Case Note

Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union

Eleni Frantziou*

Introduction

On 15 January 2014, the Court of Justice (hereafter 'the Court') delivered its judgment in *Association de Médiation Sociale* (hereafter 'AMS').[1] *AMS* brought for the first time before the Court the issue of horizontal applicability in relation to a provision of the EU Charter of Fundamental Rights (hereafter 'Charter'), namely Article 27 thereof, which enshrines the right of workers to information and consultation within the undertaking.[2] The case therefore raised questions of 'undeniable constitutional significance', as Advocate-General Cruz Villalón had put it in his Opinion, regarding the post-Lisbon enforcement and interpretation of the Charter and, in particular, its application to disputes between private parties.[3]

However, the Court arguably failed to tackle the questions put before it in a convincing manner. It strictly confined its analysis to Article 27 Charter and the non-horizontality of directives, thus steering clear of broader questions of principle regarding the horizontal effect of fundamental rights, the value of a binding

* PhD Candidate, University College London. With thanks to Professor Piet Eeckhout, Alexander Kamp, the editor and reviewers, for their thoughtful comments on earlier drafts, as well as to the participants of a UCL symposium on the *AMS* judgment on 11 Feb. 2014 and, particularly, Professor Silvana Sciarra and Dr Nicola Countouris, for a thought-provoking discussion of the case. Any errors remain, of course, my own. Email contact: eleni.frantziou.12@ucl.ac.uk.

[1] ECJ 15 Jan. 2014, Case C-176/12 *Association de Médiation Sociale* v. *Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*.

[2] Cf ECJ 24 Jan. 2012 *Dominguez* v. *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, where the horizontality question was raised but the Court did not consider it.

[3] Opinion of A-G Cruz Villalón delivered on 18 July 2013 in ECJ 15 Jan. 2014, Case C-176/12 *Association de Médiation Sociale* v. *Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, para. 3.

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Charter in the enforcement of fundamental rights in the EU post-Lisbon, the legal value of the social and employment rights that the Charter enshrines, as well as its distinction between rights and principles. The judgment therefore leaves much to be desired in terms of legal reasoning, consistency with prior case-law, and interpretative value in respect of the Charter.

This note first discusses the factual and legal background of the case and provides a brief account of the judgment. It then comments on its different elements, focusing in particular on the Charter's horizontal effect. It will mainly address three issues: first, the Court's (lack of) discussion of the Charter's horizontality as a matter of constitutional principle; secondly, the consistency of the Court's discussion of horizontal effect in *AMS* with its prior case-law; and finally, the likely implications of the Court's judgment for the interpretation of Article 27 Charter and for its social and employment rights in particular. Overall, I will argue that the *AMS* judgment is the product of an uncomfortable judicial compromise, which is likely to cause confusion regarding the horizontal application of fundamental rights in the EU in the Charter era.

Factual and legal background

AMS is an association governed by private law, which participates in the implementation of social mediation measures and measures for the prevention of crime in Marseille. It temporarily employs individuals who are otherwise unable to find work on 'accompanied-employment contracts', thus providing them with training and work experience, in order to ultimately direct them towards more stable employment. It has approximately a hundred employees on such contracts, at any one time. Additionally, AMS employs a total of eight permanent staff, to ensure its smooth operation. The question that sparked the proceedings discussed herein was whether these employees were entitled to exercise the right to information and consultation within the undertaking as enshrined in EU law and, if so, whether they could assert it against AMS, their employer.

Under European Union law, the right of workers to information and consultation within the undertaking is expressed in primary law in Article 27 Charter, which provides: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.'

Additionally, this right is found in secondary law in Directive 2002/14/EC, which establishes a general framework for informing and consulting employees within the EU.[4] Article 3(1) of Directive 2002/14/EC provides that EU member

[4] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23 March 2002, p. 29.

states must ensure adequate representation for those working in undertakings that employ either over twenty or over fifty people.[5]

French labour law implementing the Directive and, more specifically, Article L.1111-2 of the French Labour Code, states that undertakings employing over fifty people must create a works council and designate a trade union representative. However, in conjunction with Article L.1111-3 of the Labour Code, this provision excludes employees on certain types of contracts, including accompanied-employment contracts like the ones maintained by AMS, from the calculation of the number of employees for the purposes of representation

Despite the exclusions enshrined in French law, AMS's employees created a works council and designated a trade union representative, Mr Hichem Laboubi. AMS challenged the legality of their actions before the District Court of Marseille, arguing that, since it did not meet the requisite number of fifty employees as calculated under French law, it was not bound by the rules concerning representation. However, the District Court found that the exclusion of certain groups of employees from representation under the French Labour Code was in fact contrary to Directive 2002/14 and needed to be set aside.[6] It therefore dismissed AMS's claim.

