Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 18 July 2013 [1]

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)

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

(Charter of Fundamental Rights of the European Union — Article 27 — Workers' right to information and consultation within the undertaking — Directive 2002/14/EC — National provision excluding specific categories of workers from the right of representation within the undertaking — Effectiveness of fundamental rights in relations between individuals — Status of a fundamental right in the Charter as a 'principle' — Article 51(1) of the Charter — Article 52(5) of the Charter — Whether a 'principle' may be relied on in a dispute between individuals — Acts of the European Union which directly specify the substantive content of a 'principle' — Specific expression through a directive — Effectiveness — Duty of a national court to refrain from applying national provisions contrary to acts which directly specify the substantive content of a 'principle' — Interpretation of national law in conformity with European Union law — Limits)

1. Stated with the utmost simplicity, the question of principle raised by the Cour de cassation (Court of cassation) is whether the Charter of Fundamental Rights of the European Union ('the Charter'), where its contents have been given specific expression by a directive, may be relied on in relations between individuals. If the response is in the affirmative, the referring court raises a much more specific question, for the purpose of which the Court has case-law which will greatly facilitate its task. First, however, the question of principle must be considered.

2. This case stems from the uncertainties of the Cour de cassation concerning the compatibility of a national legislative provision with the right of workers to information and consultation, as given specific expression in Directive 2002/14/EC. [2] That directive implemented in detail the right now declared in Article 27 of the Charter, a right which must be examined to determine whether it is in the nature of a 'right' or a 'principle', within the meaning of the general provisions of the Charter (Articles 51(1) and 52(5)). It should be pointed out, moreover, that the uncertainties of the Cour de cassation have arisen in the context of a dispute between a union and an employer, which has led the Cour de cassation to refer a question to the Court concerning the effectiveness of both the right at issue and its specific expression in Directive 2002/14 in the sphere of relations between individuals.

1 — Original language: Spanish.

2 — Directive 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 2002 L 80, p. 29).

3. The circumstances of the present case having been briefly set out, it is clear that the Court is asked to rule on several issues of undeniable constitutional significance.

4. From a logical standpoint, the first issue is the extremely general one, which is not specifically addressed by the Charter, relating to the effectiveness of fundamental rights in the sphere of relations between individuals ('horizontal' effectiveness) and the possible scope of such rights in the case of the specific right at issue in the present case.

5. This may also be the first opportunity, in general and in particular, to address the issue, barely elucidated in the Charter and its Explanations, of the distinction between 'rights' and 'principles' and the resulting difference in treatment referred to in Article 51(1) and provided for in greater detail in Article 52(5) of the Charter.

6. This will also be an opportunity to examine for the first time the very complex Article 52(5) of the Charter. Accordingly, and in particular, the present case raises the issue of the 'implementation' of the 'principles' as a precondition for their operation. However, at the same time it also raises the issue of the scope of the judicial guarantee of those 'principles', as laid down by the second sentence of Article 52(5).

7. Finally, if the reasoning which I shall propose below is accepted, the Court must address what constitutes perhaps the most sensitive issue in the question referred by the Cour de cassation: in the event that the European Union act which directly implements and gives specific expression to the 'principle' is a directive, what consequences follow from the fact that the dispute is between two individuals? That last question again highlights the limits of the horizontal direct effect of directives, placing the present case before the Court at the end of a long line of case-law which includes, inter alia, *Mangold* and *Kücükdeveci*.

I – Legal framework

A – *European Union law*

8. As set out in its heading, Article 27 of the Charter proclaims the right of workers to information and consultation within the undertaking. That provision reads as follows:

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

9. In Articles 51(1) and 52(5) of the Charter, the distinction between 'rights' and 'principles' is set out in the following terms:

'Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies 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 and respecting the limits of the powers of the Union as conferred on it in the Treaties.

…Article 52Scope and interpretation of rights and principles

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

10. Article 2 of Directive 2002/14 establishes a list of definitions, including one relating to the concept of 'employee'. Article 2(d) provides as follows:

'"employee" means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice'.

11. The scope of application of Directive 2002/14 is laid down by Article 3, in the following terms:

'Scope

1. This Directive shall apply, according to the choice made by Member States, to:

(a) undertakings employing at least 50 employees in any one Member State, or

(b) establishments employing at least 20 employees in any one Member State.

Member States shall determine the method for calculating the thresholds of employees employed.

2. In conformity with the principles and objectives of this Directive, Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.

3. Member States may derogate from this Directive through particular provisions applicable to the crews of vessels plying the high seas.'

12. Directive 2002/14 entered into force on 23 March 2002. The deadline for transposition expired on 23 March 2005.

B – *National law*

13. Article L. 1111-3 of the Labour Code lays down the following derogation from the general scheme for calculating staff numbers:

'1. Apprentices;

2. holders of an employment-initiative contract, for the duration of the agreement under Article L. 5134-66;

3. [repealed]

4. holders of an accompanied-employment contract for the duration of the agreement …;

5. [repealed]

6. holders of a professional training contract until expiry provided for by the contract where it is for a limited duration or until the end of the professional training when the contract is for an unlimited duration,

shall be excluded from the calculation of staff numbers.

However, those employees shall be taken into account for the purposes of applying the legal provisions relating to the calculation of the risk of accidents at work and occupational diseases.'

II – The facts and the main proceedings

14. The Association de Médiation Sociale ('the AMS') is a private non-profit-making association governed by the French Law of Associations of 1901, whose fundamental objective is the prevention of crime in the urban area of Marseille. To that end, the AMS carries out activities described as social and employment mediation, based on the employment of young people under 'accompanied-employment contracts', and subsequently directs them towards more stable employment or social activities. Through those contracts the AMS therefore pursues the social rehabilitation and reintegration into working life of persons in particularly vulnerable situations. When the present dispute arose, the AMS had concluded between 120 and 170 'accompanied-employment contracts'.

15. Although, as has been stated, the AMS is a private non-profit-making association, it is sponsored by several institutional actors at the regional and municipal levels, and supported by other private local social bodies.

16. To carry out its activities, the AMS has its own members of staff employed on indefinite contracts, a total of eight employees. Mr Laboubi is one such permanent employee. He was employed on an indefinite basis on 28 November 2005 and is responsible for local mediation activities in lower secondary educational establishments in Marseille.

17. As a result of the exclusion under Article L.1111-3 of the French Labour Code of the category of 'accompanied-employment contracts', the AMS takes into account only its eight permanent employees for the purpose of calculating its staff numbers. That calculation has effects, in so far as the present case is concerned, on the arrangements for the representation of workers within the undertaking. Unlike fixed-term contracts, which are used in the calculation in proportion to their length, 'accompanied-employment contracts' are entirely excluded from that calculation. As a consequence of the national rule, although the AMS has a hundred or so workers under 'accompanied-employment contracts', in addition to the association's eight permanent employees, the staff numbers in that undertaking do not reach the minimum threshold of fifty employees required for the application of the relevant provisions of Directive 2002/14.

