

The Lazy Legislature: Incorporating and Horizontalising the Charter of Fundamental Rights through Secondary Union Law

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LEIBNIZ-INSTITUT
FÜR MEDIENFORSCHUNG
HANS-BREDOW-INSTITUT

Tobias Mast / Christian Ollig

THE LAZY LEGISLATURE

Incorporating and Horizontalising the Charter of
Fundamental Rights through Secondary Union Law

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1. Introduction

The constitutionalisation of the legal order, which has been observed in various contexts since the turn of the millennium,¹ is about to be expanded by a new chapter at the European level with Art. 14(4) Digital Services Act and Art. 5(1) subpara. 2 Terrorist Content Online Regulation. As the European Court of Justice has not yet given a general ruling on the horizontal effect of the Union's fundamental rights, legislation is now taking an unconventional step with these norms. They refer to the European Charter of Fundamental Rights to address the obligations of private entities, rather than specifying the fundamental rights themselves with regard to the platform economy. It is conceivable that the interpretation of both the Charter and the reference norm shows that the fundamental rights referred to are extended at the level of secondary law beyond the scope of application provided for in primary law. Such cross-level referrals to the Charter in secondary law raise questions with regard to their compatibility with primary law and the relevant interpretative methodology. We reveal the pitfalls by first presenting its two current manifestations, then outlining the previous role of secondary law for the horizontalisation of the Charter, before focusing on the new legislative technique with the above-mentioned implications.

2. Taking into Account Fundamental Rights as a Regulatory Requirement

The terms of service of intermediary services, which have become a significant factor in internet governance,² are a crucial tool for European regulation.³ The Terrorist Content Online Regulation and the Digital Services Act have a variety of effects on terms of service. The central rules of those acts require providers of intermediary services to include in their terms of service provisions against the abuse of the platform with terrorist content and to apply them (Art. 5(1) Terrorist Content Online Regulation) or to provide information on algorithmic and human content moderation (Art. 14(1) Digital Services Act). Art. 5(1) subpara. 2 Terrorist Content Online Regulation follows on from this: The hosting service provider

shall do so in a diligent, proportionate and non-discriminatory manner, with due regard, in all circumstances, to the fundamental rights of the users and taking into account, in particular, the fundamental importance of the freedom of expression and information

¹ The term describes processes of approximation or adaptation of constitutional characteristics on at least three different non-constitutional norm levels: international law, European law and national law, whereby the meaning diverges depending on the level. See on international law: A. Paulus, 'The International Legal System as a Constitution', in J. L. Dunoff and J. P. Trachtmann (eds.), *Ruling the World?* (Cambridge University Press 2009) p. 69-109; A. Peters, 'Constitutionalization', in J. d'Aspremont and S. Singh (eds.), *Concepts for International Law* (Edward Elgar 2019) p. 141-153. On European law: A. Ciacchi et al. in H.-P. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford University Press 2014). On the level of national law: G. F. Schuppert and C. Bumke, *Die Konstitutionalisierung der Rechtsordnung*, 1st edn. (Nomos 2000).

² L. Belli and J. Venturini, 'Private ordering and the rise of terms of service as cyber-regulation', 5 *Internet Policy Review* (2016) p. 1-17; E. Celeste, 'Terms of service and bills of rights: new mechanisms of constitutionalisation in the social media environment?', 33 *International Review of Law, Computers & Technology* (2019) p. 122-138; G. Teubner and A. Golia, 'Societal Constitutionalism in the Digital World: An Introduction', *MPIIL Research Paper Series* No. 2023-11, p. 8; For Germany, the Federal Court of Justice recently ruled that these community guidelines are general terms and conditions which are subject to a content review guided by fundamental rights, BGHZ 230, 347.

³ J. P. Quintais et al., 'Using Terms and Conditions to apply Fundamental Rights to Content Moderation', 24 *German Law Journal* (2023), p. 881-911; T. Mast, 'AGB-Recht als Regulierungsrecht', 78 *Juristenzeitung* (2023) p. 287-296.

in an open and democratic society, with a view to avoiding the removal of material which is not terrorist content.

Art. 14(4) Digital Services Act formulates similarly:

Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.

The sheer mention of terms or standards of primary law is not a technical novelty in EU law. EU legislation enacted in recent years, in various areas, illustrates a current tendency to take up primary law concepts—in different ways—for a variety of motives, and in vertical as well as horizontal situations.⁴ Yet, with Art. 5(1) subpara. 2 of the Terrorist Content Online Regulation and Art. 14(4) of the Digital Services Act, the EU legislature now explicitly formulates for the first time that private actors are bound in some way by the fundamental rights of the Charter. Against this background, interpretations are conceivable that add new effects to the fundamental rights of the Charter and thus differ considerably from previous approaches. In the following, we are therefore not so much interested in interpreting the two provisions mentioned above, but in dealing with the legal questions that arise in general with such legislative technique.

3. The Original Role of Secondary Law in Horizontalizing the Charter

Even before EU legislation tried to explicitly award horizontal effects to fundamental rights, there was a tradition of discussing the horizontal effect of Union law sources. The results of such discussions have, in part, led to settled case law at the European Court of Justice. It is now recognised that private individuals cannot take action against other private individuals on the basis of a directive.⁵ Likewise, it is part of the established repertoire of Luxembourg case law to grant direct horizontal effect to provisions of the TFEU under certain circumstances.⁶ By contrast, with regard to the effect of the Charter among private individuals, the European Court of Justice has so far provided only fragmentary insights into its understanding: The question of whether and to

⁴ Cf e.g. Art. 2(a) Euratom (Regulation (EU) 2020/2092) (rule of law); Art. 6(1)(f) GDPR (Regulation (EU) 2016/679), (fundamental rights and freedoms); Art. 8, Art. 10 et seq. Regulation establishing the Neighbourhood, Development and International Cooperation Instrument (Regulation (EU) 2021/947) (EU values and human rights); Art. 1(2), Art. 14(3)(a), Art. 49, 51, 57 et seq. of the Regulation on the European Union Agency for Asylum (Regulation (EU) 2021/2303) (fundamental rights and the rule of law); Art. 6(2) Regulation establishing the Asylum, Migration and Integration Fund (Regulation (EU) 2021/1147) (prohibition of discrimination under fundamental rights; compatibility with the Charter); Art. 23(1) Directive on Combating Terrorism (Directive (EU) 2017/541) (fundamental rights and general legal principles of Art. 6 TEU).

⁵ European Court of Justice 9 March 2004, Joined Cases C-397/01 & 403/01, *Pfeiffer et al.*, ECLI:EU:C:2004:584, para. 109; ECJ 24 January 2012, Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33, para. 42; ECJ 15 January 2014, Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, para. 36; ECJ 7 August 2018, Case C-122/17, *Smith*, ECLI:EU:C:2018:631, para. 43; on (only apparent) exceptions to this case law M. Ruffert, 'Art. 288 TFEU', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV*, 6th edn. (C.H. Beck 2022) para. 59.

⁶ ECJ 6 June 2000, Case C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 34 et seq. (free movement of workers); ECJ 18 December 2007, Case C-341/05, *Laval*, ECLI:EU:C:2007:809, para. 98 (freedom to provide services); ECJ 11 December 2007, Case C-438/05, *Viking*, ECLI:EU:C:2007:772, paras. 33, 61 (freedom of establishment).



what extent private individuals can invoke the fundamental rights of the Charter against other private individuals is one of the more recent discussions in European legal scholarship; a doctrine of the horizontal effect of fundamental rights is in the making.⁷

We are yet to establish a consolidated body of case law from the European Court of Justice regarding the horizontal application of the Charter. However, one point is unequivocal: Secondary legislation has always held a pivotal role in this context. While the Court ostensibly addresses the issue of whether EU fundamental rights apply horizontally, the legislative body formulates the essential framework—*a conditio sine qua non*—for such jurisdiction. In fact, secondary legislation originally served two primary purposes in the horizontalization of the Charter's fundamental rights: firstly, as elucidated in the subsequent section, it is predominantly secondary law that initiates the application of the Charter in various contexts, including private relationships; secondly, secondary legislation establishes the substantive criteria for the Charter's impact on interactions between private entities. Before we delve into the novel role of secondary legislation that piques our interest here—secondary law as a direct source of the Charter's horizontal effect—it is essential to briefly outline this initial role of secondary legislation in the horizontalization of the Charter.