AMS then appealed to the *Cour de Cassation.* That court first considered whether French law could be construed compatibly with the Directive, but found that this was impossible. It then went on to consider whether the right to information and consultation within the undertaking, *as enshrined in Article 27 Charter* and Directive 2002/14, could have the effect of disapplying a provision of French law in a dispute between private parties. However, it expressed doubts concerning what European Union law provided in these circumstances. It therefore decided to reserve its judgment and to make a reference to the Court of Justice for a preliminary ruling, which can be summarised as follows: first, the French court asked whether the right to information and consultation within the undertaking, as enshrined in Article 27 Charter and further specified in Directive 2002/14, could be invoked in a dispute between private parties. Secondly, it asked whether these provisions actually precluded French legislation from excluding from the scope of representation workers on 'accompanied-employment' contracts.

[5] The provision leaves it up to the member states to choose which of these two thresholds they wish to implement.

[6] It is noteworthy that, prior to addressing the EU law questions above, the District Court had referred to the *Conseil Constitutionnel* a question on the compatibility of the exclusions enshrined in Arts. L.1111-2 and L.1111-3 with the French Constitution. The *Conseil Constitutionnel* affirmed their constitutionality.

The judgment

The Court answered the questions posed by breaking them up into a discussion of Directive 2002/14, followed by a discussion of Article 27 Charter.

First of all, the judgment made clear that the exclusion of certain groups of employees from the scope of the French Labour Code contravened Article 3(1) of Directive 2002/14.[7] While the Directive allowed member states a degree of discretion in respect of implementation, it plainly required them to take into account all employees in the calculation of the thresholds, and French legislation had failed to do so.[8] The Court therefore found that France had not implemented Directive 2002/14 correctly.[9] Since Article 3(1) of the Directive fulfilled the conditions for direct effect, this provision could be invoked against the state.[10] Nonetheless, as is clear from the French court's first question, what that court was interested in knowing was whether the right to information and consultation could also be invoked against a private party, in this case AMS.

In this regard, the Court restated the principle that directives lack direct horizontal effect.[11] It then examined the possibility of applying the Directive indirectly, under the principle of consistent interpretation.[12] However, since the *Cour de Cassation* had already pointed out in its reference to the Court of Justice that consistent interpretation would require a *contra legem* reading of national law, the Court concluded that indirect horizontal effect was not an option in this case.[13] It then turned to Article 27 Charter and its potential for direct horizontal effect. It found that the wording of this provision, and particularly the reference to national laws and practices made therein, indicated that 'for this article to be *fully effective*, it must be given *more specific expression* in European Union or national law'.[14] Despite this finding though, the Court did not go on to discuss Article 27 in the light of Directive 2002/14. It considered that

[7] *AMS*, para. 29.

[8] Ibid., paras. 33-34.

[9] Ibid.

[10] Ibid., *para.* 35.

[11] Ibid., *para.* 36. See ECJ 26 Feb. 1986, Case 152/84 *Marshall* v. *Southampton and South-West Hampshire Area Health Authority*, para. 48.

[12] *AMS*, para. 38. See ECJ 13 Nov. 1990, Case C-106/89 *Marleasing* v. *La Comercial Internacional de Alimentacion*, para. 8. See also ECJ 4 July 2006, Case C-212/04 *Adeneler* v. *Ellinikos Organismos Galaktos*, para. 111; ECJ 5 Oct. 2004, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* v. *Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, para. 119; and *Dominguez, supra* n. 2, para. 27.

[13] *AMS*, paras. 39-40. See ECJ 16 Dec. 1993, Case C-334/92 *Wagner Miret* v. *Fondo de Garantía Salarial*, para. 22. See also ECJ 15 April 2008, Case C-268/06 *Impact* v. *Minister for Agriculture and Food and others*, para. 100; *Dominguez*, *supra* n. 2, para. 25.

[14] *AMS*, para. 45, emphasis added.

> it is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.[15]

Thus, the Court concluded that Article 27 Charter could not be invoked to disapply the French legislation found to be in breach of EU law, irrespective of whether it was invoked alone or in conjunction with Directive 2002/14.[16] Instead, the Court decided that the main claimant, Mr Laboubi, could apply for damages for breach of EU law, under the doctrine of state liability.[17]

The Court expressly distinguished this case from past rulings and, particularly, from the *Kücükdeveci* judgment.[18] It noted that an invocation of a Charter provision in conjunction with further legislation is still possible, where the provision in question is able to confer on individuals a right which they may invoke 'as such'.[19] While this is the case for the right to non-discrimination, which had been at stake in *Kücükdeveci* and is now codified in Article 21 Charter, it is not the case for Article 27.[20]

It is noteworthy that the judgment does not make any reference either to the reasoning or to the conclusions of Advocate-General Cruz Villalón, who had discussed these issues in a detailed and convincing manner in his Opinion.[21] The Advocate-General had started his assessment in a different tone, by discussing the question of the horizontal effect of the Charter and answering it in the affirmative.[22] He had then concluded that, while Article 27 Charter did not create subjective rights[23] and therefore could not be applied directly in itself in a private dispute, it was nonetheless possible to invoke it in conjunction with its specific expression in Directive 2002/14, in line with the Court's judgment in *Kücükdeveci*.[24]

[15] *AMS*, para. 46.

