

PROTECTION OF SOCIAL RIGHTS AS A PERMANENT CHALLENGE FOR THE EUROPEAN UNION

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ABSTRACT

Social rights protection in the European Union has undergone significant development. Currently their protection is regulated by relevant treaty provisions and the Charter of Fundamental Rights (Charter), both of a primary law nature, as well as by the non-binding European Pillar of Social Rights (Pillar). The aim of the paper is the assessment of the social rights protection in the EU, and whether all social rights provided in the CFR have their counterparts in the EPSR, hence whether and in what way the EPSR assists the actual exercise of social rights provided by the CFR. Comparing the content of the above-mentioned legal instruments makes it possible to answer the question whether all social rights provided in the Charter have their counterparts in the Pillar. This can help determine whether the latter affects the implementation of the former. If the answer is in the affirmative, it can further allow for determining in what way the principles of the Pillar assist in the actual exercise of social rights provided by the Charter. This is very important taking into account the need for an ongoing response to unforeseen threats, like for example COVID-19. The social aspects of EU integration thus are and will remain a subject of interest in the nearest future.

Keywords: Charter of Fundamental Rights, Social Pillar, social rights, European Labour Authority, Social Scoreboard

The research for this paper has been supported by the Polish National Science Centre (decision no. 2015/17/B/HS5/00419).

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1. INTRODUCTION

The main goal of the former European Communities was to create a common market, including the free movement of products (goods and services) and factors of production (labour and capital). Other issues, such as social ones, were to remain within the scope of regulation of individual countries¹. Gradually however they also became a matter of cooperation at the Community level, and later at the European Union (EU) level. Apart from many non-binding documents that highlighted the importance of the ‘social dimension of the internal market’², one should primarily focus on the relevant treaty regulations. Pursuant to the Treaty of Amsterdam, the Social Protocol was incorporated into the treaty provisions as a separate title – today’s Title X: Social policy.

An unquestionable factor in the strengthening of the significance of fundamental rights, including those of a social character, is the binding legal force of the Charter of Fundamental Rights of the European Union (CFR or Charter)³, as provided by Article 6 TEU. The CFR’s provisions can be treated as an attempt to correct the ‘social deficit’ by eliminating uncertainty about the status and position of social rights in the EU legal order⁴. Its provisions take the form of rights, freedoms, and principles. Most of the social rights which are provided for in the CFR can be classified as provisions containing elements of both rights and principles. This

¹ Catherine Barnard, “Regulating Competitive Federalism in the European Union? The case of EU Social Policy,” in *Social Law and Policy in an Evolving European Union*, ed. Jo Shaw (Oxford-Portland: Hurt Publishing, 2000), 53.

² See Economic and Social Committee opinion on the social aspects of the internal market (European social area) (O.J.E.C. C365, 11 February, 2011); Green Paper on European Social Policy, COM(93) 551 final; White Paper on European Social Policy – A way forward for the Union, COM(94) 333 final; Council resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union (O.J.E.C. C368, 23 December, 1994).

³ Charter of Fundamental Rights of the European Union, 2012/C 326/391, 26 October 2012.

⁴ Miguel Poiares Maduro, “The Double Constitutional Life of the Charter,” in *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, ed. Tamara Hervey and Jeff Kenner (Oxford-Portland Oregon: Hurt Publishing, 2003), 284–286.

is unfortunately not conducive to ensure an adequate level of legal certainty for the participants in the internal market. Rights and freedoms are the basis for individual claims, while principles can only be relied upon to interpret and control the legality of legal acts. One can ask the question whether additional legal measures are needed to improve this situation. If the answer is in the affirmative, should the European Pillar of Social Rights (EPSR or Pillar) be assessed in such a way? Its programmatic nature distinguishes it as more than just a duplication of the social rights contained in the CFR⁵. The Pillar 'is to serve as a guide towards (...) ensuring better enactment and implementation of social rights'⁶. It reaffirms rights already present in the EU and in the international legal *acquis* and complements them by taking account of new realities. It seeks to render them more visible, more understandable, and more explicit for citizens⁷.

The aim of the paper is the assessment of the social rights protection in the EU, and whether all social rights provided in the CFR have their counterparts in the EPSR, hence whether and in what way the EPSR assists the actual exercise of social rights provided by the CFR. The Pillar as such has already been a subject of very interesting research both in a general way and on specific issues⁸. None of them had however explicitly or

⁵ Sacha Garben, "The European Pillar of Social Rights and the European Social Charter," *Europe des droits & libertés/Europe of Rights & Liberties*, no. 1 (2020): 65–78.

⁶ Interinstitutional Proclamation on the European Pillar of Social Rights, (O.J.E.C. C428, 13 December, 2017).

⁷ Communication from the Commission to the Parliament, Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Pillar of Social Rights, COM (2017) 250 final, para 6.

⁸ Look especially at: Klaus Lörcher and Isabelle Schömann, *The European pillar of social rights: critical legal analysis and proposals* (Brussels: ETUI, The European Trade Union Institute, 2016); Sacha Garben, Clarie Kilpatrick and Elise Muir, "Towards a European Pillar of Social Rights: upgrading the EU social *acquis*," *College of Europe Policy Brief* 1 (2017); Clarie Kilpatrick, Elise Muir and Sacha Garben, "From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy EU Law Analysis Blogpost," (20 March 2017), assessed April 21, 2020, <https://eulawanalysis.blogspot.com/2017/03/from-austerity-back-to-legitimacy.html>; Olivier De Schutter, "The European Pillar of Social Rights and the Role of the European Social Charter in the EU legal order," (14 November 2018), accessed September 2, 2020, <https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132>; Sacha Garben, "The European Pillar of Social Rights: Effectively Addressing Displacement?" *European Constitu-*

