

ETUI Policy Brief

European Economic, Employment and Social Policy

N° 3/2019

What has the Charter of Fundamental Rights of the European Union delivered for workers?

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The authors are all members of the ETUI Transnational Trade Union Rights (TTUR) network¹ and editors of the recently published book *The Charter of Fundamental Rights of the EU and the Employment Relation*² upon which this policy brief is based.

Key points:

Ten years after becoming EU primary law, the Charter of Fundamental Rights of the European Union has:

- not been promoted effectively enough by all EU institutions in their day-to-day legal and political actions, particularly when adopting EU directives;
- been used by the Court of Justice of the European Union (CJEU) to prevent a more progressive interpretation of EU Directives as well as to block a more progressive implementation by Member States of directives in the field of labour law. Furthermore, by blocking the accession of the EU to the European Convention of Human Rights, the CJEU has restricted the task of ensuring that the EU institutions' uphold the human rights laid down in the Charter to a purely internal EU control.

Certain hurdles therefore still need to be overcome to ensure that the Charter lives up to the expectations that it created, particularly within the European trade union movement and community of legal scholars. The Charter was intended to and should guide the EU institutions, and in particular the Commission and the CJEU, towards a full recognition and promotion of fundamental social rights for all EU citizens, especially workers. However, this potential of the Charter has so far remained largely untapped.

The three lives of the Charter

The Charter of Fundamental Rights of the European Union (hereafter the Charter or CFREU) has lived three lives. It started as an idea, with more or less a decade passing between its initial conception in 1989 (in the form of the Community Charter of Fundamental Social Rights of Workers, or the 'Community Charter') and its formal adoption in 2000. It then took nearly another decade for it to acquire binding force via the Lisbon Treaty in 2009. Now, ten years after its entry into force, it is time to assess whether the current Charter has really delivered for the workers of the European Union, and if so, what. This is exactly the challenge taken up in the new book of the European Trade Union Institute's (ETUI) Transnational Trade Union Rights (TTUR) network, *The Charter of Fundamental Rights of the EU and the Employment Relation* (Dorssemont *et al.* 2019).

The adoption of the Charter and its promotion as an instrument of primary EU law clearly generated 'great expectations', particularly

within the European trade union movement. The European Trade Union Confederation (ETUC) advocated the adoption of the Lisbon Treaty as representing significant progress (ETUC 2009). Nearly a decade later, though, it is not certain that these expectations have been met. However, such a question needs to be analysed with great care. First, a distinction must be made between the different roles that various EU institutions, bodies, offices and agencies, as well as the Member States, play(ed) in working to 'respect the rights, observe the principles and *promote* the application' of the Charter, as framed in Article 51(1). Secondly, a decade is perhaps too short a time period to draw a final assessment of the full impact of the Charter which is after all to be conceived as a 'living instrument'.

1 For more information on the ETUI TTUR: <https://www.etui.org/Networks/The-Transnational-Trade-Union-Rights-Experts-Network-TTUR>
2 Dorssemont *et al.* 2019.

The potential of the Charter in contributing to the improvement of working conditions needs to be assessed from different angles. Questions arise regarding:

- a) whether the Charter has played a role in strengthening what we call the 'social constitution' of the European Union
- b) whether the Charter's rights have been effectively promoted by all EU institutions in their day-to-day legal and political actions, particularly when adopting EU directives
- c) whether the Court of Justice of the European Union (CJEU or the Court) has effectively used the Charter
 - to interpret EU legal provisions relevant to workers in a progressive way and/or to prevent Member States from implementing so-called 'minimum directives' in a way more favourable to workers;
 - to combat EU directives judged incompatible with the rights stemming from the Charter;
 - to empower national judges to disapply national law which is incompatible with EU directives which are based on rights stemming from the Charter.

What has been delivered?

Contrary to the adoption of the original Community Charter, neither the adoption of the Charter nor the fact that it acquired binding force as an instrument of primary EU law has actually stimulated the Commission to schedule in any systematic way a range of legislative projects based on the use of conferred competences. As the Commission is, in legal terms, the 'guardian' of the Treaty on European Union (Article 17(1) TEU), it is obliged to promote the Charter but has failed to do so. In fact, since 2008, the Commission has abandoned its previous intention of setting a social policy agenda. In fact, the last Commission communication related to social policy hardly referred to the Charter (European Commission 2008). Admittedly, the recent proclamation of the European Pillar of Social Rights (EPSR), albeit non-legally binding and not part of primary EU law, seems to have created a (positive) shift of direction in this regard.