[16] Ibid., para. 51.

[17] *AMS*, para. 50. See ECJ 19 Nov. 1991, Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others* v. *Italy*, paras. 35, 40.

[18] *AMS,* para. 49.

[19] Ibid.

[20] Ibid.

[21] For a thorough commentary of the Opinion, see B. Pirker, 'AG Cruz Villalón in C-176/12 AMS: Rights vs. principles and the horizontal effect of Charter provisions Ante Portas', *European Law Blog*, 11 Sept. 2013, <http://europeanlawblog.eu/?p=1905>, visited 20 Feb. 2014.

[22] *AMS Opinion*, para. 41.

[23] Ibid., para. 55.

[24] Ibid., paras. 77, 80. See ECJ 19 Jan. 2010, Case C-555/07 *Kücükdeveci* v. *Swedex*, para. 53.

Commentary

AMS can be critiqued from several different angles. Among other things, the Court did not elaborate on the distinction between rights and principles made in Articles 51(1) and 52(5) of the Charter[25]; it resorted to state liability without assessing whether this provided an effective remedy in this case[26]; and it did not provide detailed reasons for its conclusions, not least because they diverged fundamentally from the Advocate-General's Opinion. Further, as will be demonstrated in more detail below, the Court's judgment in *AMS* sits uneasily with prior case-law and appears to push to one side questions about the role and reach of fundamental rights in the EU in the Charter era. In particular, it is likely to put some of the Charter's provisions – and, consequently, those claiming them – in a precarious situation of legal uncertainty.

The problem posed to the Court of Justice by the French court can be broken up into the following main elements: first, as the Advocate-General had aptly put it, there is a broader 'question of principle' regarding the horizontal effect of the Charter, namely whether this instrument is capable of creating horizontal effects at all.[27] Once this question has been addressed, Article 27 Charter more specifically ought to be examined. This involves both an assessment of the impact of secondary legislation on its enforceability, as well as an interpretation of the content and reach of Article 27 itself. These issues will be discussed in turn.

The horizontal effect of the Charter and the overarching question of principle left unanswered

In order to answer the questions put before it, it was clear that the Court would need to step out into the uncharted territory of interpreting the effect on private relations of the Union's first fundamental rights catalogue.[28] The judgment did not however do so and its structure is instructive in this regard.

As noted earlier, the Court's reasoning begins with, and indeed focuses on, a discussion of the provisions of Directive 2002/14.[29] After reaffirming the well-known principle that directives lack direct horizontal effect, the Court goes on to discuss the potential of applying Directive 2002/14 indirectly. It is only the absence of indirect horizontal effect of the Directive that leads the Court to the third part

[25] For a note discussing the distinction between rights and principles in more detail, see B. Pirker, 'C-176/12 AMS: Charter Principles, Subjective Rights and the Lack of Horizontal Direct Effect of Directives', *European Law Blog*, at 16 Jan. 2014, <http://europeanlawblog.eu/?p=2162>, visited 20 Feb. 2014.

[26] See, in this regard, the arguments raised by AG Cruz Villalón in *AMS Opinion*, paras. 78-79.

[27] Ibid., para. 1.

[28] Ibid., para. 33.

[29] *AMS*, paras. 28-40.

of its assessment, which concerns the horizontal application of Article 27 Charter.[30] Even in that part of the analysis though, the Court does not evaluate what the Charter's primary law status means for its horizontal applicability and does not attempt to assess what changes it has brought about in respect of prior case-law. Indeed, other than affirming its application in this case,[31] the Court makes no reference to the Charter's scope under Article 51(1) thereof, which addresses it to EU institutions and member states and has therefore been the subject of controversy concerning horizontal effect.[32] Overall, therefore, the judgment suggests a degree of resistance to the idea that the Charter has changed much in the way fundamental rights are enforced in the Union.[33] Rather, it gives the impression that the Charter functions as a fallback mechanism – a potential exception to the principle of non-horizontality of directives regarding 'rights-conferring' provisions – which does not however break new ground in the constitutional understanding of horizontal effect for fundamental rights in the EU post-Lisbon.[34]

To some extent, the Court's reluctance to address broad questions regarding the Charter's horizontality is understandable. European attitudes towards horizontal effect vary greatly and different legal systems use horizontality in substantially different ways to apply the rights they consider 'fundamental' in private disputes.[35] This makes it difficult for the Court to find a widely acceptable com-

[30] Ibid., paras. 41-49.

[31] Ibid., para. 42; See ECJ 26 Feb. 2013, Case C-617/10 *Åklagaren* v. *Hans Åkerberg Fransson*, para. 19.

[32] Opinion of AG Trstenjak, delivered on 8 Sept. 2011, in ECJ 24 Jan. 2012, Case C-282/10 *Dominguez* v. *Centre Informatique Du Centre Ouest Atlantique and Préfet De La Région Centre*, paras. 80-83; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', 8 *EU Const* (2012) p. 375, footnote 11.