18. Notwithstanding the foregoing, on 4 June 2010 the Union Locale des Syndicats CGT Quartiers Nord notified the director of the AMS of the creation of a CGT trade union section within the association and the appointment of Mr Laboubi as its representative. The AMS stated in its reply to the letter from the union that, since the staff numbers of the association failed to reach the threshold of at least fifty employees, it was not required to introduce worker representation measures.

19. On 18 June 2010, the AMS called Mr Laboubi to a meeting at which he was notified of the temporary suspension of his employment relationship. On the same day, the AMS brought proceedings before the Tribunal d'instance de Marseille (Marseille District Court) seeking a declaration that the appointment of Mr Laboubi as the CGT trade union section representative was void.

20. During the proceedings before the Tribunal d'instance, that court referred a priority question on constitutionality to the Conseil constitutionnel, since it considered that the exclusion of 'accompanied-employment contracts' from the calculation of the staff numbers in the undertaking could infringe the constitutional principle of equality. By judgment of 29 April 2011, the Conseil constitutionnel found that that exclusion was not unconstitutional.

21. That procedural issue of constitutionality having been determined, the Tribunal d'instance de Marseille found that the provisions of Article L.1111-3 of the French Labour Code were contrary to European Union law, in particular Directive 2002/14, refrained from applying the national legislative provision and accordingly dismissed the AMS's application.

22. An appeal against that decision was brought before the Cour de cassation, which decided to refer the present question to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU.

III – The question referred and the procedure before the Court

23. On 16 April 2012, the reference for a preliminary ruling was received at the Registry of the Court; the questions referred are worded as follows:

'(1) May the fundamental right of workers to information and consultation, recognised by Article 27 of the Charter …, and as specified in the provisions of Directive 2002/14 …, be invoked in a dispute between private individuals in order to assess the compliance [with European Union law] of a national measure implementing the directive?

(2) In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with the following contracts: apprentice, employment-initiative contract, accompanied-employment contract and professional training contract?'

24. Written observations have been submitted by the CGT, the defendant in the main proceedings, the Governments of the French Republic, the Republic of Poland, the Federal Republic of Germany and the Kingdom of the Netherlands, and the Commission.

25. The oral hearing was held on 23 April 2013 and attended by representatives of the CGT, and the Agents for the French Republic, the Republic of Poland and the Commission.

IV – Analysis

26. The Cour de cassation has asked the Court two questions of a very different nature, the second of which is subject to an affirmative answer to the first. The first question essentially raises issues of principle, as I have shown at the beginning of this Opinion. In short, it is the question whether a right proclaimed by the Charter, and given specific expression by secondary legislation, is a legitimate criterion for assessment in the specific circumstances of a dispute between individuals. In the event that the Court answers that that criterion is valid, and only in that event, the referring court asks the Court another concrete and specific question, since it also has uncertainties in that regard, concerning the compatibility with European Union law of a particular provision of national law, that is to say Article L.1111-3-4 of the French Labour Code.

27. This means, because it is necessary to avoid any ambiguity, that the Cour de cassation is not asking the Court the usual question whether *a directive* can have horizontal effects in relations between individuals, since the Cour de cassation, in light of its order for reference, is sufficiently aware of the case-law of the Court in that regard. First, it is asking the Court something quite different, that is whether the Charter, where its content, on the one hand, requires implementation in an act giving specific expression to that content, and where, on the other hand, that specific expression has taken place through a directive, is an admissible criterion for review for a national court assessing the legality of a national rule. I shall then consider, as I have said, the uncertainty of the Cour de cassation as to whether its national law is compatible with European Union law.

A – *The first question*

1. The Charter and its effectiveness in relations between individuals

28. Before proposing an answer to the question concerning the horizontal effect of fundamental rights, I think it is appropriate to address what I consider to be an error. That error is the argument that the Charter contains a provision on the effectiveness or, more properly, the lack of effectiveness of fundamental rights in relations between individuals. According to that argument the provision in question is the first sentence of Article 51(1), according to which '[t]he provisions of this Charter are addressed to the institutions … of the Union … and to the Member States ...'.

29. On the basis of that wording, the argument which I reject draws a contrary, or should it be preferred *inclusio unius est exclusio alterius*, inference that, since the provisions of that Charter are addressed to the institutions of the Union and to the Member States, they are *not* addressed to individuals. [3]

30. I consider that that inference is clearly hasty. Suffice to say that traditionally the, largely constitutional, provisions which contain declarations of rights have not expressly referred to the addressees or duty bearers of the rights, which were spontaneously understood to be the public authorities. Moreover, it is still clearly only in a minority of cases that individuals are expressly defined as possible addressees of rights. That is tantamount to saying that, in most cases, the issue of the relevance of fundamental rights in private law relationships had to be dealt with by way of interpretation, without the aid of an express constitutional provision and generally on a case-by-case basis. [4]

31. In my view, and without there being any need to undertake an exhaustive interpretation of Article 51(1) of the Charter, it is quite clear that the issue which that provision essentially sought to address was the extent to which the fundamental rights enshrined in the Charter are binding, first, on the institutions of the Union and, secondly, on the Member States. In my opinion there is nothing in the wording of the article or, unless I am mistaken, in the preparatory works or the Explanations relating to the Charter, which suggests that there was any intention, through the language of that article, to address the very complex issue of the effectiveness of fundamental rights in relations between individuals. [5]

3 — In the academic legal literature, see, inter alia, De Mol, M., 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', *European Constitutional Law Review,* 2010, No 6, p. 302; Hatje, A., in *EU-Kommentar* (coord. Jürgen Schwarze), 2nd ed., Baden-Baden, 2009, Article 51, p. 2324, paragraph 20; Kingreen, T., *EUV/EGV – Komentar,* 3rd ed., Munich, 2007, Article 51 GRCh, p. 2713, paragraph 18, or Riesenhuber, K., *Europäisches Arbeitsrecht,* Hamburg, 2009, § 2, p. 45, paragraph 25. On the different approaches concerning that issue, see the general account given by Advocate General Trstenjak in the Opinion in Case C-282/10 *Dominguez* [2012] ECR.

4 — See the comparative analysis of Bilbao Ubillos, J.M., *La eficacia de los derechos fundamentales frente a particulares*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997, pp. 277 et seq., and the summary provided by Seifert, A., 'L'effet horizontal des droits fondamentaux. Quelques réflexions de droit européen et de droit comparé', *Revue trimestrielle de droit européen*, Dalloz, 2013.

5 — In that regard, see Craig, P., *EU Administrative Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 465.

32. Finally, I consider that the above reasoning is not invalidated by the second sentence of Article 51(1) of the Charter, where it declares that '[t]hey', that is the Union and the Member States, 'shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'. It is clear that the purpose of that sentence is not, even collaterally, to preclude the relevance of the fundamental rights of the Charter to private law relations. The purpose of that sentence is to introduce, first, the *summa divisio* between 'rights' and 'principles' and, secondly, a caveat regarding any change in the allocation of competencies to the Union, as established in the Treaties, as a result of the entry into force of the Charter.

33. If, as I believe, that is the case, it would mean that, in that regard, an interpreter of the Charter is faced with the same, often uncertain, prospect that an interpreter of the Constitutions of the Member States generally faces.