completely devoted its attention to the relationship between the CFR and the EPSR. One can put a hypothesis that social rights are indeed protected in the EU and the EPSR is much broader in the scope of rights than the CHR, considering in particular that most of the provisions on social rights provided for in the CFR are classified as principles in a rather general way. The level of its protection depends however on the scope of division of competences between the EU and its Member States, what can be seen in the content of the above-mentioned legal acts and other related documents. Those documents (of both binding and non-binding nature, like relevant Treaty provisions, directives, regulations and communications) have been the basis of the analyses carried out in this article, therefore the formal and dogmatic research method has been largely used. To determine whether all social rights provided in the CFR have their counterparts in the EPSR the different categories of social rights protected in the EU legal order had to be analysed. Carrying out this analysis has been possible thanks to the use of the deductive research method, which allowed for further attempts to answer whether and in what way the EPSR assists the actual exercise of social rights provided by the CFR. It was also necessary to conduct theoretical and legal research aimed at gaining knowledge on the mechanisms guaranteeing the protection of social rights in the EU legal order.

This is why the main aims of the EPSR, together with its twenty principles, are discussed at the beginning of this text (in Part 2). This is necessary in order to make a comparison between them and the social rights protected under the CFR's provisions (Part 3). This comparison will make it possible to answer the question whether all social rights provided in the CFR have their counterparts in the Pillar, and further assess whether the latter affect the implementation of the former, and if so to what extent? An appropriate assessment of social rights protection in the EU requires an examination of various initiatives that have been taken so far. This is why not only the European Labour Authority and the European Social Fund, but also the European Semester and the Social Scoreboard will be

tional Law Review 14, no. 1 (2018); Sacha Garben, "The European Pillar of Social Rights: An Assessment of its Meaning and Significance," *Cambridge Yearbook of European Legal Studies* 21 (2019); Garben, "The European Pillar of Social Rights and the European,".

discussed (Part 4). In Part 5 concluding remarks are offered, together with a summary of the previous analyses.

2. THE EUROPEAN PILLAR OF SOCIAL RIGHTS AND REAL ECONOMIC UNION

In September 2015, the former President of the European Commission Jean Claude Juncker announced the development of the EPSR, which was to ‘take account of the changing realities of Europe’s societies and the world of work’⁹. This initiative was aimed at complementing what has already been achieved when it comes to the protection of social rights in the EU. There are close interlinkages between the EU Member States’ economies and labour markets and therefore policy choices in one Member State often spill-over into others¹⁰. The EPSR draft outlines were presented by the European Commission on 8 March 2016, leaving it for extensive public consultations, which lasted until the end of 2016¹¹. As a result of these consultations, its final version was presented by the Commission on 26 April 2017 and was jointly signed by the European Parliament, the Council and the Commission on 17 November 2017 at the Social Summit for Fair Jobs and Growth in Gothenburg, Sweden. It should be stressed that the new European Commission President – Ursula Von der Leyen – has pledged in her political guidelines to keep the implementation of the EPSR as one of the Commission’s priorities¹².

⁹ Speech of the President of the European Commission Jean Claude-Juncker delivered on 9 September 2015 in the European Parliament on ‘State of the Union 2015: Time for Honesty, Unity and Solidarity’, accessed January 7, 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5614.

¹⁰ European Pillar of Social Rights – Business Europe Contribution to the debate, points 10, 15 and 17 and CEEP Opinion on the European Pillar of Social Rights, para 4.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

¹² A Union that strives for more. My agenda for Europe: political guidelines for the next European Commission 2019–2024, accessed May 5, 2020, <https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1>.

According to the Commission Recommendation¹³, the EPSR has been addressed mainly to the euro area, but the Interinstitutional Proclamation extends it to all Member States¹⁴. There should be no doubt that entitlement to social assistance should not depend on whether a Member State uses the Euro and such approach should be assessed positively¹⁵. The Pillar's scope includes social rights that are already protected at the EU level, while adding some new rules to meet the challenges of social, technological, and economic development¹⁶. It does not however entail an extension of the Union's powers as defined by the Treaties. The main purpose of the Pillar is to assess the EU acquis and clarify the rules that may contribute to greater convergence, while respecting the competences of the Member States¹⁷.

The Pillar comprises three basic chapters, which provide twenty principles for its implementation:

- I. *Equal opportunities and access to employment*: 1) education, training and lifelong learning; 2) gender equality; 3) equal opportunities; 4) active support for employment;
- II. *Fair working conditions*: 5) safe and flexible employment; 6) remuneration; 7) information on employment conditions and protection in the event of dismissals; 8) social dialogue and employee involvement; 9) balance between work and private life; 10) healthy, safe and well-adapted work environment and data protection;
- III. *Social protection and social inclusion*: 11) childcare and support for children; 12) social protection; 13) unemployment benefits; 14) minimum income; 15) income from old age and old-age pension; 16) health care;

¹³ Commission recommendation of 26th April 2017 on the European Pillar of Social Rights, C(2017) 2600 final, recital 13.

¹⁴ Interinstitutional Proclamation on the European Pillar of Social Rights (n 6), recital 13.

¹⁵ Garben, "The European Pillar of Social Rights: An Assessment," 110.

¹⁶ The entire EU acquis on social issues has been precisely defined in the Commission Staff working document – The EU social acquis. Accompanying document. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on an European Pillar of Social Rights, SWD(2016) 50 final.

¹⁷ COM(2016) 127 final (n 10) para 3.2.

17) inclusion of people with disabilities; 18) long-term care; 19) housing policy and assistance for the homeless; 20) access to basic services.