3.1. Secondary Law as a Trigger of the Application of Fundamental Rights

The decision of EU legislation to regulate a certain substantive area is decisive for whether the European Court of Justice comments on the horizontal effect of fundamental rights at all. This is because the Charter applies to the Member States exclusively when they implement Union law (Art. 51(1) sentence 1 Charter). The enactment of secondary law triggers the applicability of the Charter; the mere competence of the EU is not sufficient for this exercise⁸—fundamental rights protection under the Charter is accessory to legislative action.⁹ Only insofar as a matter falls within the scope of Union law can private law in this area be subject to constitutionalisation by Union fundamental rights.¹⁰ The starting point that enables the horizontalization of fundamental rights by the Court thus lies with the legislature.

⁷ See under 3.1. and 3.2.

⁸ H. D. Jarass, 'Art. 51 Charter', in H. D. Jarass, *Charta der Grundrechte der Europäischen Union*, 4th edn. (C.H. Beck 2021) para. 24; C. D. Classen, 'Französisches Grundrechtsverständnis: kaum Dogmatik, objektiv-rechtliche Traditionen, subjektiv-rechtliche Perspektiven?', 68 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2020) p. 213 at p. 232.

⁹ See e.g. ECJ 10 July 2014, Case C-198/13, *Julián Hernández et al.*, ECLI:EU:C:2014:2055, para. 35; ECJ 19 November 2019, Joined Cases C-609/17 & C-610/17, *TSN*, ECLI:EU:C:2019:981, paras. 45 et seq.; the German Federal Constitutional Court refers to this as an accessory system of fundamental rights of the Union ("*fachrechtsakzessorische Anlage der Unionsgrundrechte*"), BVerfG 6 November 2019, 1 BvR 16/13, *Recht auf Vergessen I*, para. 54. In specific cases, this may also apply beyond secondary law to primary law norms that are applicable between private parties and trigger the application of the Charter, e.g. Art. 157(1) TFEU or Art. 16(1) TFEU.

¹⁰ Cf A. Seifert, 'Die horizontale Wirkung von Grundrechten: Europarechtliche und rechtsvergleichende Überlegungen', 24 *Europäische Zeitschrift für Wirtschaftsrecht* (2011) p. 696 at p. 701 et seq.; S. Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU', 66 *Rev. Derecho Comunitario Eur.* (2020) p. 407 at p. 422.



3.2. Secondary Law as a Connecting Factor for the Horizontal Effects of Fundamental Rights

The European Court of Justice takes up this legislative baton in two respects.¹¹ Initially, the Court only referred to the Charter in order to interpret Union law¹² or national law¹³ in conformity with fundamental rights. Fundamental rights have an indirect effect between private parties through the judicial interpretation of the respective secondary law provision.¹⁴ Particularly since the Lisbon Treaty, the European Court of Justice has charged “technical legal acts without pathos”¹⁵ with fundamental rights in horizontal situations by way of indirect horizontal effect. In doing so, the European Court of Justice horizontalizes the Charter through its interpretation of secondary law in conformity with fundamental rights in, for example, data protection,¹⁶ anti-discrimination,¹⁷ consumer protection,¹⁸ and copyright law¹⁹. Secondary law functions, therefore, as a gateway for the constitutionalisation of private law by the judiciary.²⁰

On the other hand, in its more recent case law, the European Court of Justice derives direct fundamental rights obligations of private individuals from the Charter in order to remedy the lack of horizontal effect of directives that have not been transposed or have been transposed inadequately.²¹ If a Member State fails to transpose or insufficiently transposes a provision of a directive that is intended to regulate private law relationships, there is no corresponding legal basis for private action in national civil law. It is true that, despite the transposition deficits, there is an obligation to interpret the remaining national law in conformity with the directive after the transposition deadline has expired.²² Yet, if such an interpretation is only possible *contra legem* in view of the finality of the relevant national provision, the latter is inapplicable.²³

¹¹ For a general overview see C. Izquierdo-Sans et al., (eds.), *Fundamental Rights Challenges*, 1st edn. (Springer 2021).

¹² ECJ 13 May 2014, Case C-131/12, *Google Spain*, paras. 68 et seq.; ECJ 16 July 2015, Case C-580/13, *Coty Germany*, ECLI:EU:C:2015:485, paras. 28 et seq.; ECJ 06 November 2018, Joined Cases C-569/16 & C-570/16, *Bauer*, ECLI:EU:C:2018:871, paras. 51 et seq.

¹³ ECJ 21 December 2011, Joined Cases C-411/10 & C-493/10, *N.S. et. Al.*, ECLI:EU:C:2011:865, para. 77; ECJ 22 November 2012, Case C-277/11, *M.M.*, ECLI:EU:C:2012:744, para. 93.

¹⁴ H. D. Jarass, *supra* n. 8, para. 38; A. Schwerdtfeger, ‘Art. 51’, in J. Meyer and S. Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union*, 5th edn. (C.H. Beck 2019) para. 59.

¹⁵ On this see C. Unseld, *Zur Bedeutung der Horizontalwirkung von EU-Grundrechten*, 1st edn. (Mohr Siebeck 2018), p. 173 et seq. (translated).

¹⁶ ECJ 13 May 2014, Case C-131/12, *Google Spain*, ECLI:EU:C:2014:317, paras. 68 et seq.; on this see e.g. E. Frantziou, ‘Further Developments in the Right to be Forgotten: The European Court of Justice’s Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*’, 14 *Human Rights Law Review* (2014) p. 761 at p. 767 et seq.

¹⁷ ECJ 14 March 2017, Case C-188/15, *Boungaoui*, ECLI:EU:C:2017:204, paras. 27 et seq.

¹⁸ ECJ 19 December 2019, Joined Cases C-453/18 & C-494/18, *Bondora AS*, ECLI:EU:C:2019:1118; see also O. Gerstenberg, ‘Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts’, 21 *European Law Journal* (2015) p. 599-621.

¹⁹ ECJ 3 September 2014, Case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132; see also C. Unseld, ‘Urheberrecht: Werknutzung für Parodie – Vermittlung diskriminierender Aussagen’, 25 *Europäische Zeitschrift für Wirtschaftsrecht* (2014) p. 912-915; ECJ 29 July 2019, Case C-476/17, *Pelham*, ECLI:EU:C:2019:624.

²⁰ A. Sandhu, *Grundrechtsunitarisierung durch Sekundärrecht*, 1st edn. (Mohr Siebeck 2021) p. 187 et seq., who in this respect refers to secondary law as a vehicle of direct third-party effect (at p. 188).

²¹ E. Muir, ‘The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer’, 12 *Review of European Administrative Law* (2019) p. 185-215; see also H. Sauer, ‘Horizontalwirkung von Richtlinien und Unionsgrundrechten’, 43 *Juristische Ausbildung* (2021) p. 387 at p. 394, referring to a “*Vergrundrechtlichung*” of the content of directives.

²² ECJ 13 November 1990, Case C-106/89, *Marleasing*, ECLI:EU:C:1990:395, para. 8; ECJ 16 December 1993, Case C-334/92, *Wagner Miret*, ECLI:EU:C:1993:945, para. 20 et seq.; ECJ 14 July 1994, Case C-91/92, *Faccini Dori*, ECLI:EU:C:1994:292, para. 26.

²³ ECJ 17 April 2018, Case C-414/16, *Egenberger*, ECLI:EU:C:2018:257, para. 79.



This exclusionary effect under fundamental rights has the consequence that the civil law claim is governed by other existing legal provisions. The provision of a directive itself, however, cannot be enforced by private individuals against other private individuals—as they can against public authorities. Rather, according to the European Court of Justice, in the absence of other civil law claims, private individuals can now directly invoke EU fundamental rights against other private individuals.²⁴ The European Court of Justice requires that the non-implemented provision of the directive be the concretisation of a fundamental right that in any case gives rise to a claim.²⁵ The European Court of Justice examines for each fundamental right individually whether or not it applies horizontally between private parties. In particular, the provision of the Charter must “in itself” confer a right on the individual; no further concretisation of the right must be necessary. Furthermore, the nature of the fundamental right must be based on private-law relationships, i.e., it would have to be possible for a corresponding duty of a private individual to arise directly from the Charter provision. Moreover, only fundamental rights apply horizontally and not principles within the meaning of Art. 52(5) Charter. So far, the European Court of Justice has affirmed these conditions, *inter alia*, for the prohibition of discrimination (Art. 21(1) Charter),²⁶ the right to an effective remedy (Art. 47 Charter),²⁷ and the right to paid annual leave (Art. 31(2) Charter).²⁸ For workers’ right to information and consultation within the undertaking (Art. 27 Charter), the European Court of Justice rejects a direct horizontal effect.²⁹ It is not yet clear whether other fundamental rights of the Union meet these requirements. By assuming a direct horizontal effect of certain fundamental rights, the European Court of Justice is positioning itself against powerful voices.³⁰ So far, however, the Court has not derived a direct effect of fundamental rights in isolation: Rather, the connection of private parties to fundamental rights has always served to remedy the non-implementation of directives.³¹ In the Court’s jurisprudence to date, the direct horizontal effect of the Union’s fundamental rights is, in practice, an adjunct to (inadequately implemented) secondary law.³² This again shows the important role of secondary law in the horizontalization of the Charter’s fundamental rights.