[33] See, in respect of the divergent views held by the Court's judges regarding the Charter's effects: S. Morano-Foadi and S. Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', 17(5) *ELJ* (2011) p. 595, p. 599, 610.

[34] *AMS*, particularly para. 41. Cf. Opinion of AG Cruz Villalón delivered on 19 May 2011 in ECJ 13 Sept. 2011, Case C-447/09 *Prigge and Others* v. *Deutsche Lufthansa*, para. 26.

[35] To list only some, if non-exhaustive, examples, the Irish Constitution has been interpreted as being horizontally directly effective, where this construction is possible: *Murtagh Properties* v. *Cleary* [1972] IR 330; in the United Kingdom, the position under the Human Rights Act is still unsettled: see G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint', 74(6) *MLR* (2011) p. 878, 878-879; W. Wade, 'Horizons of Horizontality', 116 *LQR* (2000) p. 217; L. Morgan, 'Questioning the "True Effect" of the Human Rights Act', 22 *LS* (2002) p. 259, 260-261; S. Pattinson and D. Beyleveld,'Horizontal Applicability and Horizontal Effect', 118 *LQR* (2002) p. 623, 664; M. Hunt, 'The "Horizontal Effect" of the Human Rights Act', *PL* (1998) p. 423. In Germany, the Federal Constitutional Court has a broad duty of ensuring that all law is applied in accordance with the 'objective order' of constitutional law principles (*objective Wertordnung*), which are inviolable in both public and private law proceedings: BVerfGE 7, 198 – *Lüth*, 205. Finally, the European Convention on Human Rights adds an extra layer of complexity

mon ground regarding horizontality at the EU level, particularly in a case concerning a provision of the Charter's politically sensitive Solidarity chapter like Article 27. Nevertheless, the complicated nature of the issues at stake does not altogether justify the conceptual gaps in the assessment of EU law in the *AMS* judgment, which entail some real risks. First of all, the question, which the French court had put before the Court of Justice, of whether or not a fundamental right codified in the Charter can be invoked against private parties goes well beyond the case-law regarding the horizontal effect of directives.[36] The Court's focus on the properties of the Directive and lack of discussion of the role and status of the Charter provision do not appear to offer a complete answer to that question. Of course, as the Advocate-General had rightly noted, it is impossible to discuss the horizontal effect of the Charter *as if* horizontal effect did not already form part of the Court's case-law to date.[37] However, it is equally unsatisfactory, when discussing the horizontality of a new and constitutionally important document, to extrapolate from past practice without offering an analysis of how previous rules apply to the new legal context, and, most importantly, what reasons can be adduced for maintaining them.[38]

This is important, because a case raising difficult constitutional issues of the kind at stake in *AMS* is likely to have an impact on the interpretation of the Charter at large. Indeed, as Peers notes, the judgment does more than exclude the horizontal effect of Article 27: by distinguishing that provision from Article 21 Charter, it can be read as implicitly affirming the potential for horizontality of some of the Charter's provisions, as a matter of principle.[39] However, the cryptic and hurried manner in which this is done[40] creates significant difficulties in the application of the ruling. While different Charter provisions need not necessarily

to this picture as, within its jurisdiction, a broad construction of the positive obligations doctrine is employed. See, illustratively: ECtHR 9 Oct. 1979, Appl. No. 6289/73, *Airey* v. *Ireland*; ECtHR 21 June 1988, Appl. No. 1012682, *Plattform 'Ärzte Für Das Leben'* v. *Austria*; ECtHR 28 Oct. 1998, Appl. No. 2345294, *Osman* v. *United Kingdom*; see also D. Spielmann, *L'effet Potentiel de la Convention Européenne des Droits de l'homme entre Personnes Privées* (Bruylant 1996).

[36] The Charter now forms part of the Union's 'broader constitutional charter', as the Court had proclaimed in *Les Verts*, which presumably grants its provisions greater significance in EU law than the provisions of a directive. See ECJ 23 April 1986, Case 294/83 *Parti Ecologiste 'Les Verts'* v. *Parliament*, para. 23; J. Kokott and C. Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon', *EUI Working Paper 2010/6*, p. 6, <http://cadmus.eui.eu/handle/1814/15208>, visited 20 March 2013.

[37] *AMS Opinion*, para. 34.

[38] See *Prigge Opinion*, *supra* n. 34, para. 26.

[39] S. Peers, 'When Does the EU Charter of Rights Apply to Private Parties?', *EU Law Analysis Blog*, 15 Jan. 2014, <http://eulawanalysis.blogspot.co.uk/2014/01/when-does-eu-charter-of-rights-apply-to.html>, visited 20 Feb. 2014.

