Council, acting under Article 137(3) of the EC Treaty, to respect the principle of equivalent working conditions in any directives. It precludes the importation of cheap labour undercutting national labour standards.
Chapter 7

Non-discrimination (Article 21)

Bruno Veneziani

Article 21: 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

1. Article 21(1)

1.1. The strategic position of Article 21 within the Charter

Chapter III, entitled “Equality”, indicates that the principle of equality before the law in general (Article 20) is inadequate to achieve its objective without the additional principles of non-discrimination (Article 21) and equality between men and women (Article 23).

1.2. Sources of inspiration

Different approaches to dealing with discrimination, such as the individual’s right to enjoy freedom without discrimination, and/or a legal obligation upon public authorities to guarantee such effective enjoyment, are evident in other international instruments. The EC Treaty, Article 13, provides only for Community competence to take action. In contrast, the prohibition of discrimination is a fundamental principle in the constitutions of
all EU Member States. The legal formulas used express different positions. The “negative formula” simply expresses a ban on illegal discriminatory behaviour. A “positive formula” is expressed in terms of the attribution of specific rights. A “proactive formula” explicitly links the ban on discrimination to aims that the ban wishes to achieve.

1.3. The concept of discrimination.

Article 21 does not define discrimination. In some constitutions, the concept refers to individual rights. But in other cases, the concept seems to embrace a positive task for the State, to eliminate anything which produces unlawful distinctions in society or concrete hurdles to achieving equality. A similar approach is evident in EC Directives 2000/43 and 2000/78 on discrimination. Both Directives of 2000 cover both direct and indirect discrimination.

1.4. Discrimination and the ECHR

The European Court of Human Rights has illuminated some aspects of discrimination. “Discrimination” is a distinction which lacks an “objective and reasonable justification”, does not aim to reach a lawful goal, and lacks proportionality. Different treatment of people in the same situation is prohibited, as is the same treatment applied to people in substantially different conditions. Finally, justification for distinctions based on sex or birth must be for “imperative and very strong reasons”.

1.5. Discrimination and EC law

Before two Directives of 2000, EC law on discrimination focused on the principle of equal treatment of men and women, and, in the two Directives 97/81 on part-time workers and 1999/70 on fixed-term workers, protection of atypical workers against discrimination. Directive 97/80 on the burden of proof defined explicitly the concept of indirect discrimination.
1.6. The scope of the principle of non-discrimination.

The scope of Article 21 of the EU Charter is by far the widest yet. It prohibits named grounds of discrimination, which are but examples of the prohibition of “any ground” of discrimination. “[A]ny discrimination is prohibited”, including acts or omissions, direct and indirect, manifest and hidden, both individual and collective discrimination practices. In the work context, this covers the worker as an individual or as a member of a collectivity.

Article 21’s principle of non-discrimination has great potential in the employment sphere, where different treatment of workers is the norm. Distinctions among workers inevitably produce discriminatory effects. Any limitations on the scope of the prohibition of discrimination are constrained by Article 52(1) of the Charter. Only certain exceptions to the prohibition on discrimination are permitted in international sources: occupational qualifications, State security and protection of the employee.

1.7. Grounds of discrimination

The list of grounds of discrimination provided for by Article 21 is longer than Article 13 of the EC Treaty or ILO Convention No. 111, and is more wide-ranging than national constitutions. Once legally binding, the Charter will oblige the Member States to enact legislation including all grounds of discrimination envisaged in this fundamental right. Moreover, the list does not preclude national legislators including other possible grounds of discrimination. Specifically, a ban on antitrade union discrimination may be implied in the prohibition on discrimination on grounds of “political or any other opinion”.

1.8. Implementing and enforcing the prohibition on discrimination

In isolation, the prohibition in Article 21 could be read as implying only “negative” protection, without requiring proactive policies or positive state intervention. However, a systematic interpretation linking Article 21
with other articles in Chapter III, “Equality”, justify reading it in the context of promoting an effective policy of equal treatment of women and men (Article 23), protection and care of the well-being of children (Article 24), dignity, independence and participation of the elderly (Article 25), and independence, integration and participation of persons with disabilities (Article 26).

1.9. Scrutiny of existing national provisions

National laws establishing differences in legal entitlements may discriminate on one of the grounds prohibited in the Charter; for example, minimum wage legislation which provides different rates of pay for adult and younger workers.

2. Article 21(2)

2.1. Earlier drafts

Article 21(2) reproduces almost literally the first sentence of Article 12 of the EC Treaty.

2.2. EC Directives

The two Directives 2000/43 and 2000/78 state that their prohibition of discrimination “does not cover differences of treatment based on nationality”.

2.3. International sources of inspiration

Discrimination on the ground of nationality is prohibited in different formulations in international instruments.

2.4. National systems

Many national constitutions prohibiting discrimination do not refer specifically to nationality.
2.5. *Meaning of Article 21(2)*

The European Court of Justice has given discrimination on the grounds of nationality an extensive interpretation, scrutinising other criteria which may exclude Community citizens from rights provided for Member State nationals. This expansive approach to Article 21(2) could benefit also workers from non-EU Member countries.
Chapter 8

Equality between men and women (Article 23)

Yota Kravaritou

Article 23: 1. Equality between men and women must be ensured in all areas, including employment, work and pay.

2. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

1. Introduction

Although EC law on sex equality is probably the most advanced of any jurisdiction in the world, gender inequality has not radically diminished, and new forms of inequality between men and women have even appeared. This requires additional measures to attain substantive equality, and changing the culture and mentalities concerned with gender relations.

Article 23 emphasises labour rights in the explicit reference to employment, work and pay, but these are only examples: equality must be ensured “in all areas”. The concept of the under-represented sex gives the Article not only an individual, but also a collective dimension.

Article 21 prohibits discrimination on grounds of sex. In contrast, Article 23 is posited in affirmative wording: “Equality… must be ensured in all areas”, a proactive project implying an obligation to take action in favour of equality, reinforcing the instruments of positive action and gender mainstreaming, now enshrined in EC primary law.

The Charter is linguistically neutral as regards gender. Although difference is recognised, there is no assumption of preeminence as between the sexes. That equality “must be ensured in all areas” means as much
that men must “assimilate” to the social roles undertaken by women as vice versa. The emphasis on the global dimension of equality in Article 23 - in the public, work and private spheres - indicates awareness of the breadth of problematic gender relations in European society.

2. Sources of inspiration

Articles 2, 3(2) and 141 of the EC Treaty provide a foundation for Article 23.

3. The history of Article 23

Earlier drafts limited sex equality in the charter to labour law and labour market relations. Only later was there the emphasis that equality “must be ensured in all areas”, an incomparably larger potential including not only the public sphere, linked to citizenship and democracy, but also the private sphere in the sense of familial and personal relations which interact with employment.

Though wider in scope, the text is less precise and detailed in its prescription of effective means and procedures to achieve its objectives. EC experience of applying the equality concepts to paid labour can be exploited in other spheres: redefining sex equality in relation to domestic unpaid work, reconciliation of work and private life as it affects both sexes, women’s representation in organisations of workers and employers, and their participation in processes of collective bargaining over working conditions.

4. Community Law

The Treaty of Amsterdam made promotion of equality one of the aims of the Community in all its activities, such as women’s representation and participation in decision-making processes, not confined to the labour market. Related dimensions of equality include violence against women,
sexual exploitation, women’s physical and mental health and sexual harassment.

5. National laws and practices

Many Member State constitutions explicitly recognize equality between the sexes, though there are different formulations: single and abstract provisions or multiple articles with more concrete formulations.

6. Interpretation of Article 23

The general principle of equality of the sexes was recognized for the first time in Article 2 and, above all, Article 3(2) of the EC Treaty, the legal basis of gender “mainstreaming” to include all the specified activities of the Community, including the Member States. Article 23 of the EU Charter seems to go even a step further towards the recognition of a human right of equality of men and women in all areas.

It has long been established by the European Court that equality of the sexes in the field of employment is a fundamental individual right authorising legal action and claims before the courts. Article 23, paragraph 1, goes beyond employment and raises the question of justiciability in other areas. The second paragraph of Article 23, stipulating “The principle of equality”, may imply that the content and legal consequences of positive action are not the same in each different sphere: work and economic activity, the personal and familial sphere, and the public and political sphere.

Article 23 includes, but is not limited to employment and paid employment relationships. It includes work, a larger concept more linked to women’s activities. Article 23 requires a programmatic approach involving measures affecting groups, allowing for collective and individual legal actions, depending on the specific area where these measures are to
operate. Equality of the sexes is to apply also in the public and political spheres, including political representation. Equality in familial and personal relations is structured and influenced by law; for example, social provision by the state, in particular, personal services. Equality between the sexes is an issue present in the public, private and work areas; human rights in all three areas are both indivisible and complementary.