The question of whether the Charter has been helpful in preventing or remediating violations of fundamental rights by EU institutions, offices, agencies or bodies is harder to tackle. It is undeniable that directives with an impact in the field of social policy have rarely been challenged on the basis of the Charter. For instance, the age limit for pilots in the civil aviation industry was found to be compatible with the prohibition of discrimination in Article 21 and with the right to work in Article 15 CFREU.³ Criminal law sanctions in cases of offences regarding the working time of lorry drivers were considered to be compatible with the principle of legality in criminal proceedings (Article 49(1) CFREU).⁴

3 CJEU, 5 July 2017, C-190/16, *Fries*.

4 CJEU, 20 December 2017, C-102/16, *Vaditrans*.

The central role of the European Commission in imposing austerity policies that have negatively affected the social *acquis* (the common body of laws defining the social policy of the EU) at national level has been repeatedly challenged by individuals and trade unions on the basis of the Charter (Bruun *et al.* 2014). However, the CJEU has been very reluctant to scrutinise the role of EU institutions acting within the framework of the new economic governance (although the *Ledra Advertising* and *Florescu* cases might constitute a turning point).⁵

The bulk of the case law in which the Charter has been invoked relates to cases concerning actions by countries when implementing EU law, because this is the only instance where the Charter is binding for Member States. This requirement inevitably weakens the impact of the Charter in general and, in particular, in subject areas which concern fundamental rights that fall outside the scope of EU competences or have not yet given rise to EU legislation. Hence the exclusion of pay, the right of association, the right to strike and the right to impose lock-outs, from EU competences (Article 153(5) TFEU) has been an obstacle to getting the full value of a number of Charter provisions (such as Article 12 on freedom of assembly and association and Article 28 with regard to collective action). Nor has the Charter a clear added value when it comes to ensuring the right to fair and just remuneration because it does not refer explicitly to this right.

A number of Charter provisions constitute a challenge in view of the lack of immediately relevant EU directives adopted on the basis of existing competences enshrined in the Social Policy Title of the Treaty on the Functioning of the European Union (TFEU). These gaps can be filled by pointing out relevant legal materials adopted outside the Social Policy Title that are relevant for the employment relation (Article 5 on the prohibition of slavery and forced labour,⁶ Article 8 on the protection of personal data,⁷ and Article 17(2) on intellectual property⁸) or by giving substance to a provision that seems extremely abstract (Article 1 on human dignity).⁹ The identification of these instruments may prove to enhance the value of a number of Charter provisions.

However, the mere fact that Member States are acting outside the field of EU competences or within an ambit in which the EU has not yet used its competences, or that they are implementing an EU 'minimum directive' in a more progressive way, does not mean that they will be completely shielded from the impact of the Charter. The nature of this impact might in these cases be different. As the

5 CJEU, 13 June 2017, C-258/14, *Florescu and others*, and 20 September 2016, C-8/15 P to C10/15 P, *Ledra Advertising and Others*.

6 E.g. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

7 E.g. the Data Protection Directive 95/46/EC as well as to the recent General Data Protection Regulation (EU) 2016/679 (GDPR).

8 E.g. the Directives on Computer programs (91/250/EEC, later readopted codified version 2009/24/EU), Databases (96/9/EC), Copyright/Information Society (2001/29/EC), Civil enforcement (2004/48/EC), the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (2016/943/EU).

9 E.g. in anti-discrimination directives (Directives 2006/54, 2000/78 and 2000/43).

Charter will not apply, it will not serve as a catalyst for progressive development and interpretation (*Rechtsfortbildung*) of labour law.

There are two distinct scenarios in which the Charter could be linked to an EU directive implementing one of its provisions. In the first scenario, an EU directive is seen as a piece of legislation promoting or elaborating a fundamental right in the Charter that is relevant to workers; in such a scenario, the provisions of the Charter could be beneficial in two ways. First, it could serve as a catalyst for a more progressive interpretation of an EU directive that elaborates and fleshes out such a right. Then, the CJEU would not just compel national judges to interpret national law in conformity with EU directives, it would also interpret EU directives in conformity with the Charter. However, so far the Court has not used these conceptual resources in a systematic way.

The second beneficial way in which the Charter might have an impact is if the rights enshrined within it were to be construed as general principles of EU law, empowering national judges to disapply national provisions which implement EU directives not in conformity with the Charter.¹⁰ One might argue that the Charter thus generates a 'horizontal effect', since it can be employed in disputes between individuals.

In practice, however, the Charter has been used to block a more progressive interpretation of EU directives and, worse, to block a more progressive implementation of minimum directives in the field of labour law. This is the second scenario and it could explain not only why expectations have not been met, but why the Charter has proved to be sometimes even counterproductive. The Charter has given an unprecedented fundamental rights status to purely economic principles, thus confirming the predominance of its economic constitution. Therefore, the right to conduct a business has been successfully applied in areas such as collective redundancies, transfers of undertaking and discrimination in order to undermine workers' rights.¹¹

What is a 'worker'?