[40] See in particular *AMS,* para. 47.

be applied to private relations in the same manner,[41] the judgment appears to relegate the assessment of horizontality entirely to a right-by-right analysis, rather than providing a *framework* within which national courts can discuss the horizontal effect of Charter provisions.[42] This is problematic, as uncertainty regarding the Charter's horizontality is already confronting national courts in situations distinct from *AMS*.[43] In the absence of clear precedent regarding the conditions under which Charter provisions can produce horizontal effects, national courts will need to make a reference to the Court of Justice on each occasion that mildly diverges from the present judgment. The delays and uncertainty likely to ensue from this obligation are discouraging for all claimants, but they are particularly problematic in the Charter context, where provisions such as those regarding trafficking, discrimination, and rights at work are likely to affect individuals in particularly vulnerable positions.[44]

The analysis of the horizontal effect of article 27 charter

In addition to questions regarding the Charter's horizontality at large, which can be inferred from the French court's reference to the Court of Justice, *AMS* raised, of course, a specific question about the horizontal effect of Article 27 Charter in particular. However, the Court's interpretation of this provision suffers from important shortcomings.

First, the textual and technical analysis of Article 27 in *AMS* is problematic. The Court interprets this provision as meaning 'that workers *must*, at various levels, be guaranteed information and consultation *in the cases and under the conditions provided for by European Union law and national laws and practices*'.[45] This interpretation seems to have two constituent parts: the first is that Article 27 *requires* that workers be guaranteed information and consultation. The second is that this requirement should be applied in accordance with secondary legislation and national laws and practices. However, the Court only focuses its analysis on the

[41] For instance, this is clear from the division of the Charter into thematic chapters.

[42] On the ways in which the structure of the adjudicative framework of fundamental rights in the EU as one that includes both EU and national courts, see D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice National Courts and the New Framework of Fundamental Rights Protection in Europe', 50(5) *Common Market Law Review* (2013) p. 1267, p. 1272-1274. Of course, it could be argued that the distinction between rights-conferring provisions and non-rights-conferring provisions, explained below, provides precisely that framework. However, as I will try to demonstrate, this distinction is unclear and, as such, unhelpful for adjudicative purposes.

[43] See, for example, in the UK, *Benkharbouche* v. *Embassy of the Republic of Sudan* [2014] ECR 169.

[44] See L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', 11 *Int J Const Law* (2013) p. 1056.

[45] *AMS*, para. 44, emphasis added.

latter part of the article, interpreting the meaning of the reference to EU or national legislation as implying absolute conditionality on such legislation in order for the provision to become 'fully effective'.[46] This gives rise to one of the most problematic aspects of the judgment.

It is unclear what the meaning of 'full effect' is and how it ought to be assessed.[47] If the meaning of this term is intended to be synonymous with direct effect, as both the subject matter of the case and subsequent paragraphs of the judgment would suggest,[48] then there is a clear problem of consistency with prior case-law. In its judgment in *Kücükdeveci*, the Court had ruled that the right not to be discriminated against on grounds of age could be invoked directly in a dispute between private parties, when read in conjunction with a directive that gave it more 'specific expression'.[49] In the same vein, in *AMS* the Court finds that a provision like Article 27, which is not specific enough to be invoked on its own, can become 'fully effective' through further legislation.[50] This would indicate that such legislation, in this case Directive 2002/14, which enshrines further conditions for this right to be applied,[51] would be capable of sufficiently clarifying the content of the right so that it can be invoked by individuals.

However, the Court then diverges from this approach. It finds that, in order for a Charter right to become 'fully effective' through further legislation, it is not sufficient that such legislation should simply express more specific conditions than the Charter right.[52] Rather, these specific conditions should be inferable from a reading of the Charter provision or its explanations, *taken separately from any other legislation*.[53] In other words, for Article 27 to meet the specific expression requirement as laid down in *AMS*, it or its explanations needed not only to state that member states should guarantee for workers the right to information and consultation but, also, that they should lay down 'a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation'.[54] Thus, the Court sets a very high threshold for what 'specific expres-

[46] Ibid., para. 45.

[47] The formulation used at para. 45 in the French version of the *AMS* judgment, which was the language of procedure, « afin que cet article produise pleinement ses effets », does not seem to explain the Court's reasoning any further.

[48] *AMS,* paras. 47, 49.

[49] *Kücükdeveci, supra* n. 24, para. 21. *Kücükdeveci* made reference to Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ 303, 2 Dec. 2000, p. 16.

[50] *AMS*, para. 45.

[51] Ibid., para. 35.

[52] Ibid., para. 46.

[53] Ibid.

[54] Ibid., para. 46.

sion' in a directive is, if indeed not altogether abandoning the concept in practice. After all, it is difficult to think of a fundamental right worded in as specific a manner as the Court suggests that Article 27 should be, in order to become fully effective.

The distinction that the Court draws between this case and *Kücükdeveci* is even more problematic. The Court states that Article 21, which was at stake in that case, is capable of conferring individual rights and therefore of being invoked 'as such'.[55] However, as the Court finds that Article 27 is not rights-conferring, the 'Kücükdeveci effect'[56] cannot be used in order to make up for this shortcoming.[57] It is difficult to follow the Court's reasoning here. What the Court appears to be saying is that there are some Charter provisions that can be invoked 'as such', like Article 21, and some Charter provisions that cannot, like Article 27. It might therefore be argued that the Court is in fact reverting to a *Mangold*-esque line of reasoning, whereby (some) fundamental rights may be *in themselves* enforceable, when they are within the scope of EU law, without the need to have recourse to the provisions of a directive.[58] If this approach is correct, then the value that Directive 2002/14 serves here is that it brings the case within the scope of EU law, and hence makes it possible to invoke the Charter provision.