Taking into account the above-mentioned principles, there should be no doubt that many of them are important for real economic union and internal market freedoms. This will mainly concern the freedom of establishment and the freedom to provide services, under which employers exercise their cross-border rights according to the appropriate Treaty provisions. Its efficient implementation often requires reconciliation of divergent interests of employees and employers. For example, the need to provide employers with flexibility in adapting to economic changes (e.g. new open forms of employment), and ensuring the appropriate quality of working conditions. Enterprises need a predictable business environment characterised by legal certainty, while employees in turn are interested in employment and income security¹⁸. It is however true that ‘the Pillar has neither been conceived, nor designed, to resolve the clashes between social and market values that have arisen in the area of the internal market’ (or economic governance)¹⁹. It can however in many ways strengthen the awareness of the social rights that are guaranteed by EU law.

3. CATALOGUE OF SOCIAL RIGHTS PROTECTED AT THE EUROPEAN UNION LEVEL

3.1. Introductory remarks

Because the EPSR is the second EU initiative concerning the protection of human rights since the entry into force of the CFR, it is understandable that one should focus its analysis on the provisions of the latter. The scope of its regulations are wide and cover not only political and civil rights, but also social and economic ones. The CFR has the rank of primary law and must be respected by both the EU Member States and its institutions. When identifying the catalogue of social rights in EU law, it

¹⁸ Ibid para 2.3.

¹⁹ Sacha Garben, “The Constitutional (Im)balance between “the Market” and “the Social” in the European Union,” *European Constitutional Law Review* 13, no. 1 (2016).

seems that the main attention should be focused on Title IV of the CFR, entitled “Solidarity”. Deeper analysis of its content allows, however, for identifying a number of other provisions related to the protection of social rights. They can therefore be basically divided into those that are related to the performance of work and those which do not show such a connection (Table 1 below). The inspiration for such a division was the definition of labour law provided in Article 1 of Directive 2006/123/EC²⁰. According to its content labour law includes legal provisions or contractual provisions regarding employment and working conditions, together with health and safety at work and the relationship between employers and employees, remuneration, working time, and holidays²¹.

Table 1: Catalogue of social rights in the CFR and the EFSR

Rights related to taking up and carrying out work		Rights not related to taking up and carrying out work	
Freedom of assembly and association		Right to education	
Article 12 CFR	principle 8 EPSR	Article 14 CFR	principles 1, 11 EPSR
Freedom to choose an occupation and right to engage in work		Rights of the elderly	
Article 15 CFR	principle 8 EPSR	Article 25 CFR	principles 15, 18 EPSR
Equality between women and men		Family and professional life	
Article 23 CFR	principles 2 and 3 EPSR	Article 33 CFR	principles 2, 9 EFSR
Integration of persons with disabilities		Social security and social assistance	
Article 26 CFR	principle 17 EFSR	Article 34 CFR	principles 12, 13, 15, 19, 20 EPSR

²⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (O.J.E.C. L276, 27 December, 2006).

²¹ *Handbook on the implementation of the services directive* (Luxembourg: Office for Official Publications of the European Communities 2007), 15. See also Philip Harvey, “Why is the right to work so hard to secure,” in *The state of economic and social human rights*, ed. Lanse Minkler (Cambridge: Cambridge University Press, 2013), 135–170.

Rights related to taking up and carrying out work		Rights not related to taking up and carrying out work	
Workers' right to information and consultation within the undertaking		Health care rights	
Article 27 CFR	principles 7, 8 EPSR	Article 35 CFR	principle 16 EPSR
Right of collective bargaining and action			
Article 28 CFR	principle 8 EFSR		
Right of access to placement services			
Article 29 CFR	principle 8 EFSR		
Protection in the event of unjustified dismissal			
Article 30 CFR	principle 7 EFSR		
Fair and just working conditions			
Article 31 CFR	principles 5, 6, 7, 10, 14 EFSR		
Prohibition of child labour and protection of young people at work			
Article 32 CFR	principle 4 EFSR		

Source: Own study based on the provisions of the CFR and the EPSR

Each social right protected under the CFR and presented in the Table above has been compared with the principles of the EPSR in order to find its counterparts. This is an outcome of the analytical findings provided in the following sub-part of the text (Point 2 and 3 below).

3.2. Rights related to taking up and carrying out work

Rights related to taking up and carrying out work are very important to workers just from the moment of seeking employment, throughout the performance of work, until its ending. According to the CFR they entail: freedom of assembly and association, freedom to choose an occupation and the right to engage in work, equality between women and men, integration of persons with disabilities, workers' right to information and

consultation within the undertaking, right of collective bargaining and action, right of access to placement of services, protection in the event of unjustified dismissal, fair and just working conditions and prohibition of child labour and protection of young people at work. All those rights have their counterparts, in direct or indirect manner, in the EPSR. The question is if and how they relate to, and compliment, each other (they will be assessed below in the above-mentioned sequence). Trying to compare the relationship between the CFR and the EPSR its main characteristics have to be taken into account. While the former offers a baseline of principles and rights that at least in part represent judiciable rights that are applicable when Member States are implementing or acting within the scope of EU law, the later one is more concerned with coordination, informing, and enforcing of those rights.

In accordance with Article 12 CFR, everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, together with the right to form and to join trade unions. It is worth emphasizing that even before the CFR became legally binding, the CJEU recognized the right to free and peaceful assembly as a fundamental right and a general principle of EU law²². Freedom of assembly and association is indirectly provided in paragraph first of principle eight of the EPSR, which in fact basically corresponds to the provisions of Articles 152 and 154–155 TFEU. The EPSR does not thus mention freedom of assembly and association as such but rather focuses on its subjects, i.e. social partners representing interests of employers and employees, affirming the powers conferred on them by the TFUE.

