OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 8 September 2011 (1)

Case C-282/10

Maribel Dominguez

v

Centre informatique du Centre Ouest Atlantique

and

Préfet de la région Centre

(Reference for a preliminary ruling from the Cour de cassation (France))

(Article 31(2) of the Charter – Fundamental social rights – General legal principles – Horizontal effect of directives – Article 7 of Directive 2003/88/EC – Working conditions – Organisation of working time – Entitlement to paid annual leave – Existence of entitlement to leave whatever the nature and length of an employee's absence – National rule by which the grant of such leave is conditional on a minimum period of actual work during the reference year – Obligation on the national court to disregard national legislation contrary to EU law)

Table of contents

V – Main arguments of the parties

A – First question

B – Second question

C – Third question

VI – Legal assessment

A – First question

B – Second question

1. General

a) Material legal aspects

b) Existence of a legal action between private individuals

2. The role of the national court in litigation between private individuals

a) Limits on applicability of directives under EU law

b) Possible alternative approaches

i) Direct application of the fundamental right in Article 31(2) of the Charter

– Applicability of the Charter

– Status of fundamental right

– Lack of horizontal effect

– Conclusion

ii) Direct applicability of a general legal principle

– The ranking of the right to annual leave within the EU legal system

– Applicability of general principles between private individuals

– Conclusion

iii) Application of the general principle, as given specific expression in Directive 2003/88

– The Court’s approach in Kücükdeveci

– Transferability of this approach to entitlement to annual leave

I – **Introduction**

1. In these proceedings for a preliminary ruling under Article 267 TFEU the French Cour de cassation ('the referring court') puts three questions to the Court of Justice regarding the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time . (2)

2. This reference for a preliminary ruling stems from a legal action between Ms Dominguez ('the claimant in the main proceedings') and her employer, the Centre informatique du Centre Ouest Atlantique ('defendant in the main proceedings'), in which the issue is whether and to what extent the latter is under an obligation to pay an allowance in lieu of annual leave that she was unable to take due to an accident. In the opinion of the referring court one important aspect requiring clarification is the way in which the length of that leave should be calculated, the special feature here being that under the relevant national legislation, firstly, the existence of entitlement to annual leave is conditional upon the employee having worked for a minimum number of days and, secondly, not every kind of absence from the workplace due to an accident is counted as working time.

3. The existence of entitlement to leave and the precise amount thereof cannot be determined, however, until it is clear whether the aforementioned national legislation can be deemed compatible with Article 7 of Directive 2003/88 and whether the claimant is entitled to rely directly on the directive in relations with the defendant. This case, on the one hand, raises legal issues to which the Court has already given a clear answer, so that it can in principle confine itself to citing the relevant judgments. On the other hand, however, the Court is being invited to state how entitlement to paid annual leave should be categorised within the hierarchy of norms under the system of European Union ('EU') law and whether an employee is possibly also entitled to rely directly on this in relations with his or her employer.

4. Four different approaches will therefore be considered to assist employees in the exercise of their rights against employers. The possibility of directives having horizontal effect will be examined first of all. In light of the fact that the Charter of Fundamental Rights of the European Union has now become legally binding I will then go on to examine the direct application of Article 31(2) of that Charter. One further alternative is the direct application of any general legal principle affording employees the right to annual leave. I will then finally consider the extent to which the approach developed by the Court in the *Kücükdeveci* case (3) can be applied here. In doing so I will discuss the advantages and

disadvantages of this approach in detail. The case now before the Court gives it an opportunity to examine this approach in doctrinal terms and, if necessary, to refine it.

II – **Legislative context**

A – *EU law* (4)

1. Charter of Fundamental Rights of the European Union

5. Article 31 of Title IV ('Solidarity') of the Charter of Fundamental Rights of the European Union ('the Charter') cites the right of every worker to 'fair and just working conditions'. Article 31(2) provides:

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

6. Article 51 of Title VII ('General Provisions') determines the scope of application of the Charter. Article 51(1) reads as follows:

'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. Directive 2003/88

7. Article 1 of Directive 2003/88 provides as follows:

'Purpose and scope

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of … annual leave …

…'

8. Article 7 of that directive states:

'Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

9. Article 17 of Directive 2003/88 allows Member States to derogate from certain provisions of the directive. No derogation is allowed with regard to Article 7 of the directive.

B – *National law*

10. Article L. 223-2(1) of the Code du travail (Labour Code) applicable in the main proceedings provides:

‘A worker who, during the reference year, has been employed by the same employer for a period equivalent to a minimum of one month of actual work shall be entitled to leave, the length of which shall be calculated on the basis of 2.5 working days for each month worked, provided the total period of leave that may be requested does not exceed 30 working days’.

11. Article L. 3141-3 of the new Code du travail, in the version established by the Law of 20 August 2008, provides:

‘An employee who has been working for the same employer for a period equivalent to a minimum of 10 days of actual work shall be entitled to leave of 2.5 working days for each month worked. The total length of leave that may be requested shall not exceed 30 working days.’

12. Article L. 223-4 of the Code du travail applying at the relevant time, provides:

‘Periods equivalent to 4 weeks or 28 days of work shall be treated as equivalent to one month of actual work for the purpose of calculating the length of leave. Periods of paid leave, compensatory leave provided for by Article L. 212-5-1 of the Code du travail and by Article L. 713-9 of the Code rural (Rural Code), periods of maternity leave provided for under Articles L. 122-25 to L. 122-30, leave acquired by reason of reduced working time and periods of an uninterrupted duration not exceeding one year during which performance of the contract of employment is suspended owing to a work-related accident or occupational disease, shall be treated as periods of actual work. (Periods during which an employee or an apprentice is retained or recalled for national service [compulsory national service of a military or civilian nature] for any reason shall also be treated as periods of actual work for the purpose of calculating the length of leave.)’

13. The current Article L. 3141-5 of the Code du travail provides:

‘The following shall be treated as periods of actual work for the purpose of calculating the length of leave:

1. Periods of paid leave;

2. Periods of maternity, paternity and adoption leave, leave for adoption and raising of children;

3. Compulsory compensatory leave provided for by Article L. 3121-26 of the Code du travail and Article L. 713-9 of the Code rural;

4. Leave days acquired in respect of reduced working time;

5. Periods of an uninterrupted duration not exceeding one year during which performance of the contract of employment is suspended owing to a work-related accident or occupational disease; and

6. Periods during which an employee is retained or recalled for national service for any reason.'

14. Under Article XIV(4) of the model rules annexed to the national collective labour agreement for staff of social security bodies no annual leave entitlement is given in a particular year in respect of absences as a result of illness or prolonged illness that has resulted in a break in work of 12 consecutive months or more, absence for compulsory military service, or unpaid leave provided for in Articles 410, 44 and 46 of the collective agreement. Leave entitlement begins again on the date on which work is resumed, the length of leave being calculated in proportion to the time of actual work that has not yet given rise to the allocation of annual leave.

III – **Facts, main proceedings and questions referred for a preliminary ruling**

15. The claimant in the main proceedings has been an employee of the defendant in the main proceedings since 10 January 1987; the defendant in the main proceedings comes under the collective labour agreement for staff of social security bodies.

16. On 3 November 2005 she had an accident on the journey between her home and her place of work. As a result of that accident she was signed off work from 3 November 2005 to 7 January 2007.

17. On 8 January 2007 she resumed work on a part-time basis and started back again full-time on 8 February 2007. On her return the defendant in the main proceedings informed her of the number of days of leave which, according to its calculations, were due to her for the period of her absence. The claimant in the main proceedings lodged an objection to this, asserting a claim against her employer for 22.5 days' paid leave in respect of that period or, in the alternative, payment of compensation in the sum of EUR 1 971.39.

18. She initially asserted her claim in the Conseil de prud'hommes (industrial relations court) of Limoges, which dismissed her applications in a decision of 15 January 2008. She then appealed against that decision to the Cour d'appel de Limoges (Limoges Court of Appeal). Her appeal was dismissed by a judgment of 16 September 2008, in which the Cour d'appel ruled, inter alia, that the defendant in the main proceedings, as employer, had correctly applied the relevant employment legislation and had rightly found that she was not entitled to leave because the claimant in the main proceedings had been absent for more than 12 months as a result of an accident on the way to work and had not done any actual work during that time. The Cour d'appel also ruled that the claimant in the main proceedings could not rely on rules of employment law applicable in the case of a work-related accident.

19. In the proceedings in the Cour de cassation she is appealing against that judgment claiming, firstly, that an accident on the way to work should be equated with a work-related accident and she should therefore be covered by the same arrangements. Secondly, she argues that the period following the interruption of her contract of employment following her accident on the journey to work must be reckoned as actual working time for the purpose of calculating paid leave.

20. In light of the case-law of the Court of Justice, which is comprehensively cited, the referring court expresses doubts both as to the compatibility of the relevant national employment legislation and the obligation on the national court to disregard national legislation that is contrary to EU law.

21. In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 7(1) of Directive 2003/88 be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum of 10 days’ (or one month’s) actual work during the reference period?

(2) If the answer to the first question is in the affirmative, does Article 7 of Directive 2003/88, which imposes a specific obligation on an employer in so far as it creates entitlement to paid leave for a worker who is absent on health grounds for a period of one year or more, require a national court hearing proceedings between individuals to disregard a conflicting national provision which makes entitlement to paid annual leave conditional on at least 10 days’ actual work during the reference year?

(3) Since Article 7 of Directive 2003/88 does not distinguish between workers according to whether their absence from work during the reference period is due to a work-related accident, an occupational disease, an accident on the journey to or from work or a non-occupational disease, are workers entitled, under that directive, to paid leave of the same length whatever the reason for their absence on health grounds, or must that directive be interpreted as not precluding the length of paid leave differing according to the reason for the worker’s absence, if national law provides in certain circumstances for the length of paid annual leave to exceed the minimum of four weeks provided for by the directive?’

IV – **Procedure before the Court**

22. The order for reference of 2 June 2010 was lodged at the Registry of the Court of Justice on 7 June 2010.

23. Written observations were submitted by the parties to the main proceedings, the French, Danish and Netherlands Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

24. At the hearing on 17 May 2011, oral argument was presented by the representatives of the parties to the main proceedings, the French, Danish and Netherlands Governments and the Commission.

V – **Main arguments of the parties**

A – *First question*

25. *All of the parties to the proceedings* are agreed that the answer to the first question is to be found in the case-law of the Court, especially the judgments in *BECTU* (5) and *Schultz-Hoff and Others*. (6) They therefore propose that the answer to this first question should be that Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or

practices which make entitlement to paid annual leave conditional on a minimum of 10 days' (or one month's) actual work during the reference period.

B – *Second question*

26. Both the lines of argument and the answers to this question proposed by the parties to these proceedings are extremely divergent.

27. The *claimant in the main proceedings* refers to the judgments in *Simmenthal* (7) and *Melki* (8) and says that the direct applicability of Article 7 of Directive 2003/88 is not affected by what the Court said in the *BECTU* case. In her view, the national court's position is clear in that it is obliged to disapply those provisions of national law according to which entitlement to paid annual leave is contingent upon fulfilment of a condition incompatible with EU law.

28. The *defendant in the main proceedings* relies upon the case-law cited by the referring court and draws the opposite conclusion. In its view, the principles developed in that case-law imply that, in legal proceedings between private individuals, the national court cannot disregard a national provision on the grounds that it is incompatible with a directive. To do so would represent an interpretation *contra legem*. In view of the very definition of a directive, which addresses the Member States and does not create direct obligations on their citizens, it sees no reason to revise this established case-law as otherwise this would be tantamount to abolishing the distinction between directives and regulations.

29. The *French* and *Netherlands Governments* go somewhat further in their analysis of the case-law.

30. The *French Government* recalls, for example, not just the case-law cited by the Cour de cassation, but also the judgments in *Mangold* (9) and *Kücükdeveci*. (10) In those judgments the Court expanded its case-law on the position of the national court where there is national legislation in existence that contravenes EU law. This means that where there is a conflict between a national provision and a general principle of EU law the national court must, if necessary, disregard the national provision. The French Government points out in this connection that although according to settled case-law entitlement to paid annual leave is to be regarded as 'being a particularly important principle of EU social law' it has not yet been recognised by the Court as a general principle of EU law such as the principle of non-discrimination on grounds of age, for instance. The aforementioned case-law cannot therefore be extended to entitlement to paid annual leave.

31. The French Government therefore proposes that the answer given to the second question should be to the effect that where Article 7(1) of Directive 2003/88 precludes a national provision which makes entitlement to paid annual leave conditional on a minimum of 10 days' (or one month's) actual work during the reference period that provision in the directive does not permit a court hearing a legal action between private individuals to disregard the national provision.

32. The *Netherlands Government* confines its arguments to this question. Its view is that, according to established Court of Justice case-law cited by the Cour de cassation, a court that hears a legal action between private individuals is not obliged to disregard a national

provision that is contrary to a provision of a directive. Instead, the national court has to interpret and apply the national legislation in harmony with the directive.

33. In the opinion of the Netherlands Government the judgment in *Kücükdeveci* and the fact that entitlement to annual leave was regarded as 'a particularly important principle of EU social law' permits of no other conclusion, especially as that principle is not a general principle of law.

34. Whilst the French and Netherlands Governments come to the conclusion that the Court's reasoning in *Kücükdeveci* does not apply, the *Commission* finds no reason to rule out its analogous application in the main proceedings here.

35. In the view of the Commission the answer to the second question should be that the national court is required, within the limits of its jurisdiction, to safeguard the legal protection afforded to individuals and ensure the full effectiveness of EU law so that it may, if necessary, disregard any national provision that is not in harmony with the right to paid annual leave.

C – *Third question*

36. The *claimant in the main proceedings* proposes that the answer to this question should be that Article 7 of Directive 2003/88 is to be interpreted as precluding a differing length of paid leave according to the reason for the employee's absence. Indeed this provision in the directive states that employees are entitled to paid leave of the same length whatever the reason for their absence.

37. The *defendant in the main proceedings* holds the opposite view. It argues that Article 7 of Directive 2003/88 does not preclude rules that determine the length of paid annual leave in the case of employees who are absent due to illness or a work-related accident being more favourable, as regards their period of absence being treated as equivalent to actual work, than would be the case with employees who are not absent due to a work-related accident.

38. The *French Government* concludes from the aforementioned case-law of the Court that Article 7 of Directive 2003/88 has to be interpreted as meaning that the length of paid annual leave may ultimately differ according to the reason for the employee's absence since the minimum four weeks of leave provided for in this provision of the directive is assured.

39. The *Commission* points out that the order of the national court referring this question for a preliminary ruling does not make it clear to which element of national law this question refers but it nevertheless proposes that it be answered in the manner proposed by the French Government.

VI – **Legal assessment**

A – *First question*

40. By its first question, the referring court seeks to ascertain whether Article 7(1) of Directive 2003/88 permits a Member State to make the exercise of entitlement to paid annual leave conditional on a minimum length of work time stipulated by national law, French law

having originally put this minimum length of work time at one month but now, following a legislative amendment, putting it at 10 days.

41. The answer to this question is to be found in the case-law of the Court, particularly in its judgments in *BECTU* and *Schultz-Hoff and Others*. For this reason it is appropriate to recall the relevant findings of the Court and then examine them to see whether they can be transposed to the main proceedings.