7. The principle of equality and “specific advantages in favour of the under-represented sex”

The second paragraph of Article 23 begins with “The principle of equality”, whereas Article 141(4) uses the term “the principle of equal treatment”. The first expression is much wider in scope, allowing for a wider formulation of positive action measures.

Measures taken under Article 141(4) are to provide specific advantages with respect to working life. The second paragraph of Article 23 of the Charter, like the first paragraph, applies “in all areas”. It is not possible to separate off the sphere of employment from other spheres, especially as these affect equality between men and women. Hence, the need for measures as regards reconciliation of work and family, the relation between paid and unpaid work, and women in organisations in the economic field, especially trade unions and employers’ organisations.

Positive action does not target the individual act of discrimination. Rather, it is a measure requiring action in order to realize substantive equality in the case of group discrimination, in this case, against women. Positive action measures in Article 23 are not an exception to the right to equality, let alone a violation of the equality principle. Rather, they are the necessary steps towards ensuring equality in accordance with the first paragraph of Article 23. The term under-represented sex explicitly recognizes the collective dimension of sex equality. One of the sexes, the female, is known to be under-represented in certain structures of power - segments of the paid workforce and political structures. In these structures there
has little progress towards equality despite legislative interventions. The principle of gender mainstreaming in Article 3(2) of the EC Treaty requires all relevant policies to reflect the criterion of whether or not they contribute to equality of men and women. This goes beyond the prevailing strategies of anti-discrimination and promotion provisions. Positive action, which implies a variety of legal measures, is the most important dynamic instrument for implementation of the gender mainstreaming principle.

The conditions under which positive action is undertaken are not the same in different areas. For example, what is the meaning of “specific advantages in favour of the under-represented sex” in the private, familial and domestic sphere? Men are the under-represented sex in this case. Ensuring equality as regards the responsibilities for reproduction is well known to labour law as requiring reconciliation of work and family life for both sexes. Positive action may additionally require the engagement of public authorities in promoting policies and infrastructures to ensure equality between men and women in this sphere. It requires greater comprehension of the connections between work and the demands of the private sphere.

8. Conclusion

Article 23, linking work, employment and pay with the private and public spheres, underlines the specific quality of European citizenship for women.
Chapter 9

Workers’ right to information and consultation within the undertaking (Article 27)

Thomas Blanke

Article 27: 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 Community law and national laws and practices.

1. Introduction

Proper structures of representation, consultation and information at workplace and enterprise levels are a mainstay of modern forms of work organisation. Yet not all of the EU Member States recognise this right as a general right of all workers and their representatives, and only a few of them give this right constitutional status. Although Article 27 does not reflect a common acquis at Member State level, Article 137(1) of the EC Treaty grants competence to the Community with regard to “the information and consultation of workers”.

2. Sources of inspiration of Article 27

Existing sources in EC law were Directives 98/59/EC (collective redundancies), 77/187/EC (transfers of undertakings) and 94/45/EC (European works councils).
3. Earlier versions of Article 27 of the EU Charter and the interpretation of the history of the wording

The wording “information and consultation in good time”, inserted at a later stage, implies that the information must be given and the consultation procedure must occur prior to the final decision of the management.

Earlier wording that the scope of information and consultation is confined to “matters which concern them within the undertaking” was deleted in the final text, thus potentially increases the scope of information and consultation to include matters beyond the undertaking.

The reference to “Workers or their representatives” is a major regression from the earlier formulation of “Workers and their representatives” and contradicts the Community acquis in other directives. The European Court, in Cases 382-383/92, insisted that Community law required the information and consultation of workers’ representatives. Information and consultation only of workers was not sufficient.

Earlier references to “all levels” were replaced by the requirement to apply “at the appropriate levels”. Information and consultation extends beyond the undertaking; it potentially includes the national and Community levels.

4. Community law: a 25 years progress towards Article 27

The first step in EC law to require structures of workers’ representation within undertakings in order to inform and consult workers was made by Directive 75/129/EEC of 17.2.1975 on collective redundancies (now Directive 98/59/EC).


These directives embody the European model of industrial relations which underpins Article 27 of the EU Charter: the recognition of workers’ right to information and consultation as a fundamental social right.

5. National laws and practices

Workers’ rights of representation and participation within the enterprise take very different forms across the EU. They may be exercised exclusively through trade union representatives and/or through employee’s representatives. At workplace level, national systems of worker representation were shaped by legislation and/or collective agreement. The only Member States with an explicit constitutional guarantee of workers’ right to information and consultation are Belgium and the Netherlands.

The nature and intensity of workers’ rights to be involved in management decisions at the different levels of undertakings ranges from a minimal right to information only, to regulations providing for consultation procedures, to participation and codetermination structures. National laws will be affected to different extents and in different ways by Article 27 of the EU Charter.
6. Interpreting Article 27 of the EU Charter

Workers’ right to information and consultation appears as the first article in Chapter IV, entitled: Solidarity. The implication of this Chapter is that the EU is based not only on traditional individual and liberal rights, but equally on social rights creating networks of solidarity among the citizens of the EU.

European Community law has addressed the issue of workers’ information and consultation in a series of regulations which have varied widely on how detailed and in which form information must be given, what the consultation procedures should be and which matters should be covered by consultation.

As regards the definition and the scope of “information” and “consultation”, there is, in principle, a continuous trend towards more abstract descriptions of time, form and content of these rights in order to make them more effective in achieving their objectives.

The objective of information is to enable the employees’ representatives to obtain an adequate view of the problem on the basis of the facts and to prepare a substantive statement. This statement is an essential part of the consultation with the competent organs of the undertaking.

The objective of the consultation procedure is an exchange of the different views of management and the labour representatives and to establish a continuous dialogue between both parties in order to reach, where possible, a common position and an agreement on decisions within the scope of the employers’ powers.

The employer has to inform and consult the workers or their representatives on all matters, including those which concern them outside the undertaking. The information and consultation must occur “at the appropriate levels”, including the level of establishments, undertakings, companies, enterprises embracing more than one company (for example in franchising systems) and so on, regardless if they act in national or transnational markets. Article 27 of the EU Charter thus establishes a
guarantee of information and consultation for workers at both national and transnational levels.

The employer has the obligation to inform and consult either the workers directly, or the workers’ representatives. Direct information and consultation of individual workers could be an “appropriate level” only in very small companies or establishments. To reduce the right for workers or their representatives to a right only for the individual workers would contradict the guarantee of the freedom of association in Article 12 of the EU Charter by enabling employers to choose to ignore and undermine workers’ representatives, including trade unions.

The view that the guarantee of information and consultation to “workers representatives” applies only to works councils and not to trade union representatives is contested. Not all Member States of the EU operate a “dual-channel system”, separating workers’ representatives into those elected by the workforce in the establishment, on the one hand, and trade union representatives, on the other. Trade unions are inextricably linked to workplace organisation. An interpretation of “representatives” as including trade unions corresponds to the extension of the matters for information and consultation beyond the range of the undertaking. Workers’ representatives may be either trade union representatives, or these together with works councils appointed from the workforce as a whole within the undertaking.

7. Conclusions

Article 27 of the EU Charter transforms all national laws and practices into the expression of a more general fundamental European social right, on which they are henceforth based, and in light of which they are henceforth to be interpreted.

Article 27’s reference to the national laws and practices implies that the Member States are obliged to maintain at least the mandatory standards
of information and consultation provided by statutory law or by collective agreements.

German labour law provides a particularly valuable insight into the nature of the right to information and consultation of workers within the undertaking. It seems curious that Germany, the Member State with probably the oldest and strongest tradition of workers’ participation through works councils at establishment level, does not recognise this right as a fundamental social right, whereas the Community, dominated by countries with trade union representation systems, establishes this right as a fundamental social right.

Two potentially important conclusions follow. First, the right to information and consultation is a new fundamental social right. Secondly, this right is not a weak version of the German co-determination tradition.

The German co-determination tradition reflected an early socialist ideology of democratic management. Article 27 is not based on this co-determination tradition. As such, it is pointless to criticise it as a weak form of co-determination. Instead, Article 27 aims to protect the interests of the individual worker against the dominant position of the employer in situations in which those interests could be substantially affected. As a fundamental social right this has different sources.

Initially, it derives from the need to protect workers in extraordinary situations, such as collective redundancies and transfers of undertakings. It emerges further from the objective to protect in an effective way the health and safety of workers. It reacts also to the new problems created by globalisation of the economy, with the rise of transnational companies and mergers of undertakings which make workers dependent on decisions taken in other Member States and may have the effect of weakening national traditions of workers’ involvement in the decision-making process.
However, apart from these sources, Article 27 has as much or more to do with the *protection of human dignity* (Article 1 of the EU Charter) than with traditional social rights and the objective of democratisation of the economy. As such it promises greatly to expand the scope both of traditional social rights and of practices of democratisation, to encompass threats to workers’ dignity in the many new forms these threats assume in a globalised economy, society and environment.
Chapter 10

Right of collective bargaining and action
(Article 28)

Bruno Veneziani

Article 28: Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interests, to take collective action to defend their interests, including strike action.