34. Coming now to the crux of the matter, and in view of certain opinions which are expressed in this regard, it might seem that the idea of horizontal effect was a concept unknown to European Union law, which had to be addressed for the first time as a result of the incorporation of the Charter into European Union primary law. However, the idea that the fundamental freedoms of movement [6] or particular principles such as non-discrimination on grounds of sex [7] are relevant in private legal relations is an old and well-established one. That being so, the idea that the fundamental rights of the Charter other than the fundamental freedoms or the principle of equality could have a system which is separate and, so to speak, of lower status in the Charter as a whole seems highly problematic.

35. In short, and as the referring court rightly points out, since the horizontal effect of fundamental rights is not unknown to European Union law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse.

36. The problem of what is often called 'Drittwirkung', to use the successful German expression, is not so much the idea itself, or the concept or representation of it in our constitutional culture, which it would be difficult to challenge. [8] The problem is the proper understanding of its effectiveness in concrete terms, a problem which is growing at a time when that effectiveness is, almost by necessity, protean, in the sense that it adopts very varied forms. Therefore, the difficulty lies in understanding that the obligation of individuals to respect the rights and freedoms of others is usually imposed, immediately and directly, by the public authorities themselves. From that perspective, the idea that individuals are subject to fundamental rights frequently leads to the public authorities' 'duty to protect' the rights. [9] That is, moreover, the approach which has also been endorsed by the European Court of Human Rights and which at this stage enjoys unchallenged authority. [10]

6 — See, inter alia, Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, '*Viking Line*' [2007] ECR I-10779, paragraph 33.

7 — See, in particular, Case 149/77 *Defrenne* [1978] ECR 1365.

8 — See, inter alia, Böckenförde, E.-W., *Staat, Gesellschaft, Freiheit*, Suhrkamp, Frankfurt, 1976, p. 65 et seq.; Díez-Picazo Giménez, L.-M., *Sistema de Derechos Fundamentales*, 3rd ed., Ed. Thomson Civitas, Madrid, 2008, p. 252 et seq.; Pace, A., *Problematica delle liberà costituzionali*, Parte Generale, 2nd ed., Cedam, Padua, 1990, Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006 and Kennedy, D., 'The Stages of Decline of the Public/Private Distinction', 130 *University of Pennsylvania Law Review*, 1982.

9 — On the public authorities' protection obligation, see Papier, H.-J., 'Drittwirkung der Grundrechte', in Merten, D. and Papier, H.-J. (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Volume II, Ed. C.F. Müller, Heidelberg, 2006, pp. 1335 and 1336, and in particular the contribution of Calliess, C. in the same work at p. 963 et seq., and Jaeckel, L., *Schutzpflichten im deutschen und europäischen Recht*, Ed. Beck, Munich, 2001.

10 — The theory of the 'positive obligations of the State' has its origins in the judgment of the European Court of Human Rights in *Airey* v *Ireland* of 9 October 1979, subsequently confirmed in a long line of judgments of that court, including, in particular, *Lopez Ostra* v *Spain* of 9 December 1994 and *Ilascu and Others* v *Moldavia and Russia*, of 8 July 2004. In that connection, see the analysis of Sudre, F. et al., *Les grands arrêts de la Cour européenne des Droits de l'Homme*, 6th ed., PUF, Paris, p. 18 et seq.

37. For practical purposes, the effectiveness of fundamental rights between individuals becomes relevant when the legal system provides for a specific guarantee of fundamental rights, often a judicial one. In such cases, the inherent nature of fundamental rights is imposed or superimposed on private-law relations by the State body with the most authority to give rulings on fundamental rights. From that perspective, the concept of horizontal effect results in a notable increase in the involvement of judicial interpreters of fundamental rights in the framework of relations governed by private law. The most specific instrument through which that mechanism becomes effective is that of ad hoc procedures for the individual protection of fundamental rights, where they exist. [11]

38. Finally, the horizontal effect of fundamental rights operates very differently for each right or, more simply, for the various groups of rights. There are rights which, by their very structure, are not addressed to individuals, just as there are rights whose relevance in relationships governed by private law it would be inconceivable to deny. It is neither necessary nor even permissible on this occasion to consider that matter further. It is sufficient to focus on the right at issue, the right of workers to information and consultation within the undertaking, referred to in Article 27 of the Charter.

39. The right recognised in that article is an excellent example of the second group of rights to which I have just referred, that is to say the rights which it would be more than imprudent to deny were relevant in relations governed by private law. As has been stated and in terms which there will be ample opportunity to consider, that article declares that '[w]orkers 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'.

40. The heading of the article in question is 'Workers' right to information and consultation *within the undertaking*', the last detail meaning that it must be accepted that 'the undertaking' is in some way involved in the effectiveness of that right. It is true that the public authorities (the European Union and the Member States) will be the first to be called upon to 'guarantee' workers the enjoyment of that right, through adopting and implementing the relevant provisions. However, in complying with the provisions of the public authority, undertakings themselves, and for such purposes the same is true whether they are public or private, must also ensure, on a day-to-day basis, that workers are guaranteed information and consultation at the appropriate levels.

41. The foregoing leads me to the intermediate conclusion, and one which is subject to what is stated below, that Article 27 may be relied on in a dispute between individuals. In other words, that possibility cannot be denied on the basis of the argument that the Charter, as a consequence of the provisions of Article 51(1), has no relevance in relations governed by private law.

42. The issue which must be addressed next is that the Charter contains both 'rights' and 'principles', within the meaning of its general provisions. In the event that the right to information and consultation is a 'principle', Article 52(5) of the Charter contains very specific provisions, as I have already stated, with regard to the limited possibilities of relying on a 'principle' before a court. The task before the Court in this situation is to ascertain the possible status as a 'principle' of Article 27 of the Charter.

11 — Such is the case, for example, with the Federal Republic of Germany and the Kingdom of Spain, whose Constitutional Courts, through direct actions to protect fundamental rights, have developed case-law placing the court of fundamental rights at the centre of the duty of protection. Thus, in the case of Germany, the intervention of a court as a public authority gave rise to the case-law of the Bundesverfassungsgericht, the reference judgment of which was that delivered in *Lüth* (BverfG 7, 198) of 15 January 1958. In the case of Spain, the Tribunal Constitucional, in judgment No 18/1984 of 7 February 1984, held that 'the position is, on the one hand, that there are rights which can be relied on only against the public authorities (such as those in Article 24 [effective legal protection]) and, on the other hand, that the fact that the public authorities are bound by the Constitution (Article 9.1) entails a positive duty to give effect to such rights in terms of their applicability to social life, a duty which falls on the legislature, the executive and the courts and tribunals, within the scope of their respective functions' (sixth legal ground).

2. The right to information and consultation as a 'principle' within the meaning of the general provisions of the Charter

43. The innovations introduced by the Charter in the 2007 version include, in particular, the prominent distinction between 'rights' and 'principles' introduced in Article 51(1) and set out in the heading of Article 52, the effects of that distinction being given specific expression, in so far as 'principles' are concerned, in Article 52(5). However, it is striking that the Charter does not assign the fundamental rights to either of the two groups, as is usual in comparative law.[12] The Explanations confine themselves to proposing a few examples of each but unfortunately those examples do not include the right at issue.[13] For the purposes of the present case, and as I have already pointed out, that becomes a problem, though certainly not one which is insurmountable.