According to Article 15 CFR everyone has the right to engage in work and to pursue a freely chosen or accepted occupation²³. This means the freedom to seek employment, to work, to exercise the right of establishment, and to provide services in any Member State. There is no straightforward

²² CJEU Judgment of 12 June 2003, Eugen Schmidberger, Internationale Transporte und Planzüge przeciwko Republik Österreich, Case C-112/00, ECLI:EU:C:2003:333.

²³ Even before the CFR came into force this right was referred to by the CJEU, for example the CJEU Judgment of 11 January 1977, J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft, case 4/73, ECLI:EU:C:1975:114 or the CJEU Judgment of 13 December 1979, Liselotte Hauer v Land Rheinland-Pfalz, case 44/79, ECLI:EU:C:1979:290.

principle provided in the EPSR that addresses the above-mentioned issues, which are however indirectly affected by the content of its principle four, concerning active support for employment. There is no doubt that without such a support one could not be able to exercise her/his right to engage in work or change both employment or self-employment if necessary. In this case the EPSR serves rather as a source of information to workers, encouraging Member States to take appropriate action.

Equality between women and men under Article 23 CFR is to be ensured in all areas, including employment, work, and pay. When we look at the EPSR one can see that the above-mentioned rights are generally covered by its second principle on gender equality in all areas, including participation in the labour market, terms and conditions of employment, and career progression. The EPSR's third principle touches however upon one more important aspect of equality between women and men. It stands for equal opportunities regardless of gender when it comes to social protection, education, and access to goods and services available to the public. It is to be achieved, *inter alia*, by a proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures²⁴. Other initiatives that are planned to be brought forward in this area include the European Commission's activity in the framework of the Gender Equality Strategy 2020–2025²⁵, and a proposal for a directive on the gender pay gap – transparency in pay for man and woman²⁶. As one can notice, the issue of equality between women and men is important for both the CFR and the EPSR, which however is much broader and specific in the scope of rights. It covers equality in many areas like e.g. labour market, employment conditions together with equal pay, career progression, social protection or education. Taking into account the above-mentioned legal steps that are to be taken in order to implement the Pillar one can have an impression that we still need more

²⁴ COM(2012) 614 final.

²⁵ Communication from the Commission - A Union of Equality: Gender Equality Strategy 2020–2025, COM(2020) 152 final.

²⁶ Inception impact assessment – Ares(2020)40391, accessed April 24, 2020, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Strengthening-the-principle-of-equal-pay-between-men-and-women-through-pay-transparency>.

legal activity to ensure that women and men are equally treated especially in areas related to remuneration²⁷.

According to Article 26 CFR the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community. The EPSR in its principle seventeen is much broader and specific in its scope than the CHR. It provides rights (not principles) concerning income support that ensures living in dignity, services enabling participation in the labour market and in society, together with a work environment adapted to needs of people with disabilities. One of the measures aimed to implement principle seventeen of the EPSR is Directive 2019/882 providing an environment where products and services are more accessible for persons with disabilities, therefore allowing for a more inclusive society (especially its Article 4.4 and 13.2)²⁸. Not only accessibility or participation but also other areas like employment, education and training, social protection, health or external action still need more attention for persons with disabilities. They have been identified by the European Disability Strategy 2010–2020²⁹ which is currently evaluated by the European Commission, due to the fact that persons with disabilities are still facing difficulties and discrimination in everyday life.

According to Article 27 CFR workers or their representatives must be guaranteed information and consultation in cases related to working conditions. As regards the implementation of this right, the judgment of the CJEU in case C-176/12 *Association de médiation sociale* deserves special attention³⁰. It concerned the determination whether Article 27 CFR may be applied directly between individuals to refrain from applying nation-

²⁷ Compare especially Report from the Commission on the application of Directive 2006/54/EC, COM(2013) 0861 final, p. 2 and 6–11.

²⁸ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (O.J.E.C. L151, 7 Jun, 2019).

²⁹ Text on the European Disability Strategy 2010–2020, accessed April 4, 2020, <https://ec.europa.eu/social/main.jsp?catId=1484>.

³⁰ CJEU Judgment of 15 January 2014, *Association de médiation sociale v. Union locale des syndicats CGT and others*, Case C-176/12, ECLI:EU:C:2014:2.

al law which incorrectly transposed Directive 2002/14/EC³¹. The CJEU pointed out that this Article must be clarified, by EU or national law, as regards when it is to exert its fully-intended legal effects. It cannot therefore, as such, be invoked in a dispute and by itself does not suffice to confer on individuals a right which they may invoke³². Workers' right to information and consultation is also provided in the second paragraph of the EPSR's principle eight and first paragraph of its principle seven. As to employer's obligation to inform its employees about their employment conditions the EPSR extends this obligation also to those on probation. This principle has been implemented by Articles 4 and 5 of the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union³³. It not only complements and modernises the existing obligations of employers, but also ensures more predictability and clarity for workers, including those on atypical contracts. Its provisions address the risks of variable work schedules, such as on-demand work, platform work, or zero-hours contracts³⁴. It is worth mentioning that Directive 2019/1152 also contributes to the implementation of principle five of the EPSR concerning secure and adaptable employment, which is analysed later in the following part of the text.

The right of collective bargaining and action under Article 28 CFR authorizes workers and employers, or their respective organisations, to negotiate and conclude collective agreements, together with collective actions, including strike actions³⁵. One should recall here Article 153.5 TFEU,

³¹ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation (O.J.E.C. L80, 23 March, 2002).