42. As stated by the Court in its settled case-law, entitlement to paid annual leave must be regarded as a particularly important principle of EU social law from which there can be no derogations and which the competent national authorities must implement within the limits expressly laid down by Directive 2003/88. (11) By enshrining the right to paid annual leave in secondary legislation, the EU legislature sought to make certain that, in all Member States, a worker would actually enjoy periods of rest, 'with a view to ensuring effective protection of his health and safety'. (12) As the Court has said in its case-law, the purpose of the entitlement to paid annual leave is to help the worker to rest and to enjoy a period of relaxation and leisure. (13)

43. Not least of all because of the huge importance that the EU legal system attaches to this principle, the Court stated in paragraph 52 of its *BECTU* judgment cited above that Article 7(1) of Directive 93/104/EC – the wording of which is identical to that of its successor provision in Article 7(1) of Directive 2003/88 – precluded 'Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a *precondition* for such entitlement which has the effect of preventing certain workers from benefiting from it'.

44. The Court then went on to say in paragraph 53 of that judgment that 'although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever'.

45. In paragraph 55 of that judgment the Court also said that the measures that Member States adopt to implement the provisions may display certain divergences as regards the conditions for exercising the right to paid annual leave, as the directive merely lays down minimum requirements for harmonisation of the organisation of working time at EU level and leaves Member States to adopt the requisite arrangements for implementation and application of those requirements. It stressed, however, that the 'directive does not allow Member States to exclude the *very existence* of a right expressly granted to all workers'.

46. The case-law stated above is to be construed as meaning that the Court recognises, in principle, the competence of Member States to adopt so-called implementation methods by which they may specifically regulate certain aspects of the way in which the right to annual leave may be exercised, such as by regulating the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment. There is nevertheless a limit on this regulatory competence on the part of the Member States where the rule that is chosen affects the effectiveness of entitlement to annual leave to such an extent that achievement of the objective of that entitlement to leave is no longer assured. This

is the case, for instance, where a national rule decides 'whether' that entitlement should be exercised rather than 'how' it should be done.

47. As the French Government itself concedes, there is clearly such a rule in this case – particularly as the existence of entitlement is itself linked to the condition that the employee completes at least one month's work (as per Article L. 223-2(1) of the Code du travail, now amended) or 10 days (as per the current Article L. 3141-3 of the Code du travail). As the French Government has argued in detail in its written submissions, the provision requiring at least 10 days' work is explained by reference to the method by which the length of annual leave is calculated. This latter leave is equivalent to a certain number of working days, with one day of leave being the equivalent, according to this method of calculation, of 10 days' work.

48. As the French Government also concedes, reference to the need for a precise calculation of annual leave in a particular case does not alter the fact that the case-law of the Court does not provide for any exceptions to the rule that attainment of entitlement to paid annual leave must not be frustrated by national measures when implemented at Member State level. It would seem appropriate in this connection to point out that the judgment in *BECTU* was based on facts similar to those in the present case, so that the principles laid down there are directly transposable to the main proceedings here. In *BECTU* the Court was asked to ascertain whether Article 7(1) of Directive 93/104 allows a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer. Since the Court emphatically answered this question in the negative it seems to me to be obvious that the French rule at issue in this case cannot be considered in harmony with Directive 2003/88.

49. One further legal question raised during the course of the main proceedings, which – as also rightly referred to by the defendant in the main proceedings in its written pleading (14) – should also be considered to require clarification for the purposes of the present preliminary ruling procedure, is whether entitlement to paid annual leave can also arise during a period in which an employee is absent due to illness. The reason why this legal question needs to be clarified is that it will ultimately determine whether the claimant in the main proceedings has any entitlement to leave for that period or whether her absence from the workplace can be held against her.

50. Case-law provides useful guidance in answering this question as well. The judgment in *Schultz-Hoff and Others*, in which the Court initially found in paragraph 39 that Article 7(1) of the directive in relation to entitlement to paid annual leave applies to 'every worker', proves particularly productive. Its further statements in paragraph 40 of that judgment are also relevant, namely that 'concerning that entitlement, Directive 2003/88 does not make any distinction between workers who are absent from work on sick leave, whether short-term or long-term, during the leave year and those who have in fact worked in the course of that year'.

51. In paragraph 41 of that judgment the Court therefore came to a conclusion which in my opinion is also of importance to the present preliminary ruling procedure, namely that, 'with regard to workers on sick leave which has been duly granted, the right to paid annual leave conferred by Directive 2003/88 itself on all workers cannot be made subject by a

Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State'.

52. The case-law cited above should therefore be construed as meaning that the absence of an employee due to illness during a reference year does not preclude accrual of entitlement to paid annual leave provided that the sick leave has been duly certified. Legally speaking, this means that absences from work for reasons outside the control of the employee concerned, such as sickness for example, are to be counted as periods of service. This is also stated in the rule in Article 5(4) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (Revised), on which the Court based its observations regarding the relationship between annual leave and sick leave.

53. In conclusion, the provision at issue is not in harmony with Directive 2003/88. The French Government also comes to this conclusion when it states in its written submission that Article L. 3141-3 of the Code du travail is being amended. (15) Consequently, the answer to the first question must be that Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum of 10 days' (or one month's) actual work during the reference period.

B – *Second question*

1. General

a) Material legal aspects

54. The second question is posed only in the event of the national legislation at issue being held incompatible with EU law – as found above. As is apparent from the comments in the order for reference relating specifically to this question, (16) the referring court essentially seeks a ruling on whether Article 7 of Directive 2003/88 requires it, in a case between private individuals, to disregard the national legislation at issue in the dispute.

55. The answer to this question requires discussion of two material legal aspects, which are both connected: (i) the role of the national courts when applying EU law, as determined by the case-law of the Court, and (ii) the significance that the EU legal system attaches to entitlement to annual leave and its enforcement.

b) Existence of a legal action between private individuals

56. Before I turn to these central aspects of the question I should like to say, for the sake of completeness, that in my opinion there is absolutely no doubt that the main proceedings are being brought between private individuals.

57. It should be recalled, first, that according to the Court's case-law it is for the referring court alone to determine the subject-matter of the questions it intends to refer. It is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. (17)

58. Since the referring court clearly assumes in its order for reference that this is a legal action between private individuals and does not explicitly pursue the question of the defendant in the main proceedings being an element of the French State as forming part of its administration, the Court is also bound by that assessment.

59. By way of exception, however, the Court may undertake an appraisal of the reasons that led the national court to refer a particular question for a preliminary ruling. According to case-law this is so if it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (18)

60. These conditions are not satisfied here, however. According to the clear statements made by the parties to the proceedings at the hearing, the main proceedings relate to a contract of employment in which the defendant in the main proceedings appears, vis-à-vis the claimant in the main proceedings, as a private individual and not as a public authority with sovereign powers. These statements are ultimately supported by the assessment made by the referring court.

2. The role of the national court in litigation between private individuals

a) Limits on applicability of directives under EU law

61. With regard to the role of the national court when called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law – as in the main proceedings here – the Court has held that it is for the national courts to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective. (19) There is one important restriction in the case of litigation between private individuals, however, in that according to case-law a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. (20)

62. It follows that, in the Court's view, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. The Court bases this view on the argument that to do otherwise would be to recognise a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. (21) That position respects the particular nature of a directive which, by definition, only gives rise directly to obligations on the part of the Member States to which it is addressed under Article 288(3) TFEU and can impose obligations on individuals only through the medium of national transposition measures.

63. This case-law should be followed. The distinction between positive and negative direct effects of directives variously put forward (22) in relation to horizontal situations must therefore also be rejected. According to that view, directives that are not transposed should not be able to impose direct obligations on an individual vis-à-vis other private individuals but – applying the principle of primacy of EU law – national law that contravenes a directive should also be disregarded in litigation between private individuals. The objection to this

approach is, quite rightly, that it would be detrimental to the principle of legal certainty. (23) For, depending on the legislative context of a provision contravening a directive under national law, failure to apply it can indeed lead to an expansion of the obligations of private persons; whether this is so depends on what are – from the EU law point of view – rather incidental factors, such as whether there is any other provision of national law (creating obligations) to which recourse might be had in the event of the law contravening a directive being suspended.

64. It therefore follows that according to this case-law the claimant in the main proceedings could not rely on Article 7(1) of Directive 2003/88 in order to require the referring court to disregard the national legislation contravening EU law.

65. The Court has compensated for refusal to accept a horizontal direct effect of directives by pointing to alternative solutions capable of giving satisfaction to an individual who considers himself wronged by the fact that a directive has not been transposed or has been transposed incorrectly. These might include, on the one hand, the possibility of interpreting national law in harmony with a directive or, on the other, applying principles of EU law on the liability of Member States for breach of EU law.

66. The Court has based the method of interpretation in harmony with directives on the duty of all the authorities of the Member States – including, for matters within their jurisdiction, the courts – to achieve the aim pursued by the directive and take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation. (24) It means that, when applying national law, the law is to be interpreted using all available means of interpretation and, as far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 288 TFEU. (25) In *Pfeiffer and Others* (26) the Court explained how the national court should proceed in legal actions between individuals. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

67. As the Court has repeatedly explained, the obligation to interpret national law in harmony with a directive is however limited by the general principles of law, particularly the principle of legal certainty, so that the obligation cannot serve as the basis for an interpretation of national law *contra legem*. (27)

68. It cannot be explicitly inferred from the order for reference whether it is at all possible to interpret the national law in harmony with the directive. It can nevertheless be concluded from an overall appraisal of the request for a preliminary ruling that the only option that remained open to the referring court so as to achieve an interpretative outcome in harmony with the directive was apparently to disregard the legislative provision at issue. In view of the fact that in its order for reference the referring court reiterated the case-law of the Court on the limits attaching to this method of interpretation it can be assumed that interpretation in harmony with the directive is impossible in the main proceedings without an interpretation of national law *contra legem*.

b) Possible alternative approaches

69. The question that thus remains to be examined is whether a national court might in certain circumstances be permitted to undertake a procedure whereby the provision at issue could be disregarded in a situation between private individuals. In my view there are three different approaches that might be considered, which I shall discuss in detail and examine for feasibility.

70. The first thing to examine is whether direct application of the fundamental right in Article 31(2) of the Charter is possible. (28) It will then be necessary to analyse the question whether entitlement to paid annual leave can be classed as a general principle of EU law and directly applied to a relationship between private individuals. (29) It will finally be necessary to undertake a critical analysis of the Court's approach in *Kücükdeveci* with a view to assessing the transferability of that approach to this case. (30)

i) Direct application of the fundamental right in Article 31(2) of the Charter

71. As already stated, an initial approach could consist of the direct application of the fundamental right to paid annual leave enshrined in Article 31(2) of the Charter.

– Applicability of the Charter

72. Although, originally, the Charter was primarily declaratory by nature, in so far as it was to be understood as the expression of the EU's commitment to observe fundamental rights, on the entry into force of the Treaty of Lisbon on 1 December 2009, that provision acquired the definitive status of primary law within the legal order of the European Union, in accordance with Article 6(1) TEU. (31) This means that, by virtue of the commitment to fundamental rights laid down in Article 51(1) of the Charter, legislative acts adopted by EU institutions in the sphere of organisation of working time must now be assessed by reference to that provision. The Member States are henceforth also bound by that provision in so far as they implement EU law. (32)

73. In view of the fact that the circumstances giving rise to the main proceedings took place in the years 2005 to 2007 and therefore at a time when the Charter had not yet entered into force its application *ratione temporis* to the circumstances on which these proceedings are based would, strictly speaking, have to be denied. To do so, however, would be to disregard the fact that the courts of the European Union had attached considerable importance to it when interpreting EU law even before its formal incorporation within the EU legal system. (33) No objection can be raised to enlisting the Charter as an aid to interpretation, especially as it reinforces those rights that are enshrined in many legal instruments and derive from constitutional traditions common to the Member States, so that they can ultimately be considered an expression of the European scale of values.

74. Since it has now entered into force its binding nature should now be beyond dispute for interpretation purposes, as is particularly confirmed by the fact that in paragraph 22 of its judgement in *Kücükdeveci* the Court took it into consideration in its legal evaluation even though it evidently did not apply at that time. (34) It would therefore seem consistent to use the relevant provisions of the Charter in this case too as the starting point for interpretation of all other rules of EU law, including general legal principles and secondary legislation. It is

particularly worth avoiding any interpretation of rules that might conflict with sentiments expressed in the Charter.

– Status of fundamental right

75. In my opinion, classification of the right to paid annual leave established in Article 31(2) of the Charter as a social fundamental right does not present any particular problems. As I said in my Opinion in *Schultz-Hoff and Others*, (35) the inclusion of this right in the Charter provides confirmation that it constitutes a fundamental right. I subscribed there to the view expressed by Advocate General Tizzano, who had already said this in his Opinion delivered in the *BECTU* case. (36) As far as I can see, this is also the view taken by a considerable number of academic writers, (37) where similar arguments are put forward in support. They are essentially based both on the wording and the legal structure of this fundamental rights rule.

76. In fact, the very wording of this provision immediately suggests the conclusion that entitlement to paid annual leave was designed to be a 'fundamental right', whereupon inclusion in the 'principles' referred to in Article 51(1) of the Charter, which do not create any direct subjective rights and indeed need to be given expression by the entities to which it is addressed, can instantly be ruled out. Article 31(2) of the Charter declares that: 'Every worker has the *right* to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. The human rights concept of a guarantee is clearly expressed here, especially as prominence is given in this article to human dignity in working life. (38) It therefore clearly differs from other provisions in Title IV of the Charter ('Solidarity'), which are worded more like a guarantee of objective law in that the rights granted there are 'recognised' or 'respected'. These differences in wording are evidence of a graduated intensity of protection according to the legal right concerned. (39)

77. In line with this graduated system of protection, those provisions that merely contain 'principles' and under the first sentence of Article 52(5) of the Charter are primarily binding on the legislature in the course of implementation also often state that protection is granted only 'in accordance with EU law or national law and practice'. (40) One significant feature of principles is that their application often requires implementing measures to be adopted, which can also only happen in accordance with the division of competence stipulated in the Treaties and in harmony with the principle of subsidiarity. (41) The fact that, in order to take effect, principles require legislative, organisational and practical measures on the part of the European Union and its Member States is also given expression by the phrase 'promote the application thereof' in the second sentence of Article 51(1) of the Charter, which also applies to them.

78. However, this is not the case with Article 31(2) of the Charter, which is conceived in this respect as an individual requirement. The fact that Article 31(1) of the Charter, in which reference is made to 'the right to working conditions which respect his or her health, safety and dignity', is couched in fairly abstract terms and is not expressed in a more concrete manner until subparagraph 2 cannot be invoked as an argument for classifying this entire provision as a 'principle' within the meaning of Article 51(1) of the Charter, particularly as rules on fundamental rights can basically be worded in a legally abstract fashion, particularly in order to take account of political and social changes. (42) This certainly applies to social rights, which are often designed to be fleshed out, not least of all because of the associated

costs that can ultimately make realisation of such rights contingent upon the de facto economic possibilities of the State. (43)

79. A systematic interpretation cannot lead to any other result. Articles 28 und 29 of the Charter also say that holders of fundamental rights have a 'right', so that both provisions grant subjective rights. (44) Due to the proximity of these provisions to Article 31 of the Charter, their substantive connection and structural similarities, it is to be assumed that Article 31 of the Charter also concerns a subjective right.

– Lack of horizontal effect

System of protection of fundamental rights under the Charter

80. At first sight, the wording of Article 31 of the Charter could induce the belief that horizontal effect is to be attributed to this provision (45) and that it is to directly apply to the situation between employers and employees. This would theoretically also oblige private individuals to guarantee fair and reasonable working conditions. Under the first sentence of Article 51(1), however, the Charter just applies to 'the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law'. Article 52(2) also provides that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. In my view, these provisions indicate an intentional restricting of the parties to whom fundamental rights are addressed, which again sheds light on the mode of protection of fundamental rights sought by the legislature of the European Union.

