

# The Charter of Fundamental Rights of the European Union and the Employment Relation

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**etui.**

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OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

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A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Dorssemont, Filip, editor. | Lörcher, Klaus, editor. |  
Clauwaert, Stefan, editor. | Schmitt, Mélanie, editor.

Title: The Charter of Fundamental Rights of the European Union and the Employment Relation /  
edited by Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt

Description: Oxford, UK ; Portland, Oregon : Hart Publishing, 2019. |  
Includes bibliographical references and index.

Identifiers: LCCN 2018052378 (print) | LCCN 2018055176 (ebook) |  
ISBN 9781509922666 (Epub) | ISBN 9781509922659 (hardback)

Subjects: LCSH: Labor laws and legislation—European Union countries. |  
Charter of Fundamental Rights of the European Union (2000 December 7)

Classification: LCC KJE2855 (ebook) | LCC KJE2855 .C476 2019 (print) | DDC 344.2401—dc23

LC record available at <https://lccn.loc.gov/2018052378>

ISBN: HB: 978-1-50992-265-9  
ePDF: 978-1-50992-267-3  
ePub: 978-1-50992-266-6

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



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# 1

## *Introduction*

KLAUS LÖRCHER, FILIP DORSSEMONT, STEFAN CLAUWAERT  
AND MÉLANIE SCHMITT

‘Labour rights are human rights.’ This principle is expressed in the Charter of Fundamental Rights of the European Union (Charter or CFREU), the most developed and comprehensive legally binding human rights instrument – also in the social field – at EU level. In this respect it is – or at least should be – becoming more and more important. It is well known that this instrument is the first to include both civil and political rights, on one hand, and social rights, on the other, after a very long period of separation between the so-called first- and second-generation human rights.

### I. CONTEXT

The Court of Justice of the European Union’s (CJEU) jurisprudence on CFREU has been increasing, dealing with a number of articles. However, only rarely has it dealt with fundamental social rights. Given this context, and after nearly a decade since the Charter became legally binding, this makes it all the more relevant to focus now on CFREU employment rights and to explore them in detail.

A first assessment of the CFREU by the European Trade Union Institute (ETUI) Transnational Trade Union Rights network (TTUR)<sup>1</sup> took place under the leadership of Brian Bercusson, three years before the Charter became legally binding.<sup>2</sup> Several *new developments* have taken place in the meantime. Without being exhaustive, one might refer in particular to the following:

- the CFREU is now legally binding;
- the (CJEU’s) jurisprudence using or referring to the CFREU is increasing;<sup>3</sup>

<sup>1</sup>For more information on the TTUR, its activities and publications, see: <https://www.etui.org/Networks/The-Transnational-Trade-Union-Rights-Experts-Network-TTUR>.

<sup>2</sup>B Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Baden-Baden, Nomos Verlag, 2006).

<sup>3</sup>The CJEU’s Grand Chamber judgments of 6 November 2018 on Article 31(2) of the Charter were published following the delivery of the manuscripts. Accordingly, they are not dealt with in detail but only referred to in the chapters most concerned.

- the reports on the CFREU’s implementation (Commission, Parliament, Fundamental Rights Agency (FRA)) are at least sometimes becoming points of reference;
- the still increasing and sometimes already overwhelming quantity of academic literature (commentaries, articles, analyses and so on);
- the problems related to ‘Better Regulation’, REFIT, Economic Governance, Brexit and so on; and finally,
- the impact of the recently proclaimed European Pillar of Social Rights.

The *wider European legal context* has already been analysed by the TTUR Group with two main publications putting the employment relation at the heart of human rights standards coming from the Council of Europe:

- The European Convention on Human Rights and the Employment Relation (hereinafter: the ECHR publication);<sup>4</sup>
- The European Social Charter and the Employment Relation (hereinafter: the ESC publication).<sup>5</sup>

## II. OBJECTIVES

It is against this background that this publication will complete the ‘European human rights trilogy’ concerning the ‘employment relation’.<sup>6</sup>

In putting this publication together, in principle we envisaged applying the same approach as in the two previously mentioned books:

- providing arguments for the justiciability of social rights;
- making the employment rights in the CFREU more widely known in legal circles;
- being part of a development giving those rights more visibility by contributing to the increasing (legal) debate;
- contributing to strengthen the impact of the social rights also in respect of Europe’s fundamental rights architecture, in particular with regard to the Council of Europe’s instruments (ECHR and ESC), but thereby also taking into account in particular the international dimension (UN and ILO);

<sup>4</sup>F Dorsemont, K Lörcher, I Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Oxford, Hart Publishing, 2013).

<sup>5</sup>N Bruun, K Lörcher, I Schömann, S Clauwaert (eds), *The European Social Charter and the Employment Relation* (Oxford, Hart Publishing, 2017).

