

The EU Charter of Fundamental Rights and its Impact on Labor Law: a Plea for a Proportionality-Test “Light”

Herman Voogsgeerd*

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* PhD., Business and Labor law, University of Groningen.

Abstract

Traditionally, fundamental human rights have occupied an important place in labor law. The ILO constitution of 1919 focuses, for example, on the right of freedom of association. Subsequent ILO documents stress other fundamental rights such as the right to non-discrimination in the field of labor. The fundamental rights of the worker did begin to get some attention in the EU too, especially in non-binding documents such as the Community Charter of the Rights of the Worker from 1989. Since the entry into force of the Treaty of Lisbon in 2009, the Charter of Fundamental Rights introduced at the summit in Nice is legally binding to the same extent as the EU Treaty itself. The Charter includes fundamental rights in the field of labor law under the heading ‘solidarity’. In this article two basic questions will be addressed. The first question will address the ‘old’ issue of the clash between fundamental (labor) rights and the four economic freedoms of the EU, which are seen by the ECJ as of fundamental nature as well. Since the seminal cases of *Viking* and *Laval*, a lot has been written about this theme by both European and labor lawyers. I will not revisit the literature that has been written about these cases, but the more dogmatic issue of a (potential) clash between the four economic freedoms and the fundamental rights is still in need of clarification. The second question is whether the fundamental human rights will get a more important place in the case law of the European Court of Justice now that the Charter of Fundamental Rights is of binding character, or, will there be just a continuation of the already developed relationship between fundamental freedoms and rights or between two different kind of fundamental human rights? I will focus here on case law in the field of labor law. The article will finish with a plea for a proportionality test ‘light’ in order to limit the interference of EU law with the essence of fundamental rights.

A. Introduction

Human rights have gradually assumed increasing importance in EU law (considered to be an autonomous legal order since the seminal decisions by the European Court of Justice (ECJ) in the cases *Van Gend & Loos* (26/62) and *Costa/ENEL* (6/64)¹ in the first half of the 1960s). First they

¹ [1963] ECR 1 and [1964] ECR 585 respectively.

were considered to be a part of the constitutional traditions of all the Member-States. Through that comparative law route, they became general principles of law and thereby an independent source of European law. The coexistence of a separate European Convention on Human Rights (ECHR) with a court in Strasbourg might cause problems in the near future. The entering into force of the EU-Treaty of Lisbon of December 2009 can either solve or exacerbate these problems. Article 6 Treaty on European Union (TEU)² considers the provisions in the Charter of Fundamental Rights of the EU of 2000³ to have ‘the same value’ as the Treaty itself. The fundamental rights of the ECHR are treated as general principles of law of the Union in article 6, paragraph 3 TEU.

In European labor law, the ECJ has given the general principles of law an extremely prominent place. We only have to consider cases such as *Mangold*.⁴ Some fundamental rights were already well-established from the very beginning. Non-discrimination on the basis of nationality and equal pay between men and women were the most important examples to be found already in the original EEC Treaty⁵ of 1958. For these rights there was no need to resort to general principles of law. The same is true for the so-called four economic freedoms.

We will study the ‘fundamental’ nature of the four economic freedoms first. Because of their ‘fundamental’ nature, the economic freedoms interact with human rights, which are also of a fundamental nature. What is the meaning of the term ‘fundamental’ in this respect? Do there exist several layers of ‘fundamental-ness’?⁶ Second, the effect of the entry into force of the Lisbon Treaty with respect to fundamental rights will be studied. Is the role of the Charter of Fundamental Rights in the case law of the ECJ now different? Is there a quiet evolution in EU law or is there something going

² *Consolidated Version of the Treaty on European Union*, 13 December 2007, O.J. C 83/13 (2010) [TEU].

³ *Charter of Fundamental Rights of the European Union*, 7 December 2000, O.J. C364/1 (2000) [ECHR].

⁴ Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981.

⁵ *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11.

⁶ T. Kingreen, ‘Theorie und Dogmatik der Grundrechte im europäischen Verfassungsrecht’, 31 *Europäische-Grundrechte Zeitschrift* (2004) 19, 570, 572 talks about the fundamental economic freedoms as a ‘second layer of fundamental rights’. This, however, raises the question of the hierarchy between the two categories of rights. Does second mean second place?

on that has to be analysed more rigorously?⁷ Does the now binding Charter add something or is it only a codifying instrument? We will study this by analyzing case law in the field of European labor law since December 2009 in which the provisions of the Charter have been explicitly mentioned. I will end this contribution with a plea for a proportionality-test ‘light’ in order to protect fundamental human rights.

B. The ‘Fundamental’ Nature of the four Economic Freedoms and the Human Rights in the Charter

The four economic freedoms are of a fundamental nature. They are the pillars of the EU. Without these freedoms the internal market would become a fiction, as would the realization of an area without internal frontiers (Article 26 (2) TFEU).⁸ In the case-law of the ECJ the fundamental nature of the four freedoms had gradually been established even before 1985, when the Single European Act was concluded in which ‘the area without internal frontiers’ was inserted in the Treaty. An example is the case *Dassonville* from 1974 and also *Casati* from 1981 is important in this respect.⁹ What does the notion ‘fundamental’ mean in this respect? Is the notion used in the same way as in ‘fundamental (human) rights’? Although both might overlap, a difference in focus will without doubt exist.¹⁰ Fundamental human rights are those human rights that are linked to the basic dignity of human beings. Fundamental freedoms are primarily linked to the realization of the internal market. Fundamental freedoms are functional rights, they are considered to serve a certain purpose. The ECJ sometimes even refers to economic freedoms as fundamental principles of the Community itself.¹¹ Sauter and Schepel submit that the word ‘fundamental’ has only been used

⁷ As J. Morijn expects per definition in his article ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’, 12 *European Law Journal* (2006) 1, 15.

⁸ *Consolidated Version of the Treaty on European Union*, 13 December 2007, O.J. C 83/13 (2010) [TEU].

⁹ Case 8/74, *Public Prosecutor v. Benoit and Gustave Dassonville*, [1974] ECR 837 and Case 203/80, *Criminal proceedings against Guerrino Casati*, [1981] ECR 2595 respectively.

¹⁰ C. Walter, ‘Geschichte und Entwicklung der Europäischen Grundrechte’, in D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 3rd ed. (2009), No. 42.