81. Hence, there could only be contravention of the guarantee element of Article 31 of the Charter if the European Union or the Member States do not afford their officials fair and reasonable working conditions or if they do not adopt rules safeguarding the rights stated in Article 31 of the Charter even though they have the competence to do so. (46) These provisions therefore grant individuals a subjective right that primarily consists of a duty on the European Union and its Member States to provide them with protection.

82. In view of the clear wording of the first sentence of Article 51(1) of the Charter a fundamental right could only be adversely affected by the actions of a Member State in the course of implementation of EU law, such as when transposing directives into national law. (47) This provision ultimately confirms the binding force of fundamental rights on Member States in the implementation of EU law, as recognised in the case-law of the Court. (48) It should nevertheless be borne in mind that when those rights are being implemented a considerable margin of discretion is afforded to those bound by fundamental rights because Article 31 of the Charter, as a protected fundamental right, indeed requires the adoption of defining rules. (49)

83. In light of the fact, firstly, that the first sentence of Article 51(1) of the Charter clearly determines the entities bound by fundamental rights and, secondly, that to assess the function of the fundamental right in Article 31 of the Charter according to its regulatory purpose amounts to nothing more than establishment of a duty of protection on the European Union and the Member States, it is to be concluded that private individuals are not directly bound by that fundamental right. (50) It should also be added as a further argument against a horizontal direct effect of fundamental rights in general that private individuals cannot satisfy the legislative proviso contained in Article 52(1) of the Charter ('Any limitation on the exercise

of rights and freedoms recognised by this Charter must be provided for by law'). This rule of law on contravention of fundamental rights can naturally be directed only at the European Union and its Member States as agencies of the State. Private individuals can therefore at best be bound indirectly by rules implementing the duty of protection. (51) What is more, an interpretation in harmony with fundamental rights also assumes importance in the case of provisions of private law. However, this is of no further relevance for the purposes of the present proceedings. What is relevant, in fact, is the finding that the fundamental right to paid annual leave enshrined in Article 31(2) of the Charter does not have direct effect between private individuals.

The system of protection of fundamental rights under the ECHR

84. The system of protection of fundamental rights provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) proves that it is not absolutely essential for fundamental rights to be directly binding on private individuals in order to guarantee reasonable protection of fundamental rights and that it is enough for the individual to be able to rely on the legislature's duty of protection to prevent breaches of fundamental rights on the part of private individuals.

85. Although the ECHR admittedly does not provide for a right to annual leave comparable with that in Article 31(2) of the Charter it should nevertheless be borne in mind that under Articles 52(3) and 53 of the Charter the level of protection of fundamental rights contained in the ECHR is decisive for the EU legal system. These provisions, according to their spirit and purpose, are to be interpreted as meaning that the level of protection of fundamental rights guaranteed in the Charter must not lag behind the minimum standards in the ECHR. (52) For that reason and also in light of the European Union's future accession to the ECHR, as provided for in the first sentence of Article 6(2) TEU, it would appear essential to take account of approaches to the solution afforded by this pan-European system of protection of fundamental rights.

86. It should be noted here that no foundation for horizontal effect is to be found in any guarantees of fundamental rights in the ECHR, even though provisions might appear to suggest it. (53) Horizontal effect would also encounter barely surmountable difficulties on procedural grounds as applications for contravention of guarantees in the ECHR by private individuals are ab initio inadmissible *ratione personae* under Article 35 ECHR. (54) Instead, protection of fundamental rights in relationships between private individuals is achieved on the basis that a duty of protection is imposed upon the State, which it is obliged to fulfil by adopting positive measures (so-called 'positive obligations'). According to that concept it is for the State to repel challenges made by private individuals (disturbers) to the legal positions of the respective beneficiaries of fundamental rights (victims), (55) where it has a certain amount of discretion in choosing the means by which to do so. It is only in special circumstances that the ECHR requires contravention of its prohibitions to be a punishable offence in order to protect a fundamental right, such as in the field of right to life under Article 2 ECHR in the case of attacks by private individuals. The State fulfils its duty of protection by way of legislation and the enforcement thereof by, for example, seeking to achieve a balance of interests under private law in harmony with the ECHR by giving those entitled to exercise fundamental rights adequate protection under the criminal law against impingement by private individuals or by providing for reasonable regulation of relations between neighbours through administrative law. (56) Breach of this duty of protection is established in binding manner by the European Court of Human Rights by way of a judgment

pronounced against the State concerned. (57) As legal action cannot be brought against private individuals there cannot as a result of such a judgment be any joint liability on the part of the disturber ultimately responsible for infringement of the fundamental right.

87. This brief overview shows at once that the doctrine of duty of protection on which the system of protection of fundamental rights under the ECHR is based renders superfluous the question of the binding nature of fundamental rights on private individuals as it offers reasonable solutions to the legal issues that are commonly discussed in the context of horizontal effect. (58) It cannot therefore be claimed that the level of protection of fundamental rights within the European Union would lag behind that appertaining under the ECHR if it should be found that fundamental rights under the Charter do not have direct effect in horizontal situations.

– Conclusion

88. The referring court cannot therefore rely on Article 31(2) of the Charter to decline, in a dispute between private individuals, to apply national legislation in breach of EU law that is not open to interpretation in conformity with the directive.

ii) Direct applicability of a general legal principle

89. One further conceivable approach might consist of applying, in a relationship between private individuals, a general legal principle of EU law that might possibly provide for an employee to be entitled to paid annual leave.

90. However, this approach would necessitate clarification of two fundamental issues. First, it would be necessary to consider the question whether the right to paid annual leave does indeed rank as a general legal principle within the EU legal system. Secondly, it would be necessary to clarify whether this general legal principle would also apply in a relationship between private individuals.

– The ranking of the right to annual leave within the EU legal system

The concept of a general principle

91. Both the concept and function of general principles in EU law should first be briefly reviewed by way of an introduction to investigation of the first question.

92. The general principles of EU law hold a particular place in the case-law of the Court of Justice. However, even today the concept of general principles is a thorny issue. (59) The terminology is inconsistent both in legal literature and in case-law. To some extent there are differences only in the choice of words, such as where the Court of Justice and the Advocates General refer to a ‘generally-accepted rule of law’, (60) a ‘principle generally accepted’, (61) a ‘basic principle of law’, (62) a ‘fundamental principle’, (63) ‘a principle’, (64) a ‘rule’, (65) or a ‘general principle of equality which is one of the fundamental principles of EU law’. (66)

93. There is agreement in any case that general principles have considerable importance in case-law in filling gaps and as an aid to interpretation, (67) not least because the EU legal order is a developing legal order which inevitably has gaps and requires interpretation on account of its openness in respect of integrational development. On the basis of such

recognition the Court also appears to have opted not to undertake a precise classification of general principles in order to retain the flexibility it needs in order to decide on substantive matters which arise regardless of terminological discrepancies. (68) General principles also assume importance in their role as criteria for assessing the legality and validity of EU legal instruments (69) and as a basis for judicial development of the law. (70)

94. According to one definition put forward in legal literature, general principles include the fundamental provisions of unwritten primary EU law which are inherent in the legal order of the European Union itself or are common to the legal orders of the Member States. (71) In principle, a distinction can be drawn between general principles of EU law in the narrow sense, namely those which are developed exclusively from the spirit and system of the Treaties and relate to specific points of EU law, and those general principles which are common to the legal and constitutional orders of the Member States. (72) Whereas the first category of general principles can be derived directly from primary EU law, the Court essentially uses a critical legal comparison in order to determine the second category, which does not, however, amount to using the lowest common denominator method. (73) Nor is it regarded as necessary for the legal principles developed in this way in their specific expression at EU level always to be present at the same time in all the legal orders under comparison. (74)

95. The general principles are distinguished by the fact that they embody fundamental principles of the European Union and of its Member States, which explains their status as primary law within the hierarchy of rules in the EU legal order. (75) Particular importance is attached to the protection of fundamental rights in the narrow sense developed and ensured by the EU courts under this general designation and to the formulation of the procedural rights which are equivalent to fundamental rights and which, as general principles of the rule of law, have been elevated to the status of constitutional law in the European Union. (76) The general principles therefore also include principles which are closely connected with and may be derived from the structural principles of the European Union, such as liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law within the meaning of Article 2 TEU. If a Member State breaches those principles the special sanction mechanism laid down in Article 7 TEU is triggered.

96. Important principles based on the rule of law such as the notion of proportionality, (77) legal clarity, (78) or the entitlement to effective protection by the courts have been recognised as general principles of EU law. (79) They also encompass various general principles of sound administration, such as the protection of legitimate expectations, (80) the principle of non bis in idem, (81) the right to be heard, (82) including the opportunity to make submissions in the case of measures affecting interests, (83) the obligation to state reasons for legal measures, (84) and the duty of the competent institution to establish the facts. (85) Reliance on *force majeure* is also included. (86) However, there are also principles which are not alien to contract law, such as the general principle *pacta sunt servanda* (87) or the principle of *rebus sic stantibus*. (88)

97. The notion of a social state based on the rule of law is also suggested, for instance, by the recognition of the principle of solidarity (89) or the duty of the administration to have regard for the welfare of its officials. (90) The recognition of federal commitments within the European Union includes the frequently highlighted principle of cooperation among the Member States and their obligations to cooperate in relation to the European Union. On the basis of Article 10 EC the Court has thus developed the principle of reciprocal Community

loyalty. (91) The Court has also referred to the democratic principle, for example when it pointed to the need for the effective participation of the Parliament in the legislative process of the European Union, in accordance with the procedures laid down by the Treaty. (92)

98. The fundamental EU rights which the Court has recognised by means of the abovementioned evaluative legal comparison and having regard to international and European human rights conventions include such fundamental and human rights as characterise liberal and democratic societies, such as freedom of expression (93) and freedom of association. (94) They also include basic principles stemming directly from the Treaties, such as the prohibition of discrimination based on nationality(95) and the prohibition of discrimination based on sex. (96)

Right to paid annual leave in the European Union

99. It is questionable whether a right to paid annual leave meets the requirements established in case-law for a general principle. For that to be the case, such a right in the field of EU employment law would have to be of such fundamental importance, like the abovementioned examples, that it has found expression in many rules of primary law and in secondary EU law.

100. Other sources of inspiration to be considered are the numerous international agreements on the protection of human rights and the rights of workers to which the EU Member States have acceded.

101. Finally, the law of the Member States themselves has to be considered. Recourse to the comparative law approach often taken by the Court could shed light on whether, according to constitutional traditions (97) or in any event the core provisions of national employment law, such a right is afforded a pre-eminent place in national legal systems.

– Provisions of EU law

102. As far as the relevant provisions of EU law are concerned, it is possible now to draw on what has already been said about the classification of the right to paid annual leave as a fundamental right. As already mentioned, its codification in Article 31(1) of the Charter confirms its pre-eminent position within the legal order of the European Union. It should be noted in this context that, as stated in the fifth recital in the preamble, the Charter reaffirms ‘the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights’. In other words, the Charter reflects nothing less than the present body of law on fundamental rights within the European Union.

103. Although it is apparent that Article 7(1) of Directive 93/104 – the predecessor provision to Article 7(1) of Directive 2003/88 – served as the model for the wording of Article 31(1) of the Charter, this should not induce the belief that entitlement to a minimum amount of paid annual leave was not established until the directive on working time was adopted. In fact, this entitlement, regardless of the length of guaranteed leave, has long numbered amongst internationally recognised social fundamental rights.

– Provisions of public international law

104. At international level this fundamental right is mentioned, for example, in Article 24 of the Universal Declaration of Human Rights, (98) which confers on everyone 'the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. It is also upheld in Article 2(3) of the European Social Charter of the Council of Europe (99) and in Article 7(d) of the International Covenant on Economic, Social and Cultural Rights (100) as a manifestation of the right of everyone to fair and equitable working conditions. Article 8 of the Community Charter of the Fundamental Social Rights of Workers also stipulates that every worker is entitled to paid annual leave. (101) This is of relevance as substantial importance is attributed to this Charter as a source of inspiration in the case-law of the Court. It reflects the common views and traditions of the Member States and is considered a declaration of the fundamental principles held dear by the European Union and its Member States. (102) Within the framework of the International Labour Organisation, which is a special agency of the United Nations, the right to a minimum period of paid annual leave has thus far been the subject-matter of two multilateral conventions. In this respect, Convention No 132, (103) which entered into force on 30 June 1973, amended Convention No 52, (104) which was previously in force. They place mandatory requirements on the signatory States with regard to the implementation of this fundamental social right within their national legal systems.

105. However, these varied international instruments are distinct from one another both in terms of their substantive regulatory content and their legislative scope since in some cases they are international law conventions, in others merely solemn declarations with no legal force. (105) The persons to whom they apply are also different, with the result that the class of persons covered is by no means identical. In addition, the signatory States, as the addressees of these instruments, are generally granted broad discretion with regard to implementation and therefore the beneficiaries are unable to rely directly on their rights. (106) However, it is significant that in all those international instruments the right to a period of paid leave is unequivocally included among workers' fundamental rights.

– The legal systems of the Member States

106. Social rights vary considerably at constitutional law level. Several constitutions contain safeguards relating to working conditions which include the right of workers to rest.

107. For example, Article 11(5) of the Constitution of Luxembourg and Article 40(2) of the Constitution of Spain require the State to create healthy working conditions and to provide or ensure rest for workers. (107) A much more comprehensive rule, which is much closer to the wording in Article 31 of the Charter, is to be found in Article 36 of the Constitution of Italy, which provides inter alia for a right to a weekly rest day and paid annual leave. The Constitution of Portugal would appear to have been one of the models for the rules of the Charter since Article 59(1)(d) thereof establishes the right to rest and leisure, an upper limit on daily working hours, a weekly rest period and regular paid leave. (108) However, it must be said that the social fundamental rights subjectively formulated and set out in detail in these constitutions are generally understood to be purely State obligations rather than rights that are directly enforceable. (109)

108. In the majority of old Member States of the European Union, on the other hand, the right to a minimum period of paid annual leave is based on ordinary legislation which mirrors the

secondary legislation requirements of the directive, in so far as ambits of EU law are concerned. This applies, for example, to German law which, whilst recognising in Article 20(1) of the Basic Law that 'the principle of the social State' from which various minimum social entitlements are derived is a State objective, otherwise leaves it to the legislature to regulate annual leave. (110) However, the constitutions of the German Länder do nevertheless contain many social guarantees and principles that provide inter alia for an obligation on the legislatures of the Länder to make provision for adequate paid leave. (111)

109. By contrast, the new Member States, other than Cyprus, have a comprehensive codification of this right. This is the case, for example, with regard to Article 36(f) of the Slovak, Article 66(2) of the Polish, Article 70/B(4) of the Hungarian, Article 107 of the Latvian, Article 41(2) of the Romanian, Article 48(5) of the Bulgarian, Article 13(2) of the Maltese and Article 49(1) of the Lithuanian Constitutions, which expressly guarantee a minimum period of paid annual leave. Working conditions in general are addressed in the Constitutions of Slovenia (Article 66), the Czech Republic (Article 28) and Estonia (Article 29(4)). (112)

– Summary

110. The importance of entitlement to paid annual leave has long been recognised in the Court's case-law. According to established case-law it is to be regarded as 'a particularly important principle of EU social law' from which there can be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself. However, the Court has not as yet clearly ruled whether it is a general principle of EU law. Its unequivocal classification is also made more difficult by the fact that no uniform terminology is used in case-law to describe such general principles. (113)

111. The comparative law review set out above does indeed show that the idea that an employee is entitled to periodic rest time permeates the legal systems of both the EU and its Member States. The fact that this idea has constitutional status both at EU level (114) and within several Member States (115) is indicative of the prominent position afforded to that right, which suggests its classification as a general principle of EU law.