However, this part of the judgment must be treated with caution. It is drafted in a particularly confusing manner and does not allow for any clear conclusions to be drawn regarding its place in the Court's case-law. Indeed, it is unclear what value there is in interpreting Article 27 in conjunction with legislation that gives it more specific expression and could, in principle, render this provision 'fully effective', as the Court suggests at paragraph 45 of its judgment, if the question of enforceability still ultimately depends on a *self-standing* interpretation of whether the Charter provision can confer individual rights, as the Court concludes at paragraphs 46-49. To the extent that the *Kücükdeveci* principle is not expressly overruled, the two statements appear contradictory. *AMS* therefore adds to the substantial lack of clarity that surrounds the *Mangold*/*Kücükdeveci* saga.

Furthermore, by confining its assessment to an exclusion of the direct effect of Article 27, the Court does not discuss other means of enforcing the Charter provision. However, fundamental rights can be enforced through several different avenues.[59] Indirect effect, namely the development of legal principles applied by the courts in their interpretation of private law, is particularly important in fun-

[55] Ibid., para. 47.

[56] E. Muir, 'Of Ages in – and Edges of – EU Law', 48 *CMLRev* (2011) p. 39, 60.

[57] *AMS*, para. 49.

[58] ECJ 22 Nov. 2005, C-144/04 *Mangold* v. *Helm*, paras. 75-78.

[59] R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) p. 355-356; See also C. O'Cinneide and M. Stelzer, 'Horizontal Effect/State Action', in M. Tushnet et al. (eds.), *Routledge Handbook of Constitutional Law* (Routledge 2013) p. 177 at p. 177.

damental rights adjudication.[60] The absolute nature of these rights can have a 'radiating effect', thus entering other legal fields.[61] The Court's assessment of indirect horizontal effect is nonetheless confined to an analysis of the Directive, and does not consider the potential impact of Article 27 Charter in this regard. Yet one does not necessarily exclude the other. While consistent interpretation of the French Labour Code with Article 3(1) of Directive 2002/14 might have been impossible, it is not clear from the judgment whether this provision was altogether incompatible with the spirit and purport of the fundamental right to information and consultation within the undertaking, enshrined in Article 27 Charter. Indeed, the Charter article was of a far broader scope than the Directive, which simply indicated the relevant thresholds. While it may not be able to give rise to new legal obligations 'as such', this does not necessarily prevent the provision from being used as a tool to interpret the *existing* obligations.[62] Presumably, even the French laws wrongly implementing the Directive were premised on a broader goal of securing information and consultation. Thus, if French law provided a window for interpretation in the light of that fundamental right, which is not mentioned in the judgment, then indirect effect could have made a material difference to the case.[63]

Last but not least, the Court's assessment was overly restrictive in its discussion of the remedy of state liability for breach of Directive 2002/14, which provides the claimant in this case with little more than false hope. The nature of the doctrine of state liability under EU law effectively precludes Mr Laboubi from succeeding before national courts, as it is difficult to assess the damage he has suffered under the *Francovich* conditions.[64] His claim was about the loss of his and his fellow employees' fundamental right to be informed and consulted in their workplace, as prescribed in Article 27 Charter and specified in the Directive. Even if one could

[60] R. Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role of the German Doctrine of "Mittelbare Drittwirkung Der Grundrechte"', 4 *EHRLRev* (2001) p. 421, 424.

[61] Ibid.

[62] See the discussion regarding the normative core of fundamental rights obligations *infra*, at p. 10-11.

[63] For example, the Court could have invited the national court to assess whether, read in the light of Art. 27 Charter more broadly, some degree of information and consultation could still be inferred for persons working under accompanied-employment contracts. It is not suggested that this would *necessarily* have been the case here, as the determination would still depend on national law. Yet a complete assessment of the horizontality of Art. 27 Charter by the Court of Justice required an assessment of its indirect horizontality, in addition to its direct horizontality.

[64] See *Francovich, supra* n. 17, para. 40. To the extent that his employment contract was suspended during the time that he pursued the court action, then he might be able to recover any lost salaries (the judgment is unclear about what the nature of his suspension was). Whether this is attributable to the French provisions in question remains to be assessed by the national court.

maintain the argument that this loss flowed causally from the French state's bad implementation of Directive 2002/14, and that the breach was sufficiently serious,[65] it is still not easy to put a price tag on the loss of the opportunity to exercise a fundamental right. Equally, it is conceptually flawed to revert to the breach of the Directive, without assessing whether France also had a separate duty to implement Article 27 positively, and whether failing to fulfil this obligation gave rise to a claim in compensation not only under the well-known conditions of state liability for breach of a directive but, also, for failing to observe the fundamental right to information and consultation within the undertaking, enshrined in Article 27 Charter.[66] However, this discussion now appears almost superfluous, in view of the fact that, in its judgment, the Court classifies the right to information and consultation as one of a breed of Charter provisions labelled as rights, which do not in fact confer rights on individuals and, hence, are incapable of being invoked even against the state.[67] It is worth devoting some more space to this classification before concluding.