44. First, it is necessary only to point out that, within the structure of the Charter, the general category chosen for the title of the Charter itself, 'fundamental rights', must relate to all its contents. In other words, none of the content of the Charter, in terms of its substantive provisions, should be excluded from the category of 'fundamental rights'. That having been established, it is necessary, and this may seem less obvious, to point out that the fact that specific substantive content of the Charter is described as a 'right' elsewhere in the Charter does not in itself prevent it from potentially belonging to the category of 'principles' within the meaning of Article 52(5).

45. Both in the actual Charter and in the constitutional traditions of the Member States, it is common to regard as 'rights' or 'social rights' that substantive content relating to social policy which, because it cannot create legal situations directly enforceable by individuals, operates only following action or implementation by the public authorities. They are (social) 'rights' by virtue of their subject-matter, or even their identity, and 'principles' by virtue of their operation.

46. The authors of the Charter, with more or less justification, sought to make matters clearer by using the verb 'respect' in relation to the effectiveness of rights and the verb 'observe' in relation to that of principles. That does not seem clear to me. However, I consider that the requirement in the second sentence of Article 51(1) 'to promote the application' of the 'principles' is more meaningful. That requirement is important and at the same time expressive of the essence of 'principles'. In what follows, I shall seek briefly to explain the significance of the presence of such provisions in the Member States' declarations of rights and, now, in the Charter, with a few references to the origin of such provisions, before proposing that the right at issue be understood as a 'principle'.

a) The origin of the distinction between 'rights' and 'principles', and its sources of inspiration compared

47. The Convention entrusted with drafting the first version of the Charter was already aware of the benefits of drawing a distinction between 'rights' and 'principles'. Those categories would serve not only to facilitate a broad consensus within the first Convention, but also to facilitate the practical implementation of the provisions of the Charter.[14] The authors of the Charter relied on the experience of some Member States, where a similar distinction had allowed full justiciability of 'rights' and a reduced, or in some cases no, justiciability of 'principles'.

12 — In that regard, Seifert, A., op.cit., p. 804 et seq.

13 — According to the Explanations, '[f]or illustration, examples for principles, recognised in the Charter, include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34'.

14 — Guy Braibant, a noted member of the first Convention, recounts in his work *La Charte des droits fondamentaux de l'Union européenne*, Seuil, Paris, 2001, pp. 44-46, the importance of the distinction between 'rights' and 'principles' in reaching the broad consensus which would result in the inclusion of the Charter's social chapter.

48. Since 1937, Article 45 of the Irish Constitution has contained an exhaustive list of 'directive principles of social policy', the contents of which are not cognisable by the courts, since the legislature is the only power responsible for ensuring compliance with them. [15] Several decades later, the Spanish Constitution of 1978 developed that approach so far as to recognise, in Article 53(3) thereof, that 'principles' could, in any event, 'inform' judicial practice. [16] Moreover, other Member States would also adopt that approach, in recognising the existence of categories similar to but different from 'rights', mainly addressed to the legislature, but capable of playing an interpretative role before the courts and indeed in a form of review of the validity of acts of the legislature in those States which allow judicial review of legislation. [17] That has been, inter alia, the function of the 'objectives of constitutional value' developed in the case-law of the French Constitutional Council, [18] the 'constitutional objectives' of the Austrian Constitution [19] and the equivalent category set out in the Bonn Basic Law. [20] Another example is the Polish Constitution, Article 81 of which also limits the scope of particular economic and social rights, although the case-law of the Tribunał Konstytucyjny (Polish Constitutional Court) has opened up the possibility for a limited review of the constitutionality of legislation in the light of those rights. [21]

49. In summary, the Member States which draw a distinction similar to that provided for in Article 52(5) of the Charter have established a category complementary to that of 'rights', a category incapable of giving rise to individual rights which can be directly relied on before the courts, but which is endowed with normative force at the constitutional level allowing the review of acts, primarily those of a legislative nature. [22] That idea also reflects the concern within the Convention entrusted with drafting the Charter and within the Convention on the Future of Europe. Several Member States feared that the recognition of particular economic and social rights would result in the judicialisation of public policy, particularly in areas of significant budgetary importance. In fact, what would ultimately be called 'principles' were described in the initial drafts as 'social principles'. [23] Although that adjective would later be removed, it is clear that the main concern of the authors of the Charter concerned rights to social benefits and social and employment rights. [24]

b) The concept of 'principle' within the meaning of the Charter

50. The wording of the Charter shows that 'principles' contain obligations upon the public authorities, thus contrasting with 'rights', whose purpose is the protection of directly defined individual legal situations, though the specific expression of 'principles' at lower levels of the legal order is also possible. Public authorities must respect the individual legal situation guaranteed by 'rights', but in the case of a 'principle' the obligation is much more general: its wording determines not an individual legal

15 — With regard to Article 45 of the Irish Constitution and the case-law of the Irish Supreme Court, see Kelly, J.M., *The Irish Constitution*, 4th ed., LexisNexis/Butterworths, Dublin, p. 2077 et seq.

16 — With regard to the effectiveness of the 'guiding principles of economic and social policy' of the Spanish Constitution, see Jiménez Campo, J., *Derechos fundamentales. Conceptos y garantías*, Trotta, Madrid, 1999, p. 122 et seq., and Rodríguez de Santiago, J.M., 'La forma de vincular de los preceptos del capítulo tercero del título primero de la Constitución española', in Casas Baamonde, M.E. and Rodríguez-Piñero and Bravo-Ferrer, M., *Comentarios a la Constitución española*, Wolters Kluwer, Madrid, 2008, pp. 1187 et seq.

17 — See, for example, the comparative analysis of Ladenburger, C., 'Artikel 52 Abs. 5', in Tettinger, P.J. and Stern, K., *Europäische Grundrechte – Charta*, Beck, Munich, 2004, p. 803 et seq.

18 — See the Constitutional Court judgment 94-359 CC, of 19 January 1995, paragraph 7. In that regard, see Burgorgue-Larsen, L., 'Article II-112' in Burgorgue-Larsen, L., Levade, A. and Picod, F., *Traité établissant une Constitution pour l'Europe,* Volume 2, Bruylant, Brussels, 2005, p. 684.

19 — See, for example, Paragraphs 8(2), 7(1) and (2), and 9a of the Austrian Constitution. In that regard, see Schäffer, H., 'Zur Problematik sozialer Grundrechte', in Merten, D. and Papier, H.-J. (eds.), op. cit., Volume VII/1, p. 473 et seq.

20 — See, for example, Sommemann, K.-P., *Staatsziele und Staatszielbestimmungen*, Mohr Siebeck, Tübingen, 1997.

21 — See, for example, Sadurski, W., *Rights before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer, Dordrecht, 2005, p. 178 et seq.