112. The fact that not all Member States grant it constitutional status within their legal systems is not detrimental, however, (116) as it is in any event considered a core element of national law irrespective of whether an employment relationship is one governed by private or public law; this has also been recognised in the Court's case-law. (117) Since it is not restricted to a certain area of law but spans several different sectors, i.e. it applies to many occupational areas in all Member States in the field of both employment and service law, entitlement to paid annual leave claims a certain general validity typically afforded to general principles and differing from specific rules of law. (118) The situation is no different under EU law since, as I have observed most recently in my Opinion in Case C-155/10 *Williams and Others*, (119) those directives on the organisation of working time which contain sector-specific rules due to the special features of certain occupational areas, (120) which can in that respect be considered a *lex specialis* with regard to the provisions of Directive 2003/88, make their own provision for the right to leave.

113. Furthermore, entitlement to paid annual leave exhibits a minimum substantive degree of normative certainty, which is commonly considered a prerequisite of recognition as a general

principle. (121) This is endorsed, first, by a comparison with various principles of law recognised in case-law, such as the aforementioned ‘principle of democracy’ or ‘solidarity’ which are distinguished by their abstractness. It is also apparent from the clarity of the objective of the entitlement. Regardless of the essential configuration arrived at by the legislature, the objective of entitlement to annual leave is primarily to give employees a temporary break from their contractual labours. At any rate, by meeting the minimum requirements for substantive certainty that entitlement also fulfils the conditions necessary to be considered a general principle.

114. In the light of the foregoing, it should be noted that there are several arguments in favour of granting entitlement to annual leave the status of a general principle within the legal system of the European Union.

– Applicability of general principles between private individuals

115. It is also necessary to clarify whether this general principle would in certain circumstances apply even to relationships between private individuals.

Fundamental possibility of direct application

116. It is acknowledged in the case-law of the Court that individuals can rely on general principles in their relationships with the State. (122) However, the Court has not as yet expressed an opinion on the basic question of whether fundamental rights as general principles are directly applicable at all in relationships between private individuals.

117. This question is deserving of specific attention, particularly in view of the significance of protection of individual fundamental rights. It is conceivable to argue, on the one hand, by reference to the origin and objective of general principles, that they principally serve to protect the individual from intervention by public authorities, with the result that direct application between private individuals would have to be denied. On the other hand, it is possible to take the view that the traditional ‘public/private’ juxtaposition is no longer appropriate in a modern State. It is indeed possible to conceive of cases in which protection of fundamental rights vis-à-vis private bodies would appear every bit as essential as against public authorities, so that failure to afford protection of fundamental rights would be tantamount to a breach of fundamental rights. (123)

118. This would be the case, for example, with employment relationships such as at issue here, especially as an employment relationship – irrespective of whether in a specific instance it is configured under private or public law – is generally characterised by an uneven balance of power between employer and employee. (124) Since it is often a matter of chance whether an employer is a body governed by private law or a public authority, (125) it would be difficult to justify a difference in protection of fundamental rights according to the circumstances of a case.

119. The theory that private individuals are bound by fundamental rights as general principles would be supported, not least of all, by the principle of effectiveness *(effet utile)* in EU law and the coherence of the EU legal order. EU law could be helped to become more effective in many areas by the horizontal effect of fundamental rights. Whilst Member States can apply EU law only in conformity with fundamental rights because they are bound by those fundamental rights, private individuals could jeopardise the practical effectiveness of EU law

within the scope of their legal relationships if they were permitted to breach fundamental rights in areas determined by EU law. This would endanger the coherence of EU law. (126)

120. An examination of former case-law reveals approaches in that direction in the Court's arguments.

121. Indications of direct applicability of general principles in relationships between private individuals are to be found, for example, in the case of *Defrenne*, (127) in which the Court ruled that the principle laid down by Article 119 of the EEC Treaty (now Article 157 TFEU) that men and women should receive equal pay may be relied on before the national courts in equal measure in relationships with both public and private employers.

122. Indications are also to be found in case-law on the application of fundamental freedoms vis-à-vis private individuals, in the judgment in *Walrave*, (128) for instance, in which the Court ruled that the prohibition of discrimination based on nationality in Articles 7, 48 and 59 of the EEC Treaty (now Articles 18, 45 and 56 TFEU) does not only apply to the action of public authorities but extends likewise to rules of any other nature – in that particular case the rules of a sporting federation – aimed at regulating in a collective manner gainful employment and the provision of services. The Court based its judgment on the grounds that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law. Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application. (129) In its judgment in *Bosman* (130) the Court later ruled that the provisions of primary law relating to the free movement of workers also apply to the transfer rules of the international football association FIFA ('Fédération Internationale de Football Association') and UEFA ('Fédération Européenne des Associations de Football').

123. On the other hand, however, it is questionable whether it can simply be concluded from the judgments in *Walrave* and *Bosman* that fundamental rights are generally to be directly applied in the form of general principles in relationships between private individuals, especially as both of those cases concerned the application of fundamental freedoms to private organisations which to a certain extent had regulatory powers and hence were of a quasi-public nature. It would therefore be feasible to argue that the Court's judgments were justified by the particular circumstances of each case. If one were to accept that argument, any parallel would be precluded in view of the fact that the defendant in the main proceedings is probably not such a private organisation with regulatory powers.

124. A further indication of the direct applicability of general principles in relationships between private individuals can be derived from the judgment in the *Angonese* case, which concerned access to employment at a private bank in which the Court took the view that 'the prohibition of discrimination on grounds of nationality laid down in [Article 45 TFEU] must be regarded as applying to private persons'. (131)

125. Mention should finally be made here in this connection of the ruling in *Kücükdeveci*, (132) in which the Court applied to an employment relationship between

private individuals the principle of non-discrimination on grounds of age the status of which as a general principle of EU law was first acknowledged in the *Mangold* case. (133) It should be noted in this context that the Court has taken its own individual approach in its grounds for the direct application of a general principle which requires more in-depth examination in terms of legal theory, not least of all because of its innovative character. Reference is therefore made here to my further observations (134) with regard to this approach, which I will go into separately in detail.

126. In summary, it must be stated that in light of this case-law the direct application of fundamental rights in the form of general principles in relationships between private individuals cannot be ruled out in principle. (135)

Risk of an attitude inconsistent with the provisions of the Charter

127. Since the Charter entered into force entitlement to paid annual leave has been based on Article 31(2) of the Charter. A general principle that might be developed by the Court on the basis of the above observations and essentially provide for such an entitlement must nevertheless continue to have a separate existence as Article 6 TEU makes express mention of both the Charter and fundamental rights deriving from general principles in paragraphs 1 and 3. (136) As for the relationship between rights under the Charter and rights under general principles, it is to be concluded from these provisions that they have equal status. (137) Hence, they can also be applied concurrently so that a private individual is not prevented from relying on the more extensive guarantee. They are largely identical in substance, however, since, on the one hand, as can be seen from its preamble, the Charter reaffirms the rights resulting from the sources of law used by the Court and, on the other, the Charter is evidence of the substance of constitutional traditions common to the Member States. Nevertheless, one cannot rule out the possibility of fundamental rights deriving from general principles and developed further affording a greater degree of protection than those under the Charter. (138)

128. Where a parallel application of fundamental rights under the Charter and general principles within the EU legal system is to be assumed it should be noted that the direct application of a legal principle providing for an entitlement to annual leave carries the risk, at least in a legal action between private individuals, of inconsistency. As already stated, the first sentence of Article 51(1) of the Charter is to be interpreted as meaning that the fundamental right to paid annual leave enshrined in Article 31(2) of the Charter does not have direct application between private individuals. To allow private individuals at the same time to rely on a general principle would nevertheless be to circumvent the restriction on the addressees of fundamental rights provided by the EU legislature in the Charter.

129. However, the requirement of coherent protection of fundamental rights demands that both fundamental rights be interpreted, as far as possible, in coordinated fashion. (139) As, according to the fifth recital in the preamble to the Charter, the fundamental rights deriving from general principles and, above all, the Court's case-law based thereon are to be integrated into the interpretation of fundamental rights under the Charter there must be no substantive inconsistency between the two categories of fundamental rights. What is needed is a harmonised interpretation, wherever a fundamental right under the Charter so permits. (140)

130. In the present case a harmonised interpretation would be impossible as regards the direct application of the general principle to the relationship between employer and employee. The decision by the EU legislature to only indirectly grant protection to fundamental rights – in the main proceedings via Article 31(2) of the Charter – by imposing a duty of protection on the European Union and its Member States would then be counteracted by the fact that this would ultimately pave the way, by means of an unwritten general principle, to nevertheless allowing horizontal effect, including the right to require a national court to disregard a national law in breach of EU law, even in a relationship between private individuals. In order to avoid an inconsistent attitude it would be necessary to reject the direct application of the general principle. (141)

131. It should also be stressed that these statements apply only in so far as, in the case of a fundamental right under Article 31(2) of the Charter and the general principle, the same fundamental right or fundamental rights with the same scope of protection are concerned. As stated in the introduction, however, the possibility of further developed fundamental rights that derive from general principles affording greater protection than the fundamental rights in the Charter cannot be ruled out. In such a case an attitude inconsistent with the first sentence of Article 51(1) of the Charter could in certain circumstances be untenable.

132. The following observations do not apply unless the Court should consider that, in principle, the application of a general principle aimed at granting annual leave does not constitute an attitude inconsistent with the first sentence of Article 51(1) of the Charter.

Applicability to entitlement to paid annual leave

133. Since the direct applicability of fundamental rights in the form of general principles cannot be categorically ruled out in relationships between private individuals it is now necessary to examine whether the requirements in this context are satisfied.

– Grant of a subjective right

134. For that to be the case the aim of entitlement to annual leave at issue here should, first, be the grant of subjective rights. As already stated, the general principle grants a subjective right in that it creates an entitlement for the employee vis-à-vis the employer, essentially to be released from his or her contractual obligation to carry out work in order to have reasonable time for rest and recuperation. To this extent it satisfies the first requirement for direct applicability.

– Substantively unconditional and sufficiently precise

135. Furthermore, the general principle must be substantively unconditional and sufficiently precise to enable it to be asserted against the employer as a private person. A provision is substantively unconditional if it is applicable unreservedly without conditions attaching to it and is not subject to the taking of any other measure either by the institutions of the Member States or by the European Union. (142) A provision is sufficiently precise if it unequivocally creates an obligation (143) – that is to say, it is legally perfect and can be applied by the courts as such. (144)

136. It is doubtful whether these conditions are satisfied in the case of an entitlement to annual leave, especially as it is not clear how far the scope of protection of the general

principle actually extends. Since its scope is not clear and conclusively ascertainable from the outset it is necessary to examine in each individual case whether the scope of protection might be affected by a measure taken by the European Union and/or its Member States. It would be for the Court to undertake such a task when asked to interpret the general principles of EU law. (145)

137. In order to be sufficiently precise the general principle must cover various aspects of entitlement to paid annual leave, which should nevertheless, logically, be regulated only by the legislature itself so as to take sufficiently reasonable and flexible account of present-day demands. To name just a few examples, these aspects requiring regulation concern, on the one hand, the number of days of leave to be granted, one of the issues then arising being whether this means a precisely fixed number of days or rather a minimum number of days. In order to be directly applicable vis-à-vis an employer the general principle would also have to determine how the days of leave should be apportioned over the year to enable the annual leave to fulfil its recuperative function. Furthermore, the general principle would have to take account of special circumstances pertaining in each sector of the economy by, where necessary, including sector-specific rules for individual areas of activity.

138. That is obviously impossible. First, such an extensive general principle cannot exist without at the same time calling into question the differentiation of terms in specific legal rules. (146) Secondly, it should be noted that the regulation of these details falls within the inherent competence of the legislature. Not least for that reason, the constitutions of those Member States that explicitly recognise entitlement to annual leave as a fundamental right leave it to the national legislature to determine the mode of implementation. The same applies at EU level with regard to the relationship between Article 31 of the Charter and Directive 2003/88.

139. The EU's legislative competence is jointly exercised under the Treaties by the Council and the European Parliament. The rule-making powers which they hold as legislative bodies in the area of the law on leave as part of the EU's social law must be respected in any event. This is required not only for the aforementioned practicability reasons but also for institutional balance within the EU. This balance is not based on the principle of separation of powers in the constitutional-law sense, but on a principle of separation of functions, whereby the EU's functions are intended to be exercised by the organs which are best placed to perform them under the Treaties. Unlike the principle of separation of powers, which seeks partly to ensure that the individual is protected by moderating State power, the principle of separation of functions in EU law is intended to ensure that the European Union's aims are effectively achieved. (147)

140. As I have stated in my Opinion in Case C-101/08 *Audiolux*, the Court of Justice, as an EU institution within the meaning of Article 12(1) EU, also forms part of that institutional balance. (148) This means that, in its capacity as an EU judicial body which has the right to ensure, within its jurisdiction, that in the interpretation and application of this Treaty the law is observed, it respects the rule-making powers of the Council and of the Parliament. (149) This necessarily presupposes that it leaves to the EU legislature the task of rule-making in the field of organisation of working time conferred on it by the Treaties and, as before, observes the necessary self-restraint in developing general principles of EU law which might possibly run counter to the legislature's aims.

141. The direct applicability of a general principle of an employee's entitlement to annual leave vis-à-vis his or her employer would therefore for one thing be contingent on the Court giving it sufficiently precise legislative content by way of interpretation, whereby – in view of the plethora of necessary rules – it would ultimately assume the competence traditionally reserved to the EU legislature. As this is not permissible for the reasons set out above it is to be assumed that this general principle, at least in its pure form, cannot be regarded as substantively unconditional and does indeed require legislative configuration by the legislature.

142. The general principle does not therefore satisfy the requirements for it to be directly applicable to relationships between private individuals.

– Conclusion

143. In light of the foregoing, the referring court cannot, in a dispute between private individuals, use a general principle as a basis for disregarding national law in breach of EU law where an interpretation in conformity with the directive is not possible.

iii) Application of the general principle, as given specific expression in Directive 2003/88

144. Another conceivable approach would be to apply the aforementioned general principle, as given specific expression in Directive 2003/88. (150)

– The Court's approach in *Kücükdeveci*

145. In its judgment in the *Kücükdeveci* case, to which some of the parties involved in the proceedings have referred in their observations, the Court took a similar approach, confirming the duty on a national court to implement the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, (151) if necessary by disregarding any provision of national law contrary to that prohibition. (152)

146. With that ruling the Court expanded the principle of primacy of EU law over national law to cover so-called 'horizontal relationships'. (153) This approach conforms to earlier case-law on the absence of direct horizontal effect of directives (154) in that the Court did not rule that Directive 2000/78 should apply to a relationship between private individuals but simply that *the principle of non-discrimination on grounds of age was given expression therein*, which – as already found in the *Mangold* case (155) – constitutes a general principle of EU law as a specific application of the general principle of equal treatment. (156) The approach followed by the Court in *Kücükdeveci* is essentially based on the idea that a general principle such as the principle of non-discrimination on grounds of age has to be implemented consistently also at national level in the interests of individual legal protection and the effectiveness of EU law. (157) In doctrinal terms this approach constitutes a refining of the *Mangold* case-law.