A number of provisions explicitly or implicitly refer to workers and/or employers as holders of the rights enshrined in the Charter.¹²

10 For a recent example, see CJEU 17 April 2018, C-414/16, *Egenberger*, para 76: 'That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'. For an even more recent example, outside the sphere of discrimination: CJEU, 6 November 2018, C684/16, *Max-Planck-Institut*.

11 See CJEU, 9 March 2006, C-499/04, *Werhof*; CJEU, 18 July 2013, C-426/11, *Alemo-Herron*; CJEU (GC), 21 December 2016, C-201/15, *AGET Iraklis* and CJEU, 14 March 2017, C-157/15, *Achbita*.

12 For examples of workers being explicitly mentioned as rights-holders, see the right to the protection in the event of unjustified dismissal (Article 30), the right to information and consultation (Article 27), the right to collective bargaining and collective action (Article 28), and the right to fair and just working conditions (Article 31). For examples of employers being explicitly mentioned, see the right of collective bargaining and action (Article 28). For implicit references to workers as rights-holders, due to the reference to 'work', see the freedom to choose an occupation and right to engage in work (Article 15) and the protection of young people at work (Article 32). Moreover, although the word work is not used in the provision, it makes sense to assume that the right of access to a

The question then inevitably arises: who are these workers? Just as in the Community Charter, the Charter does not define the notion.

In her contribution to our book, Unterschütz indicates two hurdles to an extensive interpretation of the notion of worker. First, in a number of EU directives intimately related to the fundamental rights enshrined in the Charter, the notion of 'worker' is defined in reference to national law (Unterschütz 2019).¹³ Secondly, the CJEU's autonomous approach to the concept of worker, elaborated in a number of cases, is still indebted to the enigmatic concept of 'subordination' and is therefore not helpful for extending the application of EU directives to genuine self-employed workers. Contrary to this, a recent decision of the European Committee of Social Rights (ECSR) – the main monitoring body of the Council of Europe's European Social Charter (ESC) – stating that 'self-employed workers should enjoy the right to bargain collectively through organisations that represent them, including in respect of remuneration for services provided' is evidence of a broad interpretation of the notion of 'worker'.¹⁴ The ILO supervisory bodies have also adopted a much broader approach, even in sensitive issues like the right to strike and the right to collective bargaining (ILO 2018, nr. 1285).

Interpreting the tool

The Charter constitutes a Bill of Rights protecting European citizens against the EU institutions and Member States implementing European law. The task of ensuring that the institutions uphold human rights will be restricted to a purely internal control stemming from the CJEU. The Lisbon Treaty made an attempt to support human rights protection by enshrining a constitutional obligation to accede to the European Convention on Human Rights (ECHR), thus providing leeway for an external control on human rights (Article 6(2) TEU). However, the CJEU has blocked this accession through the exercise of a veto right, qualified as an 'Opinion'.¹⁵

The lack of external control could be remedied if the CJEU were to take into account elements of international law other than the Charter, and the interpretation of such elements by competent organs. Such an approach would be consistent with the way in which the European Court of Human Rights (ECtHR) has pledged to interpret the ECHR (Lörcher 2013). It would strengthen an idea of international co-operation and increase the credibility of the discourse on the so-called 'dialogue between (Supreme) Courts'. Above all it would prevent the fragmentation of case law, or even worse conflicting case law, of European law.

free placement service refers to a worker (Article 29). Last but not least, although the provision does not refer to work or workers, it is clear that the right of everyone to form and to join trade unions for the protection of his or her interests is held by workers (Article 12). Finally, there is implicit reference to workers in Article 5 on the prohibition of forced labour.

13 Veneziani (2019) has also pointed out that seafarers were originally excluded from the application of the most significant EU directives in the field of information and consultation, although they are workers under the law of the Member States.

14 ECSR, 12 December 2018, No.123/2016, *Irish Congress of Trade Unions v. Ireland*, paras. 95.

15 CJEU, Opinion 2/13 of 18 December 2014.

The Charter enshrines such an idea: it states that ‘the rights enshrined in the Charter that correspond to those protected by the ECHR should (at least) have the same meaning and scope as the latter’ (Article 52(3) CFREU). Such a statement only makes sense if the CJEU interpreted these rights in light of the case law of the ECtHR, which the Charter, according to the Preamble, is said to reaffirm. Lörcher (2019) pushes this demand of intertextual interpretation a step further, arguing that Article 53 CFREU puts forward that international standards ratified by all the Member States constitute a minimum level of protection that has to be taken into account.