1. The strategic position of Article 28 within the Charter

The rights of collective bargaining and action, together with Article 27 (workers’ right to information and consultation within the undertaking) and Article 12 (freedom of assembly and of association), create a network of collective labour rights protecting the dignity of workers.

2. International sources

International instruments also provide for this right, in particular, ILO Conventions.


Explicit rights to collective labour negotiation are to be found in the constitutions of some Member States; otherwise rights of collective bargaining are said to derive from the broad right of association. The EU Charter may have a substantive impact on national legal systems without such rights at constitutional level.
4. The content of the right of collective bargaining

Article 28 aims to strengthen the widespread practice of collective bargaining in the majority of European countries through a fundamental right. It deals the process of collective bargaining, the outcome in the form of the collective agreement; the actors involved: workers, employers, their organisations, and the levels: “appropriate” levels.

The text of Article 28 uses the expression “right of collective bargaining”, to mean a completed process of two phases: “to negotiate and conclude collective agreements”. The wording implies all the steps necessary, from initiating negotiations, to actual negotiations, to concluding the collective agreement. The substantive content of this formula may be more comprehensive than in some national constitutions and legislation.

“Collective agreements” is the expression used in Article 28 to indicate the final step of the process of collective bargaining. However, nothing is said about its definition, the legally binding nature of the agreement, its internal structure (normative, obligatory clauses), the potential scope of workers and employers covered (erga omnes effect), the range of issues negotiated, union security arrangements, the relationship of agreements at different levels of collective bargaining, its relation to the individual contract of employment, its position within the general hierarchy of labour law norms and, finally, its relationship with the law in general. This appears to leave some scope for intervention by national laws and practices, subject to review by the European Court of Justice.

The formula “in accordance with Community law and national laws and practices” appears to allow national legal order to give different legal definitions of the right of collective bargaining. However, Article 28 mirrors a general principle of national legal systems recognising the full autonomy of collective parties and their freedom of contract. Norms governing collective bargaining and the collective agreement must
reflect in principle the freedom of the collective parties. National limitations on contractual autonomy are subject to review.

Collective bargaining and collective agreements have become important in Community labour law in light of the multiple functions they perform. First, the quasilegislative function assumed by the social partners engaged in collective bargaining at EU level in the form of the social dialogue. This has led to collective agreements given legal effect in the form of directives. In the most recent case, the agreement on telework, the result is not to be embodied in a directive. This will highlight the central issue of its precise legal effect, an issue on which Article 28 may be engaged.

Secondly, a general model emerging is that the collective agreement may have an important function in facilitating the implementation and application of Community labour law. This takes two forms. Collective bargaining and collective agreements are allocated a role in the transposition of Community law into the national laws of the Member States. Collective bargaining and collective agreements are also allocated a role in the flexibilisation of Community law, allowing for its adaptation to the specific national context of industrial relations and employment practices in each Member State.

Thirdly, collective bargaining and collective agreements are recognised as reflecting fundamental social objectives and values which are to be protected against competing objectives and values in Community law, in particular, those of competition law. The European Court may give more weight to the right of collective bargaining recognised in Article 28 in the absence of recognition of competing values (e.g. of competition) in the EU Charter of Fundamental Rights.

Article 28 may be used to challenge obstacles placed, by EU institutions or Member States, in the path of the social partners when they are engaged in the process of collective bargaining or wish to secure respect for collective agreements “in accordance with Community law”.

European labour law and the EU Charter of Fundamental Rights
National constitutions generally appear to emphasise the right to collective bargaining, to start and conduct negotiations. There is also some national legislation providing an obligation to negotiate on certain issues at certain intervals. The obligation to negotiate may be reciprocal, balanced by an obligation on both sides to enter into negotiations. On the other hand, some Member States reject the idea of legal regulation of the right of participation in collective bargaining, which can be obtained only through the power of the social partners. Given this spectrum of provisions, the express declaration in Article 28 of a right to collective bargaining may become the instrument for overcoming what are perceived as weaknesses in national laws on the collective bargaining process.

A right to conclude collective agreements could foreshadow an obligation to conclude such agreements, which could conflict with the fundamental right of trade union freedom in national laws. The policy not to include a right or duty to conclude an agreement is confirmed in international sources. The right of free collective bargaining includes the freedom to initiate or not to initiate negotiations, and to conclude or not to conclude any agreement. Collective agreements must be concluded without any interference by third parties (e.g. compulsory arbitration or conciliation). On the other hand, Article 28 may be interpreted so as to reinforce the right to conclude collective agreements. Article 28 imposes on both contracting parties the duty of mutual cooperation and to act in good faith in reaching the agreement. The right to conclude collective agreements means that both sides, “workers and employers, or their respective organisations”, must abstain, after negotiations have begun, from any harmful conduct, such as delaying tactics or wholesale and repeated rejection of positions, which limit the effective enjoyment of the right. Finally, the right to conclude collective agreements confers rights on workers, employers or their organizations, even if not affiliated to the signatory organisations, to gain access to collective agreements concluded by other parties.
The right of collective bargaining is a fundamental collective right. Despite this, the right is often considered also an individual right, though enjoyed collectively. The Charter appears to cover all possible actors in collective bargaining, regardless of whether they are organised or not. However, Article 28 is phrased in the alternative: “Workers and employers, or their respective organisations”. The word “or” means that where workers or employers are not formally organised, perhaps because they lack the capacity to do so, they nonetheless have the right to bargain collectively, even without a specific form of organisation. Unfortunately, the EU Charter is inconsistent in its designation of the personal scope of collective rights: trade unions (Article 12), workers’ representatives (Article 27) and workers’ organisations (Article 28).

The principle of the collective autonomy of the social partners means the reference to “appropriate levels” leaves it to the unfettered discretion to the parties to the bargaining process to decide which is the most appropriate level to undertake collective bargaining. This may be European, national, territorial, interconfederal, sectoral, national or international group of enterprises or plant level. “At the appropriate level” may be interpreted, alternatively, as implying that national laws and practices on collective bargaining determine what is the “appropriate” level. The autonomy of the parties to determine the level of collective bargaining is somewhat diluted.

Freedom of choice is indicated by different models of workers’ representation at the workplace. Trade unions in a “single-channel” system have both bargaining and information/consultation rights. In this context the “appropriate” level will be the workplace. “Dual-channel” systems of representation are characterized by the coexistence of union representatives alongside unitary bodies elected by both unionized and non-unionized workers, generally called works councils. The problem is to consider not if, but when Article 28 covers works councils which become involved in
a negotiating procedure. Article 28’s reference to “appropriate levels” threatens to undermine established roles of different organisations of workers, with resulting overlaps, confusion and possible conflict.

A second problem is the prospect that Article 28’s reference to “appropriate levels could open up “the right to negotiate and conclude collective agreements” indiscriminately, thereby posing a potential threat to established organisations of workers. There are clearly risks in an interpretation of Article 28 which opens the gates of collective bargaining to any organisation of workers. The question remains open whether works councils in dual-channel systems of worker representation will be able to invoke Article 28 to start a negotiation process and conclude a collective agreement.

A final unresolved question arises at the EU level, where there is a definite lack of clarity both as to the nature of the process (social dialogue, collective bargaining), and the organisations (organisations of employers and trade unions at intersectoral, sectoral, regional, multinational levels) who may seek to avail themselves of the rights in Article 28. One thing is arguably clear: it must be appropriate to negotiate some matters at European level. The question is whether the rights provided in Article 28 will enable organisations of trade unions and employers to start negotiations at European level.

5. The right to take collective action

The final text, “the right... to take collective action..., including strike action”, may be read as recognising the right to strike. If collective action includes strike action, and the former is qualified as a right, then the latter must also be a right.

The ILO does not include the right to strike explicitly in the text of its Constitution and numerous Conventions. However, it has been affirmed in the case law developed by the ILO’s Freedom of Association Committee, interpreting Convention No. 87.
The constitutions of some Member States have explicitly recognised the right to strike. In others, it is not explicit but implied. In others, it is not possible to speak of a right but only of a freedom to strike. Article 28 may lead to a fundamental change in those national legal orders where this right is not given constitutional value or is not expressed at a constitutional level.

6. The content of “the right… in cases of conflicts of interest, to take collective action to defend their interests, including strike action”

In the absence of any specific limitations, Article 28 seems to cover conflicts of all kinds of interests, including, in principle, also economic and political interests. This is consistent with most national legislation and with international instruments.