147. According to the Court, however, direct applicability in relationships between private individuals of the principle of non-discrimination on grounds of age, as given specific expression in Directive 2000/78, clearly does not come into consideration until certain conditions are fulfilled. It is necessary, first, for there to be difference in treatment on grounds of age in the main proceedings which is not objectively justified, which is to be

ascertained from the factual conditions laid down in Directive 2000/78. (158) Secondly, the national legislation in question must cover an area regulated by the directive. (159)

– Transferability of this approach to entitlement to annual leave

Requirements for it to apply

148. A corresponding application of this approach to the main proceedings, so as to give the national court the power, where necessary, to disregard national law that is in breach of EU law, would inter alia require entitlement to paid annual leave to have the status within the EU legal system of a general principle above and beyond its codification under secondary law in Article 7(1) of Directive 2003/88; this is supported by the arguments already put forward. (160)

149. One further condition would be the requirement that an employment relationship be in existence, which is apparently the case in the main proceedings. Finally, there would have to be an entitlement to leave satisfying the requirements of the directive. This would ensure that the general principle did not enjoy unlimited application but extended only as far as the national legislation at issue fell within the scope of application of Directive 2003/88. This condition is also fulfilled in the main proceedings as the substance of the legislation in dispute is a condition for claiming annual leave imposed by the national legislature. (161)

150. Lastly, in order for it to be possible to activate the general principle and set it against national law it would be necessary for there to be a contravention of the right to leave enshrined in the directive. This has already been found to be the case in my examination of the first question referred for a preliminary ruling. (162)

151. When considered from the formal aspect, the requirements for a direct application of entitlement to annual leave in the form of a general principle, as given specific expression in Directive 2003/88, are indeed satisfied. It is nevertheless appropriate to consider the advantages and disadvantages of such an approach before contemplating such action in the present case. (163)

The advantages and disadvantages of such an approach

152. This approach has the advantage of avoiding the aforementioned shortcomings of a direct application of the general principle in pure form. (164) This especially applies in relation to the requirement of ‘sufficient precision’. Because the directive gives specific expression to the general principle, that principle ultimately achieves the substantive precision necessary for direct applicability.

153. Certain reservations might be expressed regarding the theoretical accuracy of this approach, which I shall illustrate below.

– Risk of mixture of sources of law

154. My reservations concern, first, the risk, which cannot be entirely ruled out, of an improper mixture of sources of law having different status within the EU legal system as a result of the combined application of a general principle and a directive.

155. From an objective point of view this approach is essentially based on the assumption that the content of a general principle must be reflected in the content of the directive and that therefore an autonomous stipulation of that content by way of interpretation is fundamentally unnecessary. Ultimately, nothing other is being implied than that the scope of protection of a general principle is virtually identical to that of the provision in the directive putting it in concrete terms. (165)

156. The disadvantage with this, however, is that it leaves completely open the question of how far the scope of protection of a particular general principle actually extends and whether a directive might possibly contain wider provisions that are not covered by that scope of protection at all. (166) The assumption on which this approach is based ignores the fact that synchronisation of the content of a directive with the content of primary law is not only in no way mandatory but is also, in truth, the exception because secondary law will usually contain wider provisions. (167) This presents a problem in that recourse to this approach would be out of the question in such a case. If the purpose of this approach, as postulated by the Court, were actually to be to apply a general principle, it would certainly be doctrinally correct to undertake an autonomous determination of its content first of all, instead of doing things the other way round and inferring the substance of a general principle from the provisions of a directive. (168)

157. Since, at the end of the day, when taking this approach it is the directive and not the general principle itself that becomes the starting point for ascertaining the scope of protection of the rule, (169) with this mode of procedure there is the danger of more and more legislative content of a directive being considered an element of a general principle. In other words, a directive could theoretically develop into an inexhaustible source of inspiration for enhancement of the scope of protection of a general principle, the consequence of which in the long run would be an amalgamation of sources of law with different status. (170) Ultimately this mode of procedure would lead to irreversible 'ossification' of that legislative content. As a result of incorporating more and more legislative content from a directive within the scope of protection of a general principle, the legislature would be deprived of the ability to make amendments to the directive, especially as such legislative content would then be elevated to the status of primary law, upon which it cannot impinge.

158. In light of the fact that entitlement to paid annual leave is a fundamental social right which – by its very nature – needs to be given specific expression to a significant extent and can also often only be granted as a function of particular economic and social realities, (171) this approach could have unforeseeable consequences for the European Union and its Member States. It should be noted that a certain amount of flexibility is required by the legislature when giving specific expression to such a general principle, as society's view of what is to be considered 'social' or 'socially just' can change over the course of time and is often based on compromise. (172) Nor should one disregard the fact that implementation of the concept of a social state depends upon the particular economic situation appertaining in the European Union and its Member States. It is therefore necessary to avoid encasing social standards in cement without any regard for economic and social reality.

159. However, this should not be understood to mean that the European Union should disregard the social dimension of integration. The promotion of social cohesion in the sense of the idea of 'solidarity' is and remains an important aim of European integration, as is made clear in Article 2 TEU ('solidarity' as one of the values on which the European Union is founded) and Article 3(3) TEU ('combating social exclusion', 'social justice', 'social

protection', 'equality between women and men', 'solidarity between generations', 'protection of the rights of the child') and Article 9 TFEU ('promotion of a high level of employment', 'guarantee of adequate social protection', 'the fight against social exclusion'). Particular regard is to be had instead to the margin of discretion enjoyed by the EU legislature when discharging its duty of protection under a fundamental right.

– The directive does not conclusively give specific expression to the principle

160. Even if the Court should not share these reservations it would be doubtful whether the approach taken in *Kücükdeveci* would be applicable to the main proceedings, especially as Directive 2003/88 scarcely gives sufficient specific expression to the general principle to enable it to apply directly in a relationship between private individuals.

161. Directive 2003/88 not only provides for a number of special rules – in Article 15 for example, permitting the Member States to introduce more favourable rules or, in Article 17, allowing variations and derogations from some central provisions of the directive (173) – it also affords the Member States a wide margin of discretion. Article 7(1) of Directive 2003/88 expressly states that Member States 'shall take the measures *necessary* to ensure' that every worker is entitled to paid annual leave '*in accordance with the conditions* for entitlement to, and granting of, such leave laid down by *national legislation* and/or *practice*'. No specific answers to essential questions of the right to leave, such as how much leave is to be granted, are to be directly construed from either the directive or the wording of Article 31(2) of the Charter, (174) which with regard to the guarantee of a fundamental right to annual leave is even shorter in content than the relevant implementing provision in Article 7 of Directive 2003/88.

162. There is here a significant difference compared to the prohibitions on discrimination for which the approach applied in *Kücükdeveci* was developed. The distinctive feature of prohibitions on discrimination is that their substantive core is essentially identical at both primary and secondary-law levels. It is also possible to ascertain what discrimination is by interpreting prohibitions on discrimination under primary law. The rules in directives in this respect are no more than detailed formulations of primary-law principles. Only where directives regulate personal and material scope and legal consequences and procedures do they make rules whose content cannot immediately derive directly from primary law. The situation with regard to employees' fundamental rights under Article 27 et seq. of the Charter is different as they are designed to be given specific expression by the legislature from the start. (175)

163. Since Directive 2003/88 does not conclusively regulate annual leave but makes considerable reference to national law, the question that arises is whether the relevant national implementing law can also be consulted when giving specific expression to the general principle. My view is that this approach would encounter various obstacles. In light of the large number of differing national provisions in the field of entitlement to leave it is not only the practicalities of such an approach that would be in doubt. The uniform application of EU law in all Member States would also fail to be guaranteed.

– Absence of legal certainty for private individuals

164. There are also reservations with regard to the compatibility of this approach with the requirement of legal certainty. This latter requirement is also a general principle of EU

law. (176) As the Court has said on numerous occasions, the principle of legal certainty requires that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. (177) However, as it will never be possible for a private individual to be certain when an unwritten general principle given specific expression by a directive will gain acceptance over written national law there would, from his point of view, be uncertainty as to the application of national law similar to that experienced where a directive is directly applied in a relationship between private individuals, which the Court, as so often affirmed in its case-law, (178) has been at particular pains to avoid. (179) This would have serious consequences in the field of employment law, in particular, where the details of an almost immeasurable number of employment relationships are regulated.

165. It would then be impossible to rule out the risk that national courts may be compelled by this approach to decline to apply national law that is covered in any form whatsoever by the scope of application of a directive but was adopted without reference to the directive – based on the grounds that the provisions of the directive in question give specific expression to certain general principles of EU law or embody legal interests with primary law status, (180) irrespective of whether they have a corresponding power of rejection under national law. This risk is even more pertinent in that under the judgment in *Kücükdeveci* the national court is not compelled to make a reference to the Court for a preliminary ruling before doing so. (181)

166. If this approach were to be followed in the Court's case-law, directives would be afforded a status not attributed to them under the concept of primary law. They would become gateways for primary law far above and beyond the scope afforded or intended to be afforded to them by the EU institutions adopting them. In conjunction with the primary-law consequence of inapplicability of national legislation and the power of national courts at any instance to reject legislation without first carrying out a preliminary ruling procedure, as accepted by the Court, this would mean, in view of the fact that a large number of issues are *in some way* affected by directives, that national legislation would be considerably eroded.

167. It is doubtful, moreover, whether this is in conformity with the legislative and judicial system established by the Treaties.

– Risk of inconsistency with the provisions of the Charter

168. The objection that I have raised in connection with the direct application of general principles as regards the risk of an inconsistency with Article 51 of the Charter (182) applies *mutatis mutandis* in the event of recourse to this approach. I therefore refer in this context to my observations on that issue. The limit established in the first sentence of Article 51(1) of the Charter on the parties to whom fundamental rights are addressed therefore also precludes the application of the general principle, as given specific expression in Directive 2003/88.

– Result

169. In the light of the foregoing, I conclude that the direct application of a general principle such as in the *Kücükdeveci* case, so as to supersede national law that is in breach of EU law, would not be possible in the main proceedings here.

c) Definitive conclusion

170. To summarise, EU law does not afford the national court any possibility of disregarding the legislation at issue here in a relationship between private individuals. As the question referred by the national court is formulated in such a way as to ask for a ruling as to whether there is an obligation on the national court to that effect under EU law the answer to that question must be that the national court is not obliged to do so in the absence of guidelines under EU law.

3. In the alternative, liability of the Member State for contravention of EU law

171. If it is established – as in the main proceedings – that there is a contravention of EU law for improper transposition of Article 7 of Directive 2003/88 but it is nevertheless impossible for the national court to declare inapplicable the national legislation that is in breach of EU law, this certainly does not mean that the claimant in the main proceedings has no legal remedy.

172. As mentioned at the outset, (183) she would still have the possibility of bringing a civil liability action against the Member State contravening the Treaties in order to enforce her entitlement to annual leave deriving from EU law. The legal concept of State liability provides the citizen with satisfaction in such an instance by imposing an obligation on the Member State concerned to make good the damage sustained by him or her as a result of the State's infringement of EU law.

173. EU law recognises a right to reparation where three conditions are met: they are that: 'the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties'. (184) In *Dillenkofer*, (185) with particular regard to situations involving a failure to transpose a directive, the Court additionally formulated the first condition in a slightly different way ─ the result prescribed by the directive must entail the grant of rights to individuals and the content of those rights must be identifiable on the basis of the provisions of the directive ─ whilst stressing that the two formulations were in substance the same. (186)

174. As regards the division of jurisdiction between the EU judicature and the courts of the Member States, it must be observed that it is in principle for the national courts to determine whether the conditions for State liability for a breach of EU law are satisfied in a particular case. (187) However, the existence and extent of State liability for damage ensuing as a result of such a breach are questions concerning the interpretation of EU law which fall within the jurisdiction of the Court of Justice. (188)

4. Conclusion

175. In the light of the foregoing, the answer to the second question referred for a preliminary ruling must be that Article 7 of Directive 2003/88 does not impose an obligation on the national court of a Member State hearing proceedings between individuals to disregard a national provision which makes entitlement to paid annual leave conditional on at least 10 days' actual work during the reference year where an interpretation in conformity with the directive is not possible.

C – *Third question*

176. In formulating its third question the referring court clearly assumes a particular national legal framework that provides for an entitlement to annual leave of differing lengths according to the cause of the employee's absence from work due to ill health, whereby it would seem that a distinction is drawn according to whether the cause was a work-related accident, an occupational disease, an accident on the journey to or from work or a non-occupational disease. It is not apparent from the order for reference how long the leave would be in each case. It is simply established that this national legal framework provides in certain circumstances for the length of paid annual leave to exceed the minimum of four weeks provided for by the directive.

177. I have already shown in my observations on the first question that the entitlement to paid annual leave guaranteed in Article 7 of Directive 2003/88 exists irrespective of whether the employee was absent during the period at issue on health grounds, provided that she was on duly certified sick leave. (189) As the referring court correctly states in its order for reference, Article 7 of Directive 2003/88 does not distinguish between the cause of absence on health grounds. Indeed, the provision of the directive applies, in relation to entitlement to paid annual leave, to 'every worker'. Consequently, all employees, including those on duly certified sick leave for one of the above reasons, are entitled under Article 7(1) to minimum annual leave of four weeks.

178. However, this does not mean that Member States are prohibited from laying down national rules on annual leave the length of which exceeds the period of four weeks set under EU law since, as revealed by the wording of the provision, that is simply a minimum period. This provision is to be interpreted in the context of the general aim of Directive 2003/88 which, according to Article 1(1), is to lay down 'minimum safety and health requirements for the organisation of working time' and which also, under Article 15, does not affect the 'Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable'. The power of the Member States to adopt rules relating to entitlement to paid annual leave that are more favourable than those under EU law are derived from this.

179. For its part, Directive 2003/88 does not prevent Member States from linking its provisions granting more favourable treatment to the fulfilment of certain conditions provided that the minimum level of protection guaranteed by the directive is not adversely affected thereby. Mention should be made here of the *Merino Gómez* case, (190) in which the Court said that Article 7(1) of the directive, by virtue of which the Member States are to take the necessary measures 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice', must be understood as meaning that 'the national implementing rules must in any event take account of the right to paid annual leave of at least four weeks'. (191) As far as the problem in the main proceedings is concerned, this means that a Member State is basically free to treat employees differently with regard to the minimum length of annual leave depending upon the cause of their health-related absence provided that it does not fall short of the minimum period of four weeks stated in Article 7(1) of the directive.

180. Nor are any guidelines that might lead to a different conclusion to be construed from provisions regulating the right to sick leave and the conditions for exercise of that right since they 'are not, as EU law now stands, governed by that law'. (192) This entitlement falls

within the regulatory competence of the Member States. They are therefore also free to adopt rules that might also have the effect of reducing the length of annual leave provided that the requirement of a minimum four week period of annual leave laid down in Directive 2003/88 is met at all times.

181. Failure to allow absence due to illness to count towards working time based on rules under national law, such as in the case of an accident on the journey to or from work or a non-occupational disease, must not have a prejudicial effect on the minimum four week period of annual leave. I concur with the view of the French Government (193) in that this must, if necessary, be prevented by the employee being allowed to make up his or her annual leave within a reasonably long carry-over period, which takes account of the recuperative objective of Directive 2003/88. As the Court ruled in the case of *Federatie Nederlandse Vakbeweging*, (194) for the positive effect of annual leave to be fully deployed for the safety and health of the worker it must basically be taken in the year prescribed for that purpose, namely the current year. However, the significance of that rest period remains if it is taken during a later period, for example during a carry-over period.

182. The conclusion to be drawn from the above considerations is therefore that Article 7(1) of Directive 2003/88 must be interpreted as meaning that it does not preclude national legislation and/or practice that provides for differing lengths of paid leave according to the reason for an employee's absence, provided that the minimum four week period of annual leave laid down in the directive is assured at all times.

VII – **Conclusion**

183. In the light of the above considerations, I propose that the Court should answer the questions referred by the Cour de cassation as follows:

(1) Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time is to be interpreted as meaning that it precludes national provisions or practices which make entitlement to paid annual leave conditional on at least 10 days' (or one month's) actual work during the reference year.