22 — In that regard, an overall view is given in Iliopoulos-Strangas, J. (ed.), *Soziale Grundrechte in Europa nach Lissabon.* Eds. Nomos/Sakkoulas/Bruylant/Facultas, Baden-Baden, Athens, Brussels, Vienna, 2010.

23 — Braibant, G., op. cit., p. 252.

24 — In that regard, see, already at an early stage, Grimm, D., 'Soziale Grundrechte für Europa', now in the work *Die Verfassung und die Politik. Einsprüche in Störfällen*, Ed. Beck, Munich, 2001, p. 275 et seq.

situation, but general matters and ones which govern the actions of all public authorities. In other words, the public authorities, and in particular the legislature, are called upon to promote and transform the 'principle' into a judicially cognisable reality, while at all times respecting the objective framework (the subject-matter) and its purposive nature (the results) as determined by the wording of the Charter establishing the 'principle'. [25]

51. The fact that 'principles' are characterised by the concept of obligation can also be seen in the explanations relating to Article 52 of the Charter, the interpretative value of which is confirmed by the Treaty on European Union itself in the third subparagraph of Article 6(1). The explanations offer several examples of 'principles', which seem to be laid down as obligations addressed to 'the Union', broadly understood as including all the Institutions and also the Member States when they implement European Union law. [26] Accordingly, Article 25, expressly referred to in the explanations, states that the European Union 'recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'. The same recognition and respect must, according to Article 26, be given with regard to the right of persons with disabilities 'to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. Once again, the obligation on the European Union is set out in Article 37 of the Charter, which requires it to integrate and ensure '[a] high level of environmental protection and the improvement of the quality of the environment … in accordance with the principle of sustainable development'.

52. What of Article 27 of the Charter? The first thing which should be noted is that the incorporation into the Charter of the right of workers to information and consultation within the undertaking as the first article of the title 'Solidarity' is anything but chance. That social right is, as stated in the explanations, the reflection of Article 21 of the European Social Charter [27] and points 17 and 18 of the Community Charter of the Fundamental Social Rights of Workers. Moreover, it is a right found in the secondary legislation prior to the entry into force of the Charter, not only in the aforementioned Directive 2002/14, but also in other acts of European Union labour law, such as Directive 98/59/EC [28] and Directive 94/45/EC. [29]

53. That said, and given all the difficulties involved in filling out the meaning of the Charter, where it has, so to speak, discontinued its task, I would give more weight to the arguments which allocate the substantive content of Article 27 of the Charter to the category of 'principle', rather than to arguments allocating it to the category of 'right'. Primarily, there is a structural reason which confirms that it is an obligation upon the public authorities in the sense set out in point 50 of this Opinion.

54. Indeed, quite apart from the actual proclamation of the right and the resulting duty to guarantee it, the scope of the right directly guaranteed by the provision is extremely weak: '… in the cases and under the conditions provided for by Union law and national laws and practices'. This is confirmed by the fact that the article does not define any individual legal situations, leaving the European Union and national legislatures to give specific expression to the content and objectives determined by the

25 — In that regard, analysing 'principles' as obligations focusing on *goals,* see Borowsky, M., 'Artikel 52', in Mayer, J., *Charta der Grundrechte der Europäischen Union,* 3rd ed., Nomos, Baden-Baden, 2010, pp. 697 to 699, Burgorgue-Larsen, L., op. cit., p. 686 et seq., and Mayer, F., 'Artikel 6 EUV', in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union – Kommentar,* Beck, Munich, 2010, paragraph 65 et seq.

26 — The explanation relating to Article 52(5) of the Charter states as follows, in so far as is relevant here: '... Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. *They do not* however *give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice* ... and with the approach of the Member States' constitutional systems to "principles", particularly in the field of social law. …'

27 — The European Social Charter, which 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.

28 — Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

29 — Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 1994 L 254, p. 64).

'principle.' It is true that it 'guarantees' 'information and consultation' to its beneficiaries, that is workers. However, it specifies neither the kind of information nor the consultation arrangements, and nor does it specify at what levels and through which representatives they are to be effected. The content is so indeterminate that it can be interpreted only as an obligation to act, requiring the public authorities to take the necessary measures to guarantee a right.[30] Accordingly, the article does not determine any individual legal situations, but requires the public authorities to determine the objective content (information and consultation of workers) and certain outcomes (effectiveness of the information, representation on the basis of the levels and notice in sufficient time).

55. There is also a systematic argument. The group of rights included under the title 'Solidarity' incorporates mainly rights regarded as *social* rights with respect to their substance, for the content of which a form of wording such as that in Article 27 is preferred. That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of 'principles'. Although that position in the system of the Charter can never be anything but a presumption, in the case of Article 27 this is a feature additional to the ones listed above.

56. The foregoing is sufficient to support my proposal, as an intermediate conclusion, that the right of workers to information and consultation within the undertaking, as guaranteed in Article 27 of the Charter, should be understood as a 'principle' for the purposes of Articles 51(1) and 52(5).

3. 'Principles' under Article 52(5) of the Charter: the possibility of relying on 'implementing acts' before the courts.

57. The logical result of the above would be that a 'principle' such as that in Article 27 of the Charter, which guarantees information and consultation to workers in the undertaking, is subject, as regards its arrangements, to the provisions of Article 52(5) of the Charter, with the consequences which this entails in terms of whether it may be relied on before the courts. However, Article 52(5) is remarkably complex, and a separate analysis of each of its sentences is required. Therefore, I shall begin by pointing out that the first sentence of Article 52(5) addresses what may be regarded as the *operating conditions* of the 'principles', and that the second sentence determines the scope of their *justiciability*.

58. The first sentence proposes that 'principles' be endowed with content, a task it performs when declaring that the 'provisions of this Charter which contain principles "may be implemented" by legislative and executive acts' taken by the European Union or by Member States when they are implementing European Union law. I shall describe that aspect of the article as the 'specific expression' dimension of the principle, which takes place when the 'principle' is organised through legislation.

59. The second sentence contains the elements aimed at ensuring that the 'principles' are effective before the courts, although, as the article points out, the effects are limited to 'the interpretation of such acts and … the ruling on their legality'. I shall call that second aspect the 'invokability' dimension of the 'principle', the development of which takes place during the lifetime of the 'principle' before the courts.

30 — An obligation which, furthermore, raises considerable difficulties when it is given substantive expression at the supranational level. In that regard, see Cruz Villalón, J., 'La información y la consulta a los trabajadores en las empresas de dimensión comunitaria', *La Ley*, 1994, Volume 2, and Insa Ponce de León, F. L., *Los derechos de implicación de los trabajadores en las sociedades anónimas europeas*, Ed. Tirant lo Blanch, Valencia, 2010.

a) The 'implementing acts' giving specific expression to the 'principle' (the first sentence of Article 52(5) of the Charter)

60. The European Union and the Member States are under an obligation to 'promote' the 'principles' set out in the Charter (Article 51(1)), and for that purpose are to adopt those 'implementing' measures which are necessary to ensure that such promotion is effective. In spite of the use of the word 'may', it is clear that this is not an absolute discretionary power, but a possibility subject, as has just been noted, to a clear obligation in Article 51(1) of the Charter, requiring the European Union and the Member States to 'promote' the 'principles'. It is clear that such promotion will be possible only through the 'implementing' acts to which Article 52 subsequently refers.