²⁴ For an overview see H. D. Jarass, *supra* n. 8, para. 41 with further references; S. Prechal, *supra* n. 10, p. 407 et seq.; D. Leczykiewicz, ‘The Judgment in Bauer and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations’, 16 *European Review of Contract Law* (2020) p. 323–333.

²⁵ On this interaction between secondary and primary law see T. Kingreen, ‘Art. 51’, in C. Calliess and M. Ruffert (eds.), *supra* n. 5, para. 25 with further references.

²⁶ ECJ 17 April 2018, Case C-414/16, *Egenberger*, para. 77; ECJ 11 September 2018, Case C-68/17, *IR*, ECLI:EU:C:2018:696, para. 69; ECJ 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft*, ECLI:EU:C:2018:874, para. 78.

²⁷ ECJ 17 April 2018, Case C-414/16, *Egenberger*, para. 78.

²⁸ ECJ 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft*, paras. 73 et seq.; ECJ 6 November 2018, Joined Cases C-569/16 & C-570/16, *Bauer*, para. 85.

²⁹ ECJ 15 January 2014, Case C-176/12, *Association de médiation sociale*, paras. 47 et seq.

³⁰ See Opinion of A.G. Trstenjak, 24 January 2012, Case C-282/10, *Dominguez*, EU:C:2011:559, para. 83; Opinion of A.G. Bobek, 22 January 2019, Case C-193/17, *Cresco Investigation*, ECLI:EU:C:2018:614, para. 140; D. G. Schiek, ‘Constitutional Principles and Horizontal Effect: Küçükdeveci revisited’, 1 *European Labour Law Journal* (2010) p. 368 at p. 373; P. M. Huber, ‘Auslegung und Anwendung der Charta der Grundrechte’, 64 *Neue Juristische Wochenschrift* (2011) p. 2385 at p. 2389 et seq.; C. Herresthal, ‘Grundrechtecharta und Privatrecht’, 22 *Zeitschrift für Europäisches Privatrecht* (2014) p. 238 at p. 254.

³¹ C. D. Classen, ‘Zuviel des Guten? Unionsrechtliche Neuakzentuierungen beim Grundrechtsschutz’, 74 *Juristenzeitung* (2019) p. 1057 at p. 1064; A. Edenharter, ‘Wie argumentieren EuGH und BVerfG in Grundrechtsfragen?’, 57 *Europarecht* (2022) p. 302 at p. 314.

³² For a critique of this development see C. Herresthal, *supra* n. 30, p. 1064; F. Kainer, ‘Rückkehr der unmittelbar horizontalen Grundrechtswirkung aus Luxemburg?’, 35 *Neue Zeitschrift für Arbeitsrecht* (2018) p. 894 at p. 859 et seq.; T. Kingreen, *supra* n. 25, para. 25; welcoming this development S. Prechal, *supra* n. 10, p. 423; H. Sauer, *supra* n. 21, p. 394 et seq.



4. Horizontalization through Secondary Legislation – the New Scenario

While secondary law has so far served as a point of reference for the European Court of Justice in the two constellations mentioned above, two recent acts on the digital single market suggest that the legislature is no longer willing to leave the determination of the horizontal effects of fundamental rights to the judiciary alone. Irrespective of the question of whether and how this can permissibly be accommodated in the existing hierarchy of norms, *de facto* a new regulatory technique can be identified: As described, in Art. 5(1) subpara. 2 Terrorist Content Online Regulation and Art. 14(4) Digital Services Act, the EU legislature explicitly imposes on private actors the duty to take EU fundamental rights into account—or at least “copies” of these: Charter-corresponding specifications at the hierarchical level of secondary law, the effects of which remain to be clarified³³. Such explicit references to fundamental rights in secondary law are certainly not foreign to legislative techniques in some member states. Examples of fundamental rights being mentioned in ordinary law can be found in legislation governing private relationships,³⁴ which is particularly true with regard to workers’ rights, for example, in France,³⁵ Italy,³⁶ Portugal³⁷ and Spain³⁸. With its more recent legislative technique, the EU legislature seems to be following this legal tradition of explicitly referring to fundamental rights in ordinary law.

Such technique differs from ordinary legislation in at least two ways. First, the reference to fundamental rights is particularly imprecise in terms of its legal consequences.³⁹ Instead of laying down specific obligations, the legislator provides only very rough guidelines for the application of the norm. This is obviously useful for legislation, especially in matters where the outcome of actual situations is practically difficult to predict, for example, with regard to which processes violating legal rights take place on online platforms and how they can be adequately countered. In order to partly relieve itself of this responsibility, the legislator delegates powers to the private actors concerned within a given quasi-constitutional framework. This leads to the second and more significant difference between a reference to fundamental rights and other legislation: concepts of constitutional law are transferred to private actors. As a new form of hybrid regulation or co-regulation, the EU provides a quasi-constitutional framework for the regulation of user behaviour by platform operators. The legislation thus takes asymmetrical power relations between private parties—for example, between platform operators and users—as an occasion to

³³ See at n. 70.

³⁴ See A. Seifert, *supra* n. 10, p. 697; specifically on France see C. D. Classen, *supra* n. 8, p. 229 et seq.

³⁵ Art. L.1121-1 Code du Travail: “Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.”

³⁶ Art. 1 Statuto dei Lavoratori: “I lavoratori, senza distinzione di opinioni politiche, sindacali e di fede religiosa, hanno diritto, nei luoghi dove prestano la loro opera, di manifestare liberamente il proprio pensiero, nel rispetto dei principi della Costituzione e delle norme della presente legge.”

³⁷ Art. 14 et seq. Código do trabalho português, with reference to freedom of expression, physical integrity, protection of privacy and data protection law, among others.

³⁸ Art. 4(1) Estatuto de los trabajadores: “Los trabajadores tienen como derechos básicos, con el contenido y alcance que para cada uno de los mismos disponga su específica normativa, los de: a) Trabajo y libre elección de profesión u oficio, b) Libre sindicación, c) Negociación colectiva, d) Adopción de medidas de conflicto colectivo, e) Huelga, f) Reunión, g) Información, consulta y participación en la empresa.”

³⁹ Cf M. Eifert, A. Metzger, H. Schweitzer and G. Wagner, ‘Taming the giants: The DMA/DSA package’ 58 CML Rev. (2021), p. 987 at p. 1013-1014; M. Wendel, ‘Taking or Escaping Legislative Responsibility? EU Fundamental Rights and Content Regulation under the DSA’, in B. Raue and A. von Ungern-Sternberg (eds.) *Content Regulation in the European Union* (Trier University and IRDT 2023), p. 59 at p. 81-82.



introduce ideas of public law into private law relations. Conceptually, it is based on the circumstance that the operators themselves enact a private order through terms of service on their platforms.⁴⁰ However, since EU legislation in this picture is itself a higher level of norms to which platform operators must adhere, it also lends itself to being ascribed a certain constitutional quality with regard to the private order.

We will now focus on the pitfalls of this new legislative technique as it applies to references to the Charter. The questions raised can be divided into the areas of conformity with primary law and methodological questions of interpretation,.

5. Conformity with Primary Law

Secondary legislation cannot modify the interpretation and effect of the Charter.⁴¹ By contrast, it is an open question whether or not and within what limits it can copy fundamental rights concepts at the level of secondary law. The Charter is at the level of primary law (Art. 6(1) subpara. 1 sentence 1 TEU), so that the *lex superior* principle applies in relation to secondary law (cf. Art. 263 et seq. TFEU).⁴² Secondary legislation that is incompatible with this is declared invalid by the European Court of Justice.⁴³ Two aspects in particular should be considered here: First, is secondary legislation allowed to enact fundamental rights provisions at all? Or is this the original task of primary law? Second, would specific provisions of the Charter not prevent a secondary law reference to fundamental rights?

5.1. Primary Law Reservation of Fundamental Rights Provisions?

The transformation of fundamental rights from supra-positive and pre-state to positivised human and civil rights took place historically as constitutionalists “reached into the stars” and integrated them into the constitutions.⁴⁴ In modern constitutional documents the idea of human and civil rights as fundamental statements was united with the idea of the constitution.⁴⁵ Even today, for example, German constitutional jurisprudence emphasises that fundamental rights and the constitution must necessarily be thought of together.⁴⁶ If, however, fundamental rights are not

⁴⁰ *Supra* n. 2 and 3.