(2) Article 7 of Directive 2003/88 does not impose an obligation on the national court of a Member State hearing proceedings between individuals to disregard a national provision which makes entitlement to paid annual leave conditional on at least 10 days' actual work during the reference year where an interpretation in conformity with the directive is not possible.

(3) Article 7(1) of Directive 2003/88 must be interpreted as meaning that it does not preclude national legislation and/or practice that provides for differing lengths of paid leave according to the reason for an employee's absence, provided that the minimum four week period of annual leave laid down in the directive is assured at all times.

---

1 – Original language: German.

Language of the proceedings: French.

---

2 – OJ 2003 L 299, p. 9.

---

3 – Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

---

4 – In accordance with the terms used in the EU Treaty and in the TFEU Treaty, the expression 'EU law' will be used as an umbrella expression for Community law and European Union law. Where individual provisions of primary law are relevant hereinafter, the rules which are applicable *ratione temporis* will be cited.

---

5 – Case C-173/99 [2001] ECR I-4881.

---

6 – Joined Cases C-350/06 and C-520/06 [2009] ECR I-179.

---

7 – Case 106/77 [1978] ECR 629.

---

8 – Joined Cases C-188/10 and C-189/10 [2010] ECR I-5667.

---

9 – Case C-144/04 [2005] ECR I-9981.

---

10 – *Kücükdeveci* (cited above in footnote 3).

---

11 – See *BECTU* (cited above in footnote 5, paragraph 43); Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; and Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 48; see, with regard to Directive 2003/88 *Schultz-Hoff and Others* (cited above in footnote 6, paragraph 22); Case C-277/08 *Vicente Pereda* [2009] ECR I-8405, paragraph 18; and Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, paragraph 28. See the case-law summary

by Schrammel, W., and Winkler, G., *Europäisches Arbeits- und Sozialrecht*, Vienna 2010, p. 179 et seq.

---

12 – See *BECTU* (cited above in footnote 5, paragraph 44); *Merino Gómez* (cited above in footnote 11, paragraph 30); *Schultz-Hoff and Others* (cited above in footnote 6, paragraph 23); and *Vicente Pereda* (cited above in footnote 11, paragraph 21).

---

13 – See *Schultz-Hoff and Others* (cited above in footnote 6, paragraph 25), and *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (cited above in footnote 11, paragraph 30).

---

14 – See p. 8 of the defendant's pleading in the main proceedings.

---

15 – See paragraph 29 of the French Government's pleadings.

---

16 – See p. 5 of the order for reference, which puts the subject-matter of the second question more clearly.

---

17 – See Case C-316/09 *MSD Sharp* [2011] ECR I-0000, paragraph 21, and Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 26.

---

18 – See, amongst others, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18; Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 19; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22; Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 29; and Joined Cases C-261/07 and C-299/07 *VTB-VAB* [2009] ECR I-2949, paragraph 33.

---

19 – See *Kücükdeveci* (cited above in footnote 3, paragraph 45); Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 42; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 111.

20 – See *Kücükdeveci* (cited above in footnote 3, paragraph 46); *Pfeiffer and Others* (cited above in footnote 19, paragraph 108); Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 19; and Case 152/84 *Marshall* [1986] ECR 723, paragraph 48. See regarding the horizontal effect of directives Vcelouch, P., *Kommentar zu EU- und EG-Vertrag* (ed. Heinz Mayer), Vienna 2004, Article 249 EC, p. 23, paragraph 72; Knes, R., 'Uporaba in učinkovanje direktiv s področja varstva okolja v upravnih in sodnih postopkih', *Varstvo narave*, 2008, p. 14, 15, and specifically on employment law Thüsing, G., *Europäisches Arbeitsrecht*, Munich 2008, p. 14, paragraphs 29 and 30.

---

21 – *Faccini Dori* (cited above in footnote 20, paragraph 24).

---

22 – See, for instance, the Opinion of Advocate General Alber delivered on 18 January 2000 in Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, points 29 to 31; Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 6 May 2003 in *Pfeiffer* (judgment cited above in footnote 19, point 58); and, emphasising the specific nature of the law intended to counteract discrimination: Opinion of Advocate General Bot delivered on 7 July 2009 in *Kücükdeveci* (judgment cited above in footnote 3, points 63, 70).

---

23 – See Herresthal, C., *Rechtsfortbildung im europarechtlichen Bezugsrahmen – Methoden, Kompetenzen, Grenzen dargestellt am Beispiel des Privatrechts*, Munich, 2006, p. 81 et seq.; v. Danwitz, T., 'Rechtswirkung von Richtlinien in der neueren Rechtsprechung des EuGH', *Juristenzeitung*, 2007, p. 697, 703.

---

24 – See *Kücükdeveci* (cited above in footnote 3, paragraph 47); Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; *Faccini Dori* (cited above in footnote 20, paragraph 26); Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40; *Pfeiffer and Others* (cited above in footnote 19, paragraph 110); and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 106.

---

25 – See *Kücükdeveci* (cited above in footnote 3, paragraph 48) and *von Colson and Kamann* (cited above in footnote 24, paragraph 26).

---

26 – *Pfeiffer and Others* (cited above in footnote 19, paragraph 116).

27 – See, to this effect, Case 80/86 *Kolpinghuis Nijmegen* [1987[ECR 3969, paragraph 13; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 110; *Impact* (cited above in footnote 19, paragraph 100); *Angelidaki and Others* (cited above in footnote 24, paragraph 199); and Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paragraph 61.

28 – See points 71 to 88 of this Opinion.

29 – See points 89 to 143 of this Opinion.

30 – See points 144 to 169 of this Opinion.

31 – See *Kücükdeveci* (cited above in footnote 3, paragraph 22), and Case C-279/09 *DEB* [2010] ECR I-0000, paragraph 30.

32 – See Jarass, H.D., *Charta der Grundrechte der Europäischen Union – Kommentar*, Munich 2010, Article 31, paragraph 3, p. 277, and Article 51, paragraph 6, p. 413.

33 – Rightly referred to by Lenaerts, K./Van Nuffel, P., *European Union Law*, London 2011, p. 832, paragraph 22-022. See Case C-540/06 *Parliament* v *Council* [2006] ECR I-5769, paragraphs 38 and 58; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraphs 90 and 91; Case C-275/06 *Promusicae* [2008] ECR I-271, paragraphs 61 to 65; Joined Cases C-402/05 P and C-415/05 P *Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 335; *Kücükdeveci* (cited above in footnote 3, paragraph 22) and Joined Cases C-92/09 and C-93/09 *Eifert* [2010] ECR I-0000, paragraph 45 et seq. See the judgment of the Court of First Instance (now the General Court) in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365. The European Court of Human Rights has also made reference to the Charter in its judgments of 11 July 2002 in *Goodwin v.United Kingdom* (Application No 28957/95, paragraph 100) and 30 June 2005 in *Bosphorus v.Ireland* (Application No 45036/98, paragraph 159).

34 – As Fischinger, P., rightly remarks in 'Normverwerfungskompetenz nationaler Gerichte bei Verstößen gegen primärrechtliche Diskriminierungsverbote ohne vorherige Anrufung des EuGH', *Zeitschrift für Europäisches Privatrecht*, 2011, p. 206, Article 21 of the Charter

could not have applied to the facts on which the *Kükükdeveci* judgment was based as the Charter did not enter into force until a long time after that judgment was handed down.

---

35 – Opinion of 24 January 2008, *Schultz-Hoff and Others* (judgment cited above in footnote 6, point 38).

---

36 – Opinion of Advocate General Tizzano of 8 February 2001, BECTU (judgment cited above in footnote 5, point 28).

---

37 – Lenaerts, K., 'La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne', *Revue trimestrielle des droits de l'homme*, 2010, point 28, p. 217 et seq.; Jarass, H., loc. cit. (footnote 32), paragraph 2; Picod, F., *Traité établissant une Constitution pour l'Europe, Partie II – La Charte des droits fondamentaux de l'Union*, Volume 2, Brussels 2005, Article II-91, p. 424, 653; Frenz, W., *Handbuch Europarecht,* Volume 4 (Europäische Grundrechte), p. 1078, paragraph 3597 and p. 1164, paragraph 3881; Riedel, E., *Charta der Grundrechte der Europäischen Union*, 3rd edition, Baden-Baden 2011, Article 31, p. 442, paragraph 12; Seifert, A., 'Mangold und kein Ende – die Entscheidung der Großen Kammer des EuGH vom 19.1.2010 in der Rechtssache Kücükdeveci', *Europarecht*, 2010, p. 808, refers to a fundamental right in relation to Article 31(2) of the Charter.

---

38 – To this effect Riedel, E., loc. cit. (footnote 37), Article 31, p. 442, paragraph 12.

---

39 – Schwarze, J., 'Der Grundrechtsschutz für Unternehmen in der Europäischen Grundrechtecharta', *Europäische Zeitschrift für Wirtschaftsrecht*, 2001, p. 519.

---

40 – Frenz, W., loc. cit. (footnote 37), p. 134, paragraph 444.

---

41 – See Borowsky, M., *Charta der Grundrechte der Europäischen Union*, 3rd edition, Baden-Baden 2011, Article 51, p. 660, paragraph 34.

---

42 – Frenz, W., loc. cit. (footnote 37), p. 1164, paragraph 3882.

---

43 – Ibid., p. 135, paragraph 444.

---

44 – Lenaerts, K., loc. cit. (footnote 37), Frenz, W., loc. cit. (footnote 37), p. 1165, paragraph 3884.

---

45 – The problem of 'horizontal effect' relates to the question whether fundamental rights are of significance only to the situation between the individual and the State (i.e. are State-oriented) or whether they also apply in the context of relationships between citizens inter se. The theories of 'horizontal direct effect' and 'horizontal indirect effect' of fundamental rights are both maintained in that context. 'Horizontal direct effect' means that fundamental rights also have direct application in the field of private relations. According to that view, transactions would be impossible if they were to contravene a fundamental right. The theory of 'horizontal indirect effect', on the other hand, would consider the general clauses to be 'entry points' of fundamental rights into private law; the values enshrined in the system of fundamental law have to be observed when interpreting these general clauses. Only in the case of horizontal indirect effect could the relevant factors (e.g. fundamental rights and contractual freedom) be weighed up (see, in this respect, Walter, R./Mayer, H., *Grundriss des österreichischen Bundesverfassungsrechts*, 9th edition, Vienna 2000, p. 548 et seq., and my Opinion of 29 March 2007 in Case C-80/06 *Carp* [2007] ECR I-4473, point 69).

It is apparent from a comparative-law study of the horizontal effect of fundamental rights in the Member States (see Rengeling, H.-W./Szczekalla, P., *Grundrechte in der Europäischen Union – Charta der Grundrechte und Allgemeine Rechtsgrundsätze*, Cologne 2004, p. 179 et seq., paragraph 338 et seq.) that it is in any event known to and discussed in most of the Member States, although the individual issues here too are in some instances unclear and up for discussion. In Italy, indirect effect is recognised for equivalent relationships governed by private law as well as direct effect on private individuals in legal relationships where one contracting party is capable of exerting more power than the other. In Belgium, the horizontal effect of fundamental rights is discussed with a tendency in case-law to recognise horizontal indirect effect. Debate also continues in Austria to a certain extent. The issue has not yet been decided in Greece. The horizontal effect of individual fundamental rights has been recognised in any event in France, Ireland, the Netherlands, Portugal, Spain and Slovenia. Slovenian legal literature indicates that it is possible for some fundamental rights to have (direct) horizontal effect because of the Slovenian constitution (see Krivic, M., 'Ustavno sodišče, pristojnosti in postopek', in: Pavčnik/Mavčič [ed.], *Ustavno sodstvo*, Cankarjeva založba, 2000, p. 69). The horizontal effect of fundamental rights legislation has not yet been recognised in Denmark and Luxembourg. In the United Kingdom fundamental rights have to be construed from statute and the common law since there is no written constitution contained in one comprehensive document (see *Fundamental Social Rights in Europe*, European Parliament – Directorate General for Research, Working Document SOCI 104 DE, p. 26 et seq.). The relevant case-law on the ECHR is also gaining increasing importance, especially since the 'Human Rights Act' of 1998 and even earlier by virtue of EU law. In Finland, fundamental rights do not have direct effect on individuals; however, the State is obliged to prohibit infringements by private individuals.

46 – Jarass, H., loc. cit. (footnote 32), paragraph 9; Frenz, W., loc. cit. (footnote 37), p. 1171, paragraph 3909.

47 – Jarass, H., loc. cit. (footnote 32), Article 51, p. 419, paragraph 21.

48 – To this effect, Geiger, R., *EUV/AEUV-Kommentar* (ed. Rudolf Geiger/Daniel-Erasmus Khan/Markus Kotzur), 5th edition, Munich 2010, Article 51, p. 1016. See Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25; Case C-292/97 *Karlsson* [2000] ECR I-2737, paragraph 37; Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28; and *Promusicae* (cited above in footnote 33, paragraph 68).

49 – Jarass, H., loc. cit. (footnote 32), Article 31, p. 279, paragraph 9, and Article 51, p. 419, paragraph 21; Frenz, W., loc. cit. (footnote 37), p. 1172, paragraph 3910.

50 – Against a horizontal direct effect: Jarass, H., loc. cit. (footnote 32), Article 31, p. 277, paragraph 3, and Article 51, p. 421, paragraph 24; the same author, *EU-Grundrechte*, Munich 2005, § 4, p. 42; De Mol, M., 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', *European Constitutional Law Review*, 2010, point 6, p. 302; Frenz, W., loc. cit. (footnote 37), p. 1172, paragraph 3910; Schiek, D., 'Constitutional Principles and Horizontal Effet: Kücükdeveci Revisited', *European Labour Law Journal*, 2010, point 3, p. 373; Hatje, A., *EU-Kommentar* (ed. Jürgen Schwarze), 2nd edition, Baden-Baden 2009, Article 51, p. 2324, paragraph 20; Kingreen, T., *EUV/EGV – Kommentar*, 3rd edition, Munich 2007, Article 51 GRCh, p. 2713, paragraph 18, who says that some of the fundamental rights in the Charter, at first sight, could admittedly be construed as having a horizontal effect although the author takes the view that the fundamental rights stated therein do not have a horizontal effect as the first sentence of Article 51(1) is binding only on the EU and the Member States. In the opinion of the author adverse effects on fundamental rights by private individuals can be prevented by exercising the sovereign duty of protection against incursion by non-sovereign parties. Similarly, Riesenhuber, K., *Europäisches Arbeitsrecht*, Hamburg 2009, § 2, p. 45, paragraph 25, according to whom the fundamental rights in the Charter do not have direct binding effect, merely indirect effect by way of the legislature's duty of protection. Kokott, J./Sobotta, C., 'The Charter of fundamental rights of the European Union after Lisbon', *EUI Working Papers (2010/6) − Academy of European Law*, p. 14, also take the view that Article 51 of the Charter precludes the direct effect of fundamental rights in relationships between private individuals.

51 – See Jarass, H., loc. cit. (footnote 32), Article 31, p. 277, paragraph 3; Knecht, M., *EU-Kommentar* (ed. Jürgen Schwarze), 2nd edition, Baden-Baden 2009, Article 31, p. 2276, paragraph 4; Kingreen, T., loc. cit. (footnote 50); Kühling, J., *Europäisches Verfassungsrecht* (ed. Armin von Bogdandy), Heidelberg 2003, p. 603, assumes that fundamental rights can create sovereign duties of protection with regard to actions by private individuals so that the questionable construction of private individuals being bound by fundamental rights would be required.