³² Case C-176/12 Association de médiation sociale (n 30) paras 45–49.

³³ (O.J.E.C. L186, 11 July, 2019).

³⁴ For more details, see for example Bartłomiej Bednarowicz, “Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union,” *Industrial Law Journal* 48, no. 4 (2019): 604–623.

³⁵ Brian Bercusson, “The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level,” *TRANSFER* 2 (2003): 216. According to AG Trstenjak, the provisions of Art. 28 CFR (just like its Articles 29 and 31) grant subjective rights, generally because they state that holders of fundamental rights have a ‘right’. Opin-

which states that its provisions shall not *inter alia* apply to the right to strike. The CJEU, in the famous cases C-341/05 *Laval* and C-348/05 *Viking* stated however that it does not mean that the right to strike is totally excluded from EU law³⁶. It is therefore a legitimate interest which can justify a restriction of the internal market freedoms, if the proportionality test is passed³⁷. The need to fulfil the above-mentioned conditions creates the impression that the CJEU's understanding of the right to strike as a fundamental right is more a theoretical than a real one³⁸. This interpretation turned out to be different from the one presented by international control bodies relevant for ensuring compliance with social rights, such as the European Court of Human Rights, the International Labour Organisation Committee of Experts, and the European Committee of Social Rights. They understand the right to strike as a fundamental one which may be restricted only in specific situations, and because of the autonomy of social partners such restrictions should not be assessed according to the principle of proportionality³⁹. The right of

ion of Advocate General Trstenjak delivered on 8 September 2011, ECLI:EU:C:2011:559, para 79; CJEU Judgment of 24 January 2012, Maribel Dominguez przeciwko Centre informatique du Centre Ouest Atlantique i Préfet de la région Centre, Case C-282/10, ECLI:EU:C:2012:33.

³⁶ CJEU Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan i Svenska Elektrikerförbundet, Case C-341/05, ECLI:EU:C:2007:809 and CJEU Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-348/05, ECLI:EU:C:2006:386.

³⁷ Case C-348/05 *Viking* (n 36), paras 77 and 90; case C-341/05 *Laval* (n 36), paras 103 and 107–110.

³⁸ The European Economic and Social Committee: *The Social Dimension of the Internal Market* (O.J.E.C. C44, 11 February, 2011), para 3.4.5.1.

³⁹ ECtHR Judgment of 12 November 2008, *Case Demir and Baykara v. Turkey*, application no. 34503/97, hudoc.int; ECtHR Judgment of 21 April 2009, *Case Enerji Yapi-Yol Sen v. Turkey*, application no. 68959/01, hudoc.int; Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010424, para 208; the International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), ILC.102/III(1A), pp. 176–179; the European Committee of Social Rights decision of 3 June 2013, *Swedish Trade Union Con-*

collective bargaining and action is also provided for in the EPSR. Its principle eight states that social partners have the right to collective action. It however does not resolve (and – what is important – was not intended to do so) the above-mentioned interpretational discrepancy. Currently the task of balancing competing rights of the same value, like the right to strike and internal market freedoms, still lies with the CJEU jurisprudence. According to Article 29 CFR everyone has the right of access to a free placement service, which is the task of the Member States. Active support for employment is also provided in principle four of the EPSR, but in much broader and specific scope than the CHR. It pays therefore special attention also to young people, unemployed persons and the long-term unemployed and includes employment services, such as job-search counselling and guidance, training, hiring subsidies and re-insertion support. It is unquestionable that all the above-mentioned are very important for everyone who wishes to find employment or to lead a dignified life in the event of a job loss. This is one of the reasons why the Commission announced its intention to put forward a proposal for the European Unemployment Reinsurance Scheme (EUBRS), which aims to support those at work and protect those who have lost their jobs because of external shocks⁴⁰. It should safeguard the ability of national unemployment schemes to pay out sufficient unemployment benefits in times of unexpected economic shocks. It seems that the coronavirus pandemic across the EU is accelerating this initiative, taking into account Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak⁴¹. This can be seen as a kind of emergency operationalisation of the EUBRS, designed to respond immediately to different challenges, including currently fighting the effects of COVID-19.

federation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Case 85/2012, paras 72–74 and 107.

⁴⁰ Communication from the Commission – Work Programme 2020: A Union that strives for more, COM(2020) 37 final, para 5.

⁴¹ (O.J.E.C. L159, 20 May, 2020).

Protection in the event of unjustified dismissal is provided for in Article 30 CFR. Unjustified or unfair dismissal of employees contradicts the European social model implemented within the EU, and protection therefrom deserves to be called a fundamental right⁴². The EPSR, in the second paragraph of its principle seven, provides in more detailed way that prior to any dismissal workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access effective and impartial dispute resolution and, in cases of unjustified dismissal, a right to redress, including adequate compensation. The EPSR is therefore broader and more specific in its scope than the CHR, which generally refers to Union law and national law and practices. It has been implemented by Article 16 and 18 of Directive 2019/1152 which, in the same way as the EPSR, provides for effective and impartial dispute resolution and a right to redress in the case of infringements of workers' rights. This is the employer who have to provide in writing duly substantiated grounds for the dismissal if workers consider that they have been dismissed because they exercised the rights provided for in Directive 2019/1152. It is also for the employer to prove that the dismissal was based on other grounds. It covers all workers, what should be assessed positively taking into account the quite large number of different regulations, that are currently applied to workers in the event of unjustified dismissal. Here some examples are illustrative, like the transfers of undertakings,⁴³ insolvency of employers⁴⁴, collective redundancies⁴⁵, non-discrimination in the context of termination of em-

⁴² Niklas Bruun, "Protection against unjustified dismissal (Article 30)," in *European Labour Law and the EU Charter of Fundamental Rights*, ed. Brian Bercusson (Baden-Baden: Nomos Publisher, 2006), 339.