¹¹ As for example in Case 220/83, *Commission v. France*, [1986] ECR 3663.

by the ECJ to “forcefully impose the internal market rules upon the member-states”.¹²

Nevertheless, in the structure of the Treaty the four economic freedoms have an important role. The four freedoms had a prime stage at the beginning of the EC-Treaty.¹³ Fundamental human rights have also had a place even earlier in that Treaty, as in Article 6 TEU. In the Lisbon-Treaty this has changed. In Article 6 (1) of the EU Treaty, the same legal value as the Treaties is given to fundamental human rights in the Charter. Only in part III of the Treaty on the functioning of the EU do we find the fundamental freedoms. The first two parts of the TFEU concern the general principles and non-discrimination including European citizenship. This position of the internal market rules in the new Treaty is not spectacular. The internal market is only qualified as one of the ‘policies’ of the EU. It is nowhere established in the text of the Treaty that these freedoms are ‘fundamental’.

This implies that the main driver behind the fundamental-ness of the four economic freedoms was and still is the ECJ. It is submitted that the word ‘fundamental’ has been introduced by the ECJ to enlarge the scope of the Treaty.¹⁴ Ehlers is of another opinion in this respect. In no situation do the fundamental freedoms operate as the creation or widening of a competence.¹⁵ The four freedoms consist of broad principles and narrow exceptions, as if the adage *in dubio pro communitate* is still relevant. The wider the scope of the principles, the more the Member-States will be forced to justify their legislation and administrative measures. Proof of this development of the widening scope of the fundamental economic freedoms is that these freedoms are also applied to sensitive policy issues like direct taxation, labor law and the law concerning social security. Even in case the Union has no competencies in an area, the four freedoms are still applied. The Member-States have a certain discretionary freedom to make policies where they still have competencies. Nevertheless, these competencies must be fulfilled within the framework of the four economic freedoms. Ehlers is therefore not completely right in that the four freedoms cannot enlarge the

¹² W. Sauter & H. Schepel, *State and Market in European Union law: the public and private spheres of the internal market before the EU Courts* (2009), 11.

¹³ *Treaty Establishing the European Community*, 7 February 1992, 1 Common Market Law Review (1992) 573 [ECT].

¹⁴ As Sauter and Schepel submit, *supra* note 12.

¹⁵ D. Ehlers, ‘Die Grundfreiheiten der Europäischen Gemeinschaften’, in D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten* 3rd ed. (2009), 230, No. 39.

scope of the Treaty. The competencies that the Member States still possess will have to be implemented and enforced taking into account the four freedoms. It is as if an additional layer of oversight is put on the activities of the Member-States and economic and other operators. In this way, the four economic freedoms have become a kind of superstructure. There is still a discretionary freedom for the Member-States, but it is subject to limits. In this respect Rigaux and Buelens use the term 'infralaw': but for free movement of persons, which is one of the four freedoms itself, European labor and social security law are infralaw. They submit that there is a hierarchical relation between the internal market and competition law on the one hand and labor and social security law on the other hand.¹⁶ The first category is more important. In my view it is certainly possible that through this category European labor and social security law are 'reframed' by the ECJ. This is not the same as a clear hierarchy between different areas of the law. So the freedoms must be of a fundamental nature if they can reframe other areas of law. That even minor restrictions of the economic freedoms are prohibited also proves the fundamental character of the freedoms.¹⁷ In this respect the ECJ has always refused to accept a *de minimis*-exception in the area of the four freedoms. This exception, derived from competition law, allows small effects on competition not to be taken into account. Small or only potential effects on free movement of goods or services caused by a national measure does not prevent the measure to be caught by the *prima facie* ban on all discriminatory or restrictive measures.¹⁸ Any kind of infringement or inhibition is sufficient to trigger the application of the freedoms.

The *de minimis*-exception is often confused with the lack of a sufficient cross-border element. If there is no cross-border element, there is no free movement at all. In that situation, there is an insufficient link to one of the freedoms. The link is too uncertain and too indirect to be caught by the Treaty provisions on free movement.¹⁹ The *de minimis*-exception is a

¹⁶ M. Rigaux & J. Buelens, 'Can a Stronger Anchoring of European Labour Law and Social Security Law to Community Law Guarantee a Sustainable European Social Model?', in F. Pennings *et al.* (eds), *Social Responsibility in Labour Relations. European and Comparative Perspectives. Liber Amicorum for Teun Jaspers* (2008), 26.

¹⁷ Sauter & Schepel, *supra* note 12, 11.

¹⁸ See for example case C-67/97, *Criminal proceedings against Ditlev Bluhme*, [1998] ECR I-8033.

¹⁹ See for example case C-379/92, *Criminal proceedings against Matteo Peralta*, [1994] ECR I-3453.

quantitative criterion, while the ‘too uncertain, too indirect’ exception is a qualitative criterion.

Even the cross-border element becomes somewhat irrelevant if we study recent case law. Especially concerning (a) free movement of persons or services (where a personal element is at stake) and (b) European citizenship, an element of human rights is involved too. An example is the case of *Angonese*, where the cross-border element was quite thin.²⁰ Angonese was an Italian who was required to present a specific certificate of German language proficiency. This certification could only be obtained in Italy in order to participate in a vocational training course leading to a job with a bank in Italy. But he had obtained certification much earlier in Vienna, Austria. The ECJ seems to focus here on those who are generally in the same situation as Angonese. It is only a coincidence that he is an Italian. Any other European citizen moving to another Member State could be confronted with the same kind of trouble as Angonese had in Italy. Especially in the areas of free movement of persons and European citizenship, the convergence with fundamental human rights is significant.²¹

While the four freedoms have been interpreted by the ECJ in an extremely broad and comprehensive manner from the 1970s onwards, the attention to fundamental human rights is of a later date. The fundamental nature of human rights has been finally established in the old EU-Treaty and the Lisbon-Treaty. The origin of protection of human rights within the EEC has been rather difficult, because the fundamental human rights were not mentioned in the original Treaty. Only through a method of comparative law, by looking at the national constitutional traditions of the Member-States, the ECJ was able to apply fundamental human rights in the early years of the EEC. The national constitutional traditions of the Member-States were transferred to the European level through the form of general principles of law. General principles of law have always played a major role in the development of Community law, probably due to the rudimentary stage in which the legal order of the Community was at that time. In the *Wachauf* of 1989 and *ERT* cases of 1991 the role of fundamental human rights (in the form of general principles of law) was that the Member-States were bound to adhere to these principles when they implemented

²⁰ Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

²¹ See also Kingreen, *supra* note 6, 572. European citizenship implies free movement of persons without an economic context.