⁴¹ T. Wischmeyer, *Grundrechtliche Bindung privater Plattformbetreiber unter dem EU Digital Services Act* (Gesellschaft für Freiheitsrechte 2023), p. 9, 26.

⁴² H. D. Jarass, ‘Zum Verhältnis von Grundrechtecharta und sonstigem Recht’, 48 *Europarecht* (2013) p. 29 at p. 33; K. Riesenhuber, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 4th edn. (De Gruyter 2021) § 10 para. 29; generally on the *lex superior* principle in Union law R. Bieber and I. Salomé, ‘Hierarchy of Norms in European Law’, 33 *CML Rev.* (1996) p. 909-932; G. Conway, ‘Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ’, 11 *German Law Journal* (2010) p. 966 at p. 983 et seq.; E. Hancox, ‘Judicial approaches to norm overlaps in EU law: A case study on the free movement of workers’, 58 *CML Rev.* (2021) p. 1057-1096.

⁴³ ECJ 9 November 2010, Case C-92/09, *Schecke*, EU:C:2010:662, para. 89.

⁴⁴ Formulation based on H. Maurer, ‘Idee und Wirklichkeit der Grundrechte’, 54 *Juristenzeitung* (1999) p. 689 at p. 693; cf K. Stern, ‘Idee der Menschenrechte und Positivität der Grundrechte’ in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. 9, 3rd edn. (C.F. Müller 2011) § 184 para. 40 et seq.; on human rights guarantees under international law C. Möllers, *Die Möglichkeit der Normen* (Suhrkamp 2015) p. 408.

⁴⁵ K. Stern, *supra* n. 44, paras. 43 et seq.; cf I. Augsberg, *Theorien der Grund- und Menschenrechte* (Mohr Siebeck 2021) p. 18.

⁴⁶ K. Stern, ‘Idee und Elemente eines Systems der Grundrechte’ in J. Isensee and P. Kirchhof (eds.), *supra* n. 45, § 185 para. 50: ‘Fundamental rights are derived from constitutional norms, and only from these. Citizens’ rights granted outside the constitution, even if they have the same content as fundamental rights, should be designated differently’ (translated). Similar D. Merten, ‘Begriff und Abgrenzung der Grundrechte’, in D. Merten and H.-J. Papier (eds.),



only defined materially, but are also historically characterised by a *hierarchical supremacy*, legal theory raises the question of the extent to which secondary legislation is entitled to use the concept of fundamental rights itself at a lower normative level as a means of regulation.⁴⁷ The blanket reference to fundamental rights will appear to some as a legislative failure or even non-performance,⁴⁸ since the European legislature is actually supposed to “promote” the application of fundamental rights according to Art. 51(1) sentence 2 Charter. This is in line with the usual interpretation in national constitutional law, according to which it is the task of the legislature to transpose and concretise the principles of freedom expressed in the fundamental rights into the other areas of the legal order.⁴⁹ In the words of the former German Federal Constitutional Justice Konrad Hesse: “The Constitution entrusts the private law legislation with the task of implementing the content of fundamental rights in a differentiating and concretizing manner in a law that is directly binding on the parties to a private legal relationship. It is up to the legislation to make the various modifications that are required to realize the influence of fundamental rights on private law”.⁵⁰ Accordingly, it could be the task of EU legislation to give effect to the fundamental rights and values of the Union by translating and concretising them in accordance with the specific features of each area of law. Hence, a legislature that simply uses the concept of fundamental rights without shaping and concretising their content and passing on that task to private actors could be described as lazy.

Certainly, the legal technique of a reference to the Charter may not change the Charter’s content: The EU legislature may not simply bypass the procedure for amending the Treaties with its new technique.⁵¹ The procedures for amending the Treaties and secondary legislation differ from each other to a much greater degree than the national procedures for enacting ordinary laws and laws amending the constitution. The latter usually have higher requirements only in terms of qualified majority voting, otherwise the same legislative bodies decide according to the same procedural rules.⁵² By contrast, at the EU level the procedure for amending the Treaties is very different from that for enacting secondary legislation. With the exception of certain areas of the TFEU, amendments to primary law must be submitted to an amendment procedure under Art. 48(2-5) TEU. This procedure involves international treaties of amendment between EU Member

Handbuch der Grundrechte in Deutschland und Europa, vol. 2/4, 1st edn. (C.F. Müller 2006) § 35 para. 67; U. Volkmann, ‘Allgemeine Grundrechtslehren’, in M. Herdegen et al. (eds.), *Handbuch des Verfassungsrechts* (C.H. Beck 2021) § 16 para 10: ‘Fundamental rights differ from the merely moral (pre-legal, pre-state, etc.) system of equal rights first of all by their positive enactment as law, and precisely in a constitution’ (translated). Doubting T. Kingreen, ‘Vorrang und Vorbehalt der Verfassung’, in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. 12, 3rd edn. (C.F. Müller 2014) § 263 para. 51.

⁴⁷ Cf M. Denga, ‘Plattformregulierung durch europäische Werte: Zur Bindung von Meinungsplattformen an EU-Grundrechte’, *Europarecht* (2021) p. 569 at p. 594.

⁴⁸ M. Wendel, *supra* n. 39, p. 59 at p. 78, 82.

⁴⁹ E.-W. Böckenförde, ‘Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozial-staatlichen Demokratie’, in D. Posser and R. Wassermann (eds.), *Freiheit in der sozialen Demokratie* (C.F. Müller 1975) p. 77 at p. 82 et seq., p. 88 et seq.; cf M. Jestaedt, *Grundrechtseinfaltung im Gesetz* (Mohr Siebeck 1999) p. 29 et seq.; A. Kulick, ‘“Drittwirkung” als verfassungskonforme Auslegung – Zur neuen Rechtsprechung des BVerfG’, 69 *Neue Juristische Wochenschrift* (2016) p. 2236 at p. 2236 et seq.

⁵⁰ K. Hesse, *Verfassungsrecht und Privatrecht* (C.F. Müller 1988) p. 27 (translated).

⁵¹ M. Wendel, *supra* n. 39, p. 59 at p. 76.

⁵² For the German Basic Law J. Rozek, ‘Verfassungsrevision’, in J. Isensee and P. Kirchhof (eds.), *supra* n. 46, § 257 para. 12.



States and is considered complex and unpredictable.⁵³ Moreover, it is disputed whether the Charter, which only became binding through the (static⁵⁴) reference in the Lisbon Treaty pursuant to Art. 6(1) subpara. 1 TEU, can be amended on its own.⁵⁵

If legal scholars use this national conviction of a division of roles between constitutional law and ordinary law as an argument against the incorporation of fundamental rights into secondary law, they fail to recognise that the resulting norms do not aspire to a higher hierarchy but leave the content of the Treaties and the Charter untouched. Those who argue against this legal technique without analysing the concrete normative content of the legislature, but rather argue with its mere hierarchical position below primary law⁵⁶ are using an old idea of national state theory⁵⁷ to explain a new phenomenon of another type of legal order. Yet, such ideas are foreign at the level of Union law. In order to be convincing, this kind of argument would at least have to be updated and more related to legal specifics of the Union. To us, however, it seems to be more fruitful to shed light on the requirements and limits of this legislative technique resulting from positive law.

5.2. Violation of Specific Requirements of the Charter?

The question arises whether specific provisions of the Charter preclude a reference to fundamental rights in secondary law that binds private actors to the Charter. In particular, Art. 51(1) sentence 1 Charter could have a *blocking effect* for secondary legislation.

According to the first sentence of Art. 51(1) Charter, the provisions of the Charter are addressed to the institutions and bodies of the Union and to the Member States when they are implementing Union law. Private individuals are not explicitly mentioned. Conversely, it could follow that fundamental rights cannot apply between private individuals.⁵⁸ If this were a requirement of primary law, it could not be overridden by a reference to secondary law. Indeed, it could be argued that the provision leaves open the question of whether or not the Charter binds private individuals.⁵⁹

⁵³ C. Ohler, 'Art. 48 TEU', in E. Grabitz et al. (eds.), *Das Recht der EU*, 75th edn. (C.H. Beck 2022) cf para. 13: 'elaborate and, above all, unpredictable procedure' (translated).

⁵⁴ M. Niedobitek, 'Entwicklung und allgemeine Grundsätze', in D. Merten and H.-J. Papier (eds.), *Handbuch der Grundrechte*, vol. 6/1, 1st edn. (C.F. Müller 2010) § 159 para. 23.