---

52 – See Becker, U., *EU-Kommentar* (ed. Jürgen Schwarze), 2nd edition, Baden-Baden 2009, Article 53, p. 2333, paragraph 1, according to whom Article 53 of the Charter serves to eliminate conflict between various sources providing for fundamental rights. He argues that the provision leads in the end to preferential treatment: if the other fundamental right (e.g. under the ECHR) goes further than the Charter rights the latter cannot be construed in such a way as to prohibit more comprehensive protection. Vice versa, if the Charter provides greater legal consequences than other fundamental rights these will not be restricted ab initio.

---

53 – To this effect, Grabenwarter, C., *Europäische Menschenrechtskonvention*, 4th edition, Vienna 2009, p. 130, paragraph 14.

---

54 – See Rengeling, H.-W./Szczekalla, P., loc. cit. (footnote 45), p. 180, paragraph 339. See the judgments of the European Commission of Human Rights of 11 October 1988 in *Ian Nimmo v. United Kingdom* (Application No 12327/86) and 7 April 1997 in *Scientology Kirche Deutschland e.V. v. Germany* (Application No 34614/97).

---

55 – See Reid, K., *A practitioner's Guide to the European Convention on Human Rights*, 2nd edition, London 2004, p. 46, paragraph I-064; Grabenwarter, C., loc. cit. (footnote 53), p. 127, paragraph 7; Jarass, H., *EU-Grundrechte*, Munich 2005, p. 52, paragraph 12; Rengeling, H.-W./Szczekalla, P., loc. cit. (footnote 45), p. 180, paragraph 339, who reject the concept of horizontal effect in relation to individual guarantees in the ECHR. It is instead solely a question of interpreting the law of the Contracting States in accordance with the convention and of so-called positive obligations on those States (duties of protection) inter alia to protect rights under the convention through national legislation. This would similarly apply to other instruments of public international law for the protection of human rights, particularly the International Covenant on Civil and Political Rights.

---

56 – Grabenwarter, C., loc. cit. (footnote 53), p. 131, paragraph 15.

---

57 – See the judgments of the European Court of Human Rights of 16 December 2008 in *Khurshid Mustafa and Tarzibachi v.Sweden* (Application No 23883/06), paragraph 50 (right to information); of 24 June 2004 in *Von Hannover v.Germany* (Application No 59320/00), paragraph 57 (right to respect for private and family life); of 16 November 2004 in *Moreno Gómez v.Spain* (Application No 4143/02), paragraph 55 (right to respect for private and family life); and of 30 November 2004 in *Öneryildiz v.Turkey* (Application No 48939/99), paragraph 135 (proprietary interests).

---

58 – See Grabenwarter, C., loc. cit. (footnote 53), p. 131, paragraph 15, who takes the view that problems of horizontal effect are incorporated in the doctrine of duty of protection.

---

59 – See Schwarze, J., *European Administrative Law*, Luxemburg 2006, p. 65, and Sariyiannidou, E., *Institutional balance and democratic legitimacy in the decision-making process of the EU*, Bristol 2006, p. 145.

---

60 – Case 8/55 *Fédération Charbonnière de Belgique* v *High Authority* [1954-1956] ECR 245, at 299.

---

61 – Case 13/57 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *High Authority* [1958] ECR 273, 304.

---

62 – Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, at 84.

---

63 – Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, 511.

---

64 – Joined Cases 43/59, 45/59 and 48/59 *von Lachmüller and Others* v *Commission* [1960] ECR 463, at 475.

---

65 – Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, at 272.

---

66 – Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7.

67 – Tridimas, T., *The General Principles of EU Law*, 2nd edition, London 2006, p. 17 et seq. and 29 et seq., points out, first of all, that the general principles fill in gaps in EU law, which result from the fact that the EU legal order is a new and young legal order and needs to be developed further. In addition, the EC Treaty represents a framework treaty with many generally formulated provisions and imprecise legal concepts which confer on the Court extensive powers to develop the law. Secondly, the author points out their function as an aid to the interpretation of secondary law. Lenaerts, K./Van Nuffel, P., *Constitutional Law of the European Union*, 2nd edition, London 2005, paragraph 17-066, p. 711, point out that, in the context of the interpretation of EU law, the administration as a rule has recourse to general principles, above all in the case of uncertainties in the law to be interpreted or gaps in the rules. Toriello, F., *I principi generali del diritto comunitario – Il ruolo della comparazione*, Milan 2000, p. 141, refers both to their role in filling gaps and their function as an aid to interpretation, as well as listing other functions.

---

68 – See Schwarze, J., loc. cit. (footnote 15), p. 65.

---

69 – See Lenaerts, K./Gutiérrez-Fons, J. A., 'The constitutional allocation of powers and general principles of law', *Common Market Law Review*, 2010, p. 1629; Toriello, F., loc. cit. (footnote 67), p. 141.

---

70 – See Toriello, F., loc. cit. (footnote 67), p. 141.

---

71 – See Schweitzer, M./Hummer, W./Obwexer, W., *Europarecht*, p. 65, paragraphs 240 and 241.

---

72 – To this effect Lengauer, A.-M., *Kommentar zu EU- und EG-Vertrag* (ed. Heinz Mayer), Vienna 2004, Article 220, paragraph 27, p. 65; Toriello, F., loc. cit. (footnote 67), p. 315 to 318.

---

73 – To this effect Schweitzer, M./Hummer, W./Obwexer, W., *Europarecht*, paragraph 244, p. 66; Oppermann, T., *Europarecht*, 3rd edition, Munich 2005, paragraph 21, p. 144; Toriello, F., loc. cit. (footnote 67), p. 140.

---

74 – See Tridimas, T., loc. cit. (footnote 67), p. 6.

75 – In the generally held view, the general principles have the status of primary law (see Schroeder, W., *EUV/EGV – Kommentar* (ed. Rudolf Streinz), Article 249, p. 2159, paragraph 15). The Court has repeatedly held that the legal measures of the Community institutions are to be assessed with reference to the general principles. See Case 29/69 *Stauder* [1969] ECR 419, paragraph 7, and Case 44/79 *Hauer* [1979] ECR 3727, paragraph 14 et seq.

---

76 – See also Wegener, B., in Calliess/Ruffert (ed.), *Kommentar zu EUV/EGV*, 3rd edition, Munich 2007, Article 220, paragraph 37, p. 1956, and Tridimas, T., loc. cit. (footnote 23), p. 2 et seq.

---

77 – See Case C-359/92 *Germany* v *Council* [1994] ECR I-3681. Even before this idea was laid down in Article 5(3) EC (now Article 5(4) TEU), it was not disputed in case-law or in legal literature that Community competences are exercised subject to the principle of proportionality (see Lienbacher, G, *EU-Kommentar* (ed. Jürgen Schwarze), 1st edition, Baden-Baden 2000, Article 5 EC, paragraph 36, p. 270).

---

78 – Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403.

---

79 – Case T-192/99 *Dunnett and Others* v *EIB* [2001] ECR II-813. See, specifically on the right of effective access to a court, Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 61; *Unibet* (cited above in footnote 33, paragraph 37); and *DEB* (cited above in footnote 31, paragraph 29).

---

80 – Case C-402/98 *Agricola Tabacchi Bonavicina* [2000] ECR I-5501.

---

81 – Case 14/68 *Walt Wilhelm* [1969] ECR 1.

---

82 – Case 32/62 *Alvis* [1963] ECR 49.

---

83 – Case 55/69 *Cassella Farbwerke Mainkur* v *Commission* [1972] ECR 887; Joined Cases 33/79 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677; Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885; Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36; Case C-395/00 *Cipriani* [2002] ECR I-11877, paragraph 51; Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria* v *Commission* [2007] ECR I-7141; Case C-349/07 *Sopropré* [2008] ECR I-10369, paragraphs 36 and 37.

---

84 – Case 125/77 *Koninklijke Scholten-Honig* [1978] ECR 1991.

---

85 – Case C-269/90 *Technische Universität München* [1991] ECR I-5469.

---

86 – Case 68/77 *IFG* v *Commission* [1978] ECR 353.

---

87 – Case T-154/01 *Distilleria Palma* v *Commission* [2004] ECR II-1493, paragraph 45.

---

88 – Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council* [2005] ECR II-3533, paragraph 277.

---

89 – Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78 and 39/79, 31/79, 83/79 and 85/79 *Ferriera Valsabbia* v *Commission* [1980] ECR 907.

---

90 – See *Kuhner*, cited above in footnote 83.

---

91 – Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045.

---

92 – Case C-65/93 *Parliament* v *Council* [1995] ECR I-643, paragraph 21.

---

93 – Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19.

94 – See *Bosman* (cited above in footnote 18).

95 – Case 237/83 *Prodest* [1984] ECR 3153.

96 – Case 149/77 *Defrenne* [1978] ECR 1365.

97 – See Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 to 69; Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59; and Case C-61/11 PPU *El Dridi* [2011] ECR I-0000, paragraph 61.

98 – Universal Declaration of Human Rights, which the United Nations General Assembly adopted on 10 December 1948 by Resolution 217 A (III).

99 – The European Social Charter was opened for signature by the Member States of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965. Article 2(3) thereof states that, with a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake to provide for a minimum of two weeks' annual holiday with pay.

100 – The International Covenant on Economic, Social and Cultural Rights was adopted unanimously by the United Nations General Assembly on 19 December 1966. Article 7(d) thereof states that '[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: … [r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.

101 – The Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 states in Article 8 that '[e]very worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonised in accordance with national practices while the improvement is being maintained'.

102 – See Frenz, W., loc. cit. (footnote 37), p. 1059, paragraph 3539.

103 – Convention No 132 concerning Annual Holidays with Pay (revised 1970), adopted by the General Conference of the International Labour Organisation on 24 June 1970, which entered into force on 30 June 1973.

---

104 – Convention No 52 concerning Annual Holidays with Pay, adopted by the General Conference of the International Labour Organisation on 24 June 1936, which entered into force on 22 September 1939. This convention was revised by Convention No 132 but itself remains open for ratification.

---

105 – Zuleeg, M., 'Der Schutz sozialer Rechte in der Rechtsordnung der Europäischen Gemeinschaft', *Europäische Grundrechte-Zeitschrift*, 1992, Issue 15/16, p. 331, points out that instruments having no binding legal effect, such as the Community Charter of the Fundamental Social Rights of Workers, serve primarily as a road map. At most, they acquire legal relevance where courts of law cite them for the purpose of interpreting or further developing the law. Balze, W., 'Überblick zum sozialen Arbeitsschutz in der EU', *Europäisches Arbeits- und Sozialrecht*, 38, 1998 Supplement, paragraph 4, correctly states that, although the Community Charter of the Fundamental Social Rights of Workers, as a solemn declaration, itself produces no binding legal effects, it was a significant catalyst for the Commission action programme for implementing the Community Charter of the Fundamental Social Rights of Workers of 28 November 1989, which was adopted at the end of 1989. The action programme provided for a total of 23 specific proposals for directives, inter alia in the field of the health and safety of workers, most of which were implemented by 1993. It thus follows that even solemn declarations can, as a source of inspiration for legislative activity, ultimately acquire relevance in the implementation of the fundamental social rights proclaimed therein.

---

106 – See Frenz, W., loc. cit. (footnote 37), p. 1060, paragraph 3542.

---

107 – See González Ortega, S., 'El disfrute efectivo de la vacaciones anuales retribuidas: una cuestión de derecho y de libertad personal, de seguridad en el trabajo y de igualdad', *Revista española de derecho europeo*, No 11 [2004], p. 423 et seq.

---

108 – See Vieira De Andrade, J.C., 'La protection des droits sociaux fondamentaux dans l'ordre juridique du Portugal', *La protection des droits sociaux fondamentaux dans les États membres de l'Union européenne – Étude de droit comparé*, Athens/Brussels/Baden-Baden, 2000, p. 677.

---

109 – See Frenz, W., loc. cit. (footnote 37), p. 1062, paragraph 3542.

---

110 – Ibid., p. 1062, paragraph 3548.

---

111 – Article 24(3) of the Constitution of the Land of North Rhine Westphalia, for example, states that statutory provision is to be made for the right to adequate paid leave.

---

112 – See Riedel, E., *Charta der Grundrechte der Europäischen Union* (ed. Jürgen Meyer), 2nd edition, Baden-Baden 2006, Article 31, paragraphs 3 and 4.

---

113 – See point 92 of this Opinion.

---

114 – See Nielsen, R., 'Free movement and fundamental rights', *European Labour Law Journal*, 2010, point 1, p. 258, who points out the potential significance of the Charter in the development of social fundamental rights into general principles by way of the Court's case-law. In the author's opinion, when discharging its function the Court should increasingly base its findings on the Charter which – unlike the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR) – lays down numerous social standards, such as prohibitions on discrimination, child labour, slavery and forced labour, freedom of assembly and association, the right of free negotiation and the right of employees to take strike action.

---

115 – See Lenaerts, K./Gutiérrez-Fons, J.A., loc. cit. (footnote 69), p. 1633, who say that the more that the Court is inclined to adopt a particular type of rule the greater will be the convergence between the legal systems. As long as such convergence is incomplete but a specific approach has been implemented in an overwhelming majority of Member States the Court will generally follow that approach by accommodating it in EU case-law.

---

116 – Tridimas, T., loc. cit. (footnote 67), p. 6, points out that in certain circumstances the Court may acknowledge a general principle as such even though it is not recognised by the legal systems of Member States.

---

117 – See the Order of 7 April 2011 in Case C-519/09 *May* [2011] ECR I-0000, paragraphs 26 and 27, in which the Court ruled that even an employee of a public-law body was a

'worker' for the purposes of Article 7 of Directive 2003/88 notwithstanding his or her status as a public servant.

---

118 – Tridimas, T., loc. cit. (footnote 67), p. 1, raises the question of how to distinguish between a general principle and a specific rule. In his view, it depends, on the one hand, on the general validity of that principle, with 'general' being understood to mean that the principle has to display a certain degree of abstractness. On the other, it depends on the relevance of that principle within a legal system.

---

119 – See points 39 to 42 of my Opinion of 16 June 2011 in Case C-155/10 *Williams and Others*, which concerned the right to paid annual leave of an airline's pilots. This case interpreted Clause 3 of the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), as implemented by Directive 2000/79/EC (OJ 2000 L 302, p. 59). That clause contains its own provisions on leave for mobile workers in civil aviation.

---

120 – The rules in respect of the working time of seafarers also provide a further example. According to the 12th recital in the preamble to Directive 2003/88 it does not apply to this group of people. Reference is made instead to Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) which put into effect the European Agreement in respect of the working time of seafarers (OJ 1999 L 167, p. 33). Clause 16 of this agreement contains specific rules on leave for seafarers which resemble those in Article 7 of Directive 2003/88.

---

121 – In the opinion of Tridimas, T., loc. cit. (footnote 67), p. 26, a general principle has to display an ascertainable minimum level of legally binding substance.

---

122 – Thus for example the Court has held that various national measures were precluded by EU law on the basis that they were incompatible with the general principle of equal treatment (see, for example, Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, and Case 5/88 *Wachauf* [1989] ECR 2609) or with specific manifestations of that principle, such as the prohibition of discrimination on grounds of nationality in various contexts (see, for example, Case 293/83 *Gravier* [1985] ECR 593 (access to vocational training); Case 24/86 *Blaizot* [1988] ECR 379 (access to university courses); Case 42/87 *Commission* v *Belgium* [1988] ECR 5445 (State aid for training); Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145 (intellectual property); and Case C-43/95 *Data Delecta* [1996]

ECR I-4661 (court proceedings)), respect for fundamental rights (see, for example, *Johnston*, cited in footnote 79 (effective judicial control in the context of the 'occupational requirement' as a justification for a difference of treatment of men and women); *Wachauf*, cited above (right to property in the context of the common organisation of the market in milk and milk products); and Case C-60/00 *Carpenter* [2002] ECR I-6279 (right to respect for family life in the context of a potential restriction on freedom to provide services), the principle of the protection of legitimate expectations (see, for example, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325 (legitimate expectations in the context of a new national limitation period within which repayment of sums collected in breach of EU law may be sought)) and the principle of proportionality (see, for example, Joined Cases 41/79, 121/79 and 796/79 *Testa* [1980] ECR I-1979 (Member State discretion in extending the period of entitlement to unemployment benefits under Article 69(2) of Regulation No 1408/71), and Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281).