61. Similarly, a close examination of the wording of the first sentence of Article 52(5) of the Charter confirms that the article refers to *legislative* measures to implement the 'principles', with the consequences which are detailed below.

62. In fact, the first sentence of Article 52(5) states that the 'principles' of the Charter may 'be implemented' by acts of the European Union and of the Member States. Those implementing acts must be understood as acts necessary to give specific legislative expression to a 'principle' and having no other purpose than that of providing it with sufficient substance for it to attain substantive independence and, ultimately, become a judicially cognisable right. The wording cannot be understood in any other way, since the obligation is addressed not only to the executive, but also to the legislature. Therefore, where the article refers to 'implementation' it is referring primarily to a *specifically legislative* implementation.

63. Taking this a step further, I consider that it is possible to identify, from among the legislative implementing acts referred to in the first sentence of Article 52(5) of the Charter, particular provisions which can be said *to give specific substantive and direct expression to the content of the 'principle'*. That differentiation is essential, since, otherwise, in areas as extensive as social policy, the environment or consumer protection, the 'implementation' of a 'principle' would consist of nothing less than an entire branch of the legal system, such as the whole of social law, environmental law and consumer law. That result would render nugatory and disruptive the function which the Charter confers on 'principles' as a criterion for interpreting and reviewing the validity of acts, since it would be impossible to carry out that function.

64. By thus distinguishing between acts giving specific substantive and direct expression to the content of a 'principle' and other acts, whether legislative acts or their individual implementing acts, it is therefore possible to safeguard the effectiveness of both the 'principles' contained in the Charter and the objective pursued by Article 52(5), which is purely to guarantee protection, albeit conditional, for those articles of the Charter requiring legislative implementation.

65. Article 3(1) of Directive 2002/14 actually provides a good example of what I have described as acts giving specific substantive and direct expression to a 'principle'. That article, as its heading states, addresses the 'scope' of the rights defined in Directive 2002/14. In turn, the title of Directive 2002/14 is also relevant for the present purposes, since it states that it has the objective of 'establishing a general framework for informing and consulting employees in the European Community', which coincides exactly with that of Article 27 of the Charter.

66. In that context, Article 3(1) of Directive 2002/14 provides the content of the 'principle' with substantive and direct expression: the personal scope of the right to information and consultation. Needless to say, establishing of the status of the holder of a right is an essential precondition for its exercise, from which it is possible to identify the special protection provided for by the Charter. It is in this regard that Article 3(1) of Directive 2002/14 may be referred to as an example of the substantive and direct expression of Article 27 of the Charter and, therefore, is capable of forming part of the content of Article 27 which may be relied on before the courts, as I shall now explain.

b) The 'invokability' dimension of the 'principle' (the second sentence of Article 52(5) of the Charter)

67. The second sentence of the oft-cited Article 52(5) of the Charter declares that 'principles' 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. That provision contains two aspects which must now be highlighted, one implicit and one explicit, the first raising no particular difficulties of interpretation, unlike the second.

68. Regarding the first, it is evident from a reading of Article 52(5) of the Charter that its wording very implicitly but unequivocally excludes the possibility of directly relying on a 'principle' so as to exercise an individual right based upon that principle.[31] Accordingly, the Charter confines the justiciability of 'principles' to their, one might say, refined state as rules and acts, and does so using a criterion which incorporates the literal wording of the 'principle' in the Charter and the acts giving substantive and direct expression to that principle.

69. The explicit aspect, and the more delicate as regards its interpretation, concerns the 'acts' to which the article refers. Indeed, if the reference to 'such acts' applied exclusively to implementing legislative acts giving substance to the principle, there would be a 'vicious circle': those implementing legislative acts would be reviewed in the light of a principle whose content, as stated in Article 27 of the Charter, is precisely that which is determined by those implementing legislative acts.

70. It is therefore necessary to consider that the scope of the acts whose interpretation and review is allowed by the second sentence of Article 52(5) differs from and is broader than that of the legislative acts giving specific expression to a principle. Specifically, all those implementing acts which go beyond the substantive and direct expression of the 'principle' will be the acts which may be relied on before the courts together with the other implementing acts. Otherwise, both Article 27 and its judicial guarantee in the second sentence of Article 52(5) of the Charter would be rendered ineffective.

71. Therefore, and in the light of a combined reading of the first and second sentences of Article 52(5) of the Charter, I consider that the characteristic function of the acts which I have called a specific substantive and direct expression of the 'principle' is that of being incorporated into the criterion for assessing the validity of other acts implementing that 'principle' for the purpose of that sentence. Moreover, it will be in the light of that criterion, comprising the wording of the 'principle' and the acts giving specific substantive and direct expression to it, that it will be necessary to assess the validity of the other implementing acts.

72. Thus, one example of an act likely to be subject to a review of its legality under the second sentence of Article 52(5) of the Charter is the act forming the subject-matter of the second question of the Cour de cassation: Article L.1111-3-4 of the French Labour Code, a provision which forms part of the system for calculating the staff numbers in undertakings for the purposes of worker representation. That representation is a channel for the right of workers to information and consultation, and is therefore an important element in the formulation and practical implementation of the 'principle' in Article 27 of the Charter. The rule excluding a specific category of workers from the system for calculating staff numbers is a rule which clearly has the potential to infringe the content of the 'principle', including, of course, the content defined in acts giving specific substantive and direct expression to the 'principle'.

31 — In that regard, the preparatory documents for the Charter confirm that the members of the Convention never excluded the justiciability of acts in the light of the principles, but this was always on the understanding that any judicial review would constitute an abstract review of the acts and not a guarantee of rights, as explained by Braibant, G., op. cit., p. 46, and also by another member of the Convention, Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles', *Common Market Law Review,* 38 2001, pp. 1212 and 1213. On the basis of the preparatory documents and the provisions of Article 52(5) of the Charter, its function of objective review is also advocated by Ladenburger, C., 'Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions' – Institutional Report, FIDE 2012, p. 33: 'only one point is clear: Article 52(5) 2nd sentence does not exclude any justiciability of principles'.

c) The fact that the act giving specific substantive and direct expression to the 'principle' is in the nature of a directive

73. In the case referred by the Cour de cassation to the Court, the specific expression of the right of workers to information and consultation is contained in a directive. Given the nature of the present case as a dispute between individuals, that fact raises the question of whether the abovementioned nature of the rule giving specific expression to the principle, in particular the limited possibilities of its having horizontal effect, may create an entirely insurmountable obstacle to all that I have so far been proposing. I shall attempt to show that I do not think that that is the case.

74. Although the abovementioned article of the Charter requires the cooperation of the European Union legislature, this does not mean that such cooperation entails unlimited delegation in favour of the legislature, in particular where such delegation may lead to undermining the meaning of the second sentence of Article 52(5) of the Charter. That would be the result if, by choosing to legislate by means of a directive, the legislature were able to deprive individuals, in disputes *inter privatos*, of the judicial review of validity which the Charter guarantees them.