⁵⁵ See also M. Niedobitek, 'Vertragliche Grundlagen, rechtliche Gestalt, Institutionen der Union', in M. Niedobitek (ed.), *Grundlagen der Union* (De Gruyter 2014) § 1 paras. 51, 95, rejecting this; dissenting also C. Ohler, 'Art. 48 TEU', in E. Grabitz et al. (eds.), *supra* n. 53, para. 22; H. D. Jarass, 'Introduction', *supra* n. 8, para. 10, is of the opinion that an amendment to the Charter constituted an amendment to Art. 6 TEU and is therefore subject to the amendment provision of Art. 48 TEU.

⁵⁶ Cf T. Wischmeyer, *supra* n. 41, p. 9, 26; M. Wendel, *supra* n. 39, p. 76 et seq.; leaving the question open R. A. Achleitner, 'Revision der Grenzen der Meinungsfreiheit?', in M. Bajlicz et al. (eds.), *Recht im Umbruch – Umbruch im Recht* (Jan Sramek 2022), p. 3 at p. 24; focusing on an indirect horizontal effect J. P. Quintais et al., *supra* n. 3, p. 881 at p. 902-903.

⁵⁷ Cf generally critical about arguments based on the theory of the state in constitutional law, C. Möllers, *Staat als Argument* (Beck 1999).

⁵⁸ Opinion of A.G. Trstenjak, 24 January 2012, Case C-282/10, *Dominguez*, para. 83; Opinion of A.G. Bobek, 22 January 2019, Case C-193/17, *Cresco Investigation*, para. 140; M. De Mol, 'Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', 6 *European Constitutional Law Review* (2010) p. 293 at p. 302; D. G. Schiek, *supra*, n. 30 at 373; H. D. Jarass, 'Die Bedeutung der Unionsgrundrechte unter Privaten', 25 *Zeitschrift für Europäisches Privatrecht* (2017) p. 310 at p. 315; A. Schwerdtfeger, 'Art. 51 Charter', in J. Meyer and S. Hölscheidt (eds.), *supra* n. 14, para. 57; M. Deng, *supra* n. 47 at 585; C. Krönke, 'Privatverfahrensrecht in digitalen Grundrechtsnetzwerken', *Zeitschrift für Urheber- und Medienrecht* (2022) p. 13 at p. 14.

⁵⁹ Opinion of A.G. Cruz Villalón, ECJ 15 January 2014, Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2013:491, para. 28 et seq.; E. Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality', 21 *European Law Journal* (2015) p. 657 at p. 659 et seq.; E. Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle', 22 *Cambridge Yearbook of European Legal Studies* (2020) p. 208 at p. 210 et seq.; M. Ruffert,



Rather, the purpose of Art. 51(1) sentence 1 Charter is to delimit the scope of application of European fundamental rights protection from national fundamental rights protection. The provision therefore makes a decision on the scope of application of the Charter within the jurisdiction of the EU or the Member States, not on the personal scope of application.⁶⁰ If Art. 51(1) sentence 1 Charter would enumerate exhaustively the addressees of fundamental rights obligations (“institutions, bodies, offices and agencies of the Union” and “Member States only when they are implementing Union law”), the additional naming of other addressees in other provisions of the Charter would also be superfluous. Indeed, some fundamental rights of the Union are explicitly tailored to private law relationships.⁶¹ Consequently, Art. 51(1) sentence 1 Charter could not contain a blanket exclusion of a direct horizontal effect of fundamental rights.⁶² In particular, a horizontal effect had already been known in Union law before the incorporation of the Charter into European primary law.⁶³ In the absence of a discussion of horizontal effect in the Fundamental Rights Convention, this question seems to have been left to the development of case law and literature.⁶⁴ Recently, the European Court of Justice has followed this line of argument. It has confirmed that Art. 51(1) sentence 1 Charter does not preclude the application of fundamental rights between private actors at the level of primary law.⁶⁵ As Art. 51(1) sentence 1 Charter does not exclude the horizontal application of fundamental rights of the Union, this provision does not have a blocking effect on a secondary law order to bind private actors to fundamental rights.

A reference to a fundamental right in secondary law would also have to be sufficiently *justified*, because it could not only constitute an extension of a fundamental right, but also an encroachment on a fundamental right within the meaning of Art. 52(1) sentence 2 Charter. The legislative technique of referring to the Charter in secondary law across hierarchical levels to use the content of the Charter to regulate horizontal legal relationships between private actors should not obscure the fact that this is still a simple piece of legislation: Even if it aims to use fundamental rights to shape a horizontal relationship between private actors the law itself is still an object that must be measured against higher-ranking law in the vertical relationship. Although the provisions of secondary law are intended to take account of fundamental rights in horizontal relations between private actors, they are themselves acts of Union institutions pursuant to Art. 51(1) Charter. If secondary law were, with its incorporation technique, to establish a level of protection that unjustifiably falls below the level of fundamental rights protection required by the Charter, the secondary law provision would be incompatible with primary law.

‘Privatrechtswirkung von Grundrechten im Europarecht’, in K. von der Decken and A. Günzel (eds.), *Staat – Religion – Recht: Festschrift für Gerhard Robbers zum 70. Geburtstag* (Nomos 2020) p. 923 at p. 925; T. Kingreen, ‘Art. 51 Charter’, in C. Calliess and M. Ruffert (eds.), *supra* n. 5, para. 24.

⁶⁰ S. K. Stein, *Drittwirkung im Unionsrecht* (Nomos 2016) p. 77; C. Unseld, *supra* n. 15, p. 226; T. Lock, ‘Art. 51 Charter’, in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para. 20; S. Prechal, *supra* n. 10, p. 418.

⁶¹ See Art. 3(2), Art. 5(3), Art. 24(2), Art. 27, Art. 32(1) sentence 1 Charter.

⁶² A. Seifert, *supra* n. 10, p. 700 et seq.; S. K. Stein, *supra* n. 60, p. 77 et seq.; A. Schwerdtfeger, ‘Art. 51 Charter’, in J. Meyer and S. Hölscheidt (eds.), *supra* n. 15, para. 57.

⁶³ Opinion of A.G. Cruz Villalón, 15 January 2014, Case C-176/12, *Association de médiation sociale*, para. 34 et seq.; critically on this Opinion of A.G. Bobek, ECJ 22 January 2019, Case C-193/17, *Cresco Investigation*.

⁶⁴ D. Leczykiewicz, ‘Horizontal application of the Charter of Fundamental Rights’, 38 *European Law Review* (2013) p. 479 at p. 485 et seq.; C. Herresthal, *supra* n. 30, p. 254; C. Unseld, *supra* n. 15, p. 225 et seq.

⁶⁵ ECJ 6 November 2018, Joined Cases C-569/16 & C-570/16, *Bauer*, para. 87; ECJ 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft*, para. 76.



In horizontal constellations, increasing the effects of fundamental rights in favour of one individual can constitute a restriction of fundamental rights vis-à-vis another individual; this must be measured against Art. 52 of the Charter. The level of protection applicable is always to be determined *relationally*: The strengthening of one is might be the weakening of the other, which requires justification. Art. 5(1) subpara. 2 Terrorist Content Online Regulation and Art. 14(4) Digital Services Act are not, therefore, entirely unproblematic. While the former refers to all fundamental rights, but then wants to take into account “in particular, the fundamental importance of the freedom of expression and information in an open and democratic society”, the latter, after a global reference to fundamental rights, emphasises “including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media” only to immediately cancel this emphasis by adding “and other fundamental rights and freedoms as enshrined in the Charter”.

As a preliminary conclusion, it does not seem to be *a priori* contrary to primary law for secondary legislation to refer to the Charter in order to use it to regulate relationships between private parties. The legality of this approach depends on the specific design of the reference norm.

6. Interpretative Methodology

6.1. Hypothetical Results of Interpretation

Since the literature on European law has so far been silent on the legislative technique of explicitly referring to the Charter imposing obligations on private individuals in secondary law, clarification is to be provided on the basis of some general legal considerations as to which meanings can be ascribed to such references. The type of reference depends not only on the interpretation of secondary law, but crucially on whether the specific Charter fundamental right referred to *itself* is interpreted as having horizontal effect anyway.

Insofar as the secondary law reference to the Charter did not order anything that did not already apply without its reference, it was a *declaratory* reference. A declaratory reference merely refers, for reasons of usefulness, to provisions that are binding on the addressee of the reference provision anyway.⁶⁶ It helps the legal interpreter to find the normative appeal written elsewhere and to relate it to the present legal act, but it does not in itself extend the present legal acts normative content. It is precisely the fundamental rights effect that already follows directly from the Charter that would apply. Understood as a declaratory reference, Art. 5(1) subpara. 2 Terrorist Content Online Regulation and Art. 14(4) Digital Services Act would therefore simply refer to the horizontal effects that follow directly from the Charter anyway. Its main purpose would be to remind practitioners to take the Charter into account when analysing the legal situation. Cases of merely declaratory references are conceivable; they do not pose any particular problems, but should not be ignored here for the sake of completeness.