The general expression “right… to take collective action” appears to embrace all types of action aimed at self-help which arise in cases of conflicts of interest. It would therefore include “secondary action”, which is currently declared unlawful in some Member States. Collective action may include sit-downs, sit-ins, occupations and work-ins, which can conflict with some civil rights, and are considered unlawful in most Member States. Blockades, picketing and other collective action affecting public and/or essential services are within the general statement of the right to strike at constitutional level. Limits may be posed by national constitutions which include other values which strikers must take into account: general interests, public order, public safety, etc. Such accommodations may be contested in adjudicating on the scope of the right to take collective action under the EU Charter.

All workers, regardless of the nature of the employer, whether public or private, are entitled to Article 28’s right to take collective action. The issue is not whether the right exists, but how it is exercised, whether there are
limits on the *modality* of engaging in the conflict of interests. An outright prohibition of strike action in the totality of public services could not be in conformity with the right declared in Article 28. The EU Charter’s right to take collective action may therefore have a significant impact on those countries where strikes by certain categories of civil servants are forbidden by law.

Article 52 of the EU Charter allows for limitations, but these “must be provided for by law and respect the essence” of the right to collective action. Further, they are “subject to the principle of proportionality” and must be “necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”. In some constitutions, specific provisions on collective action require that essential services be guaranteed.

The question may arise of potential conflict between the right to collective action and other rights under Community law, such as the right of establishment or free movement of goods. In partial response to potential conflicts between the EC law on free movement of goods and collective industrial action, Council Regulation No. 2679/98 already provides protection for fundamental rights in national law to take collective action “including the right or freedom to strike”.

The right to collective bargaining is granted “at the appropriate levels”, but this phrase does not qualify the right to take collective action. Article 28, therefore, stipulates no limitation on the levels at which the right to collective action may be exercised. This is open to at least two interpretations. First, the qualifying limitation, “in accordance with Community law and national laws and practices” could allow for restrictions, subject to Article 52 of the Charter. Alternatively, the implication is that collective action is permissible at “all levels”, including also at the EU level.
7. The personal scope of the right to take collective action

Those entitled to take collective action include workers or their organisations, and employers or their organisations. The word “or” appears to indicate an alternative, not an exclusion. According to some national constitutions and case law, the right to strike is an individual subjective right which can be performed only collectively, by an association, group or organisation. It is not clear what impact this formulation will have on national contexts where only trade unions are entitled to exercise the right to collective industrial action. The consequence would be that workers and employers who are not members of these organisations, or who are members of organisations not recognised by the jurisdiction as trade unions have no legal right to take collective action.

8. The right to lock-out.

The legality of the lock-out is a specific problem for Article 28. The majority of national constitutions do not refer to lock-outs; they implicitly exclude it from the range of rights of employers, or refer to it as a mere freedom. The EU Charter poses a challenge: does it imply full legal equality between strikes and lock-outs as fundamental rights?
Chapter 11

Protection in the event of unjustified dismissal
(Article 30)
Niklas Bruun

Article 30: *Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.*

1. Introduction

The right to protection against unjustified dismissal is rarely found in national constitutions. However, there are international sources protecting against unfair dismissal, and almost all EU Member States have national regulations. Recognition of protection against unjustified dismissal as a fundamental right indicates that the employee's interest in security of employment is to be given significant weight, for example, in legislation aiming to give flexibility to companies.

2. International sources of inspiration for Article 30

The ILO in 1982 adopted the Recommendation No. 166 and Convention No. 158 on Termination of Employment laying down fundamental principles for protection against termination of employment.

3. Earlier versions of Article 30

Earlier versions referred to “Right to protection in cases of termination of employment”, which later became “protection against unjustified dis-
missal”. The choice of the broad term “unjustified dismissal” seems to cover all aspects of “unjustified dismissal”, including failure to give a reasonable period of notice.

4. Community law

Community law regulates collective dismissals (Directive 98/59/EC), dismissals arising from transfers of undertakings (Directive 2001/23/EC) and insolvency (Directive 80/987/EEC). The revised Directive 2001/23/EC, Article 4(1), allows Member States to exclude from protection against dismissal “certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal”. There is tension between the Directive and the EU Charter, which protects “Every worker” having this fundamental right.

Article 30 also protects the economic interests of the employee in dismissal situations arising from unjustifiable incompetence, or worse, of the employer. It remains unclear how far the economic protection offered by this interpretation may be extended.

Community law specifically protects workers exercising their right to parental leave against unjustified dismissal and provides similar protection against dismissal for a reason connected with maternity, or others forms of discrimination.

The Community law referred to explicitly in Article 30 excludes certain grounds as justifiable reasons for termination of employment. There are also procedural requirements: justifiable termination of employment cannot take place unless a procedure of information and consultation has taken place.

5. National law and practice

The only EU Member States which at present have a constitutional guarantee of protection against unlawful or unfair dismissal are Finland and
Portugal. The Finnish Constitution has been interpreted to mean that all reasons for dismissal must be among those provided for in legislation, otherwise they are null and void. Furthermore, the reasons for dismissal must be specifically defined in substance; legislation cannot be enacted providing that a person can be dismissed whenever the employer has a reason for this in general. The provision has also been applied to layoffs.

All Member States have extensive legal regulation protecting workers against unjustified dismissal. One question is whether the concept of “dismissal” in the EU Charter covers only a narrow concept (e.g. dismissal with notice), and not other kinds of termination (e.g. rescission, summary termination).

Some Member States’ legislation provides exceptions for certain groups of workers. Article 30, however, applies to “every worker”.

In national legal systems, dismissals on economic or collective grounds are dealt with differently from individual dismissals which are due to the behaviour or the situation of an individual employee. The Charter clearly covers both: dismissals on economic grounds and for individual reasons have to be justified and all dismissals may be contested as unjustifiable.

The legislation of several Member States contains threshold periods before the employee is entitled to protection. Article 30 may raise questions of whether all, some or any of these are justifiable.

Though sanctions vary widely, financial compensation seems most common. By making protection against unjustifiable dismissal a fundamental right, the Charter may lead to reconsideration of the adequacy of financial sanctions in some or most cases.
6. Conclusions

Article 30 of the EU Charter protects *every worker* against unjustified dismissal as a fundamental right. The scope of the protection may vary in different Member States, but there is a core minimum which must be respected.

The right to dignity of the worker (Articles 1 and 31) indicates some procedural requirements in the process leading to a dismissal. The right to be heard and consulted on individual level, and/or the right to information and consultation on collective level form a part of the procedures that are necessary in order to ensure adequate protection.

The right to protection contains not only a right for every worker to *compensatory measures*, but also to *preventative measures* before the dismissal takes place. They are part of the protective measures that the employer must ensure to the worker in order for a dismissal eventually to be justifiable.

Sanctions have to be effective, proportionate and adequate. Economic compensation might be inadequate sanction, not least in cases were the worker immediately finds a new job. Failure of the employer to adopt adequate preventive measures should be taken into account when considering appropriate remedies.

The protection is granted in cases of an *unjustified* dismissal, not “unlawful”, nor “unfair” dismissal. It is not enough to state that a national law contains a provision that dismissal may take place when there is a “fair” reason for the termination of the employment. The dismissal must fulfil specific substantive requirements for a termination, and, in addition there may be procedural requirements.

Protection is against unjustified *dismissal*. However, a wide scope of application would covers situations which clearly might lead to dismissals, such as long term lay-offs. These also require justification.
7. Final aspects

The protection against unjustified dismissal sets a minimum standard for the European Union, relevant both to the enlargement of the EU, and to any potential future deregulatory trends. Harmonisation of European law on dismissals could end regular debates over social dumping, whether it is cheaper for multinational companies to lay off and close down operations in different Member States.
Chapter 12

Fair and just working conditions (Article 31)

*Thomas Blanke*

**Article 31:**

1. *Every worker has the right to working conditions which respect his or her health, safety and dignity.*

2. *Every worker has the right to limitation of maximum working hours, to daily and weekly rest and to an annual period of paid leave.*

**1. Introduction**

The right to fair and just working conditions in Article 31 of the EU Charter underlies all the other individual and collective fundamental social rights of workers and elevates this subjective right to the status of a fundamental social right.

The general duty in Article 31(1) to respect the worker’s dignity highlights both that the inviolability of human dignity in labour relations is not automatically guaranteed, and a growing awareness of the need to protect the whole personality of the worker in the context of unequal power in determining conditions of employment.

**2. Sources of inspiration of Art. 27 in international and Community law**

There is a long tradition of legal regulation in international labour law regarding limitations of working hours and health and safety.
3. Earlier versions of Article 31 of the EU Charter

The elements of Article 31 were present in early drafts, and all were placed within the Chapter on “Solidarity” in the Charter.

4. Provisions on fair and just working conditions in Community law

There is a broad spectrum of EU regulations in the field of safety and health of workers. However, Article 31’s “right to working conditions which respect his or her… dignity” must be considered a new social right of the individual worker, and one of ever greater relevance.