75. However, it is inescapable that that conclusion must be justified by the settled case-law of the Court of Justice, according to which directives can in no way be relied on, except for the purposes of interpretation, in disputes between individuals. [32] I do not think that this is impossible, and nor do I consider that the consequences of my proposal will create legal uncertainty, as the Federal Republic of Germany has stated with regard to this issue in its written observations.

76. The provision or provisions of a directive which are, hypothetically, capable of giving specific substantive and direct expression to the content of a 'principle' are, in fact, not numerous, but rather the opposite. I think, in that regard, that it is possible to provide a very strict interpretation of such provisions, so that the outcome will be entirely acceptable for the system governing the legislative category to which such provisions belong, that is to say directives. In other words, the specific substantive and direct expression of a provision of the Charter is a function that should be seen as ad hoc and in any case individually identifiable. In any event, quantitatively the provisions of a directive which perform that function will be very limited, so that the settled case-law on that delicate matter should be able to remain intact with respect to almost all of the provisions of present and future directives.

77. Finally, I consider that my proposal on that delicate point is consistent with the development of the case-law of the Court of Justice, which has allowed, also in a very specific way, objective review of national acts in the light of directives in disputes *inter privatos*. Without the need for me to elaborate further on this point, the solution I propose here, far from being a turning point in the Court's case-law, is, on the contrary, in keeping with an approach which began in *CIA Security*, *Mangold* and *Kücükdeveci*, [33] to cite only the most significant judgments. [34]

78. One last important detail: the solution proposed here should not result in a situation of legal uncertainty. Rather the reverse is true, what could cause a situation of uncertainty is the possibility that the legislature might unilaterally alter the effectiveness of the general provisions of the Charter. The process for giving specific expression to the content of the 'principles' forms part of a first cycle

32 — See, in particular, Case 152/84 *Marshall* [1986] ECR 723; Case C-188/89 *Foster and Others* [1990] ECR I-3313; Case C-91/92 *Faccini Dori* [1994] ECR I-3325; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659; Joined Cases C-397/01 to Case C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, and *Dominguez*. In relation to developments in that case-law, see the works of, inter alia, De Witte, B. 'Direct effect, primacy and the nature of the legal order', in Craig, P. and De Búrca, G., *The Evolution of EU Law*, 2nd ed., Oxford University Press, Oxford, 2011, pp. 329 to 340; Simon, D., 'L'invocabilité des directives dans les litiges horizontaux: confirmation ou infléchissement?', *Europe* No 3, March 2010 and Dougan, M., 'When Worlds Collide: Competing Visions of the Relationship Between Direct Effect and Supremacy', 44, *Common Market Law Review*, 2007.

33 — Case C-194/94 *CIA Security International* [1996] ECR I-2201; Case C-144/04 *Mangold* [2005] ECR I-9981, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

34 — In that regard, I would refer to the Opinion of Advocate General Bot in *Kücükdeveci*, in particular point 68 et seq.

of consolidation of the Charter, something which quite naturally occurs during the first years of the existence of a declaration of rights in a constitutional legal order. Over time that content will be consolidated and will delimit the justiciability of the 'principles' of the Charter, indicating both to the public authorities and to citizens the type of review which courts can carry out, and within what limits. That result can only help to strengthen legal certainty in the implementation of an instrument central to the European Union legal order such as the Charter, and, in particular, the implementation of the 'principles' set out in Article 52(5) thereof.

79. That said, it is undeniable that in the case of a dispute between individuals, even if the court restricts itself to invalidating or refraining from applying an unlawful act, one party will always have an obligation imposed upon it which it did not initially expect to bear. Nevertheless, and as argued by the CGT representative at the hearing, an individual who suffers damage as a result of the unforeseen assumption of an obligation, an obligation which arises subsequently on account of the unlawful conduct of a Member State, is still able to claim from that Member State, where appropriate, compensation for the damage caused as a result of that unlawful conduct. It is true that actions to establish the liability of Member State for an infringement of European Union law were originally designed to protect persons who rely on a right before the national courts.[35] However, in a case such as the present case, where the European Union rule is a 'principle' of the Charter whose content has been infringed by an act whose lawfulness is at issue in a dispute between individuals, it is reasonable that the burden of an action for damages should fall on the person who has benefited from the unlawful conduct, and not on the holder of the right arising from the specific expression of the content of the 'principle'.

80. Therefore, and in conclusion, I consider, on the basis of the second sentence of Article 52(5) of the Charter, that Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, may be relied on in a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation.

B – *The second question*

81. By its second question, and placed in the context of implementation of the previously described system of justiciability, the Cour de cassation asks the Court directly about the compatibility of a scheme such as that provided for in Article L.1111-3 of the French Labour Code with European Union law, in this case Article 27 of the Charter, as given specific expression Article 3(1) of Directive 2002/14. Under that provision, workers with 'employment-initiative contracts', 'accompanied-employment contracts' and 'professional training contracts' are excluded from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff.

82. Although the question refers in general to three categories of excluded contracts, it is clear from the case-file that the applicant, the AMS, has concluded approximately 120 to 170 'accompanied-employment contracts' and that there is no record that any 'employment-initiative contracts' or 'professional training contracts' have been concluded. Accordingly, and unless the Court finds otherwise, the answer which must be provided should relate exclusively to the compliance with Directive 2002/14 of the exclusion of 'accompanied-employment contracts', provided for in Article L.1111-3-4.

35 — See, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20, and Case C-127/95 *Norbrook Laboratorios* [1998] ECR I-1531, paragraph 106.

83. Only the French Republic, the CGT and the Commission have stated a position on that issue. According to the French Republic, the special nature of the excluded contracts, including 'accompanied-employment contracts', justifies a restriction on the scope of Article 27 of the Charter, given specific expression by Directive 2002/14. It claims that, since they are contracts aimed at integration into the labour market, rather than contracts binding on a worker within the context of an ordinary employment relationship, the objectives of Article 27 of the Charter and Directive 2002/14 are not undermined as a result of that exclusion. The French Republic relies on Article 52(1) of the Charter, under which exercise of the rights and freedoms may be subject to limitations, provided they comply with the principle of proportionality.

84. For its part, the CGT focuses its arguments on the judgment of the Court of Justice in *Confédération générale du travail and Others* (*CGT*).[36] That decision enabled the Court to rule for the first time on Directive 2002/14, in a case from the French Republic in which a question was raised concerning the exclusion of a category of workers until they had reached a specific age. According to the CGT, the fact that the Court declared that that exclusion was contrary to Directive 2002/14 confirms that in the present case, where once again a category of workers is excluded, there has been an infringement of that directive. The Commission concurs with the CGT's arguments and also proposes that the Court of Justice interpret Directive 2002/14 as meaning that it precludes national legislation such as that at issue in the present case.