Community law.²² Moreover, the principles fulfilled a role in testing whether a restrictive or discriminatory measure could still be objectively justified.

This second role of the principles is a way to solve potential clashes between an economic freedom and a fundamental human right. This implies that a solution to the clash, *de lege lata*, is only possible at the stage of the justification and in order to arrive at that stage, the existence of a *prima facie* restriction to one of the economic freedoms has to be established. *Prima facie*, at first face, is a notion often used in law. Its precise meaning is, however, disputed. According to Dammann it is a rule of argumentation.²³ A *prima facie* restriction implies a general inclination of the measure to restrict one of the economic freedoms. This implies that the measure is contrary to the Treaty, unless individual and less general arguments specific to the case at hand lead to another outcome. This view is better than the one suggesting that the *prima facie* test is only an intermediate test and that the real test is at the justification stage. The *prima facie* test only focuses on the general inclination of a rule; it only takes into account the consequences for the internal market. It is a one-dimensional test. It is at the level of the subsequent justification stage that all the facts of the case become relevant, including fundamental human rights. And during that stage the proportionality principle fulfills a crucial role.

The only exception is the situation where a restriction to a fundamental human right itself hinders an economic fundamental freedom. An example is the case of *Carpenter* where a British service-provider showed that his provision of services within the Community was dependent on his family life.²⁴ A refusal of the British government to let his wife of Filipino nationality stay in the UK became thereby a condition under which he could exercise a fundamental economic freedom. The right to a family life recognized in article 8 ECHR became linked to the provision of services in the Community.

The development of European citizenship is another field in which human rights and economic freedoms could become reconciled at the first

²² Cases 5/88, *Wachauf v. Germany*, [1989] ECR 2609 and C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, [1991] ECR I-2925 respectively.

²³ J. Dammann, *Materielles Recht und Beweisrecht im System der Grundfreiheiten* (2007), 210.

²⁴ Case C-60/00, *Carpenter v. Secretary of State for the Home Department*, [2002] ECR I-6279.

prima facie level. The *Zambrano* case²⁵ is an example of this. Without having utilized the economic freedoms within the EU, Belgium could not refuse the right of residence and the right to work and a work permit to a Colombian father of a child who had obtained Belgian citizenship and therefore became *ipso facto* an EU citizen. This outcome is the ultimate consequence of the point of view of the ECJ that Union citizenship is the central capacity of the subjects of the Member States. Apart from this citizenship, Article 8 ECHR must have played a role.

This situation is exceptional though. For all other situations the original framework developed by the ECJ will still be used. Fundamental human rights will have their full weight only during the second justification stage. This way of testing seems due only to the fact that the fundamental freedoms were developed earlier in Community law than the fundamental human rights as general principles of law. Now that the ECJ has such a huge experience with interpreting the four economic freedoms, the interpretation of fundamental human rights will have to be adapted in one way or another to this huge experience. This implies that necessity and proportionality are extremely important principles to interpret fundamental human rights as well. There are different ways in which to apply the proportionality test. The suitability or appropriateness test focuses on the effectiveness of the measure in attaining its objective. The necessity test focuses on the question whether the measure is really necessary and whether there is an alternative that is less severe for the economic freedoms. The most intrusive test is the proper proportionality test: this involves a balancing of conflicting interests.²⁶ It is submitted here that fundamental human rights should not be subjected to the most intrusive test. The ECJ should use some self-restraint in this respect.

An interesting example in the area of labor law is the *Schmidberger*-case.²⁷ Demonstrations in Austria blocked imports and thereby the free movement of goods. The Austrian government did not immediately intervene to end the demonstration, because it wanted to pay respect to fundamental rights such as the freedom of assembly and the freedom to expression. The ECJ had to reconcile these fundamental rights with the free movement of goods, which was characterized again as having a 'fundamental role [...] in particular for the proper functioning of the internal

²⁵ Case C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, [ECJ 8 March 2011] (Court decision not yet reported).

²⁶ See in this respect J.H. Jans *et al.*, *Europeanisation of Public Law* (2007), 152.

²⁷ Case C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659.

market'.²⁸ The two fundamental human rights at stake are not absolute and therefore it must be shown whether the restrictions to the free movement of goods are proportionate in relation to their social purpose. In this case they were: the demonstrations were approved, alternatives were considered beforehand by the Austrian authorities, traffic was deviated, etc. The rights expressed through the demonstrations could be safeguarded. In the earlier case *Commission v. France* the outcome was different.²⁹ The French government did not do anything to alleviate the consequences of a strike on imports to France. Governments have a positive duty to realize the freedoms. Although other parties, such as the collective partners, may implement directives or start a strike, it is the Member-State that is responsible for the actual implementation and enforcement of EU law.

These two cases have been criticized firmly in the literature. The road would be open now for the degradation of fundamental human rights such as the right of assembly. Fundamental human rights would be lowered to the level of economic efficiency arguments and fundamental rights would only become a last resort, because means that are less restrictive to the free movement of goods would prevail.³⁰ On the other hand, the ECJ makes an explicit distinction in *Schmidberger* between fundamental rights in the ECHR that allow a restriction, such as the freedom of assembly, and others such as torture, that do not permit a derogation.³¹ Case law of the Strasbourg Court of Human Rights on certain fundamental rights will probably not change this³². That Court interprets fundamental human rights, whereas the ECJ tries to balance economic freedoms and fundamental rights. In the EU system both kinds of rights are comparable but not equal. Both are directly

²⁸ *Id.*, para. 60.

²⁹ Case C-265/95, *Commission v. France*, [1997] ECR I-6959.

³⁰ See for example J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law', 12 *European Law Journal* (2006) 1, 15.

³¹ *Schmidberger v. Austria*, *supra* note 27, para. 80.