Equal treatment is considered to be crucial to the sense of human dignity. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin provides in Article 2(3) a definition of the notion of “harassment” related to both discrimination and human dignity. The protection of “dignity” is, therefore, much more far reaching. It relates also to the protection of personal data, the kind of work, the amount of remuneration, and other concerns of traditional labour law.

5. The right to fair and just working conditions in the law of the Member States

Member States’ constitutions do not provide a guarantee similar to Article 31 of the EU Charter, though some elements concerning fair and just working conditions are provided in some constitutions. An example is Article 36, paragraph 1 of the Italian Constitution, which provides: “The worker shall be entitled to remuneration in proportion to the quantity and quality of his work in every case, sufficient to enable him and his family to live a free and decent life...”. The courts have interpreted this norm as directly, granting an employee the right to a minimum wage normally equal to the prevailing wage scale in collective agreements. Again,
German legal doctrine based on the constitutional fundamental rights of human dignity does not grant subjective rights enabling the individual to claim special protective measures or regulations, but does prescribe an obligation on the state to provide a minimum standard of national provisions for protection of health and safety.

A constitutional right to dignity has developed restraints on employers with regard to assessments and supervision of employees. Central aspects of the employment contract, such as wages, intensity of work and working time are increasingly seen as crucial to the concept of human dignity. For example, German law is developing an increasingly rigorous control of the equity of working conditions, including the amount of wages. Member State legislation on health and safety, including restrictions on working time may allow for derogations. These may become problematic in the light of Article 31(2) of the Charter. The Opinion of Advocate General Tizzano in Case C-173/99, BECTU, has already illustrated how the EU Charter’s recognition of “an annual period of paid leave” as a fundamental right can override the attempt in UK law to limit entitlement to this right, for example, by imposing a qualification period.

6. Conclusions: Article 31 of the EU Charter covers the whole spectrum of working conditions with respect to human dignity

The right to fair and just working conditions which respect dignity is reinforced by Article 1 of EU Charter, the principle that “Human dignity is inviolable. It must be respected and protected”.

Article 31’s guarantee of fair and just working conditions covers all working conditions insofar as they can affect human dignity. This includes, e.g. working time, but also remuneration and all other working conditions, even though not explicitly mentioned in the Charter, such as sexual harassment, offensive actions against workers and violations to workers’ personality in its older and more modern dimensions (e.g. personal
data). Thus, information and consultation procedures are included within the scope of fair and just working conditions as an essential element protecting the health, safety and dignity of workers.

The EU Member States are obliged by Article 31 to provide effective regulations within their national legal systems to protect the human dignity of workers across the whole field of conditions at work.
Chapter 13

Prohibition of child labour and protection of young people at work. (Article 32)

Antoine Jacobs

Article 32: The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

1. Introduction

Rarely recognised in national constitutions, the elevation of child labour standards to the status of a fundamental right of the EU may stimulate a more substantial European contribution to the global struggle against child labour and the exploitation of young workers.

2. The history of Article 32

The right to protection of children and young people in employment was included in the earliest drafts for the EU Charter. However, amendments in subsequent drafts substantially weakened the protections offered.
3. Sources of inspiration

The ILO’s Minimum Age Convention No. 138 of 1973 has been ratified by all EU Member States with the exception of Austria. Child labour is among the four fundamental rights at work which ILO Member States should comply with even if they have not ratified the relevant Conventions. Directive 94/33/EC on the protection of young people at work was adopted in 1994 and should have been implemented by 22 June, 1996. Only two Member States mention child labour in their constitutions: Italy and Portugal.

4. The ban on child labour

No Member State has fixed the minimum age of employment on an age lower than 15. The imminent accession of the countries of Central and Eastern Europe means that Directive 94/33EC, as part of the “acquis communautaire”, will oblige these states to prohibit access to their labour markets by children younger than 15 years, even if they have a lower compulsory school age.

Article 32 explicitly states an exception to the minimum age of admission to employment: “without prejudice to such rules as may be more favourable to young people”. The scope of “more favourable” exceptions is openended. However, its scope may be interpreted having regard Directive 94/33/EC, Article 4(2)(b), which refers to “a combined work/training scheme or an inplant work-experience scheme, provided that such work is done in accordance with the conditions laid down by competent authorities”.

The EU Charter accepts that derogations to the the minimum age of admission to employment, the prohibition of child labour, are permitted if they are “limited”. This leaves uncertain the acceptable age for child labour. Apart from work experience schemes, three types of derogations are found in national laws: domestic work (e.g. in private households) or
family work (often in agriculture), cultural or similar activities (artistic, sports, cinema, often subject to prior authorisation by a competent authority) and “light work” (as provided in Directive 94/33). The derogation clause in Article 32 is much more vague and imprecise, a sensitive issue where children perform temporary jobs to earn pocket money, sometimes encouraged by parents and exploited by business.

Specific provision for the working conditions of children under 16 appears to be missing in the text of Article 32, though it may be covered if the opening words of Article 32(2) are interpreted also to cover the working conditions of children under 16. National legislation in the Member States has subjected the work of children under 16 to numerous conditions (e.g. limits on night work, working time, mandatory rest periods and rest breaks), but not concerning remuneration, including a minimum wage, for child labour.

5. The regulation of the work of minors/adolescents/young workers

Specific labour standards also protect young workers (minors/adolescents) between the minimum age of access to employment and the age of 18. ILO Convention No. 138 imposes a minimum age of 18 years (exceptionally 16 years) for admission to any type of employment or work which is likely to jeopardise the health, safety and morals of young persons.

Article 32 of the EU Charter requires that young people admitted to work “have working conditions appropriate to their age”, a vague formula. Directive 94/33/EC requires the Member States to issue regulations with respect to working time, night work, breaks, rest periods and annual rest for young workers, and to prohibit the employment of young people in harmful occupations as specified in the Directive.
Article 32 requires that young workers “be protected against economic exploitation”, as did Directive 94/33/EC (Article 1(3)). This will raise many questions about employment and labour standards in Member States’ regulation of the work of young workers. For example, does it require equitable remuneration? The Italian Constitution explicitly guarantees young workers equal remuneration for equal work (Article 37).

6. Enforcement

National legislation on child labour and young people in work are generally enforced by a Labour Inspectorate, with the availability of criminal sanctions. The Charter’s provisions on child labour similarly require regular inspections and substantial sanctions. However, it is doubtful whether in all EU Member States the Labour Inspectorate is sufficiently strong and the Public Prosecution Service sufficiently active to enforce these laws.

7. The dimension of globalisation

In many Third World countries, child labour is still widespread and many European companies have establishments in those countries, or do business with employers in those countries which make use of very low-paid child labour. States can deal with this issue by imposing trade restrictions on goods and services produced with the help of child labour. The policy instrument is the insertion of “social clauses” in trade agreements between states. The EU could use its various legal and commercial powers to support the struggle against the “worst forms of child labour”. Since 1996, the new Community scheme of generalised tariff preferences provides for the temporary withdrawal of preferences from countries which practice the most blatant forms of exploitation of child labour. Other policies might be considered. For example, there could be an obligation on European companies to report regularly on the operation of their sub-
sidiaries outside the EU as regards the use of child labour. Companies found to make use of child labour could be excluded from access to public procurement, subsidies or other business with the EC itself. Article 32 of the EU Charter should impose an obligation on the EU authorities to outlaw any business activity inside the EU which is based on exploitation of the worst forms of child labour outside the EU.

8. Conclusion

Article 32 of the EU Charter directs attention to at least four practical problems of child labour: (i) how to limit the exceptions on the ban on child labour; (ii) how to effectively protect young workers; (iii) how to enforce these rules properly; and (iv) how to prevent European companies from exploiting children and youngsters outside the EU.
Chapter 14

“Horizontal” provisions

Chapter VII
General Provisions
Articles 51-54
Brian Bercusson

1. Introduction

Chapter VII (“General Provisions”) is concerned with limitations on the Charter by the Treaties, general criteria, the European Convention of Human Rights (ECHR), other sources, and the Charter itself. The proposition that these other sources of law may place limitations on the rights contained in the EU Charter raises a central issue of the supremacy of Community law.

Article 51: Scope

1. The provisions of this Charter are addressed to the institutions and bodies 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.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers or tasks defined by the Treaties.
2. General: addressees and scope

The Article is concerned with the addressees of the Charter and their powers/tasks. Paragraph 1 may conflict with paragraph 2 insofar as paragraph 1 specifies an obligation to *promote* the application of the rights and principles of the Charter. By definition, this cannot have been a pre-existing power or task, as the Charter did not previously exist.

Paragraph 2 says the Charter is limited by the Treaties (“powers or tasks defined by the Treaties”). This will not make sense if the Charter is incorporated into the Treaties; it cannot limit itself.