85. Indeed, and as the CGT and the Commission rightly point out, the judgment in *CGT* provides clarification when answering the second question referred. In that case the CGT brought proceedings before the French Council of State in connection with national legislation which delayed the inclusion of a category of workers in the calculation of staff numbers in an undertaking until they had reached a specific age. The Court followed the recommendation of Advocate General Mengozzi and rejected the argument that a delay in the calculation based on age was anything other than an exclusion from the calculation.[37] The French legislation did not wholly exclude a group of workers, but did so until they had reached a specific age. Nevertheless, and giving its ruling before the entry into force of the Charter, the Court held that that delay was equivalent to an exclusion, since it contributed to rendering the rights guaranteed by Directive 2002/14 'meaningless' and therefore made 'the [d]irective ineffective'.[38]

86. It is true that the second subparagraph of Article 3(1) of Directive 2002/14 provides that the Member States are to determine the method for calculating the thresholds of employees employed. However, the Court held that exclusion of a category of workers was not simply a calculation, but a unilateral reinterpretation of the concept of 'employee'. Accordingly, the Court held that 'although that directive does not prescribe the manner in which the Member States are to take account of employees falling within its scope when calculating the thresholds of workers employed, *it does nevertheless require that they be taken into account.*'[39]

87. Accordingly, Article 27 of the Charter, given specific substantive and direct expression by the second subparagraph of Article 3(1) of Directive 2002/14, must be interpreted, in the light of *CGT*, so as to allow the States to establish methods for calculating the number of workers for the purposes of staff numbers, but under no circumstances does this entail the possibility of excluding an employee from that calculation. Moreover, that is the case, as it was in *CGT*, even where the exclusion is only temporary.

36 — Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611.

37 — *CGT*, paragraph 38, referring to the Opinion of the Advocate General in that case, specifically to point 28 thereof.

38 — *CGT*, paragraph 38.

39 — *CGT*, paragraph 34 (emphasis added).

88. The Court has consistently held that when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.[40] Moreover, as is also well known, that principle of interpreting national law in conformity with European Union law has certain limits. Accordingly, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.[41]

89. Nevertheless, whether there exists the possibility of providing an interpretation in conformity with European Union law is to be assessed exclusively by the national court, since it requires an interpretation of domestic law to its full extent, for which the Court clearly lacks jurisdiction.

90. In this case, however, the Cour de cassation, in asking the Court of Justice to rule on whether it is possible to rely on Article 27 of the Charter, given specific expression by Article 3(1) of Directive 2002/14, actually does so on the understanding that, should an interpretation such as that proposed in point 87 of this Opinion be upheld, it would not be possible to provide an interpretation in conformity with European Union law. The Cour de cassation well understands that aspect, since it is not the first time that the Cour de cassation has been faced with this issue and referred a question to the Court in relation to it. In addition, it would make no sense to refer a question on whether it is possible to rely on the abovementioned European Union rules in a context such as the one before the Court, if the Cour de cassation had determined that it was possible to provide an interpretation in conformity with European Union law.

91. The same conclusion was also reached by the Government of the French Republic, both in its written and oral observations. When asked expressly about that aspect at the hearing, the Agent for the French Government recognised that it was impossible to provide an interpretation of French law capable of ensuring compliance with European Union law, as I propose that it be interpreted in point 87 of this Opinion, even taking into account the rules of labour law allowing, in exceptional cases, statutory provisions to be derogated from by means of collective agreement.

92. According to the French Government, for it to be possible to provide a combined interpretation of Article L.1111-3-4 of the French Labour Code and Article 27 of the Charter, given specific expression by Article 3(1) of Directive 2002/14, it would be necessary to rely on an 'exception to the exception', which does not exist in the present case. When asked at the hearing about the possibility that Article L. 2251-1 of the French Labour Code might contain such an 'exception to the exception', the Agent stated that provision in question refers only to measures agreed by collective agreement, a situation which is of no relevance in the present case.

93. In addition to the foregoing, it should also be recalled that when a national court (which is also the highest interpreter of domestic law) and the Government of that Member State concur in stating that their national legal system does not allow an interpretation consistent with European Union law, the Court, in the interests of the principle of sincere cooperation,[42] is obliged to accept that assessment and to answer the specific question which has been raised before it. Otherwise, both the spirit of cooperation between courts which governs the preliminary ruling mechanism of Article 267 TFEU and the effectiveness of that procedure would be called into question.

40 — See, in particular, *Pfeiffer and Others*, paragraph 114; Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraphs 197 and 198; *Kücükdeveci*, paragraph 48, and *Dominguez*, paragraph 24.

41 — See Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100, and *Angelidaki and Others*, paragraph 199.

42 — Principle laid down in Article 4 TEU and binding on both the Member States and the European Union (see, in the case of sincere cooperation of the European Union with the Member States, Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 38; the order of the Court of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others* ECR I-3365, paragraph 17, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 31).

94. In the light of the foregoing, and in view of the impossibility of providing an interpretation of national law which is consistent with the provisions of Article 27 of the Charter, given specific expression by Article 3(1) of Directive 2002/14, it remains only to assess whether the exclusions contained in Article L.1111-3 of the French Labour Code and, in particular, that relating to 'accompanied-employment contracts' are contrary to the provisions of the second subparagraph of Article 3(1) of Directive 2002/14.

95. In that regard, and to recapitulate the conclusion reached by the Court of Justice in *CGT*, if a temporary exclusion such as that at issue in that case infringes the directive, *a fortiori* the same conclusion must be reached in the case of a total and unlimited exclusion. Furthermore, the fact that an 'accompanied-employment contract' serves the purpose of integration into the labour market in no way invalidates that conclusion, since at no time was it disputed that an employee with that contract has the status of 'worker' for the purposes of Article 27 of the Charter, as given specific expression in Directive 2002/14.

96. Moreover, as regards the French Republic's argument concerning the special nature of 'accompanied-employment contracts' and their justification in the public interest, the Court responded to a similar argument in *CGT*, holding that a justification for an exemption is incompatible with Article 11(1) of Directive 2002/14, which requires Member States to take all necessary steps enabling them to guarantee the results imposed by that directive at all times.[43] It would be difficult to give a different response in the present case, in which, moreover, the total exclusion without time-limit of a category of workers is at issue.

97. Accordingly, in response to the second question referred, and in view of the impossibility of providing an interpretation of domestic law which is consistent with European Union law, I propose that the Court of Justice interpret Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, as meaning that it precludes national legislation which excludes a specific category of workers, namely those with 'excluded contracts', from the calculation of staff numbers for the purposes of that provision.

V – Conclusion

98. In the light of the arguments set out, I propose that the Court reply in the following terms to the questions referred for a preliminary ruling by the Cour de cassation:

(1) Article 27 of the Charter of Fundamental Rights of the European Union, given specific substantive and direct expression in Article 3(1) of 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, may be relied on in a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation.

(2) Article 27 of the Charter of Fundamental Rights of the European Union, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, must, in view of the impossibility of providing an interpretation of domestic law which is consistent with European Union law, be interpreted as meaning that it precludes national legislation which excludes a specific category of workers, namely those with 'excluded contracts', from the calculation of staff numbers for the purposes of that provision, allowing the national court, under Article 52(5) of the Charter, to refrain from applying national rules contrary to those rules of European Union law.

43 — *CGT*, paragraph 40.