The distinction between rights-conferring and non-rights-conferring provisions

In addition to developing the concept of 'full effect', the Court's judgment in *AMS* adds a new test regarding the enforceability of Charter provisions: that of whether a provision is rights-conferring or not.[68] This appears to create a hierarchy of provisions within the Charter based on their 'rights-conferring' nature and is additional – or perhaps even alternative – to the distinction between rights and principles made in the Charter itself. It is unclear what this distinction effectively means, but it could have very wide-ranging implications.

First of all, the distinction between rights-conferring and non-rights-conferring provisions, much like the rights/principles distinction, says very little about the legal nature of the fundamental rights enshrined in the Charter and the kind of obligations they entail. In particular, it would have been useful for the Court to explain whether non-rights-conferring provisions like Article 27 retain any minimum, irreducible core that still needs to be met and, if so, what that consists of.[69] For example, do these provisions require observance as opposed to respect, along

[65] This would be a particularly contentious point, as France had not entirely failed to implement the Directive but, rather, had implemented in wrongly: see *Francovich, supra* n. 17, para. 38; ECJ 8 Oct. 1996, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* v. *Germany*, paras. 25-27.

[66] See, by analogy: M. Ronnmar, 'Laval Returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms', 39 *Ind Law J* (2010) p. 280. The Swedish court had awarded punitive damages for breach of EU law in addition to a claim in compensation.

[67] *AMS*, para. 49.

[68] Peers, *supra* n. 39.

[69] *AMS Opinion*, paras. 48-49 and 68.

the lines of the rights/principles distinction, and is their invocation in *all* circumstances conditional on further legislation? To the extent that, as shown above, the Court sets the bar of enforceability through further legislation very high, determining what obligations the Charter's direct addressees have in observing provisions like Article 27 is crucial in ascribing to them a degree of normativity, as their fundamental status implies.

Secondly, it is not entirely clear how the determination of whether a provision confers rights or not should be made. The only hint provided in the judgment is the distinction the Court draws between Article 21 and Article 27 Charter. The classification of these rights within the Charter therefore needs to be discussed. Article 27 falls within the Charter's most contested chapter, that on 'Solidarity', as opposed to Article 21, which forms part of its 'Equality' chapter. As is well known, the Solidarity chapter is subject to a protocol on the part of two member states, which have sought to limit its enforceability.[70] The Protocol provides that the provisions of this chapter do not confer any rights additional to those existing in the jurisdictions in question.[71] However, the Court does not discuss or indeed mention the Protocol in its judgment, thus refraining from an assessment of the enforceability of Article 27 based on that document.[72] There must therefore be another substantive reason why the Court distinguishes between provisions such as Article 21, which it considers rights-conferring, and provisions such as Article 27, which it does not.

The idea of a right that can be invoked 'as such', and the Court's reference to national laws and practices as indicating that Article 27 cannot be so invoked are indicative in this regard.[73] In particular, the Court can be seen as suggesting that the crucial characteristic of provisions which are rights-conferring is that they do not require further legislative action – in other words, that they are purely 'negative' in character[74] – while provisions that make reference to national laws and

[70] Protocol 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, Art. 1(2).

[71] Ibid.

[72] This is not surprising. France, where the proceedings were initiated, is not one of the states to which Art. 1(2) of the Protocol might apply. Furthermore, this is in line with the *N.S.* judgment, where the Court had suggested that the Protocol is merely declaratory and that all Charter provisions are subject to the same degree of enforceability: See ECJ 21 Dec. 2011, Joined Cases C-411/10 and C-493/10 *N.S.* v. *Home Secretary* and *M.E.* v. *Refugee Applications Commissioner* [2011], para. 120.

[73] See C.C. Murphy, 'Using the EU Charter of Fundamental Rights against Private Parties after Association De Médiation Sociale', *European Human Rights Law Review* (2014, forthcoming). Available at SSRN: <http://ssrn.com/abstract=2400491>.

[74] By 'negative' obligations I refer to duties requiring inaction, as opposed to action on the part of member states: e.g., the obligation *not* to discriminate, as opposed to an obligation *to ensure* information and consultation.

practices, such as Article 27, are to be considered as non-rights-conferring.[75] However, developing the case-law based on such a distinction would be particularly unsatisfactory. The distinction between rights-conferring and non-rights-conferring provisions automatically creates a two-tier system of Charter provisions, which is not representative of the Charter's non-hierarchical exposition of fundamental rights.[76] Secondly, this hierarchy would adversely impact specific parts of the Charter more than others. Many of the provisions enshrined in the Charter's Solidarity chapter are, in fact, inextricably linked to secondary legislation and do not depend solely on the fulfilment of a 'negative' obligation. Reducing the question of the Charter's enforceability to the question of whether the obligation is rights-conferring or not, understood in the strict sense of whether one is able to rely on a particular right 'as such', rather than in conjunction with other legislation, risks creating a *de facto* near-exclusion of enforceability for a particular set of provisions, mainly to be found, but not necessarily confined to, the Solidarity chapter.[77] Finally, this distinction does not hold up to scrutiny from a fundamental rights perspective. Even rights that enshrine a negative obligation can become meaningless in the absence of positive action to protect them.[78] Establishing a test of enforceability based on a distinction between provisions which confer rights 'as such' and provisions which require some form of legislative action therefore appears not to recognise that rights can be conferred in more than one way.