We will instead focus on constitutive references. Indeed, primary and secondary law interpretation could show the secondary law ordering new effects, not already given by the Charter itself,

⁶⁶ A. Guckelberger, ‘Die Gesetzgebungstechnik der Verweisung unter besonderer Berücksichtigung ihrer verfassungs- und gemeinschaftsrechtlichen Probleme’, 19 *Zeitschrift für Gesetzgebung* (2004) p. 62 at p. 63 et seq.



by using its fundamental rights terminology (*constitutive* effect vis-à-vis the Charter). In this case, the reference in the present legal act creates a normative appeal which, without the reference, would be contained neither in the target norm referred to nor in the present legal act. In the case of such a constitutive reference, the reference norm would be incomplete if the cited norm were omitted.

Before we will enumerate the different possibilities of a constitutive reference, it should be repeated that a constitutive reference in secondary law can at most modify the content of the fundamental rights at the level of secondary law, but not the fundamental rights of the Charter itself. As with any other act of secondary law, the reference norm has the effect of extending the scope of application of the Charter to the reference norm pursuant to Art. 51(1) sentence 1 of the Charter. However, any changes to the content of the Charter's fundamental rights or the personal scope of application of the Charter, which may be ordered by the reference norm, always relate only to the fundamental rights regime constitutively established at the level of secondary law. The content of the individual fundamental rights of the Charter itself, as set out in Articles 1 to 50 of the Charter, and the dimensions in which they operate, as set out in Articles 52 to 54 of the Charter, remain unaffected by the reference.⁶⁷ Such a regulatory technique would generally reduce legal certainty and would circumvent the primary law amendment procedure in the case of the reference from secondary to primary law at issue here. If a reference to the Charter is constitutive, it creates—at its own level of normative hierarchy—a new, previously non-existent normative regulation for an area of application that is not covered by the object of the reference.⁶⁸ The incorporated object of reference acquires the validity and rank of the norm of reference in the form of the norm thus composed.⁶⁹ This is done methodically by copying the text of the referenced Charter provision and reading it within the framework of the referring secondary law norm, as if the Charter text were repeated in secondary law.⁷⁰ In principle, this technique is no different from the more cumbersome and resource-intensive legislative technique of simply repeating all the provisions referred to in the text at the place of reference. If, however, a reference is used instead, the wording of the reference can have a constitutive effect in various ways.⁷¹ It can affect both the applicability of certain fundamental rights and the intensity of the fundamental rights obligation—but always at the level of secondary law.

First of all, a secondary law reference could install a fundamental rights regime at its own level, whose scope of application includes private law relationships not covered by the Charter and thus differs from the one the Charter has on its own level. In other words, secondary legislation

⁶⁷ Cf for a similar debate in German law T. Clemens, 'Die Verweisung von einer Rechtsnorm auf andere Vorschriften', 111 *Archiv des öffentlichen Rechts* (1986) p. 63 at p. 66. Accordingly, it is now widely recognised in German constitutional law that the incorporation of fundamental rights of the Basic Law into the *Länder* constitutions does not duplicate the protection of the same fundamental right (in that sense see, German Federal Constitutional Court, Judgement of 19 July 1967, 2 BvR 639/66); rather, a second layer of (fundamental) rights emerges, see K. Lange, 'Grundrechtliche Besonderheiten in den Landesverfassungen' in D. Merten and H.-J. Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, vol. 3, 1st edn. (C.F. Müller 2009) § 83 para. 3 with further references.

⁶⁸ A. Guckelberger, *supra* n. 66 at p. 64 with reference to U. Karpen, 'Die Verweisungstechnik im System horizontaler und vertikaler Gewaltenteilung' in J. Rödig (ed.), *Studien zu einer Theorie der Gesetzgebung*, 1st edn. (Springer 1976) p. 221 at p. 224; G. Müller and F. Uhlmann, *Elemente einer Rechtsetzungslehre*, 3rd edn. (Schulthess 1999) para. 305.

⁶⁹ T. Clemens, *supra* n. 67 at p. 65; A. Guckelberger, *supra* n. 66 at p. 64 with reference to W. Brugger, 'Rechtsprobleme der Verweisung im Hinblick auf Publikation, Demokratie und Rechtsstaat', 78 *Verwaltungsarchiv* (1987) p. 1 at p. 4; D. Grauer, *Die Verweisung im Bundesrecht, insbesondere auf technische Verbandsnormen*, 1st edn. (thèse 1980) p. 70; F. Kirchhof, *Private Rechtsetzung*, 1st edn. (Duncker & Humblot 1987) p. 152.

⁷⁰ Cf W. Brugger, *supra* n. 69 at p. 4; T. Clemens, *supra* n. 67 at p. 66; A. Guckelberger, *supra* n. 66 at p. 63.

⁷¹ For more details, see below at 6.2.



could transport individual fundamental rights positions to the level of secondary law, which would otherwise not apply. For example, in Art. 14(4) Digital Services Act, secondary legislation specifically emphasises that providers of intermediary services must take into account the right to freedom of expression, as well as the freedom and pluralism of the media when moderating content. Art. 5(1) subpara. 2, (3)(c) Terrorist Content Online Regulation also highlights, among other things, the need to take freedom of expression and information into account. The European Court of Justice has not yet ruled on the horizontal application of these fundamental rights at the level of primary law. If their application among private individuals does not already result from the Charter,⁷² secondary law would constitutively order their horizontal application. By contrast to the familiar cases in which, for example, the Directives on Equal Treatment of the EU⁷³ impose specified obligations on private actors that come close to being bound by a respective fundamental right, here the fundamental rights system itself is used by the legislature to delegate rule-making to private actors in a limited way.

Furthermore, secondary law could install a fundamental rights regime at its own level with a different intensity of protection compared to the original one on a primary law level. For the question of whether secondary law has a constitutive effect vis-à-vis the Charter, the scope of the binding effect resulting from the Charter is once again decisive. On this basis, secondary law could either weaken or strengthen the fundamental rights obligation of private actors in relation to the fundamental rights obligation under primary law. In this respect, different levels of the scope of the fundamental rights obligation under secondary law are legally conceivable—irrespective of whether they themselves are in breach of the Charter or other primary law as a result of these deviations:

First, a weak form of fundamental rights obligation could be imposed by secondary law. If something is not to be “observed”, but merely taken into account “with due regard”—as formulated in Art. 14(4) Digital Services Act or Art. 5(1) subpara. 2, (3)(c) Terrorist Content Online Regulation—according to common reading in other contexts, there is a duty to seriously deal with the circumstance referred to or the position or interest, whereas mere awareness is not sufficient.⁷⁴ The

⁷² On the freedom of expression Art. 11(1) Charter see M. Brkan, ‘Freedom of Expression and Artificial Intelligence: On Personalisation, Disinformation and (Lack Of) Horizontal Effect of the Charter’, SSRN, 17 March 2019, <https://ssrn.com/abstract=3354180> (visited 15 Dec. 2022), who argues against the applicability of this fundamental right between private parties (p. 8 et seq.), but nevertheless predicts that the ECJ will recognise such an applicability (p. 12).

⁷³ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁷⁴ Concerning Art. 7(1) subpara. 1 Protocol (No 2) on the application of the principles of subsidiarity and proportionality see S. Hölscheidt, ‘Art. 12 TEU’, in E. Grabitz et al. (eds.), *supra* n. 53, para. 46; concerning Section 10 of the German Federal Emission Protection Law (*BImSchG*) see J. Dietlein, ‘§ 10 BImSchG’, in R. Landmann and G. Rohmer (eds.), *Umweltrecht*, 96th edn. (C.H.Beck 2021) para. 240; concerning Art. 103(1) German Basic Law see BVerfG 14 June 1960, 2 BvR 96/60; BVerfG 8 July 1997, 1 BvR 1621/94.



result of the required examination is not determined by this;⁷⁵ it is therefore a *procedural* requirement.⁷⁶ Particularly in the case of mass transactions, an effect on fundamental rights understood in this way would run the risk of being reduced to a standard phrase, which would be completely uncontrollable by those concerned, such as “[T]he fundamental rights of the persons concerned have been taken into account in the decision and do not justify a different outcome”.