On the basis of a quantitative analysis of the references in the case law related to labour law directives to which the explanations refer, Lörcher has proved that the CJEU has refused to take the Charter into account in any systematic or consistent way. Even more worrying is the fact that the CJEU, in our modest opinion, has interpreted some of the rights enshrined in the Charter in a way that is at least at variance and even in complete contradiction with the case law of the ECtHR. In the *Werhof* case, the CJEU invented a nexus between the duty to apply a collective agreement signed by an employers’ organisation to which an employer is not affiliated and the violation of the negative freedom of association.¹⁶ It invoked the ECtHR’s *Gustafsson v Sweden*¹⁷ judgment in which the existence of such a nexus was explicitly denied.

Enforcing the tool

The enforcement of the Charter is primarily based upon a judicial machinery. The Charter has not instituted any quasi-judicial machinery monitoring the implementation of the Charter rights despite the obligation of the EU institutions and the Member States to promote them. Neither has the Charter empowered collective actors at EU level to supervise the respect of these rights through any mechanism of industrial relations. Article 47 CFREU is the only provision dealing with enforcement and it relies solely on an individual’s right to an effective remedy before a tribunal. The recent proposal of a directive on the protection of persons reporting on breaches of EU law, which seeks to protect whistleblowers as actors of enforcement of EU law, as well as the political agreement reached in tripartite negotiations on 11 January 2019, cannot be seen as providing an effective alternative mechanism (European Commission 2018; see also Cobbaut 2019).

The Charter essentially has two generic judicial guardians: the CJEU and the judiciaries of the Member States. In the Preamble, both judiciaries are called on to ‘interpret’ the Charter. While the human and particularly social rights instruments of the Council of Europe are mostly considered to be solely addressed to the Contracting Parties,¹⁸ the Charter is addressed primarily to the institutions of the European Union and to the Member States *solely* when they are implementing EU law.

Furthermore, more research should be done on the way in which national courts have used the Charter in interpreting or assessing national rules implementing EU law. The French Cour de Cassation (court of appeal), in a landmark judgment of 13 February 2019, for example, referred to the principle of non-discrimination (Articles 21 and 23 CFREU) in order to shield an attack on a French law imposing proportionate representation of men and women during the election for workers’ representation. The French law concerned was considered to be implementing EU Directive 2002/14, which does not directly deal with the issue of representation or refer in this respect to the law of the Member States.

The ability to invoke some of the rights of the Charter, that are qualified as principles before the CJEU, is hampered by Article 52(5) CFREU. This provision reduces their judicial potential in the interpretation of the acts implementing these principles and in the ruling on their legality. In the case *Association de médiation sociale*,¹⁹ the CJEU missed an excellent opportunity to clarify this distinction between rights and principles by adding a supplementary layer of confusion. It made a distinction between provisions of the Charter having a direct effect and those deprived of such an effect. The disqualification of the right to information and consultation as a provision with a direct effect deprived the provision concerned (Article 27 CFREU) of much of its potential.

Rasnača (2019) argues that the likelihood of convincing the CJEU to make use of the Charter, is not only affected by the nature of the procedures, but above all by the limited access trade unions might have to that CJEU. Whereas the CJEU will block more progressive interpretations and implementations of the social *acquis*, trade unions will have major difficulties attacking EU instruments that are detrimental to the social standards enshrined in the Charter through the annulment procedure. They cannot trigger an infringement procedure and the chances they could make their point in a preliminary procedure are entirely dependent upon the willingness of national judges to submit preliminary questions. Inevitably, the question arises as to what extent this state of things is compatible with the constitutional obligation of all the EU institutions to recognise and promote the role of social partners at the European level (Article 152(1) TFEU).

Conclusions

Even if the Charter is hardly to be described as a ‘social constitution’ (see Deakin 2019) it contains important elements thereof. In combination with the overall values and certain objectives of the EU (Articles 2 and 3 TEU) it should guide the EU institutions and in particular the CJEU in the direction of full recognition and promotion of fundamental social rights in the everyday life of EU citizens and workers in particular. However, our analysis proves that we are far from achieving this and that certain hurdles still need to be overcome to ensure that the Charter lives up to the expectations it has created.

16 CJEU, 9 March 2006, C-499/04, *Werhof*.

17 See ECtHR, 25 April 1996, No 15573/89, *Gustafsson*.

18 ‘This does not exclude that national judiciaries might attribute a direct effect to certain ESC provisions, just as they tend to do with regard to ECHR provisions.’

19 CJEU, 15 January 2014, C-176/12, *Association de médiation sociale*.

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The *ETUI Policy Brief* series is edited jointly by Jan Drahoukoupil, Philippe Pochet, Aída Ponce Del Castillo, Kurt Vandaele and Sigurt Vitols.

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The ETUI is financially supported by the European Union.

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