---

123 – To this effect Tridimas, T., loc. cit. (footnote 67), p. 47. Similarly Walter, R./Mayer, H., loc. cit. footnote 45), p. 549, paragraph 1330, in whose view the application of fundamental rights might seem particularly desirable in a case where one contracting party is in a position of superiority over another (e.g. a monopolist).

---

124 – In the Court's case-law, therefore, the employee is often regarded as the party who from a socio-economic point of view is regarded as the weaker in the contractual relationship and hence more deserving of protection. See, for example, in connection with the interpretation of Article 6 of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1), Case C-29/10 *Koelzsch* [2011] ECR I-0000, paragraph 40.

---

125 – See Preis, U./Temming, F., 'Der EuGH, das BVerfG und der Gesetzgeber', *Neue Zeitschrift für Arbeitsrecht– Lehren aus Mangold II*, 2010, p. 190. It is quite rightly pointed out by Thüsing, G., loc. cit. (footnote 20), p. 15, paragraph 34, that the boundaries between where the State begins and ends are fluid.

---

126 – See Rengeling, H.-W./Szczekalla, P., loc. cit. (footnote 45), p. 182, paragraph 341.

---

127 – Case 43/75 [1976] ECR 455.

---

128 – Case 36/74 [1974] ECR 1405.

---

129 – Ibid. (paragraph 16/19).

---

130 – Cited in footnote 18.

---

131 – Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 36.

---

132 – *Kücükdeveci* (cited in footnote 3).

---

133 – *Mangold* (cited in footnote 9, paragraph 75).

---

134 – See point 144 et seq. of this Opinion.

---

135 – See too, to this effect, Advocate General Sharpston in her Opinion delivered on 22 May 2008 in Case C-427/06 *Bartsch* [2008] ECR I-7245, point 85.

---

136 – See Jarass, H., 'Bedeutung der EU-Rechtsschutzgewährleistung für nationale und EU-Gerichte', *Neue Juristische Wochenschrift* 2011, p. 1394.

---

137 – Lenaerts, K./Gutiérrez-Fons, J.A., loc. cit. (footnote 69), p. 1656, also seem to assume parallel application of rights from general principles or from the Charter as they attribute significance to the Charter as a source of knowledge for the discovery of new general principles. See too in similar vein, Preis, U./Temming, T., loc. cit. (footnote 125), who state that, on the basis of its powers under Article 6(3) TEU, the Court derives an unwritten subsidiary EU fundamental right of general freedom of action, enabling private individuals to raise general objections as to the validity of a provision of a directive.

---

138 – See Geiger, R., loc. cit. (footnote 48), Article 6, p. 45, paragraph 27; Jarass, H., loc. cit. (footnote 55), p. 19, paragraph 15.

---

139 – To this effect Jarass, H., loc. cit. (footnote 136).

140 – See Jarass, H., loc. cit. (footnote 55), p. 19, paragraph 15.

141 – To this effect De Mol, M., loc. cit. (footnote 50), who, in referring to the exclusive binding effect of fundamental rights on the European Union and its Member States provided for in the first sentence of Article 51(1) of the Charter, concludes that general principles do not have horizontal effect.

142 – See Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 13 and 14; Joined Cases 372/85 to 374/85 *Traen* [1987] ECR 2141, paragraph 25; Case 31/87 *Beentjes* [1988] 4635, paragraph 43; Case C-236/92 *Comitato di coordinamento per la difesa della Cava* v *Regione Lombardia* [1994] ECR I-483, paragraph 9.

143 – See Case 271/82 *Auer* [1983] ECR 2727, paragraph 16; Case 5/83 *Rienks* [1983] ECR 4233, paragraph 8; *Marshall* (cited in footnote 20, paragraph 52); Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 18; *Comitato di coordinamento per la difesa della Cava* v *Regione Lombardia* (cited in footnote 142, paragraph 10).

144 – See Case 50/88 *Kühne* [1989] ECR 1925, paragraph 26, and Case 131/79 *Santillo* [1980] ECR 1585, paragraph 13.

145 – See Fischinger, P., loc. cit. (footnote 34), who says, in the case of the prohibition on age discrimination, that when examining whether there is a breach of a general principle it is first necessary to determine the substance of that general principle autonomously (i.e. without reference to a rule of secondary law).

146 – See De Mol, M., loc. cit. (footnote 50), p. 301, who describes recognition of the horizontal effect of a general principle in *Kücükdeveci* as remarkable as, in her opinion, general principles are distinguishable by the fact that they, firstly, normally protect the citizen in relationships with the State and, secondly, ‘are abstract in that they only point in a certain direction without laying down any concrete rule of law’.

147 – See Schweitzer, M./Hummer, W./Obwexer, W., loc. cit. (footnote 71), p. 178, paragraph 653; Sariyiannidou, E., loc. cit. (footnote 59), p. 122 also talks of ‘separation of functions’. According to Oppermann, T., loc. cit. (footnote 73), § 5, paragraph 5, p. 80, in the

European Union the separation of public powers between the legislature, the executive and the judiciary has been modified into a specific institutional balance between the EU institutions. Between the Parliament, the Council and the Commission in particular, the functions are divided differently from at State level. There are also checks and balances in the European Union. The institutional balance reflects a fundamental principle of the rule of law. It requires each institution to exercise its powers with due regard for the powers of the other institutions, and breaches to be subject to penalties through the power of review of the Court of Justice.

---

148 – See my Opinion of 30 June 2009 in Case C-101/08 *Audiolux* [2009] ECR I-9823, point 107.

---

149 – Sariyiannidou, E., loc. cit. (footnote 59), p. 137, takes the view that Article 220 EC ultimately gives the Court the power to determine what is 'law', even though clear limits to that power do not exist. In developing general principles the Court has made extensive use of its power to develop the law. The author expresses the fear that this could blur the boundaries between judicial and political activity.

---

150 – See too, Seifert, A., loc. cit. (footnote 37), who considers it conceivable for the principles developed in *Kücükdeveci* to be applied *mutatis mutandis* in other areas protected by fundamental rights. He refers here to the fundamental right to paid annual leave in Article 31(2) of the Charter, which was primarily given specific expression in the working time directive.

---

151 – OJ 2000 L 303, p. 16.

---

152 – *Kücükdeveci* (cited in footnote 3, paragraph 53).

---

153 – See Simon, D., 'L'invocabilité des directives dans les litiges horizontaux: confirmation ou infléchissement', *Europe: actualité du droit communautaire*, 2010, point 3, p. 7, paragraph 19.

---

154 – See Seifert, A., loc. cit. (footnote 37), p. 806, according to whom recourse to a general principle is a means whereby the Court does not contradict its own case-law on the absence of direct horizontal effect of directives between individuals.

155 – Cited in footnote 9, paragraph 75.

156 – *Kücükdeveci* (cited in footnote 3, paragraph 50).

157 – Ibid. (paragraph 51).

158 – Ibid. (paragraphs 28 to 43).

159 – Ibid. (paragraphs 25 and 26).

160 – See points 110 to 114 of this Opinion.

161 – See point 47 of this Opinion.

162 – See point 53 of this Opinion.

163 – See in this connection the Opinion delivered by Advocate General Kokott on 6 May 2010 in Case C-104/09 *Roca Álvarez* [2010] ECR I-0000, point 55, in which she referred to the judgments in *Mangold* and *Kücükdeveci* and raised the issue of whether the Court would extend horizontal direct effect to other general principles, such as the principle of non-discrimination in respect of sex. In the opinion of the Advocate General, prior to any further development of that kind, it would be necessary to discuss the doctrinal foundations of that contested horizontal direct effect and its limits. Thüsing, G./Horler, S., 'Besprechung des Urteils Kücükdeveci', *Common Market Law Review*, 2010, p. 1171, also support more in-depth theoretical reasoning for this approach.

164 – See point 136 of this Opinion.

165 – See De Mol, M., loc. cit. (footnote 50), p. 305, who correctly assumes that the Court's approach is to virtually equate a general principle with a directive.

---

166 – This objection is also raised by Simon, D., loc. cit. (footnote 153), point 3, p. 4, paragraph 7. In that author's opinion, if that approach is taken the consequences of a general principle prohibiting age discrimination, its concrete terms and the directive itself are not clearly defined.

---

167 – To this effect Fischinger, P., loc. cit. (footnote 34), p. 207.

---

168 – See Fischinger, P., loc. cit. (footnote 34), p. 207, in whose opinion the approach in *Kücükdeveci* at national level would be equivalent to an attempt to infer the scope of protection of a fundamental right guaranteed by constitutional law from the substance of legislation.

---

169 – See Mörsdorf, O., 'Diskriminierung jüngerer Arbeitnehmer – Unanwendbarkeit von § 622 II2 BGB wegen Verstoßes gegen das Unionsrecht', *Neue Juristische Wochenschrift*, 2010, p. 1048, who observes that in *Kücükdeveci* – despite protestations to the contrary – the Court takes as its criterion for the conformity of national law with EU law, not the abstract proposition of primary law (i.e. the general principle), but the directive which contains detailed rules. In the opinion of Fischinger, P., loc. cit. (footnote 34), p. 206, with the approach applied in *Kücükdeveci* the facts are actually taken from the directive whilst the legal consequences derive from primary law.

---

170 – Fischinger, P., loc. cit. (footnote 34), p. 207, expresses the supposition that in *Kücükdeveci* the Court left the back door open in the future to extrapolating the content of newly devised primary law from the substance of directives.

---

171 – To this effect Frenz, W., loc. cit. (footnote 37), p. 137, paragraph 453, who makes the realisation of social rights also conditional on financial possibilities. See Riesenhuber, K., loc. cit. (footnote 50), p. 49 et seq., paragraph 34, who refers to the origin of Title IV ('Solidarity') and observes that the inclusion of fundamental social rights in the Charter was a matter of particular dispute within the Convention as it was feared that recognition of social rights would lead to a disproportionate financial burden on the European Union and its Member States. Arguments invoked in favour of their inclusion, however, were the indivisibility of political and social rights and the fact that the Community Charter of Fundamental Social Rights had already found expression in Article 136(1) (now Article 151 TFEU). The outcome was a compromise as social rights were included but were for the most

part weakly configured and did not give any real entitlement to benefits. In many instances the Charter fails to give any independent guarantees, referring for the 'whys' and 'wherefores' to the protection afforded by EU law and the law of the Member States.

---

172 – See Frenz, W., loc. cit. (footnote 37), p. 1059, paragraph 3540, who tries to explain why the Charter is incomplete with regard to social rights in particular. In his view, it is difficult for social rights to be complete. On the one hand, society's ideas of what should be considered 'social' will change whilst, on the other, the determination of social entitlements will always be based on compromise. Rengeling, H.-W./Szczekalla, P., loc. cit. (footnote 45), p. 793, paragraph 793, rightly point out that the term 'social' remains open in the Charter. It is also unclear precisely what is meant by the heading 'Solidarity' in Title IV of the Charter.

---

173 – See, with regard to details of variations and derogations, Blanpain, R., *European Labour Law*, 11th edition, Alphen aan den Rijn 2008, p. 586 et seq.

---

174 – See Bauer, J.-H./von Medem, A., '*Kücükdeveci* = *Mangold* hoch zwei? Europäische Grundrechte verdrängen deutsches Arbeitsrecht', *Zeitschrift für Wirtschaftsrecht*, Vol 11, 2010, p. 452.

---

175 – To this effect Bauer, J.-H./von Medem, A., loc. cit. (footnote 174), who are against applying the approach in *Kücükdeveci* to the case of employees' fundamental rights under Article 27 et seq. of the Charter because of the differences between these kinds of fundamental rights and prohibitions on discrimination. They point out that in many of the material areas stated in Title IV of the Charter ('Solidarity') there are directives in existence which, on a traditional interpretation, are incapable of superseding national law to the contrary in disputes between private individuals. The authors also expressly refer here to the working time directive, which gives specific expression to the entitlement to paid annual leave under Article 31(2) of the Charter, for example.

---

176 – See, in connection with principles based on the rule of law under EU law, point 96 of this Opinion. See Case C-325/91 *France* v *Commission* [1993] ECR I-3286, paragraph 26, and Case C-177/96 *Banque Indosuez and Others* [1997] ECR I-5659, paragraphs 26 to 31.

---

177 – See Case C-17/03 *VEMW* [2005] ECR I-4983, paragraph 80, and Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 45.

---

178 – See points 61 to 63 of this Opinion.

---

179 – See Avbelj, M., ‘Temeljna načela prava EU padajo na glavo’, *Pravna praksa*, 2010, point 7, p. 34, who criticises the judgment in *Kücükdeveci* as, in his view, it could overturn the Court’s former case-law on the absence of horizontal effect of directives. De Mol, M., loc. cit. (footnote 50), p. 307, expresses reservations with regard to the compatibility of that approach which establishes a general principle (prohibition on age discrimination), with the principle of legal certainty that is ultimately also a general principle. In that author’s opinion, private individuals could then no longer rely on (written) national law. They would instead have to take the possible effects of the (unwritten) general principle into account.

---

180 – To this effect, Thüsing, G./Horler, p., loc. cit. (footnote 163); Seifert, A., loc. cit. (footnote 37).

---

181 – *Kücükdeveci* (cited in footnote 3, paragraph 53).

---

182 – See point 127 of this Opinion.

---

183 – See point 65 of this Opinion.

---

184 – Goffin, L., ‘À propos des principes régissant la responsabilité non contractuelle des États membres en cas de violation du droit communautaire’, *Cahiers de droit européen*, points 5-6 (1997), p. 537 et seq.; Lenaerts, K./Arts, D./Maselis, I., *Procedural Law of the European Union*, 2nd edition, London 2006, paragraph 3-042, p. 109; Knez, R., ‘Varstvo pravic posameznika, ki jih vsebuje pravo skupnosti’, *Revizor*, points 4/5 (2003), Jahrgang 14, p. 105; Ossenbühl, F., *Staatshaftungsrecht*, 5th edition, Munich 1998, p. 505 and Guichot, E., *La responsabilidad extracontractual de los poderes públicos según el Derecho Comunitario*, Valencia 2007, p. 473, 474, assume that three conditions have to be met: (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a causal link between the breach of the obligation and the damage sustained. See, amongst others, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 25; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 36; Case C-63/01 *Evans* [2003] ECR I-14447, paragraph 83; and Case C-278/05 *Robins and Others* [2007] ECR I-1053, paragraph 69.

---

185 – Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 23.

---

186 – See too, to this effect, Advocate General Jacobs in his Opinion delivered on 26 September 2000 in Case C-150/99 *Lindöpark* [2001] ECR I-493, point 51.

---

187 – *Brasserie du Pêcheur and Factortame* (cited in footnote 184, paragraph 22); Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 41; and Case C-150/99 *Lindöpark* [2001] ECR I-493, paragraph 38.

---

188 – *Brasserie du Pêcheur and Factortame* (cited in footnote 184, paragraph 25).

---

189 – See point 52 of this Opinion.

---

190 – Cited in footnote 11.

---

191 – Ibid. (paragraph 31).

---

192 – *Schultz-Hoff and Others* (cited in footnote 6, paragraph 27).

---

193 – See paragraph 53 of the French Government's pleading.

---

194 – See Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3243, paragraph 30, and *Schultz-Hoff and Others* (cited in footnote 6, paragraph 30).