Double-Layered Horizontal Effect

How the CJEU and the FCC Effectuate a Directive in a Horizontal Constellation via Two Layers of Fundamental Rights

Leander Hasubek

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In the *Egenberger* case, the CJEU again effectuated a directive's content via the so-called horizontal direct effect of EU fundamental rights. It is the second time such a case reaches the German Federal Constitutional Court (FCC). The FCC not only continues to show openness to the CJEU's approach, but even finds that notwithstanding differences in legal construction, it can achieve equivalent substantive results via its own doctrine of indirect horizontal effect. Doing so, the FCC is able to formally keep applying German fundamental rights, while substantially also effectuating the directive as interpreted by the CJEU. In this case, this leads to a curious result that may be described as a "double-layered horizontal effect": Effectuating a directive via both the horizontal direct effect of EU fundamental rights and the indirect horizontal effect of German fundamental rights.

What is horizontal effect of fundamental rights?

In Germany, fundamental rights were traditionally conceived of as protections against the state. The question of horizontal effect concerns whether, and how, fundamental rights may also regulate relationships between private parties.

This question was answered by the FCC in its landmark *Lüth* decision (1958). The FCC rejected the notion of direct horizontal effect, under which individuals could directly invoke fundamental rights in disputes between private parties – a concept advocated by the early Federal Labour Court and its first president, Hans Carl Nipperdey. Instead, the FCC held that fundamental rights constitute an objective order of values permeating the entire legal system. In effect, this means that legal provisions governing relationships between private parties must be interpreted in a manner consistent with the parties' fundamental rights, thereby transferring the normative content of those rights into private-law relationships. Fundamental rights under the Basic Law thus acquire indirect horizontal effect, mediated through private law.

The CJEU similarly takes recourse to EU fundamental rights between private parties when interpreting EU secondary law. However, it additionally developed a doctrine of horizontal direct effect, starting with its *Mangold* decision.

The introduction of horizontal direct effect and its reception

In *Mangold* (2005), the CJEU was faced with a German provision that conflicted with the prohibition of discrimination on grounds of age in Directive 2000/78/EC by allowing the conclusion of fixed-term contracts without requiring objective justification for employees aged 52 and above. However, the Directive was not directly applicable, because first, the transposition period had not yet expired, and, second, directives cannot have direct effect in a dispute between private parties (see *Marshall* (1986)). The CJEU circumvented those obstacles by holding that the prohibition of age discrimination constituted a general principle of Community law, requiring national courts to disapply any conflicting national provision (paras 74-78).

Mangold was subjected to *ultra vires* review by the FCC in the *Honeywell* decision (2010) (see this English translation). By then, the CJEU had already confirmed its willingness to rely on general principles of EU law to disapply national provisions in *Kücükdeveci* (2010). Although the reasoning in *Mangold* had been so opaque that the FCC explicitly refrained from assessing whether the outcome could be achieved through

recognized methods of legal interpretation, it concluded that *Mangold* did not create new competences for the EU and was therefore not *ultra vires* (see especially paras 68, 78 et seq.). The FCC held that a development of the law by the CJEU imposing obligations on citizens would only be *ultra vires* if it entailed both interferences with fundamental rights and a shift in the division of competences to the detriment of the Member States (para 78).

In a dissenting opinion, Judge Landau considered Mangold to be *ultra vires*. First, he argued that the identification of a general principle common to the constitutional traditions of the Member States was methodologically untenable, since only two of the then fifteen Member States recognized a constitutional prohibition of age discrimination (cf. para 109). Second, he maintained that this restricted the national legislature's regulatory options prior to the expiry of the transposition deadline (para 112). However, Judge Landau regarded this issue as unproblematic for disputes arising after the EU Charter of Fundamental Rights (EU Charter) entered into force, as Article 21(1) of the EU Charter explicitly prohibits age discrimination (para 113).

By contrast, the Danish Supreme Court (DSC) openly defied this line of CJEU case law in 2016 (see this English translation of the judgment). On a referral by the DSC, the CJEU in *Dansk Industri* (2016) reaffirmed the logic of *Mangold* and *Kücükdeveci*, obliging national courts to disapply national provisions conflicting with the general principle of prohibition of age discrimination. When the case returned to the DSC, however, it held that unwritten general principles of EU law had not been conferred direct applicability by the Danish Law of Accession to the EU, including its amendments, and therefore could not be relied upon in disputes between individuals. In an obiter dictum, the DSC further stated that even after the Treaty of Lisbon, neither principles under Article 6(3) TEU nor EU Charter rights – including Article 21(1) of the EU Charter – had been made directly applicable in Denmark (p. 47 of the English translation; possibly limited to horizontal situations, see pp. 307 et seq. of this analysis by Neergard & Sørensen). The DSC in this case thus rejected, at least, the horizontal direct effect of EU fundamental rights.