3. Impact on Member States: only when “implementing Union law”?

The word “implementing” could be interpreted as confining the Charter’s impact to specific implementing measures of national law. The European Court takes a wider view, that EC law applies to all national laws falling within the scope of EU competence, whether or not they are specific implementing measures.

4. The uncertainty of subsidiarity

In the case of *shared* competence, the Charter is to apply “with due regard for the principle of subsidiarity”. The meaning of subsidiarity is often disputed. This Article asserts the superiority of this uncertain principle as regards fundamental rights, an additional source of uncertainty for the Charter.

5. Subsidiarity as a dynamic principle for protecting fundamental rights

Subsidiarity is concerned only with the allocation of powers and tasks as between the EU and the Member States when there is *joint* competence. Paragraph 2 precludes the establishing of new powers or tasks in the case of *shared* competences. However, failures by the Member States
may enable the institutions and bodies of the Union to act. This is reinforced by the second sentence of paragraph 1, which imposes an obligation to “promote the application” of the rights in the Charter, an obligation which applies to both the Union and the Member States.

6. Powers and tasks for the Community or the Union

The Charter provides scope for the Court to interpret the powers and tasks of the Community, where these are unclear, in light of the objective of protection of the rights prescribed by the Charter.

7. The consequences of limited application to Member States: expansion of the scope of Union law?

The Member States are bound “only when they are implementing Union law”. The situation may be anticipated of one of the fundamental rights of the EU enunciated in the Charter being blatantly violated by a Member State, which asserts that its action has nothing to do with implementing Union law. Such a situation may stimulate a challenge to the Member State’s assertion that it is not implementing Union law. If such a challenge was to reach the European Court, the Court might, despite paragraph 2, prefer an expansive interpretation of the scope of Union law to condoning a violation of the Charter.

Article 52: Scope of guaranteed rights

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.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. Insofar 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.

8. General: limitations on scope

Paragraph 1 restricts the scope of any limitations to be imposed on the Charter. In this sense it may appear to conflict with paragraph 2. Paragraph 2 again says the Charter is limited by the Treaties (“under the conditions and within the limits defined by those Treaties”). This does not make sense if the Charter itself becomes part of the Treaties.

Paragraph 3 links the Charter to the ECHR as a minimum standard. It appears to allow “Union law” to provide “more extensive protection”. If the Charter is incorporated into the Treaty, it will become “Union law” and may therefore provide “more extensive protection” than the ECHR.

9. The ECHR and the Charter: “more extensive protection”

Article 52(3) states that rights in the Charter which correspond to rights in the ECHR are to have the same meaning and scope as in the ECHR. However, “Union law” may provide “more extensive protection”. If the Charter becomes “Union law” by virtue of being incorporated into the Treaty, can it provide both the same and more extensive protection?

Article 53 states that the EU Charter shall not be interpreted as restricting or adversely affecting the ECHR, which becomes the minimum standard
of human rights and fundamental freedoms. Again, how can this be reconciled with Article 52(3) which says the Charter has the same meaning and scope?

One possible way of reconciling these provisions is that the Charter is identical in meaning and scope to the present ECHR, which provides a minimum standard but may, in the future be interpreted so as to provide more extensive protection.

10. **Limitations only on the “exercise” of rights**

Any limitations apply to the “exercise” of the rights and freedoms; they cannot impinge on their scope.

11. **Limitations by legislation, or by law?**

That limitations be provided for “by law” means they may emerge not only from legislatures, but other sources, including the courts.

12. **The criteria for limitations**

The criteria allowing limitations on Charter rights differ in many cases from those allowed to fundamental rights in the ECHR, the Community Charter of 1989 and the European Social Charters. As the EU Charter replicates the provisions in those Charters, without allowing for similar limitations, the scope of the rights under the EU Charter may be wider or narrower.

13. **Rights in the Charter may not be based on the Treaties**

Paragraph 2 refers to “rights recognised by this Charter which are based on the Community Treaties or the TEU”, implying that some rights are not so based. The former are subject to the limitations in the Treaties. Presumably, the latter are not.
**Article 53: 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, the Community 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.

14. **General: minimum international standards**

This Article specifies minimum standards in other international sources, including the ECHR. Again, the reference to minimum standards in “Union law” will not make sense if the Charter itself becomes part of “Union law”.

15. **“International agreements to which... all the Member States are party”**

Certain ILO Conventions (Nos. 87 and 98) have been ratified by all Member States. The Community Charter of 1989 has been adhered to by all Member States. The European Social Charter has been similarly ratified, though different provisions have been selected by Member States. Rights and freedoms recognised in such agreements are not to be restricted or adversely affected by the Charter. Interpretation of the EU Charter may allow for greater or more extensive protection.

16. **The Charter and “Union law”**

If the Charter itself becomes part of Union law, there is a difficult issue of its rank in the hierarchy of EU norms.
17. National law as minimum standard

The reference to “Member States’ constitutions” is formulated in Article 53 as a minimum standard which the EU Charter cannot “be interpreted as restricting or adversely affecting”. It does not prevent an interpretation of the EU Charter “extending or positively affecting” human rights and fundamental freedoms in those constitutions.

18. The Charter and supremacy of EC law

There is a potential conflict here. The European Court of Justice could develop case law on the basis of the supremacy of the EC law in general over national constitutions. However, national courts might assert a right to review EC law by using Article 53’s reference to Member States’ constitutions.

19. Conflicting rights

Article 53 of the EU Charter applies where the Charter right allegedly is weaker than the same right elsewhere. The Charter must not “restrict or adversely affect” such a right found elsewhere. It may also apply where an EU Charter right appears to conflict with somebody else’s rights under another human rights instrument. It then becomes a question of which right has priority. One solution is to interpret Article 53 as saying Charter rights cannot adversely affect any other rights. But a narrower interpretation would be that EU Charter rights cannot restrict only the same right guaranteed elsewhere. As regards other rights, however, it is a question of which is the superior source: on the one side, the EU Charter; on the other, the ECHR, international law, national constitutions, etc. Here the issue of the supremacy of EC law would come in.
Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

20. General

This Article concerns the inter-relationship of Charter rights and limitations imposed by Charter on itself.

21. Conclusion

The Charter’s horizontal clauses are concerned with conflicts between individuals asserting different rights within the Charter (conflict of rights: Article 54); and where there are conflicts between rights in the Charter and in other instruments (conflict of instruments Article 53). The problems where there are internal conflicts among Charter provisions are serious, But potentially more serious are the disputes between rights in the Charter and in other human rights instruments - which raise the issue of supremacy.
Chapter 15

The EU Charter of Fundamental Rights and national laws and practices
Brian Bercusson

1. Introduction

In various Articles of the Charter, rights are stated to be limited by reference to national laws (and practices).

2. Formulations of the Charter's references to national laws and practices

The Charter’s references to national laws and practices affect the trade union and labour rights in Articles 27 (Workers’ right to information and consultation within the undertaking), 28 (Right of collective bargaining and action) and 30 (Protection in the event of unjustified dismissal). In contrast, no restrictions of this character are expressed in other Articles of the Charter, including Article 12 (Freedom of assembly and of association), Article 15 (Freedom to choose an occupation and right to engage in work), Article 21 (Non-discrimination), Article 23 Equality between men and women, and Article 31 (Fair and just working conditions).

3. Problems and Propositions

3.1. Supremacy of EC law

The fundamental principle of the supremacy of Community law would be undermined if Charter rights were limited by national laws and practices. This would certainly be the case if the Charter were incorporated into the Treaty. Member State courts adjudicating on a dispute over violation of a Charter right could ignore the Charter if it conflicted with
national laws and practices. The European Court of Justice (ECJ) would also have to give priority to national laws and practices. The ECJ is unlikely to agree to this.

Where national laws and practices restrict the rights granted, the supremacy of Community law requires that the objectives of the Community in granting these rights should allow for an interpretation overriding the limitations in national laws and practices.

3.2. National laws and practices and international standards

These “national” standards appear to be less national than international standards. Article 52(3) states that corresponding Charter rights, including those referring to national laws and practices, are to be the same as those in the ECHR. National laws and practices must not, and cannot, conflict with the ECHR, since all Member States have ratified the ECHR. Article 53 similarly binds the Charter to a level of protection not less favourable than various international standards. Again, national laws and practices should comply with these international standards. The EU Charter’s reference to national law means no more than compliance with these international standards.

National laws and practices may not prescribe standards less favourable than international standards.

3.3. National laws and practices: the maximum standard?

If Charter rights are limited to national laws and practices, the national standard becomes not the minimum, but the maximum standard. This eliminates any added value of the Charter.

The added value of the Charter will only be realised if the references to national standards in the Charter are treated as fixing the minimum standards on which Charter rights may improve.
3.4. Diversity of standards among Member States

The most important justification for the Charter is that it established a common set of fundamental rights guaranteed to all citizens of the EU. This is lost if fundamental rights are subject to national laws and practices.