⁴³ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (O.J.E.C. L82, 22 March, 2001).

⁴⁴ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (O.J.E.C. L283, 28 October, 2008).

⁴⁵ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (O.J.E.C. L225, 28 October, 1998).

ployment⁴⁶, or atypical forms of employment⁴⁷. The above-mentioned regulations do not however cover new forms of employment, which vary significantly from traditional employment relationships. One can mention here for example new forms of work such as zero-hour contracts, casual work, domestic work, voucher-based work or platform work.

According to Article 31 CFR, every worker has the right to working conditions which respect his or her health, safety and dignity. They also have the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave. Fair and just working conditions are therefore available to all workers, i.e. those of a Member State's own nationality, citizens of other Member States, and third-country nationals (who have a work permit) – working in the territory of the Member States. It should be stressed that the annual paid leave had been classified as a fundamental right by AG Trstenjak even before the entry into force of the CFR⁴⁸. It has also been recognized as both mandatory and unconditional in nature, so sufficient in itself to confer on workers a right that they may actually rely on in disputes also between private parties⁴⁹. As to the EPSR, its whole second chapter is generally devoted to fair working conditions. In particular this issue has been pro-

⁴⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (O.J.E.C. L204, 26 July, 2006).

⁴⁷ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICEF, CEEP and the ETUC (O. J.E.C. L14, 20 January, 1998) and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICEF and CEEP (O.J.E.C. L175, 10 July, 1999).

⁴⁸ Opinion of Advocate General Trstenjak delivered on 24 January 2008, ECLI:EU:C:2008:37, para 38. Compare also the CJEU Judgment in case C-282/10 *Maribel Dominguez* (n 35) together with Opinion of Advocate General Trstenjak delivered on 8 September 2011, ECLI:EU:C:2011:559, paras 75–76 and the CJEU Judgment of 26 June 2001, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, Case C-173/99, ECLI:EU:C:2001:356 together with the Opinion of Advocate General Tizzano delivered on 8 February 2001, ECLI:EU:C:2001:81.

⁴⁹ CJEU Judgment of Joined of 6 November 2018, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, Joint cases 569 & 570/16, ECLI:EU:C:2018:871, para 85.

vided for in the first and fourth paragraphs of principle five, as well as in principles six and ten. What could be surprising the Pillar is silent about the right to a maximum weekly working time, adequate rest periods, and paid annual leave, as laid down in Article 31.2 CFR. On the other hand, as for the rest of the matter, it seems to be broader in the scope of rights than the CHR, covering also such aspects as adequate minimum income benefits, adequate minimum wages or reasonable accommodation to each individual worker's needs. The fair working conditions provided by the EPSR have been implemented by the above-mentioned Directive 2019/1152. Its Article 8 clearly states about the 'reasonable duration' of probation periods leaving details to be decided by the Member States, but indicating that it should not last longer than six months. The importance of flexibility for employers, innovative form of work and prohibition of abusing of atypical contracts have also been underlined⁵⁰. As has been mentioned above, the Pillar also calls for wages which should provide for a decent standard of living. It is a novelty which is not provided in the CFR. Decent standard of living is sought to be attained by a proposal for a minimum income directive and a proposal on minimum pay via the European Semester. There should be no doubt that both minimum wages and income are very important for all those living and working in the EU, especially because the attainment of such pay will enhance the protection of workers' dignity⁵¹. The European Commission has already proposed some planned initiatives such as fair minimum wages for workers in the EU⁵² and opened cooperation between the European Commission and social partners on this issue⁵³. We should however remember about division of competences

⁵⁰ Very interesting on 'flexicurity' policy look at Anne Davies, "How has the Court of Justice changed its management and approach towards the social *acquis*," *European Constitutional Law Review* 14 (2018): 155–157; Lörcher and Schömann, "The European pillar," 5.

⁵¹ Kilpatrick, Muir and Garben, "From Austerity," 8.

⁵² Communication from the Commission – A strong social Europe for just transitions, COM(2020) 14 final.

⁵³ The European Commission consultation document - First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages COM(2020) 83 final. See also Enrique Fernández-Marcías and Carlos Vacas-Soriano, "A coordinated European Union minimum wage policy?" *European Journal of Industrial Relations* 22, no. 2 (2016).

between Member States and the EU when it comes to wages. Taking into account the content of Article 153(5) TFEU wage setting (pay) is located outside the scope of the EU competence with some exceptions like rules on equality of pay between men and women provided in Article 157 TFEU, non-discrimination in the field of free movement of workers and posted workers as a consequence of free movement rules and non-discrimination based on nationality. It seems thus clear that implementation of the EPSR's principle six on fair wages will not be easy or even possible without appropriate changes in the EU Treaties. At the moment it could hardly take the form of binding provisions like e.g. directives. It would rather be attained gradually by soft-law instruments working in the framework of the European Semester.

Regarding children and young people at work, Article 32 CFR provides that the employment of children is prohibited and the minimum age of admission to employment may not be lower than the minimum school-leaving age. The EPSR, in the second paragraph of its principle four, states that young people have the right to continued education, apprenticeship, traineeship or a job offer of good standing within four months of becoming unemployed or leaving education. Equal treatment should therefore be guaranteed also outside employment – including in the area of education. Another important measure in this area is also the Youth Guarantee, under which the EU Member States have pledged to ensure that all young people under the age of 25 receive a good offer of employment, continued education, apprenticeship, or traineeship within a period of four months of becoming unemployed or leaving formal education⁵⁴. Since its establishment the performance of the young people's labour market has improved significantly, because it has created opportunities for them and acted as a powerful driver for structural reforms and innovation⁵⁵. The EU activities related to children and young people at work seems to aim at complex regulation of this matter. Not only working rules and conditions are therefore important but also equal treatment in

⁵⁴ Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (O.J.E.C. C120, 26 April, 2013).

