undertaken to date. There is evidence within the case itself that this might happen as it is noticeable that the applicant was initially successful at first instance even under the plausibility test in already being awarded some measure of compensation for breach of the General Law (at [29]). In other words, the CJEU's ruling did not diverge as extensively from national law as it may first appear. On the other hand, there remains the possibility that constitutional accommodation may have been stretched too far. Thus, a core provision of national constitutional law has been effectively replaced by the Charter, whereas Advocate General Tanchev in *Egenberger* was simply not prepared to allow the horizontal application of a provision of EU law which appeared directly to contradict a provision of national constitutional law (at [119]). It is also at variance with *Fernandez Martinez v Spain* ((2014) 60 EHRR 35) where the European Court of Human Rights (which the CJEU cited in the case), showed much greater deference to the autonomy of religious organisations. In the end only time will tell whether *Egenberger* will be acclaimed or detracted but it certainly pushes the jurisprudence of the CJEU in a novel direction.

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EU FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT

THE Charter of Fundamental Rights of the EU (CFREU), an instrument which brings together the fundamental rights protected in the EU, was proclaimed in 2000 and finally came into force in 2009 with the adoption of the Treaty of Lisbon. Fundamental rights are now enshrined in the primary law of the EU but the exact nature of their legal status is yet to be determined. The recent judgment of the Court of Justice in *Bauer et al.*, joined Cases C-569/16 and C-570/16, ECLI:EU:C:2018:871, clarifies the Court's position on the horizontal direct effect of certain EU fundamental rights.

The judgment in *Bauer* stemmed from the request for a preliminary ruling from the German Federal Labour Court made in proceedings brought by Mrs. Bauer (Case C-569/16) and Mrs. Broßonn (Case C-570/16) against the former employers of their late husbands, respectively Stadt Wuppertal (a state employer) and Mr. Volker Willmeroth (a private employer). Both cases concerned the employers' refusal to pay the widows an allowance in lieu of the paid annual leave not taken by their spouses before their deaths.

The issue under consideration was governed by both EU law and German law. Article 31(2) CFREU provides that "every worker has the right … to an annual period of paid leave". Article 7(1) of Directive

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2003/88 (OJ 2003 L 299/9) restates this right, and Article 7(2) specifies that the "minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated". The Directive does not allow derogations from Article 7. Referring to its previous judgment in *Bollacke* (C-118/13, EU:C:2014:1755), the Court noted that Article 7 must be interpreted as precluding national laws which provide that the entitlement to paid annual leave is lost where the employment relationship is terminated by the death of the worker.

In *Bauer*, the Court addressed two related questions: first, whether Article 7 of Directive 2003/88 and Article 31(2) CFREU precluded the application of German national rules and, secondly, if national rules were incompatible with EU law and had therefore to be disapplied, whether the provisions of EU law should prevail. The second question was effectively a question of direct effect and, in relation to Mrs. Broßonn's case, the issue was that of horizontal direct effect since the employer under consideration was a private person. In terms of the length of the analysis, the Court gave similar consideration to both of these questions, whereas Advocate General (AG) Bot focused mainly on the second question.

With respect to the first question, the Court found that, since the relevant German rules had the effect of extinguishing the deceased's entitlement upon death, these rules were incompatible with EU law and had to be disapplied. Unlike AG Bot, the Court offered an extensive analysis of the scope of Article 7. The Court dismissed as irrelevant the referring court's suggestion that the purpose of the right to paid annual leave would be frustrated if the entitlement continued after a worker's death. The Court concluded that Article 31(2) CFREU also precluded national legislation that deprived legal heirs of their right to receive entitlement to paid annual leave.

Having established that it was not possible to interpret the national rules consistently with EU law, the Court proceeded to examine the question concerning the direct effect of EU rules. With respect to direct effect of Article 7 of the Directive, the Court's analysis offered no surprises – it reiterated an established test of "unconditional and sufficiently clear" for vertical direct effect, in line with its earlier cases, such as *Van Duyn* (C-41/74, ECLI:EU:C:1974:133); it also reaffirmed the non-horizontality of directives, as established in *Marshall I* (Case 152/84, ECLI:EU:C:1986:84) and other judgments. Here the Court concluded its analysis of Mrs. Bauer's case: she could rely on Article 7 – which was unconditional and sufficiently precise – against the state employer, Stadt Wuppertal. The rest of the Court's analysis was devoted to Mrs. Broßonn's rights, whose claim against the private employer could not rely directly on Article 7 of the Directive. The joining of these two factually identical disputes illustrates the inherent unfairness that may result from the non-horizontality of directives when it comes to public and private employers, a distinction

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which has drawn criticism from AGs, notably the Opinion of AG Jacobs in *Vaneetveld* (C-316/93, ECLI:EU:C:1994:82).