³² The case of the European Court of Human Rights in *Demir and Baykara v. Turkey* [2008] ECHR 1345, in which the right of collective bargaining is qualified as an 'essential element' of the right to freedom of association in Art. 11 ECHR, led to comments in the literature. K.D. Ewing and J. Hendy argue that this might have consequences for the ECJ case law as well. See their 'The Dramatic Implications of *Demir and Baykara*', 39 *Industrial Law Journal* (2010) 1, 2, 40. I doubt this, because in *Demir and Baykara* there was an absolute prohibition on forming trade unions imposed on civil servants in Turkey and the right of those unions to participate in collective bargaining. In the ECJ case law there is not often an absolute prohibition on the freedom of association, the right to collective bargaining or the right to strike. These rights are 'only' balanced with the economic freedoms.

effective in the legal orders of the Member-States and citizens are able to refer to these freedoms before their national courts. To qualify the four freedoms as *lex specialis* of the fundamental human rights, as Ehlers seems to do, is in my opinion one step too far.³³ Normally the *lex specialis* has preference to the *lex generalis*. Ehlers is, however, right in arguing that the fundamental human rights receive a Europe-friendly interpretation by the ECJ. They are reframed. The fundamental economic freedoms are about creating Europe. That is their specific aim. That these freedoms should be completely separated from fundamental human rights, as Kingreen suggests vehemently,³⁴ is difficult to uphold. Morijn thinks that the approach of the ECJ in reconciling freedoms and human rights “will have to fundamentally change” in case these human rights get a place in the new EU Treaty.³⁵ I doubt whether Morijns’ argument is right. I submit that the way the ECJ tests fundamental rights is not that different before and after the entering into force of the Lisbon-Treaty in December 2009. Will the Charter of Fundamental Rights really be treated as a new element, now that the ECJ has more than 60 years of experience in adjudicating cases? Now that the Lisbon Treaty is in force, let us have a look at some of the case law of the ECJ.

C. Testing of Fundamental Human Rights in European Labor Law Before the Entry into Force of the Lisbon-Treaty

I consider the main cases in the field of (European) labor law, in which fundamental human rights as general principles of law have been used as a source of inspiration, to be the cases *UK v. Council* and *BECTU*.³⁶ In the first case the UK government complained about the then new working time directive 93/104/EC,³⁷ which the other Member-States in the Council voted for with qualified majority voting, because the legal basis of working conditions was used. It considered the legal basis of employment rights to

³³ As Ehlers does. See Ehlers, *supra* note 15, 217- 218, No. 18. See also chapter 14 of D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 448-449, No. 13.

³⁴ Kingreen, *supra* note 6, 574-576.

³⁵ Morijn, *supra* note 30, 40.

³⁶ Cases C-84/94, *United Kingdom v. Council*, [1996] ECR I-5755 and C-173/99, *The Queen v. BECTU*, [2001] ECR I-4881 respectively.

³⁷ Council Directive 93/194/EC, OJ 1993 L 307/18.

be a more appropriate legal base, as working times and the maximum working week concern also and mostly workers' rights. Use of that legal base would require unanimity of votes within the Council. The Commission, however, maybe for tactical reasons, preferred the legal base concerning working conditions. A qualified majority of Member-States supported the Commission in this. The ECJ was of the opinion that working conditions should not be interpreted in a narrow manner. A limitation on the number of working hours per week (and day) and sufficient hours of rest is perfectly capable of being related to working conditions. The ECJ opted for a Scandinavian view of working conditions and also mentioned an international treaty concluded by all the then Member-States within the framework of the World Health Organization (WHO). Although fundamental human rights were not mentioned explicitly in this case, the manner of legal finding of the ECJ is absolutely comparable with situations concerning a fundamental human right. The treaty of the WHO was referred to in the preamble of the directive.

In *BECTU*, where the same directive had to be interpreted, the ECJ had recourse to another document in order to buttress the right to paid annual leave. In its national law, the UK limited the scope of the entitlements by introducing a minimum threshold of employment with the same employer for thirteen weeks. *BECTU*, a trade union in the broadcasting sector, did not accept this piece of legislation and submitted a breach of the directive. In its reasoning, the ECJ focused first on a grammatical or textual analysis of Article 7(1)1 of directive 93/104. The provision contains a clear and precise obligation to a specific result, paid annual leave of at least four weeks. Because the directive also leaves some room for national legislation and practice, the ECJ also had to take the purpose and the system of the directive into account. For this, the legal basis and the preamble of the directive need to be studied in detail. The directive aims to lay down minimum requirements. Article 17 of the directive allows for derogations, but only with respect to those explicitly mentioned in that provision. The ECJ also refers to the Community Charter of the Fundamental Social Rights of workers of 9 December 1989³⁸. On its own, the reference would be strange, because this Charter was deliberately meant to be a non-binding text by the government leaders of that time. The then British government of Margaret Thatcher refused to allow any kind of binding character with respect to that text. The Charter was, however,

³⁸ *The Queen v. BECTU*, *supra* note 36, para. 39.

mentioned explicitly in the preamble of directive 93/104. This fact was sufficient for the ECJ to take points 8 and 19 of that Charter into account. Those points refer to the enjoyment of sufficient health and safety conditions by employers and the entitlement to paid annual leave. Furthermore, the ECJ considers the right to paid annual leave to be “a particularly important principle of Community social law”.³⁹ The text of directive 93/104 is sufficiently precise, derogations are allowed but within clear limits, and more favorable national provisions are allowed because of the favor-principle which is embedded in almost every European labor law directive.

The precise role of the Community Charter in this case is not clear. It seems only to be an additional text of declaratory nature. The scheme and text of the directive is sufficiently precise in order to support the outcome of the case. Probably the Charter had some role in the ECJ’s framing of the right to paid annual leave as “a particularly important principle of Community social law”. The possibility of abuse by employers in the UK seems to be important as well. They could simply hire employees for less than thirteen weeks to evade the duty to allow paid annual leave.⁴⁰ The part in the preamble of the directive that the improvement of workers’ health and safety should not be subordinated to purely economic arguments is as important as the reference to the non-binding Charter.

Just like the Community Charter of 1989, the EU Charter of Fundamental Rights of 2000 was originally not meant to have any binding effect. Just as with the Community Charter, this did not prevent the ECJ from referring to the EU Charter in its case law. In the famous *Laval* case the right to take collective action was at stake.⁴¹ The ECJ made reference to several legal texts: the European Social Charter of 1961, Convention no 87 of the ILO, the Community Charter of 1989, and the Charter of Fundamental Rights of the EU of 2000. Those texts seem to have the same status, but the ECJ simply refers to Article 28 of the Charter of 2000. In this provision, the right to collective negotiations and the right to take collective action is seen as a fundamental right, but nevertheless only protected “in accordance with Community law and national law and practices”.⁴² This implies, according to the ECJ, that these rights may be subjected to

³⁹ *Id.*, para. 43.

⁴⁰ *Id.*, para. 51.

⁴¹ Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, [2007] ECR I-11767.

⁴² *Id.*, para. 90-91.

restrictions. They are therefore not absolute, as such restrictions are found in many national constitutions.