⁵⁵ For statistics and figures see <https://ec.europa.eu/social/main.jsp?catId=1079&langId=en>, accessed April 30, 2020.

the area of education, relevant youth employment reforms and measures of its financing.

3.3. Rights not related to taking up and carrying out work

The Charter's social rights not related to taking up and carrying out work are sometimes connected with those activities but are also to provide people (not only workers) with life with dignity and security. They entail: right to education, rights of the elderly, rights regarding family and professional life, social security rights, health care rights. Also in this case all above mentioned rights have their counterparts, in direct or indirect manner, in the EPSR. The assessment of how they relate to, and compliment, each other will be provided below in the above-mentioned sequence.

In accordance with Article 14 CFR, everyone has the right to an education and access to vocational and continuing training, together with the possibility to receive a free compulsory education. Education, training and life-long learning is provided for by principle one and eleven of the EPSR, presenting a much broader scope of rights than the CFR by including quality and inclusiveness. Maintaining and acquiring skills is thus one of the best measures enabling people to participate fully in society and successfully manage transitions in the labour market. Children have also the right to affordable early childhood education and care of good quality. It should be unquestionable that these principles will be better achieved with appropriate financial support. Therefore, European Commission President Ursula Von der Leyen has expressed her commitment to further elaborating the Child Guarantee, which was called for in 2015 by the European Parliament⁵⁶.

According to Article 25 CFR the elderly are to lead a life with dignity and independence and to participate in social and cultural life. Similar rights are provided in principle fifteen of the EPSR concerning old age income and pensions, especially when it refers to the right of everyone in old age to have resources that ensure living in dignity. There is however one more principle which should be taken into account when talking about the living conditions of the elderly. This is principle eighteen

⁵⁶ Communication from the Commission (n 40).

providing the right to affordable long-term care services of good quality for persons who are reliant on care, what is not provided in the CFR. All the above-mentioned initiatives are very important for the elderly. They take however a form of principles and cannot be invoked directly before courts. They have to be thus concretized on national level depending on the capacities (especially financial one) of each individual Member State.

Family and professional life, as regulated in Article 33 CFR, provides legal, economic and social protection for families. The reconciliation of family and professional life generally requires the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child. When we look at the EPSR, work-life balance is directly provided for in principle nine and indirectly in its second principle with broader personal scope covering not only parents but also those who care for elderly or disabled family members. These two principles of the EPSR have been implemented by Directive 2019/1158 on work-life balance⁵⁷. It complements them by strengthening existing rights and introducing some new ones. Its provisions apply to all workers who have employment contracts or other employment relationships. Its scope thus entails contracts relating to employment or the employment relationships of part-time workers, fixed-term contract workers, or persons with a contract of employment or employment relationship with a temporary agency⁵⁸. Apart from personal also its material scope has been extended in several elements, like paternity leave of ten working weeks, paid at sick pay level (Article 4), no possibility of transferring two months of parental leave between parents (Article 5.2), workers' right to take their parental leave in a flexible way, which is to be paid at sick pay level (Article 5.6 and Article 8) and workers' right to carer's

⁵⁷ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188, 12 July, 2019). It replaced its predecessors: Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

⁵⁸ See also Garben, Kilpatrick and Muir, 'Towards' (n 8).

leave of five working days per year (Article 6). The scope of the Directive 2019/1158 implementing the EPSR is therefore wider and more detailed than the CFR provisions on family and professional life, which should undoubtedly be assessed positively.

Pursuant to the provisions of Article 34 CFR, social security rights should include issues related to social security and social assistance. When we look at the EPSR we can see that social security rights are generally a part of its third chapter, called social protection and inclusion, which entails principle twelve on social protection, principle thirteen on unemployment benefits, principle fifteen on old age income and pensions, principle nineteen on housing and assistance for the homeless and principle twenty on access to essential services. As regards coverage, not only workers but also the self-employed have the right to adequate social protection, regardless of the type and duration of their employment relationship. The personal scope of this right has thus been extended, also to self-employed workers. What is interesting, this right is stricter than the one provided by the CFR by indicating that it affects everyone and specifying in detail what exactly those essential services cover, especially referring to the provision of housing support in-kind. In order to implement the EPSR (especially its principle twelve), the Council adopted the Recommendation on access to social protection for workers and the self-employed⁵⁹. Member States have been encouraged to allow those subjects to access social security schemes and to increase transparency regarding social security systems and rights. This should be attained via the European Commission's support through dialogue and mutual learning activities. Member States are encouraged to implement the principles set out in the Recommendation as soon as possible and submit a plan setting out the corresponding measures to be taken at the national level by 15 May 2021. An attempt to extend the personal scope of the above-mentioned social benefits should be assessed positively. Both the CFR's and the EPSR's provisions on social security rights take however the form of rules that prevent their addressees from directly relying on them before courts. It is thus for each of the Member States to make these rights more concrete taking into account its own capabilities.

⁵⁹ Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (O.J.E.C. C387, 15 November, 2019).