Last but not least, it is worth discussing the Court's overall interpretation of Article 27, which permeates the judgment. The method the Court uses to interpret Article 27 is confined to a plain reading of the text of that article. This is criticisable. By following this approach, the Court seems to have excluded a series of relevant considerations from its assessment. The provision is detached from a rich legal background, including Article 21 of the European Social Charter, Articles 17 and 18 of the 1989 Community Charter of the Fundamental Social Rights for

[75] Murphy, *supra* n. 73, p. 7-8. See A. Young, 'Horizontality and the EU Charter, *UK Constitutional Law Blog*, 29 Jan. 2014, <http://ukconstitutionallaw.org/2014/01/29/alison-young-horizontality-and-the-eu-charter/>, visited 20 Feb. 2014.

[76] See *N.S.*, *supra* n. 72, para. 120.

[77] B. De Witte, 'The Trajectory of Fundamental Social Rights in the European Union', in G. De Búrca and B. De Witte (eds.), *Social Rights in Europe* (Oxford University Press 2005), p. 163.

[78] H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996) p. 52, 60. For instance, a traditional civil and political right, such as the right to marry and found a family, enshrined in Art. 9 Charter, does not merely consist in state interference – the right cannot be exercised in the absence of measures taken on the part of the state to implement it. More starkly still, even the prohibition of torture, inhuman or degrading treatment or punishment enshrined in Art. 4 Charter cannot be fulfilled unless a degree of state action is taken to properly train police and military forces in such a way that they will not abuse their position of power: V. Mantouvalou, 'In Support of Legalisation', in C.A. Gearty and V. Mantouvalou, *Debating Social Rights* (Hart Pub 2011) p. 119.

Workers, the ILO's core labour standards, secondary legislation and national laws, as well as the political and drafting context of the Charter itself. This makes it difficult to determine where the provision fits into this broader picture, as well as to pinpoint the reach of the obligation it enshrines. Indeed, it would seem that the Article 27 claim in *AMS* involves not only the question of horizontal effect of the right to information and consultation within the undertaking, but also a fundamental question of equality of treatment between standard workers and non-standard workers.[79] Seen in that light, the distinctions drawn by the Court between Article 21 and Article 27 Charter and, consequently, between rights-conferring and non-rights-conferring provisions, appear over-simplified.

Conclusion

The horizontal effect of fundamental rights is a subject where it is hard to get the balance right. This difficulty is compounded where the right concerned is Article 27, which is one of the Charter's most open-ended provisions.

In *AMS*, complex questions both regarding the scope of the horizontal effect of the Charter and the reach of employment rights in the EU seem to be treated as if they were settled under the doctrine of non-horizontality of directives. The Court thus refrains from setting out principles for interpreting the Charter's horizontal effect, or for understanding the nature of Article 27 in particular. Indeed, perhaps the most noteworthy aspects of the *AMS* judgment are the things it leaves unsaid: issues such as whether the Charter should apply horizontally, how 'fundamental' employment rights should be in the EU, whether the Charter should be interpreted in a hierarchical manner and, finally, what remedies are the most appropriate for enforcing fundamental rights obligations.

In this note, I have tried to illustrate that the Court's failure to devote some attention to these issues is likely to put the future of horizontal fundamental rights claims under the Charter and, particularly, claims under its Solidarity chapter, on an uncertain track. Additionally, the reaffirmation of the *Kücükdeveci* principle on the one hand and its hasty dismissal in respect of Article 27 on the other, raise important questions about the manner in which prior case-law on the horizontality of fundamental rights ought to be interpreted from now on, and create distinctions in respect of the Charter's provisions which are difficult to maintain conceptually.

That said, the *AMS* case also contains an important positive element, which is worth noting by way of conclusion: it goes much further than previous rulings in

[79] I am most grateful to Professor Sciarra for alerting me to this point. An argument based on the right to equal treatment had also originally been brought before the District Court in *AMS*, but it was not considered further.

addressing horizontality in a direct manner.[80] *AMS* can thus be seen as a first step towards tackling the question of the Charter's horizontality, and its enforcement more broadly, rather than signalling the Court's final answer. It is to be hoped that future case law will take this forward and that the more sensitive issues that horizontal effect raises in the field of fundamental rights will start being explored.

[80] Cf *Dominguez*, *supra* n. 2.