The use of fundamental human rights in the *Viking*-case is not that different.⁴³ Although this case was related to freedom of establishment and one might expect a difference in the approach of the ECJ towards establishment in comparison with free movement of services, this difference is non-existent at least with respect to the role of the rights of collective bargaining and collective action. This implies that fundamental human rights are not completely outside the scope of the EC-Treaty, they only are seen as ‘legitimate interests’ which may justify a restriction on other obligations in that Treaty. The confrontation between the fundamental freedoms and fundamental human rights takes place only at the justification stage. The Charter of Fundamental Rights of the EU of 2000, which since the 1st of December 2009 has had a legally binding status, has been referred to several times in ECJ decisions. Even before December 2009 the Charter was used in the case law of the ECJ. It has increasingly become a competitor for the Community Charter of Fundamental Social Rights of Workers of 1989, although this last text is still mentioned explicitly in article 151 TFEU. This provision, concerning the legal base for the social policy of the EU, uses rather vague wording. Weiss rightly criticizes the words “having in mind”, and asks himself whether this is only ‘a point of orientation’ for the EU legislator in making labor law directives.⁴⁴ A direct and binding application of a provision in a Charter is another matter.

An important case after the 1st of December 2009, in which the facts, however, arose far before that date, is the case of *Kücükdeveci*.⁴⁵ A German provision on the termination of the employment relationship by the employer contained a threshold: periods prior to the completion of the employee’s 25th birth year are not to be taken into account for the calculation of the notice period. Is this a case of age discrimination? The referring German court particularly pointed to primary EU law and directive 2000/78⁴⁶. But the ECJ, following its earlier case law⁴⁷, holds “that the

⁴³ Case C-438-05, *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779.

⁴⁴ M. Weiss, ‘The politics of the EU Charter of Fundamental Rights’, in B. Hepple (ed.), *Social and Labour Rights in a Global Context. International and Comparative Perspectives* (2002), 74.

⁴⁵ Case C-555/07, *Kücükdeveci v. Swedex GmbH & Co. KG*, [2010] ECR I-365.

⁴⁶ Council Directive 2000/78/EC, O J 2000 L 303/16.

⁴⁷ See especially *Mangold* Case, *supra* note 4.

directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States”⁴⁸. Here, the focus is not on primary or secondary EU law together with the fundamental freedoms, but rather the emphasis is placed on international instruments and constitutional traditions together with the fundamental freedoms.

What is the purpose of this consideration of the ECJ? Is the purpose that the general principle of EU law at hand did already exist, and that details concerning the implementation of a directive are only more of a technical matter? Is the general principle already there, and the directive is only its specific expression? The ECJ refers to Article 21(1) of the EU Charter.⁴⁹ Herein age discrimination is prohibited. An exception is not given in that provision as in the case of for example Article 28 of the Charter, dealing with the right of collective bargaining. This provision concerns freedom of association and the right of social action which has to be exercised in accordance with EU law and the national legislation and practices. The implication of *Küçükdeveci* is that a directive such as directive 2000/78 is important to determine whether a particular case falls within the scope of EU law. The principle of non-discrimination already existed before the directive 2000/78. The fundamental human rights in the Charter, however, cannot decide their scope by themselves. Here, other legal texts such as directives are of great importance and help for the ECJ to decide its cases.

D. The Role of the EU Charter of Fundamental Rights after the Entry into Force of the Lisbon Treaty (1 December 2009)

I. Category I: Only a Supportive Role for the Fundamental Rights

Several provisions of the EU Charter have been cited in many cases in the field of European labor law. There is an increasing tendency to invoke these provisions. In labor law, the following sub-fields are of importance in

⁴⁸ *Küçükdeveci* Case, *supra* note 45, para. 20.

⁴⁹ *Id.*, para. 22.

this respect. Most cases (including pending cases) concern the working time directive and the right to paid annual leave.⁵⁰ Age discrimination is a second important topic.⁵¹ Collective bargaining is also important.⁵² Other topics are equal treatment on the basis of sex⁵³ and effective remedies for employees in the situation of transfer of undertaking.⁵⁴

In *Rosenblatt*⁵⁵ the EU Charter itself was not mentioned. Age discrimination and the possibility of regulating the retirement age by collective bargaining are both covered. Therefore this case is important. Is a clause in a collective labor agreement whereby the labor contract of a person that has reached the age of 65 is automatically terminated compatible with directive 2000/78? The ECJ refers to Article 16 (b) of that directive which forces the Member States to declare clauses in (collective) contracts that are contrary to the principle of equal treatment null and void or to amend them. This provision implies, according to the ECJ, that an effective review of collective agreements by the (national) courts is a necessity. The referring German court in *Rosenblatt* expressed doubts that the aim in the collective agreement was a legitimate one. In its answer, the ECJ considered the right to bargain collectively to be a fundamental right⁵⁶ and found that the wide discretion for the social partners in Germany had been used in a reasonable

⁵⁰ Case C-350/06, *Schultz-Hoff v. Deutsche Rentenversicherung Bund*, [ECJ 20 January 2009] (Court decision not yet reported); Cases C-159/10 and C-160/10, *Fuchs and Köhler v. Land Hessen*, [ECJ 21 July 2011] (Court decision not yet reported); case C-155/10, *Williams and Others v. British Airways plc.*, [ECJ 14 September 2011] (Court decision not yet reported); case C-194/11, *Natividad Martínez Álvarez v. Consejería de Presidencia, Justicia e Igualdad del Principado de Asturias*, [ECJ 27 April 2011] (Court decision not yet issued); cases C-229/11 and C-230/11, *Heimann and Toltschin v. Kaiser GmbH*, [ECJ 16 May 2011] (Court decision not yet issued).

⁵¹ Case C-236/09, *Association Belge de Consommateurs Test-Achats ASBL and Others v. Conseil de ministres*, [ECJ 1 March 2011] (Court decision not yet reported); case C-45/09, *Rosenblatt v. Ollerking Gebäudereinigungsges. mbH*, [ECJ 12 October 2010] (Court decision not yet reported).

⁵² *Rosenblatt v. Ollerking, id.*; case C-271/08, *Commission v. Germany*, [ECJ 15 July 2010] (Court decision not yet reported); case C-132/11, *Tyrolean Airways v. Betriebsrat Bord der Tyrolean Airways*, [ECJ 18 March 2011] (Court decision not yet issued).