Second, while the obligation to take fundamental rights into account described above would reduce the effect of the fundamental rights to a procedural moment, an interpretation is also conceivable that reduces the protective content of the fundamental rights of the Charter, i.e., the material scope and/or the intensity of the interference activating the protection. For example, the effect of fundamental rights ordered by secondary law in the horizontal relationship could be *limited to their essence* (cf. Art. 52(1) sentence 1 Charter). According to European Court of Justice case law, a measure respects the essence of a right, provided it does not call it into question as such.⁷⁷ Accordingly, such an understanding would merely require the addressees of secondary law to not completely undermine the fundamental rights positions of the other parties involved. At the level of primary law, the concept of essence already serves as an argument for the application of the Charter in private law relations.⁷⁸ This line of argument could be continued at the level of secondary law.⁷⁹ Although its exact content is still unclear, the concept of essence is currently receiving a great deal of attention, so it does not seem unlikely that the European Court of Justice could activate it in the present context. It would then be difficult to determine where the limits of the essence of a fundamental right lie.⁸⁰

Third, an interpretation that bound private actors to fundamental rights through secondary law references in a way that corresponded exactly to the obligations of public actors within the meaning of Art. 51(1) sentence 1 Charter would be quite absurd, but shall not be left out here for the sake of completeness. In this scenario, the addressees of secondary legislation would be bound by the copied provisions of the Charter to the *same extent as the public actors* referred to in Art. 51(1) sentence 1 Charter. Private parties addressed under secondary law could henceforth interfere with fundamental rights and to do so would require justification. In this context, within the framework of a proportionality test, assessment prerogatives and prognostic leeway of the

⁷⁵ Concerning Art. 27 TFEU see J. Bast, ‘Art. 27 TFEU’, in E. Grabitz et al. (eds.), *supra* n. 53, para. 11.

⁷⁶ Arguing in this direction A. Heldt, ‘EU Digital Services Act: The White Hope of Intermediary Regulation’, in T. Flew and F. R. Martin (eds.), *Digital Platform Regulation*, 1st edn. (Springer 2022) p. 69 at p. 79 et seq. concerning Art. 14(4) Digital Services Act.

⁷⁷ ECJ 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 43; A. Schwerdtfeger, ‘Art. 52’, in J. Meyer and S. Hölscheidt (eds.), *supra* n. 14, para. 34; H. D. Jarass, ‘Art. 52 Charter’, *supra* n. 8, para. 29; cf K. Lenaerts, ‘Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung’, 47 *Europarecht* (2012) p. 3 at p. 9: “nicht [...] ihrer Substanz beraubt”.

⁷⁸ K. Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’, 20 *German Law Journal* (2019) p. 779 at p. 788 et seq.; H. D. Jarass, *supra* n. 8, at p. 324 et seq., 327; cf also D. Hallinan, ‘The Essence of Data Protection: Essence as a Normative Pivot’, 12 *European Journal of Law and Technology* (2021).

⁷⁹ Should the essence of a fundamental right be the decisive criterion for the horizontal application of fundamental rights at the level of primary law, a secondary law reference to the essence would only be declaratory.

⁸⁰ What is to be protected in terms of the “essence” is unclear and was not specified in the Fundamental Rights Convention. It could mean the core content of a fundamental right protected by human dignity as well as a prohibition of abuse of rights or the protection of the fundamental rights content protected by the European Convention on Human Rights as a minimum standard of fundamental rights, cf M. Hilf, ‘Die Schranken der EU-Grundrechte’ in D. Merten and H.-J. Papier, *supra* n. 54, § 164 para. 62; D. Jongsma, ‘Fundamental rights as external constraints on copyright law: horizontal effect of the EU Charter after *Funke Medien* and *Spiegel Online*’, 15 *Journal of Intellectual Property Law & Practice* (2020) p. 1003 at p. 1008, 1011; on further application problems of the essence of a fundamental right T. Tridimas and G. Gentile, ‘The Essence of Rights: An Unreliable Boundary?’, 20 *German Law Journal* (2019) p. 794-816.



private parties obligated by fundamental rights could be recognised, for example, with reference to their own fundamental rights or other legitimate interests. In concrete terms, it would be conceivable, for example, to understand Art. 14(4) Digital Services Act in such a way that content moderation of platforms may not include content in which public authorities could not justifiably intervene in the same situation with the same intention.⁸¹

In all scenarios, the meaning of the *principle of proportionality* would be of particular interest. First, the question arises as to whether a secondary law reference to fundamental rights includes the binding of the principle of proportionality at all. On the one hand, secondary legislation may explicitly require proportionate action. Examples of this are Art. 5(1) subpara. 2 Terrorist Content Online Regulation and Art. 14(4) Digital Services Act, which explicitly stipulate that content may only be moderated in a proportionate manner. On the other, it is conceivable that the secondary law reference does not explicitly state the binding nature of the principle of proportionality. In this case, however, compliance with the principle of proportionality could be a consequence of the obligation to respect fundamental rights. For the commitment to fundamental rights requires—at least according to the understanding of Art. 52(1) sentence 2 Charter—restrictions on fundamental rights must be proportionate. If a commitment to the principle of proportionality can be affirmed, the question arises as to what requirements arise from this for the party bound. On the one hand, proportionality could be based on a public actor-related understanding, as enshrined in Art. 52(1) sentence 2 Charter. This would mean a multi-level, rationalised examination programme, i.e., only legitimate purposes could be pursued in a suitable, necessary, and proportionate manner.⁸² At first sight, the principle established in the vertical relationship between public authority and citizen does not seem to be transferable to horizontal relationships without some modification:⁸³ While proportionality in the vertical relationship prescribes the pursuit of state or EU purposes in the most freedom-preserving way possible, in the horizontal relationship it is usually about the allocation of private legal spheres.⁸⁴ However, if private actors, as in the case of Art. 14(4) Digital Services Act and Art. 5(1) para. 2 Terrorist Content Online Regulation, are to be disciplined by EU law within forming their own private order, they are addressed in their role as quasi-norm-setters⁸⁵ and the principle of proportionality applicable to the vertical relationship

⁸¹ In that sense in Germany cf. Oberlandesgericht München, *Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungssammlung* (2020) paras. 72, 74; Oberlandesgericht Oldenburg, *Multimedia und Recht* (2020), para. 9; Kammergericht, *Multimedia und Recht* (2020), paras. 17, 19; see also S. Müller-Riemenschneider and L. Specht, 'Restore-Anspruch von Äußerungen und Anspruch auf Entsperrung eines Nutzerprofils', 21 *Multimedia und Recht* (2018) p. 545 at p. 547.

⁸² On this multi-stage proportionality test M. Hilf, in D. Merten and H. J. Papier (eds.), *supra* n. 80, § 164 para. 22 et seq.; R. Alexy, 'Rights and liberties as concepts', in M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 284 at p. 291 et seq.; V. Trstenjak and E. Beysen, 'Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung', 3 *Europarecht* (2012) p. 265 at p. 269 et seq.

⁸³ N. Hös, 'The Principle of Proportionality in Viking and Laval: An Appropriate Standard of Judicial Review?', 1 *European Labour Law Journal* (2010) p. 236 at p. 250; D. Wolff, 'Fundamental Rights in the Digital Era, Horizontal Effect and the Distinction Between 'State' and 'Society' in German and European Constitutional Theory', 13 *Frontiers of Law in China* (2018) p. 441 at p. 454; however, see on corresponding tendencies in the German law of Terms of Service of internet platforms T. Mast, *supra* n. 3.

⁸⁴ In particular, private individuals as holders of fundamental rights can in principle pursue arbitrary interests; they are not bound by legitimate purposes, cf. F. Maultzsch, 'Die Konstitutionalisierung des Privatrechts als Entwicklungsprozess – Vergleichende Betrachtungen zum deutschen und amerikanischen Recht', 67 *Juristenzeitung* (2012) p. 1040 at p. 1045. Furthermore, it would require justification if the actions of private individuals toward other private individuals always had to be necessary, i.e., as freedom-preserving as possible, and if they could not act in an autonomous manner at will.

⁸⁵ See at n. 40.



no longer appears inappropriate from the outset.⁸⁶ In any case, proportionality in horizontal situations could be based on an autonomous understanding of the specific EU legislature. The regulatory context of secondary law can shape the concept of proportionality. In this sense, proportionality could be understood as a balancing requirement,⁸⁷ into which the teleological particularities of the respective secondary law flow. By linguistically emphasising certain fundamental rights positions (e.g., “in particular”, “with special regard to”), secondary legislation could also prescribe the weighting of the fundamental rights. The above-mentioned linguistic peculiarities in Art. 14(4) Digital Services Act and Art. 5(1) subpara. 2 Terrorist Content Online Regulation could once again have an effect here.⁸⁸ There is much to suggest that concrete requirements are determined by an interpretation of secondary law and that this interpretation is in turn to be measured against Art. 52(1) Charter.