In *Bauer*, the Court avoided leaving Mrs. Broßonn devoid of judicial protection through what AG Bot referred to as an alternative route to grant an entitlement to paid annual leave in horizontal situations. In an echo of *Mangold* (C-144/04, ECLI:EU:C:2005:709), where the Court solved the issue of a lack of judicial protection posed by non-horizontality of directives by recognising direct effect of the principle of non-discrimination in respect of age, the Grand Chamber in *Bauer* found a solution through the application of the CFREU. The possibility of horizontal direct effect of Charter provisions was left open in *Association de médiation sociale* (C-176/12, EU:C:2014:2) (*AMS*) which concerned the workers' right to information and consultation under Article 27 CFREU. AG Bot devoted a significant part of his Opinion in *Bauer* to following the analytical approach established in *AMS* in order to reveal that it could, in fact did, lead to horizontal direct effect of Charter provisions in this case. In *AMS*, the Court refused to recognise horizontal direct effect of Article 27 CFREU because it was not sufficient in itself to confer rights on an individual and held that, to be fully effective, it had to be given more specific expression in EU law or national law. According to AG Bot, a Charter provision could have horizontal direct effect if it possessed inherent qualities, was mandatory and sufficiently clear in itself. AG Bot concluded that Article 31(2) of the Charter met these requirements and was therefore, unlike Article 27 CFREU, capable of having horizontal direct effect. While a reference to *AMS* was largely absent from the Court's analysis, the Grand Chamber echoed AG Bot's test and declared that Article 31(2) CFREU was horizontally applicable because it was both mandatory and unconditional in nature, and thus sufficient in itself to confer rights on individuals in disputes between them.

The judgment in *Bauer* offers an important addition to the line of recent cases that affirm the possibility of horizontal direct effect of Charter provisions. Recently, in *Egenberger* (C-414/16, EU:C:2018:257; noted M. Steinfeld, page 28 above) the Court ruled that Article 21(1) CFREU (prohibition of all discrimination on grounds of religion or belief) was sufficient in itself to be relied on in disputes between individuals. The significance of *Bauer* lies not only in its affirmation that social rights are capable of having horizontal direct effect, but also in its general instruction that the scope of the CFREU does not preclude horizontal direct effect. The Court referred to Article 51(1) of the Charter, which states that the provisions of the CFREU are addressed to the institutions, offices and agencies of the EU as well as Member States when they implement Union law (therefore, not to individuals). The Court noted that, while Article 51(1) did not address the question whether individuals may be directly required to comply with the CFREU, it nevertheless rejected that Article 51(1)

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systematically precluded such a possibility, thus re-enforcing the increasing recognition of horizontal direct effect of certain Charter provisions.

Bauer is a significant judgment for the protection of social rights, *in casu* the right to paid annual leave. The Court emphasised that the right to paid annual leave constituted an essential principle of EU social law derived from a number of legal instruments both under EU law and international law. It seems that the importance of this social right was yet another reason to recognise its horizontal direct effect, in addition to its self-sufficient nature. AG Bot called for a strengthened enforceability of fundamental social rights in disputes between individuals.

The judgment's strength, however, was also its weakness. By emphasising the distinctiveness of the social right under consideration, the Court cast gloom over its reassuring tone that the Charter was, overall, capable of direct enforcement in disputes between individuals. This was also borne out by the Opinion of AG Bot, which hinted to the difference between principles and rights recognised by the Charter, the former having more limited and indirect enforceability. Unfortunately, he did not engage in a further analysis of the difference between these two types of Charter provisions because it was indisputable that *Bauer* dealt with the effect of a right.

In short, this case provided a strong affirmation that the Court is moving towards recognising horizontal direct effect of EU fundamental rights. The judgment did not, however, fully resolve the conundrum of the enforceability of the Charter. By emphasising that *Bauer* was about an essential social right, the Court left ambiguity as to which Charter provisions are special – and thus worthy of a higher degree of enforceability – and which ones are not.

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THE RIGHT TO REVOKE AN EU WITHDRAWAL NOTIFICATION: PUTTING THE BULLET BACK IN THE ARTICLE 50 CHAMBER?

THE judgment of the Court of Justice of the European Union in *Wightman and Others v Secretary of State for Exiting the European Union*, Case C-621/18, EU:C:2018:999, that a Member State of the EU may unilaterally revoke a notified intention to withdraw from the EU, settled a legal question that had been posed ever since the UK gave notice of its intention to leave the EU in terms of Article 50 of the Treaty on European Union (TEU). *R. (Miller) v Secretary of State for Exiting the European Union (Birnie and others intervening)* [2017] UKSC 5, [2017] 2 W.L.R. 583 (see D. Feldman [2017] C.L.J. 217), had proceeded on the agreed assumption

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