⁵³ Case C-104/10, *Kelly v. National University of Ireland*, [ECJ 21 July 2011] (Court decision not yet reported).

⁵⁴ Case C-108/10, *Scattolon v. Ministero dell'Università e della Ricerca*, [ECJ 6 September 2011] (Court decision not yet reported).

⁵⁵ *Rosenblatt v. Ollerking, supra* note 51.

⁵⁶ In quoting case C-271/08, *Commission v. Germany*, [ECJ 15 July 2010] (Court decision not yet reported).

way. As long as the collective agreement is not contrary to Articles 1 and 2 of directive 2000/78, the German government may even declare that agreement to be of general application nationwide. In this case, the ECJ was respectful of the right to bargain collectively. Anyhow, this freedom seems to be subject to a kind of reasonableness criterion. The discretion of the social partners is not without limits.

In the joint cases *Fuchs and Köhler*⁵⁷ the same directive was interpreted by the ECJ. Here, the EU Charter was mentioned explicitly.⁵⁸ Both *Fuchs* and *Köhler* were civil servants and they wanted to remain in their positions after having reached the age of 65. They requested an interim measure to achieve this purpose. Again, the ECJ focused on the reasonableness and the existence of a legitimate aim for the German legislation whereby civil servants were forced to compulsorily retire at the age of 65. Member States have a large discretion in this respect. They are, however, not allowed to frustrate the prohibition of age discrimination in directive 2000/78. The ECJ then mentioned Article 15 (1) of the EU Charter, which contains the right to engage in work. Senior workers must also be able to participate in economic, cultural and social life. But the right balance between this aspect and opposing interests, such as encouraging recruitment of young workers, is to be made at the national level. This implies that the right mentioned in Article 15 (1) of the Charter is not of an absolute nature. The decision is made on the basis of earlier case law concerning retirement at the age of 65.

In many cases the provisions in the Charter have had a non-decisive role. *Danosa*⁵⁹ was a female member of the Board of Directors of a company. Could she be removed from her post by the supervisory board because she was pregnant? The ECJ strongly upholds the protection to pregnant women in several cases, no matter whether a woman is to be qualified as worker or self-employed under national legislation. The reference of the ECJ to Article 23 of the EU Charter is only of a supportive character here. The provision does not refer to pregnancy but only mentions the principle of equality between men and women in general.

⁵⁷ *Fuchs and Köhler v. Land Hessen*, *supra* note 50.

⁵⁸ Namely Art. 15(1) of the Charter (the right to work); *Fuchs and Köhler v. Land Hessen*, *supra* note 50.

⁵⁹ Case C-232/09, *Danosa v. LKB Lízings SIA*, [ECJ 11 November 2010] (Court decision not yet reported).

In *Kelly*⁶⁰ an applicant for a course on vocational training wanted more information on why his application was not successful in order to see whether he was discriminated, directly or indirectly, on the basis of sex⁶¹. One of the preliminary questions of the national court was that the potential right to disclosure of information of Mr. Kelly was eventually subject to the principle of confidentiality. In this context the ECJ confirmed that several EU legal acts are about confidentiality. It mentioned several directives. Finally it referred to Article 8 of the EU Charter and considered that the protection of personal data was ‘also’ provided for in that part of the Charter. Here, the Charter was referred to only in on the last occasion, and only as an additional means by which to interpret the principle of confidentiality. Again, this demonstrates that the provision in the Charter only has a supportive role.

II. Category II: More than only a Supportive Role for Charter Provisions

A more important role (rather than merely a supportive one) for a Charter provision is possible in case the EU legislator itself has made an omission. For example, the text of a directive might be incomplete or too vague and thus might go against one of the fundamental rights in the Charter. As it is now, after the entry into force of the Lisbon Treaty, the Charter provisions are of the same legal value as the Treaty itself; directives may not violate these provisions. In this sub-category, there is one example in the field of labor law. In the Belgian case *ASBL*,⁶² complaints were raised against a derogation in directive 2004/113⁶³ on the implementation of the principle of equal treatment between men and women in the access to, and supply of, goods and services.⁶⁴ The derogation is about the use of sex as a factor in the calculation of premiums and benefits in insurance-related matters. The derogation in Article 5 (2) gives the Member States the possibility to decide to keep ‘proportionate’ differences in the premiums and benefits, where the use of sex is a determining factor, up to a certain date in 2007 Accurate statistical figures will have to be used in this respect. The

⁶⁰ *Kelly v. National University of Ireland*, *supra* note 53.

⁶¹ *Id.*

⁶² Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil de ministres* [ECJ 1 March 2011].

⁶³ Council Directive 2004/113/EC, O J 2004 L 373/37.

⁶⁴ *Id.*

Belgian complainants, supported by the consumer organization ASBL, deemed this provision in the directive to be against the principle of equal treatment. The ECJ is of the opinion that the derogation as such is admissible, but that a temporal limitation ought to have been set. Without such a limitation, the directive would violate the objectives in Article 21 (1) (non-discrimination) and 23 (equality of men and women) of the EU Charter. The derogation would then exist indefinitely. It is possible that the ECJ referred to the two provisions of the Charter, because in the preamble of directive 2004/113 there is an explicit reference to these two. In my opinion, the reference to the preamble is still necessary in the process of decision making of the ECJ, because the scope of the Charter is unclear. Several Member States do not even accept the legally binding character of the Charter (e.g. the UK and Poland). The provisions of a directive including its preamble are needed to show that an order of events is within the scope of the Treaty. This is not different from the situation before the entry into force of the Lisbon Treaty.

Another and more important case reminds us of the already mentioned balance of fundamental rights and the fundamental economic freedoms. In *Commission v. Germany*⁶⁵ the ECJ had to decide whether two public procurement directives implementing the freedom of establishment and the freedom to provide services could stand in the way of the content of collective agreements freely negotiated by management and labor in Germany. That Member State, together with Denmark and Sweden, argued that because of their nature and subject matter, the awarding of contracts to implement a salary conversion to bodies or undertakings would fall outside the scope of directives 92/50⁶⁶ and 2004/18.⁶⁷ They used the case of *Albany*,⁶⁸ where the ECJ decided that collective agreements do not fall under the scope of competition law, as a precedent. In an interesting opinion of the 14th of April 2010, Advocate-General Trstenjak pleaded for a strong role for the fundamental rights mentioned in the Charter. The ECJ, however, followed the reasoning of its earlier cases *Viking* and *Laval*. It carefully set out that Article 28 of the Charter had the same legal value as Treaty provisions. Nevertheless, an opening is left by Article 28: the right must be

⁶⁵ *Commission v. Germany*, *supra* note 56.