How does horizontal direct effect work?

The CJEU has nevertheless maintained and expanded its approach. To date, it has recognized horizontal direct effect for Article 21 of the EU Charter (non-discrimination: *Mangold* (2005), *Kücükdeveci* (2010), *Dansk Industri* (2016) for age discrimination; *Egenberger* (2018), *IR* (2018), *Cresco Investigation* (2019) for religion or belief), Article 31(2) of the EU Charter (right to paid leave: *Bauer and Willmeroth* (2018), *Max-Planck* (2018)) and Article 47 of the EU Charter (right to an effective remedy: *Egenberger*, *K.L. v. X* (2024)). All cases share the same setting: A directive that cannot be applied directly because of a horizontal legal relationship.

In general terms, particularly since *Egenberger*, the Court's examination adheres to the following pattern. First, it interprets the relevant directive and determines whether a national provision such as the one submitted by the referring court conflicts with it. Second, it recalls the obligation of national courts to interpret domestic law, as far as possible, in conformity with EU law, without requiring an interpretation *contra legem* under national interpretative methods. Third, should the interpretation consistent with the directive be impossible, the Court considers whether the relevant EU Charter right is mandatory and sufficient by itself to confer a right upon an individual.[1] To ensure the full effectiveness of the fundamental right under the EU Charter, the national court must disapply any conflicting national provision.

The Court may add that the directive gives "concrete expression" to the relevant right (e.g. para 23 of *Dansk Industri*) or that the national court must "take into consideration" the balance struck by the directive between competing interests (para 81 of

[1] The CJEU considered Art. 27 CFR not to be sufficient by itself to confer on individuals a right which they may invoke as such in Association de médiation sociale (2014). Art. 27 CFR guarantees to workers or their representatives information and consultation "in the cases and under the conditions provided for by Union law and national laws and practices".

Egenberger). In any event, the decisive role of the directive's content is clearly implied.

It is therefore unsurprising that this line of case law is often understood as a strategy to render directives effective in horizontal situations. Indeed, the directive fulfils two essential functions (see p. 498 of this paper by Fien Van Reempts). First, it opens the scope of EU law, thereby triggering the applicability of the EU Charter rights under Article 51(1). Second, it provides the *de facto* substantive yardstick against which the national provision is assessed. It should be noted though that the latter appears to be a pattern in the case law rather than a hard condition for the horizontal application of EU Charter rights.[2]

The Egenberger case

Having set this background, we can now turn to examining the role of horizontal effect of fundamental rights in the *Egenberger* case.

Ms Vera Egenberger applied for a job advertised by the Diakonie, an organisation of the Protestant Church in Germany. Her application was rejected because she was of no denomination. The case fell within the scope of Directive 2000/78, which prohibits discrimination on grounds of religion or belief. Article 4(2) of the Directive allows an exception for religious organisations where, "by reason of the *nature of these activities or of the context in which they are carried out* [emphasis added], a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos". The Directive was transposed into German law by the *Allgemeines Gleichbehandlungsgesetz* (AGG, General Law on Equal Treatment), which implemented this exception in § 9(1) AGG.[3] Ms Egenberger sought compensation for unjustified discriminatory treatment.

The Federal Labour Court referred the case to the CJEU for a preliminary ruling, considering that the first alternative of § 9(1) AGG justified a difference in treatment without regard to the nature of the specific job (para 46 of the referral decision) and doubting the possibility of an interpretation consistent with EU law. The CJEU followed the pattern outlined above to conclude that a national court must disapply a national provision conflicting with the prohibition of discrimination on grounds of religion or belief under Article 21 of the EU Charter.[4] When the case returned to the Federal Labour Court, it disapplied the first alternative of § 9(1) AGG (paras 38-43 of the decision) and further held that the discrimination was not justified under the second alternative, which does take into account the nature of the specific job.

The Diakonie then lodged a constitutional complaint with the FCC. In its Decision of 29 September 2025, the FCC held the complaint to be well founded, finding that the Federal Labour Court had failed to give adequate weight to the Diakonie's right to religious self-determination when applying the second alternative of § 9(1) AGG (paras 270-285).

Effectuating Directive 2000/78

The FCC did, however, approve of the Federal Labour Court's disapplication of the first alternative of § 9(1) AGG based on the horizontal direct effect of Article 21(1) of the EU Charter (see paras 42 et seq. of the Federal Labour Court's decision, and para 269 of the FCC's decision). This did not come as a surprise in light of *Honeywell*.

As concerns the interpretation of the second alternative of §9(1) AGG, the FCC formally took recourse to German fundamental rights via indirect horizontal effect, while substantially effectuating Directive 2000/78 in its interpretation by the CJEU.