The danger of national laws providing different minimum fundamental rights will only be avoided if the Charter is interpreted as establishing a common set of fundamental rights which may go beyond national laws and practices.

3.5. Diversity of references to national laws and practices

The references to national laws and practices are in some twelve different Articles of the Charter and include six different formulations.

This diversity should be ignored as much as possible in favour of a common interpretation.

3.6. Interpreting the different formulation of limitations in national laws and practices

Interpretation of the Charter is complex enough without having to ascertain the precise meaning of the different references to national laws and practices. For reasons of supremacy, uniformity, EC objectives and maximum standards of human rights, the differences in the formulations should be interpreted to produce a minimum of (a) diversity among; and (b) deference to national standards.

3.7. Different formulations for different rights

The references to national laws and practices are concentrated in the Chapter on “Solidarity” rights. Formulations confining rights in general “in accordance with Community and national laws and practices” refer to some collective (collective bargaining/action) and individual (dismissal) rights in the chapter on Solidarity. But Article 12 (freedom of association including in trade unions) is not so confined. Formulations limiting rights
to specific cases and conditions are only in one right in the Chapter on *Solidarity* (information/consultation).

Limitations on rights by reference in general to national laws and practices are concentrated in the rights in the Chapter on Solidarity. This contradicts the ethos of the Charter, which is to create solidarity by assuring a common floor of fundamental rights throughout the EU. The references to national laws and practices should be interpreted narrowly, in particular, so as not to contradict the objectives of solidarity.
Chapter 16

Conclusions

Brian Bercusson

1. Political dynamics of the EU Charter

The EU Charter, by including fundamental trade union rights and social and labour standards, has put these rights and standards on the political agenda of the EU. The political prominence of the Charter sets up a specific political dynamic. Failure to make the promised fundamental rights effective will create bitter disillusionment, especially among those who are promised specific trade union, social and labour rights. Disappointment will undermine their loyalty to the European integration process. This exerts pressure to make the Charter legally binding and effective.

By proclaiming the Charter, the Member States have unanimously agreed on principles of trade union rights and social and labour policy. On the basis of this unanimous approval, EU institutions may now propose policies for the effective application and implementation of these principles. The Member States cannot now withdraw from their commitment to principles in the EU Charter. If the Charter is given legal status, even constitutional status, it will become politically imperative for the EU institutions, including the European Court of Justice, to secure their effective implementation.

The EU Charter potentially stretches, if not goes beyond a narrow view of the present competences of the EU. This creates tension in the inter-institutional relations in the EU institutions in at least four ways.

First, tension between the Member States and the EU institutions. If the EU institutions take action to promote the Charter’s trade union, social and labour rights, some Member States may argue that such action falls outside EU competences.
Secondly, tension among different Member States. The Charter’s trade union, social and labour rights are consistent with the constitutional traditions and practices of many, but not all Member States.

Thirdly, tension among the EU institutions. The EU Charter offers opportunities for Commission initiatives, in contrast to the Council’s view in line with Member States’ concern with national sovereignty. The European Court of Justice delicately holds the balance in promoting European integration.

Finally, tensions resulting from pressures of sub-national and supranational actors on Member States and EU institutions. Many powerful actors and interest groups, within the Member States and also those organised at supra-national level, will seek to achieve fulfilment of the commitments in the EU Charter.

It seems likely that these tensions will give rise to a combination of pressures: from Member States attuned to the trade union, social and labour rights promised in the Charter, from EU institutions perceiving in trade union, social and labour rights an important means of obtaining support for the European integration project, and from social and political actors who see the EU Charter as commitments to the achievement of their objectives. There will certainly be counter-pressures, but the resulting tensions are likely to lead to some expansion of EU competences, and, possibly, a degree of convergence among Member States as regards trade union, social and labour rights.

2. Legal dynamics of the EU Charter

This political dynamic may be expressed through a number of legal channels: legislation, litigation, social dialogue, the European Employment Strategy’s “open-method of co-ordination”, and so on. Each offers different options for the legal implementation of the rights promised in the EU Charter. If incorporated in the EC Treaty, the Charter
would be part of a European Constitution with potentially powerful legal effects (direct effect and supremacy). All action, at EU and national level, would have to comply with the EC Treaty’s fundamental rights, guarded by the European Court of Justice.

2.1. The role of the European Court of Justice (ECJ)

The ECJ becomes a central player in the implementation and enforcement of the EU Charter. The ECJ will decide disputes where Member States are charged with failing to implement, or even allegedly violating rights in the EU Charter. The Court has played this role in the past, relying on other fundamental freedoms (of movement of goods, services, capital and labour) guaranteed in the EC Treaty. The EU Charter provides another legal basis on which the ECJ may overcome challenges to European integration in the trade union, social and labour field.

Two examples can illustrate this potential role of the ECJ. First, a decision of the Council, or the action of a Member State may appear to contravene the fundamental rights guaranteed by the EU Charter. National and/or supranational actors may mobilise opposition. Under this pressure, or independently, the Commission may seek to negotiate a solution to the apparent conflict. However, lack of success, or other political pressures, may lead to litigation ending up before the ECJ. Legal action on the grounds of violation of the EU Charter shifts what is a political conflict to a judicial forum. The prospect of litigation itself is a political lever, as those anticipating legal action may change their behaviour.

A second example is where an EU initiative appears to contravene fundamental rights guaranteed by the EU Charter. Again, national and/or supranational actors may mobilise opposition. One or more Member State governments may challenge the EU measure in litigation before the ECJ. Again, experience shows that the threat of a legal challenge gives Member States influence on the Commission preparing initiatives, and bargaining power in the negotiations over adoption of a measure in Council.
Litigation based on the EU Charter could be an important means of securing trade union, social and labour rights. Direct access to the ECJ to complain of violations of the EU Charter could influence the political agendas of both EU institutions and the Member States. For example, providing the European Trades Union Confederation (ETUC) with the right to initiate complaints before the ECJ would be especially important in enabling trade unions to challenge measures affecting fundamental trade unions rights, or using the threat of litigation to influence negotiations over EU initiatives or Member States’ action. The currently narrow access to the ECJ through direct complaints under Article 230 (ex 173) of the EC Treaty is under review. An opportunity is offered by the proposed changes to judicial structure in the Treaty of Nice.

The Charter has the potential to translate political conflicts into legal channels. This may be less than welcome to some. On the other hand, ECJ decisions upholding the Charter can provide public legitimation of EU fundamental rights in an EU where legitimacy is a valuable, because scarce, commodity. The Charter, through the ECJ, has a strong potential to legitimise structures, policies and actions taken in the pursuit of European integration.

2.2. Legitimising governance structures in social and labour policy

The exercise of EU competences in social and labour policy requires legitimate governance structures. The Charter can play a major role in building the legitimacy of these governance structures. The Charter’s fundamental rights ascribe legitimacy to collective bargaining and collective action, and information and consultation on a wide range of issues at the level of the enterprise. Affirming rights to engage in work, vocational training, equal opportunities, and other social and labour standards provides support for arrangements in the European Employment Strategy.

The Charter can be used to legitimise the actors, processes and outcomes of an EU system of industrial relations. One main function of the EU
Charter could be to provide support for the necessary legitimacy of the governance structures of an EU system of industrial relations.

2.3. Legal status of the EU Charter

The Commission expects that the Charter will become mandatory through ECJ interpretation, as part of the general principles of Community law. However, this will not apply to those parts of Charter which are beyond the ECJ's “general principles” case-law, as is the case with some of the social rights in the Charter’s chapters entitled “Solidarity” and “Equality”. It is even more difficult to imagine where social rights require positive action. To rely on the Court’s general principles to sustain the Charter’s trade union, social and labour rights is decidedly risky. A legally binding Charter is probably necessary to secure the social rights in the Charter.

There seems to be a growing consensus that the Charter will be incorporated into the basic Treaty. This raises the question of the status of the Charter in relation to the rest of the Treaty. This issue is highlighted by Article 52(2) of the Charter, which states that Charter rights based on the Treaties “shall be exercised... within [those] limits”. This is to subordinate the Charter to the Treaty. The question is whether it should be the other way: the Treaty should be subordinate to the values of the Charter.

3. A central problem: EU competences and fundamental rights

The central problem is posed by the EU Charter itself in Article 51(2): “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. The problem is that there are no EC/EU powers to promote many Charter rights. To that extent, EC/EU and related Member State activities may fall outside the scope of the Charter. One example illustrates this spectacularly: Article 137(6) of the EC Treaty (post-Nice, Article
137(5)) explicitly excludes the right of association and the right to strike. But freedom of association and the right to take collective action are explicitly guaranteed in Articles 12 and 28 of the Charter.