⁶⁶ Council Directive 92/50/EEC, O J 1992 L 209/1.

⁶⁷ Council Directive 2004/18/EC, O J 2004 L 134/114.

⁶⁸ Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

exercised ‘in accordance with EU law’.⁶⁹ This outcome proves that the ECJ prefers to balance fundamental rights and fundamental economic freedoms. The principle of proportionality is an important tool of the ECJ in this respect. First, it makes some observations on ‘the essence of the right to bargain collectively’.⁷⁰ While enhancing the level of pensions to local authority employees is part of this essence, the designation of bodies and undertakings is not. Second, the ECJ prefers a ‘fair balance’ between the interests involved.⁷¹ A higher level of pensions and what I would call ‘Europeanization’, namely the opening up of competition to the EU-level and the participation of bodies or undertakings from outside Germany in this levelling up of the pensions, must be reconciled. Preservation of elements of solidarity is perfectly possible in a procurement procedure, according to the ECJ. Hence, the ECJ basically reframes the issue. Solidarity is to be allowed, but borders are irrelevant within the EU. It seems that the Charter, however important it is, does not make a difference. Earlier elements from the *Viking* and *Laval* case law are applied. The real problem is the wide condition in Article 28 of the Charter: ‘in accordance with EU law’. This condition is so wide, that potentially anything decided at EU level can interfere with the right to collective bargaining.

This development means that the tradition of the German federal government and the German labor courts to not interfere with provisions in collective agreements will have to change. Also, in the Netherlands there exists a longstanding practice not to interfere in the content of collective agreements concluded by representative organizations of workers and employers in case the agreement will be declared to be of general applicability by the Minister of Labor. Because of the existence of the Charter, courts hesitate to intervene in the content of a collective agreement. Nevertheless, the ECJ makes this perfectly possible. Collective bargaining does not seem to be an absolute fundamental human right. Important questions relate to what the ‘essence’ of collective bargaining is and to the use of the proportionality criterion in balancing rights.

Let us have a look at two major examples in this respect and focus on the proportionality criterion: in the first place the joined cases *Hennigs* and

⁶⁹ This conditionality is qualified by M. Weiss as a ‘dramatic inconsistency’, *supra* note 44, 85.

⁷⁰ *Commission v. Germany*, *supra* note 56, para. 49.

⁷¹ *Id.*, para. 52; here the ECJ refers to the earlier *Schmidberger Case*, *supra* note 27.

*Mai*⁷² and in the second place the case *Prigge and others*.⁷³ In the first case two employees protested against a collective agreement for public sector contractual employees concerning the determination of their pay. The Federal Labor Court wanted to know whether the content of a collective agreement could violate the prohibition to discriminate on the basis of age in Article 21 of the Charter, especially in the light of Article 28 of the same document guaranteeing the right to bargain collectively. In the collective agreement at stake, basic pay in individual salary groups was determined by age categories. This is therefore a direct discrimination on the basis of age and this implies that the discrimination can only be justified by a legitimate aim. The means of achieving this aim must be appropriate and necessary (Article 6 (1) of directive 2000/78). A kind of proportionality criterion is written in the text of this provision of secondary EU law focusing on reasonableness, appropriateness, and necessity. This provision of secondary EU law is of central importance. A simple quotation of the famous cases *Viking* and *Laval* and the text of Article 28 of the Charter whereby collective bargaining must be exercised in compliance with EU law is a sufficient motivation for the ECJ, as is the statement that directive 2000/78 is an expression of the principle of non-discrimination on the basis of age. Concerning the question of the presence of a legitimate aim in this case, the ECJ confirms that the rewarding of professional experience of all ages is a legitimate aim. Moreover, the criterion of length of service is in general an ‘appropriate’ criterion. Only for those contractual employees that, on their appointment, are initially classified in an age group, the age criterion is not appropriate and necessary. Some account should be taken of their experience as well.⁷⁴ For this limited group the collective agreements do not comply with EU law. It has become clear that age per se is a suspect criterion. This will have huge consequences for collective agreements practices in many Member States. The importance of a provision of merely a secondary EU law text in balancing two different human rights is striking.

In the case *Hennings and Mai*, the question was also what the discretionary freedom for social partners to move only gradually from a pay

⁷² Cases C-297/10 and C-298/10, *Hennings v. Eisenbahn-Bundesamt and Land Berlin v. Mai*, [ECJ 8 September 2011] (Court decision not yet reported).

⁷³ Case C-447/09, *Prigge and Others v. Deutsche Lufthansa AG*, [ECJ 13 September 2011] (Court decision not yet reported).

⁷⁴ In paragraph 77 of the ‘Henning and Mai case’ the ECJ even appears to give an advice: “a criterion also based on length of service or professional experience but without resorting to age” would be a better criterion.

system based on age groups to one based on other criteria was. Here the ECJ accepted the important role of the social partners, which should have a broad discretion in the area of pay. The ‘transitional and temporary character’ of the ongoing discrimination is appropriate until a completely new system of pay is in place and does not go beyond what is necessary to achieve the aim.

The case *Prigge a.o.* concerned Lufthansa pilots, whose employment relationship was terminated at the age of 60 because of a clause in a collective labor agreement. This case is an example that might lead to more interference by governments with the content of such agreements. In this case, two fundamental rights, the right not to be discriminated on the basis of age and the right to collective negotiation, had to be reconciled. Noteworthy is that the opinion of the Advocate-General Cruz Villalón and the decision of the ECJ do not run completely parallel. The directive 2000/78, and not the provisions of the Charter, is at center stage both in the opinion and the decision. Article 16 sub (b) of the directive already states that collective agreements must respect the principle of non-discrimination of the directive. Again, *Viking* and *Laval* are mentioned by the ECJ in the same paragraph of its judgement as Article 28 of the Charter with little motivation. Both the Advocate-General and the decision of the ECJ successively pay attention to the three exceptions in the directive: the exception on public security in Article 2 (5), the exception concerning the nature of the occupation in Article 4 (1), and the exception concerning age discrimination in general in Article 6 (1). The main difference between the ECJ and its learned Advocate-General is that the ECJ does not pay a lot of attention to Article 6 because the clause in the German collective agreement is related to public security and safety, while the Advocate-General takes a strict approach with respect to the exception in Article 2 (5) and therefore needs more room for an analysis under Article 6 (1). According to the Advocate-General, public security should always be dealt with by a public authority and not by social partners. The Advocate-General applies the test of ‘necessity’ in Article 2 (5) of the directive not only in the sense of checking the proportionality of the measure in relation to its purpose, but much further in the sense that only public authorities are able to decide what ‘security’ is. This view, if it had been adopted by the ECJ, would have had huge consequences for the rights of social partners throughout the EU. A limitation of the scope of collective bargaining would then have been adopted at EU-level. The ECJ did not accept this view, but forced the collective partners to be precise and transparent in their rules concerning security.