[2] For recent reflection on this see this paper regarding K.L. v. X (2024) and this blog post on a road not taken in Thelen Technopark Berlin (2022).

[3] § 9 (1) AGG, in the translation by the CJEU: " (…) a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination [first alternative] or because of the type of activity [second alternative]." [remarks in parentheses added by the author].

[4] The CJEU also referred to Art. 47 CFR (right to an effective remedy) in light of the restrained plausibility control employed by the FCC in *Chefarzt* (2014) (see pp. 415 et seq. of this paper by Sacha Prechal; for more elaboration on the FCC's so-called two-pronged test, including a plausibility control, see this English blog post).

The FCC set out the relevant conditions for applying German fundamental rights within the scope of EU law in its *Recht auf Vergessen I* decision (2019) (*Right to be forgotten I*, see this English translation). Where German domestic law is not fully determined by EU law and thus allows for diversity in fundamental rights protection, the FCC relies primarily on the Basic Law as its standard of review. Only where German fundamental rights cannot guarantee the level of protection required by EU law – rebuttably presumed to generally be the case – does the FCC directly apply EU fundamental rights.

In *Egenberger*, in order to apply German fundamental rights, the FCC thus needed to find that German fundamental rights can guarantee the level of protection required by EU law. Specifically, it needed to examine whether the direct effect of Article 21 of the EU Charter in private relationships results in a level of protection unattainable under German fundamental rights (paras 169-175). Here, the FCC held that Article 3(3), first sentence, of the Basic Law – containing specific prohibitions of discrimination, including on grounds of belief – must be taken into account when interpreting the AGG und thus attains indirect horizontal effect (paras 171-174). When balancing right to equality and right to religious self-determination, this yields an equivalent level of protection. The decisive factor, according to the FCC, is not the legal construction – direct or indirect horizontal effect – but the substantive level of protection achieved as a result (para 175). Thus, German fundamental rights are applicable.

Notably, this is the first time the FCC attributed indirect horizontal effect to Article 3(3), first sentence, of the Basic Law. In fact, it was only in its recent *Stadionverbot* decision (2018) (*stadium ban*, see this English translation) that the FCC extended indirect horizontal effect to the general equality right of Article 3(1) of the Basic Law; before that, such effect had been recognized only for freedom rights.

However, unlike in the *Stadionverbot* decision, the FCC did not independently deduce from the equality right criteria for its constitutionality review. Owing to the supremacy of EU law in relation to German constitutional law, the FCC had to consider the contents of Directive 2000/78 as interpreted by the CJEU (paras 209 et seq.). Consequently, it interpreted German fundamental rights in light of EU law and thus incorporated the CJEU's criteria in its own constitutionality test (paras 209-225; see also this English blogpost for more details). It then effectuated the resulting balancing of equality right and right to religious self-determination under the Basic Law via interpretation of the second alternative of § 9(1) AGG, following the logic of indirect horizontal effect.

The bigger picture

Taking a step back, the CJEU and the FCC effectuated the contents of Article 4(2) of the Directive 2000/78 via two layers of fundamental rights.

The CJEU resorted to the horizontal direct effect of Article 21(1) of the EU Charter to enable the disapplication of the first alternative of § 9(1) AGG by the Federal Labour Court. Doing so allowed the CJEU to effectuate the Directive in a horizontal constellation, without openly giving up its doctrine of not directly applying directives between private parties.

The FCC resorted to the indirect horizontal effect of Article 3(3), first sentence, of the Basic Law, in order to interpret the second alternative of §9(1) AGG in light of the Basic Law's equality right and right to religious self-determination, which in turn are interpreted in light of the CJEU's interpretation of Article 4(2) of the Directive 2000/78. Framing the effectuation of a directive as a fundamental rights issue allows the FCC to exercise constitutional scrutiny. This is not without merit: In areas that are not fully determined by EU law, there is "wiggle room" to be filled out with regards to national fundamental rights (a concept the FCC calls "fundamental rights diversity", see paras 50-54 of *Recht auf Vergessen I*). In this case, EU law allows for different conceptions of the relationship between state and religion. Resorting to German fundamental rights allows the FCC to fill this "wiggle room" and grant the Church's position more weight than required under EU law.

Conclusion

In conclusion, both courts have compelling reasons to resort to the horizontal effect of fundamental rights. At the same time, the *Egenberger* case splendidly illustrates how fundamental rights doctrines concern not only the protection of individuals, but also the delineation of competences between European and national level, and the cooperation between courts. The level of complexity introduced by these considerations can at times lead to phenomena as curious as a "double-layered horizontal effect".

ABOUT THE AUTHOR

Leander Hasubek

Leander Hasubek is a law student and research assistant at the Institute of Public Law at the University of Freiburg.Leander Hasubek is a law student and research assistant at the Institute of Public Law at the University of Freiburg.

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