Secondary legislation could even establish directives for the effects of its fundamental rights obligations that go beyond the principle of proportionality. Here the linguistic emphases become relevant again. By *grading individual fundamental rights positions linguistically*, the legislature could express different levels of intensity of the fundamental rights’ effect. On the one hand, such a specification may refer to specific fundamental rights. For example, the above-mentioned fact that individual fundamental rights positions in Art. 14(4) Digital Services Act and Art. 5(1) subpara. 2, (3)(c) Terrorist Content Online Regulation are linguistically emphasised could suggest that these are to be taken into account to a greater extent than other fundamental rights positions. On the other hand, the different formulations of the fundamental rights obligations to take into account indicate that the substantive scope of the binding effect can vary depending on the situation. Indeed, while Art. 14(4) Digital Services Act formulates that intermediary services must simply have “due regard” to the fundamental rights of their users enshrined in the Charter when moderating content, Art. 5(1) subpara. 2 Terrorist Content Online Regulation goes, conceptually speaking, one step further. According to the text, hosting service providers may only moderate content having due regard to the fundamental rights of users “in all circumstances”; Art. 5(3) Terrorist Content Online Regulation adds that hosting service providers shall take “full account” of users’ fundamental rights. Even within the regulatory system of the Digital Services Act, the law-maker applies different intensities of consideration with regard to fundamental rights. While Art. 14(4) generally requires all intermediary services to take into account fundamental rights when moderating content, Recital 47 of the Digital Services Act specifies the obligation to account for very large online platforms and should “in particular” pay due regard to freedom of expression and information.

As an interim result, the specific scope and meaning of a constitutive cross-level reference to the Charter depends on how the secondary law reference norm is interpreted. Both procedural and substantive approaches are conceivable. The interpretation process itself is particularly complex in the case of a cross-level reference. It is outlined below.

⁸⁶ Cf T. Mast *supra* n. 3, at p. 290-291.

⁸⁷ Cf A. S. Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 47 *Columbia Journal of Transnational Law* (2009) p. 68 at p. 72, 87 et seq.

⁸⁸ Cf above on the specification of fundamental rights effects.



6.2. Coexistence of Primary and Secondary Law Principles of Interpretation

We have described the reference technique, whereby the referenced provisions of the Charter are to be “read along” in the context of the incorporating provision of secondary law, as if the text of the Charter were repeated there. This leads to a complex set of interpretation methods.

First, *secondary law* provides the signposts for the incorporation of the Charter: The reference norm must be interpreted as to whether it merely refers to the Charter for declaratory reasons or whether it actually intends to use the content of the Charter as its own constitutive normative appeal. In this context, the provision of secondary law is to be interpreted according to the usual methods of secondary law interpretation.⁸⁹ All further steps described here follow only in the case of an interpretation as a constitutive reference.

If they are constitutively incorporated, the fundamental rights are nevertheless to be interpreted in accordance with the conventional methods of *Charter interpretation*, in particular Art. 52 Charter.⁹⁰ The dynamic reference to the Charter, which is to be assumed on a regular basis, leads to an interpretation of the Charter in its current meaning, which is shaped by case law.⁹¹ The interpreters of the norms, therefore, have to follow the complex examination steps of Europe’s interwoven protection of fundamental rights: Even in the constellation mediated by secondary law under Art. 52(3) Charter, the ECtHR is significant in the case law of the ECtHR as a minimum standard of protection.⁹² Furthermore, according to Art. 52(4) Charter, the interpretation must be in accordance with the common constitutional traditions of the Member States. In addition, the explanations to the Charter,⁹³ which are to be taken into account in the interpretation pursuant to Art. 52(7) Charter, Art. 6(1) subpara. 3 TEU, are potentially significant in the horizontal relationship ordered by secondary law. The explanations there are of a commentary nature and can also be a useful aid to interpretation here. By contrast, the national provisions to be taken into account under Art. 52(6) of the Charter will generally not play a role here. This is due to the fact that the provision is usually interpreted in such a way that it becomes relevant above all in the justification of infringements of fundamental rights.⁹⁴ However, this is a step in the fundamental rights review that corresponds to the above mentioned interpretation of the reference clause in a way that has effects equivalent to the obligations of public actors—an interpretation which has been interpreted as rather far-fetched.

⁸⁹ G. Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’, 10 *German Law Journal* (2009) p. 537 at p. 549 et seq.; K. Lenaerts and J. A. Gutiérrez-Fons, ‘To say what the law of the EU is: methods of interpretation and the European Court of Justice’, *EUI Working Paper AEL* 2013/9, p. 6 et seq.; K. Riesenhuber, *supra* n. 42, § 10 para. 12 et seq.

⁹⁰ Generally on the interpretation of the Charter see Y. Dorf, ‘Zur Interpretation der Grundrechtecharta’, 60 *Juristenzeitung* (2005), p. 126–132; H. D. Jarass, *supra* n. 58. It is disputed whether secondary law can have an impact on the interpretation of the Charter, cf J. Anweiler, *Die Auslegungsmethoden des Europäischen Gerichtshofs der Europäischen Gemeinschaften* (Lang 1997) p. 195; M. Nettesheim, ‘Normenhierarchien im EU-Recht’, 41 *Europarecht* (2006), p. 737 at p. 755 et seq.; F. Kainer, *supra* n. 32, at p. 899.

⁹¹ See above.

⁹² Case C-400/10, *PPU - McB.*, EU:C:2010:582, para 53; Case C-279/09, *DEB*, EU:C:2010:811, para 35; Case C-205/15, *Toma*, EU:C:2016:499, para 41; W. Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon’, 7 *EuConst* (2011), p. 64 at p. 72 et seq. The first sentence of paragraph 5 of the preamble to the Charter refers to the case law of the ECtHR as a constituent element of the content of fundamental rights of the Union, C. Grabenwarter and K. Pabel, *Europäische Menschenrechtskonvention*, 7th edn. (C.H. Beck 2021) § 4 para 7.

⁹³ 2007/C 303/02.

⁹⁴ H. D. Jarass, ‘Art. 52 Charter’, *supra* n. 8, para. 80 with further references.



The already complex process of interpreting fundamental rights does not end with the scope of protection found in this way. Subsequently, a translation is required which transports the conventionally obtained content of the Charter into the new context of secondary law and evaluates it according to the guiding principles there. It has been explained above that the functioning of the incorporated Charter provisions can be modelled by embedding them in a specific secondary law context. This may concern both the applicability of certain fundamental rights and the intensity of the fundamental rights' effect. In this context, the secondary laws signposts are again to be interpreted according to the usual methods of secondary law interpretation.⁹⁵ If this leads to an interpretation of the reference clause that constitutes an unjustified restriction of the Charter under Art. 52(1), (2) Charter, because, for example, it diminishes certain fundamental rights positions compared to others without any objective reason, the reference clause is to be rescued, as far as possible *lege artis*, by an interpretation in conformity with primary law. Irrespective of whether this principle of interpretation is based on the systematic idea of the unity of Union law, on the presumption of conformity of secondary legislation with primary law, or on considerations of the separation of powers,⁹⁶ in the cases at issue here it favours an interpretation which achieves the balance of interests sought by the fundamental rights of the Charter.

7. Conclusion

With its latest regulatory technique of not concretising the content and values of the Charter in relation to the specific area of regulation, but merely referring to its fundamental rights, the EU legislator could be accused of being somewhat lazy. At the same time, it is all too understandable to seek clarification on a general horizontal effect of the Charter as long as the European Court of Justice has not answered the question—especially in platform law, which is characterised by complex conflicts of interest. Until matters are settled in Luxembourg, the meaning that one ascribes to the phenomenon described here is likely to stand or fall with whether one already ascribes horizontal effect to the Charter's fundamental rights, especially those of communication and privacy. Either way, this technique makes the already complex doctrine of fundamental rights at the EU level even more complex. We have tried to highlight some of the pitfalls. While such an approach in secondary legislation should not be ruled out *per se*, the reference clause itself must be tested against Art. 52(1) Charter, since the incorporation of fundamental rights in secondary law does not necessarily increase their overall level of protection.

⁹⁵ See *supra* n. 89.

⁹⁶ The ECJ has invoked the unity of Union law once in ECJ 9 March 2006, Case C-499/04, *Werhof*, EU:C:2006:168, para. 32. On the sub-case of interpretation in conformity with fundamental rights: ECJ 20 May 2003, Case C-465/00, *Österreichischer Rundfunk*, EU:C:2003:294, para. 68; ECJ 06 November 2003, Case C-101/01, *Lindqvist*, EU:C:2003:596, para. 87; ECJ 26 June 2007, Case C-305/05, *Ordre des barreaux*, EU:C:2007:383, para. 28 et seq.; overview of the dispute at S. Leible and R. Domröse, 'Die primärrechtskonforme Auslegung' in K. Riesenhuber (ed.), *supra* n. 42, § 8 para. 20 et seq.; sceptical M. Nettesheim, *supra* n. 93 at p. 751 et seq.