The paradox is clear: fundamental/universal rights are confronted with limited EC/EU competences. The central problem is the clash between limited EU competences and the EU Charter’s fundamental human rights. If fundamental human rights are subject to competences, it undermines the concept of fundamental human rights. Values elevated by the EU to the status of fundamental human rights are only protected to the limit of EU competences. The EU must ignore fundamental human rights where they comes up against the limitations of its competences.

A number of solutions, alone or in combination, could contribute to a resolution of this problem.

3.1. The ECJ determines competences in light of the Charter

The powers and tasks of the Community and Union provided for in the Treaties may be expanded by the ECJ where these are necessary in order to safeguard Charter rights. For example, a measure adopted by the Community or the Union implementing Charter rights could be upheld where it can be linked with a Charter provision.

3.2. Competences v. objectives

Competences can be extended by the need to achieve Community objectives. Article 2 TEU and Articles 2, 3, 4, 6 EC could be amended to include, among the objectives of the EU, promoting the rights in the Charter. A new article could be modelled on Article 308 (ex 235) of the Treaty: “If action by the Community should prove necessary to [guarantee the rights provided in the EU Charter], and this Treaty has not provided the necessary powers, the [EU institutions] shall take the appropriate measures”.

European labour law and the EU Charter of Fundamental Rights
3.3. Dynamic subsidiarity

Subsidiarity is not an absolute and exclusive allocation of competence. If one level is unable to adopt a measure, the competence is to be exercised at another level. Dynamic subsidiarity requires intervention either at Member State or at EU level. The Charter provides a catalyst for application of the dynamic subsidiarity principle. Failure to exercise competence at one level (EU or Member State) requires action at other levels. The Charter mandates action by the Community or the Member States when one or the other fails to implement the fundamental rights guaranteed by the Charter.

3.4. Horizontal subsidiarity

Again, subsidiarity does not mean an exclusive allocation of competence to EU or the Member States. For example, rather than the EC or the Member States adopting measures concerning trade union rights or labour standards, this competence could be exercised by the social partners. However, if the social partners are unable to adopt measures as a result of the intransigence of one side, competence should be exercised at another level.

The horizontal subsidiarity principle is particularly relevant to Chapter IV of the Charter, entitled “Solidarity”. In Article 1 of the TEU, the first paragraph reflects the principle of subsidiarity. The second paragraph of Article 1 TEU explicitly refers to the principle of solidarity. The concepts of subsidiarity and solidarity are linked in Article 1 TEU. This points to horizontal subsidiarity to implement the solidarity rights in the Charter.

The social dialogue grants the social partners a role in social policy which is open-ended, unlimited even by the competences outlined in Article 137, in order to achieve the objectives of Article 136. The Treaty grants the social partners extensive competences when acting through the social dialogue.
Subsidiarity can be interpreted to promote the implementation of the Charter by the EU institutions or the Member States (vertical subsidiarity), or, where appropriate, as in Chapter IV of the Charter, by the social partners (horizontal subsidiarity). The Nice Declaration made explicit the desire for a more precise delimitation of competences in accordance with subsidiarity. This could be done by a clear definition of the role of horizontal subsidiarity in implementing the Charter.

4. Democracy, legitimacy and horizontal subsidiarity

Incorporation of the Charter into the Treaties is unavoidably linked to the question of EU competences. The Treaty needs to reflect the values of the Charter, and should be amended to accommodate the Charter. Incorporation of the Charter is tied to the reorganisation and revision of the Treaties, and this means expansion of EU competences to accommodate Charter rights.

However, a tension exists between the potentially vast expansion of EU competences to accommodate all EU Charter rights, and the alleged democratic deficit of the EU. Some, if not most Member States are probably unwilling to give the EC institutions these new powers and tasks. How can an expansion of EU power be aligned with institutional changes designed to enhance the democratic legitimacy of the mechanisms for the application of these new powers?

One proposal is to reduce this tension by reinforcing horizontal subsidiarity, the exercise of the new powers and competences of the Union through the action of the social partners. The European social dialogue is already charged with competences including many of the trade union, social and labour rights in the EU Charter. The European Employment Strategy encompasses other such rights and is stated to rely heavily upon the social partners. The legitimacy of the new competences needed to implement Charter rights at EU level is reinforced by horizontal subsidiarity through the social partners.
This links the EU Charter to the broader question of the EU constitution, which includes the idea of a comprehensive revision of the Treaties. The Laeken Declaration includes questions going far beyond the Charter. The Charter becomes part of an overall institutional architecture being developed in the Convention on the Future of Europe.

The EU social partners’ joint declaration before the Laeken summit implies a wider ranging debate, which includes revisiting the Treaties and not only the status of the Charter. Reorganisation and revision of the Treaties means rethinking the institutional architecture of the EU system of industrial relations, including the EU social dialogue, the European Employment Strategy, transnational co-ordination of collective bargaining and the macro-economic dialogue.

An EU system of industrial relations would relieve the pressure on EU institutions. It would reinforce the legitimacy of new EU competences need to implement the Charter at EU level. The Charter and an EU system of industrial relations can be mutually reinforcing.

5. Conclusion: Negotiating the EU Constitution

There is a potential gap between the fundamental rights guaranteed by the EU Charter and the limited competences of the EU. The Intergovernmental Conference can amend the Treaty. The current Convention should recommend revision of Treaties to bring them in line with the Charter.

The Charter is one element in the negotiations in the present Convention over the future constitution of the EU. The trade union, social and labour rights of the Charter were the source of most of the disputes and objections from some Member States in the previous Convention. These objections will continue in the negotiations over the EU constitution in the present Convention.
The Charter could become part of an overall package deal in the coming negotiations in the Convention. For example, one approach would be to negotiate separation of some of the Charter rights, those which were resisted by some Member States, on condition that these rights must be implemented, given legal effect, through an EU system of industrial relations, including the social dialogue and a reformed European Employment Strategy. The model could be the Agreement of 31 October 1991 between the ETUC, UNICE and CEEP. This expanded EU competences, but gave the responsibility for implementing them to the social partners through the social dialogue - horizontal subsidiarity.

Incorporation of the Charter into the Treaty is part of a constitutional negotiating package including reform of the EU social dialogue, the European Employment Strategy and the open method of co-ordination, transnational co-ordination of collective bargaining and the macro-economic dialogue. This will require new institutions involving the social partners, new processes learning from past experience, and, hopefully, better outcomes. Incorporation of the EU Charter into the Treaty is part of a constitutional architecture which takes account of the specific nature of the trade union, social and labour rights in the Charter.
Notes on contributors

Brian Bercusson
is Professor of European Social and Labour Law at King’s College, University of London, and Guest Professor at the Swedish National Institute for Working Life in Stockholm. He is the author of European Labour Law (Butterworths, London, 1996). He is Director of the European Law Unit of Thompsons, Solicitors, London, and co-ordinates the Research Group on Transnational Trade Union Rights for the European Trade Union Institute (ETUI) in Brussels.

Thomas Blanke
Born 1944. Professor of law. Since 1972 member of the editorial board of Kritische Justiz. 1975 Professor of labour law at the Carl von Ossietzky university in Oldenburg (Germany), working since 1981 in the humanitarian sciences, economic and labour sciences departments. 1991/1992 Vice-president of the University. Member of the advisory board of the Hanse-Wissenschaftskolleg, a foundation belonging to the Länder of Lower Saxony and Bremen. President of the cooperation committee of the trade union school of the university of Oldenburg.

Niklas Bruun
Stefan Clauwaert

Born 1970 in Belgium, graduate in social law, university of Ghent (Belgium); researcher at ETUI since October 1995 in the fields of EU and comparative labour law as well as EU social dialogue; since 1996 Coordinator of the ETUC Trade Union Legal Experts Network NETLEX; Legal Advisor to the ETUC in EU social dialogue negotiations on fixed-term work, temporary agency work and telework; ETUC Advisor to the Governmental Committee Social Charter Council of Europe; (board) member of several international and European networks of labour law lawyers.

Antoine Jacobs


Yota Kravaritou

Born 1944; Professor of European Law, European University Institute, Florence and faculty of law, University of Thessaloniki. Research interests: labour law and social policy, European law and equality between men and women (gender studies).
Isabelle Schömann

Graduate of the University Paris I Panthéon-Sorbonne (France) in labour and social law. Former research fellow at the social science research centre in Berlin (WZB - Germany) and since May 2002 research officer at the ETUI (Belgium). Research interests: comparative and European labour law, collective labour law, lifelong learning, social security systems.

Bruno Veneziani

Born 1941, professor of labour and comparative trade union law, University of Bari. Research interests: comparative and European labour law and social policy, employment contracts and collective labour law.

Christophe Vigneau

PhD from the European University Institute (Florence), is Lecturer at the University of Paris I, Panthéon-Sorbonne (France). He specialises in Labour Law, European Community Law and Contract Law.