It becomes clear that the proportionality principle is the main vehicle available for the ECJ to balance economic freedoms with fundamental rights or two different fundamental rights. If a proportionality criterion is written explicitly in a secondary EU law directive, the ECJ prefers to use that criterion. The sensitive balancing of fundamental rights itself is not explicitly addressed. The ECJ is only operating through existing directives. The Charter of Fundamental Rights did not bring many changes at all in this respect. The problem is the wording of Article 28 of the Charter and Article 16 sub (b) of the directive 2000/78. Not so much the ECJ, but rather the EU legislator is at the basis of this development by classifying some fundamental human rights, such as the right to collective bargaining, less fundamental than other rights such as non-discrimination, for example on the basis of age. This will without doubt lead to less autonomy for national labor law⁷⁵. Some individual fundamental rights will get preference over collective labor law. I fully agree with Bernard Ryan in this respect and I cannot but quote him: “the danger is that an overemphasis on the protection of fundamental rights may obscure, or even undermine, alternative arguments for the extensive recognition of collective labor rights, deriving from inequality of income and social power”.⁷⁶

III. Category III: A Short Look at Pending Cases

Some still pending cases could shed more light on the balancing of fundamental rights and the role of the Charter. In *Tyrolean Airways*⁷⁷ the non-discrimination principle in Article 21 of the Charter is used to criticize an Austrian national collective agreement in which the classification of older workers for their remuneration was supposedly indirectly discriminatory because of age. Moreover, the Oberlandesgericht Innsbruck also wants to know whether clauses in individual employment contracts may be declared null and void, when they are indirectly discriminatory on the ground of age. The words used in this preliminary question show already that national courts change their approach to collective agreements. This

⁷⁵ See also J. Kenner in his book review of P. Syrpis, *EU intervention in domestic labour law* (2007), 37 *Industrial Law Journal* (2008) 2, 189.

⁷⁶ B. Ryan, ‘The Charter and Collective Labour Law’, in T. K. Hervey & J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: a Legal Perspective* (2003), 90.

⁷⁷ *Tyrolean Airways v. Betriebsrat Bord der Tyrolean Airways*, *supra* note 52.

case is of great importance, because it may lead to more interference with collective agreements.

In the joined cases *Heimann and Toltschin*⁷⁸ the question whether a lawful order to work short-time (because of the economic crisis) may also lead to a decrease in the paid annual leave guaranteed in Article 31 (2) of the Charter. And what about a reduction of work to zero hours - does this imply that there is no paid annual leave at all? Finally, in *Antonopoulos*⁷⁹ four provisions of the Charter are mentioned.⁸⁰ Is the principle of non-discrimination in the pursuit of trade union rights at stake now that trade union officials with a contract of indefinite duration are treated differently from those officials with a fixed-term contract? This case is also about the criterion of comparability for the purpose of non-discrimination laws. Furthermore, the question whether (non-)payment of remuneration to workers during leave of absence from work on trade union business reminds us of earlier case-law concerning the same situation with members of works councils.⁸¹

E. Conclusion

Is the EU Charter on Fundamental Rights in its binding character after the 1st of December 2009 adding anything to the existing case law? Can it be seen as an autonomous source of law, standing on its own? Are fundamental human rights now better protected than before the Lisbon-Treaty? An overview of recent case law does not suggest a revolutionary impact of the now binding character of the EU Charter. The ECJ is not changing its weighing of fundamental human rights and fundamental economic freedoms substantially. Pending cases, however interesting they are, will very probably not change this. Although the remark by the ECJ in *BECTU* that paid annual leave should not be subordinated to purely economic considerations was a promising one, economic arguments related to free movement within the EU are of continuing importance. Labor law, quite autonomous in the national setting, has to interact with the rules of the

⁷⁸ *Heimann and Toltschin v. Kaiser GmbH*, *supra* note 50.

⁷⁹ Case C-363/11, *Commissioner of the Court of Auditors at the Ministry of Culture and Tourism v. Antonopoulos*, [ECJ 7 July 2011] (Court decision not yet issued).

⁸⁰ These are Arts 12 (freedom of assembly and association), 20 (equality before the law), 21 (non-discrimination) and 28 (collective negotiations and collective action).

⁸¹ Cases C-360/90, *Arbeiterwohlfahrt der Stadt Berlin v. Bötzel*, [1992] ECR I-3589 and C-278/93, *Freers and Speckmann v. Deutsche Post*, [1996] ECR I-1165.

internal market at EU-level.⁸² The fundamental human rights are subject to a proportionality test, limited to their proper purpose and to a certain extent reframed and europeanized, opened up until the EU external borders. It is important that the ECJ shows some self-restraint in the balancing of fundamental freedoms and fundamental human rights and in the balancing of two different fundamental human rights. A not too intrusive proportionality criterion that protects the ‘essence’ of, for example, the right to collective bargaining, is essential. A test limited to ‘appropriateness’ and ‘necessity’ is needed in this respect. Increasingly, the ECJ uses the proportionality criteria mentioned in directives such as directive 2000/78, also to balance two fundamental human rights. The right to collective bargaining seems to be less important than the right to non-discrimination on the basis of age. National governments and national courts will probably intervene more in this process when declaring collective agreements to be of general applicability. This is a consequence not so much of the decisions of the ECJ, but of the deliberate choice of words by the EU legislator in Article 28 of the Charter and article 16, sub (b) of directive 2000/78.

The entering into force of the Lisbon Treaty in December 2009 did not change much in this respect. On their own, the fundamental rights in the Charter cannot change the powers and competencies of the EU. The ECJ will continue its balancing as it did before December 2009. The Charter seems to be primarily a codifying instrument.

⁸² See also S. Sciarra, ‘Market freedom and fundamental social rights’, in B. Hepple (ed.), *Social and Labour Rights in a Global Context. International and Comparative Perspectives* (2002), 99.