<sup>6</sup>See for the further two books elaborated by the TTUR Group: N Bruun, K Lörcher, I Schömann (eds), *The Economic Crisis and Collective Labour Law* (Oxford, Hart Publishing, 2014); N Bruun, K Lörcher, I Schömann (eds), *Lisbon Treaty and Social Europe* (Oxford, Hart Publishing, 2012).

- taking account within the framework of the description of the context (including, if appropriate, real problems in the world of work, such as possible data on non-implementation, austerity measures, digitalisation and so on);
- looking at gaps in the explicit guarantee of fundamental social rights that cannot be solved by (progressive) interpretation;
- providing guidance to trade unions, NGOs and others on how to make use of the Charter in order to defend and promote fundamental social rights in the world of work.

In particular, the last four indents could be considered to be the ‘added value’ of this publication.

### III. STRUCTURE AND CONTENTS

From an editorial point of view, the *general structure* of this publication was also envisaged to be in harmony with the ECHR and ESC publications. First, the subject is approached from two angles.

Part I (‘General Part’) is aimed at dealing with all relevant transversal questions. This includes the description and analysis of the general framework of the Charter in the following introductory chapters:

- the CFREU and its specific role of protecting fundamental social rights (including Articles 2, 3 and 6 TEU);
- the CFREU in the future of Europe (dealing with problems and challenges coming from, inter alia, ‘Better Regulation’, REFIT, European Pillar of Social Rights and Brexit);
- the EU’s Social Constitution in relation to the ‘Economic Constitution’.

Before starting with the comments on the specific rights guaranteed by the Charter, the general concept of the ‘employment relation’, as well as the impact of the ‘horizontal’ provisions in Title VII (Articles 51–53) are also addressed. With regard to the latter, it appeared useful to separate their respective contents by theme, not by the order of the Articles concerned. Accordingly, three chapters address the following:

- the concept of the ‘Employment Relation’ (containing, as transversal substantive issues, in particular the definition of ‘workers’ and ‘employers’);
- the ‘Field of Application and Limitations’ (Articles 51 and 52(1)). This core issue pays specific attention to the addressees of the Charter – on one hand, the EU, and on the other hand, the Member States implementing EU law – and addresses the general framework for assessing the conformity of limitations on the Charter’s rights;

- ‘Interpretation and Minimum Level of Protection’ deals in particular with the Preamble, as well as with Articles 52(2) to (7) and 53.

Finally, and also in line with the ECHR and ESC publications, a specific chapter on procedure before the EU courts (mainly Articles 263(4) and 267 TFEU) also reflects on possible litigation strategies for trade unions.

Part II (‘Specific articles’) provides legal analyses of the individual articles addressing issues of the employment relation. Here, a (difficult) choice had to be made concerning which articles should be commented on. Of course, those Articles that appear to be of particular importance are analysed: Articles 1, 5, 7, 8, 10, 11, 12, 15, 16, 17(2), 20, 21, 23, 27, 28, 30, 31, 32, 33 and 47. Conversely, Articles that have only a certain link to the employment relation, but which are considered to be of minor importance are not commented on separately, but possibly referred to in the comments on other Articles (eg Article 17(1) in the chapter on Article 16, Article 26 in the chapter on Article 21 and Article 29 in the chapter on Article 15).

In order to provide readers with a transparent *structure* of the commentaries in *Part II* (Specific Articles) it is oriented towards the following guidelines:

#### I. Introduction

- A. Context and main contents
- B. Relationship to other provisions of the Charter
- C. Relationship to other relevant instruments
  - i. EU instruments*
  - ii. Council of Europe instruments*
  - iii. ILO instruments*
  - iv. UN instruments*
  - v. Other instruments (if appropriate)*

#### II. Contents

- A. General observations
- B. Field of application
- C. Specific rights
- D. Limitations
- E. Enforcement

#### III. Conclusions

In order to show, as much as possible, the material scope of the provisions, the focus of the commentaries will be on ‘Specific rights’ (II.C). Thus, readers might find more easily what might be most relevant in the context of the ‘employment relation’. However, the material scope has to be distinguished from the ‘Field of application’ (Article 51(1)), which defines the ‘door opener’ for the application of the Charter in relation to Member States, to whom it can be applied ‘only when they are implementing Union law’. According to the provision, the fundamental rights are also addressed to the EU institutions. Therefore, several

contributions explicitly refer to so-called ‘staff cases’ (ie cases involving persons employed by the EU institutions), in particular when implementing acts (such as Directives) are lacking.

#### IV. CONCLUSIONS

It is hoped that this publication will contribute to increasing and enhancing people’s awareness and the impact of the fundamental social rights in the employment relation, thus encouraging academics and legal practitioners (not least, judges at national and, in particular, EU level) to take up the Charter as a vibrant instrument for protecting and promoting social rights in Europe.

Although all the contributions have been extensively discussed in the TTUR network, the individual authors bear sole responsibility for their own contributions, which do not necessarily reflect the views of the other authors of this volume.