There is no doubt that health care is a key objective of the Member States' social protection systems. Because it falls within the competences of the Member States, the EU only promotes cooperation between them through 'soft law' instruments and intergovernmental policy making, like the open method of coordination. It focuses in particular on access, quality, and sustainability, which is also visible in the provisions of the CFR. Pursuant to its Article 35, everyone should have the right of access to preventive healthcare and the right to benefit from medical treatment. In its principle sixteen, the EPSR provides in the same way that everyone has the right to timely access to affordable, preventive, and curative health care of good quality. The EU is therefore to complement national policies aimed at improving public health, disease prevention, and removing sources of risk to physical and mental health. Progress towards this principle is currently monitored by the EPSR's Social Scoreboard indicator on 'self-reported unmet needs for medical care'. Member States' health systems have also received increasing attention in the European Semester process (discussed below) through the Country-Specific Recommendations and the Commission's Country Reports. The right to health protection is also interpreted as including the right to a clean environment, which is provided in Article 37 CFR⁶⁰. There is however no specific principle provided in the EPSR that focuses on the right to a clean environment, what should be assessed negatively, given the increasing climate change.

3.4. The legal protection mechanism for the infringement of social rights

The legal protection mechanism for the infringement of social rights provided in different instruments of EU law depends on the type of instrument, which is a source of a given social right. According to above mentioned considerations it can be the Treaty provision, the CFR, the EPSR, relevant secondary law of binding (generally directives)

⁶⁰ Florence Benoît-Rohmer, "The impact of the European Convention of Human Rights on the juridictionalisation of the European Committee of Social Rights," in *Social rights – Challenges at European, Regional and International Level*, ed. Nikitas Aliprantis and Ioannis Papageorgiou (Bruxelles: Editions juridiques Bruylant, 2010), 237; Nicolas de Sadelier, *EU Environmental Law and the Internal Market* (Oxford: Oxford University Press, 2014).

and non-binding nature (recommendations, shames or guaranties). The rights and principles enshrined by the EPSR are not, by its virtue, enforceable against either the EU Institutions or the Member States. This is especially due to the fact, that the Pillar is a source of interpretation of the rights and principles as laid down in other instruments, especially where they refer to it⁶¹. The EPSR as such, is unfortunately of little importance in the area of direct horizontal applicability, because although it is a useful guidance it does not create legal guaranties enforceable before courts. Its rights and principles are not directly enforceable, and it requires ‘a translation into dedicated action and/or separate pieces of legislation, at the appropriate level’⁶². The above-mentioned enforceability can however be attained through relevant primary or secondary law of binding character which already is or will be adopted in order to implement its principles. One should also consider what is the importance of the CFR in this area.

It should be emphasized at the outset that the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law⁶³. Taking into account the applicability of the Charter provisions one should mainly focus on its Article 51 indicating, that it binds both the EU institutions, bodies, offices and agencies with due regard for the principle of subsidiarity and its Member States when they are implementing Union law. Fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls „within the scope of EU law”⁶⁴. Its Article 51 is silent about private parties. Does it therefore mean that that they are not allowed to rely on any of the Charter provisions as such directly before a court? In joined Cases 569 & 570/16, *Bauer and Willermoth* the CJEU stated that the Charter cannot be interpreted as meaning that it would systematically pre-

⁶¹ Garben, “The European Pillar of Social Rights: An Assessment,” 4–5.

⁶² European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, p. 3.

⁶³ CJEU Judgment in Case C-176/12 *Association de médiation sociale*, (n 30) para 42.

⁶⁴ CJEU Judgment of 26 February 2013, *Åklagaren v Hans Åkerber Franssonow*, Case C-617/10, ECLI:EU:C:2013:105, para 21.

clude such a possibility⁶⁵. Individuals are thus able to invoke Charter provisions before courts if they are sufficient in itself to confer individual rights and may be relied on as such in disputes between them in a field covered by EU law⁶⁶. Taking into account rights of a social character, the CJEU confirmed it according to Article 21 (non-discrimination) and 31.2 (right to an annual period of paid leave) of the CFR, but refused in relation to its Article 27 (workers' right to information and consultation within the undertaking). As to the later, in case C-176/12 *Association de médiation sociale* the CJEU indicated that "to be fully effective, it must be given specific expression in European Union or national law" as a source of conditions under which the right existed⁶⁷. Horizontal direct effect of Article 21 of the CFR was the subject of the case C-414/16 *Ergenberger*. The CJEU explicitly stated that the prohibition of all discrimination laid down in this Article (in this case discrimination on grounds of religion or belief) 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 law⁶⁸. The same conclusions were reached by the CJEU in relation to Article 31.2 of the CFR in joined cases 569 & 570/16 *Bauer and Willmeroth*. The right to a period of paid annual leave, affirmed for every worker by this Article, is thus both mandatory and unconditional in nature. This provision is also sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within

⁶⁵ CJEU Judgment in joined cases 569 & 570/16 *Bauer and Willmeroth* (n 49), para 87. The Court confirmed it in Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, Case C-684/16, ECLI:EU:C:2018:874, para 76. Very interesting on the essence of fundamental rights and the question of horizontal direct effect Koen Lenaerts, "Limits on Limitations: The Essence of Fundamental Rights in the EU," *German Law Journal* 20 (2019): 788.

⁶⁶ CJEU Judgment of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, ECLI:EU:C:2018:257, para 76 – concerning non-discrimination on grounds of religion or belief, or an earlier CJEU Judgment in case C-176/12 *Association de médiation sociale* (n 30) para 47 – concerning non-discrimination on grounds of age.

⁶⁷ CJEU Judgment in case C-176/12 *Association de médiation sociale* (n 30), para 45.

⁶⁸ CJEU Judgment in Case C-414/16 *Vera Egenberger* (n 66) para. 76.

the scope of the Charter⁶⁹. As to the social rights provided by the Charter one can notice a marked change in their perception by the CJEU starting from case C-176/12 *Association de médiation sociale* – by indicating that some Charter’s provisions do not have ‘rights conferring’ nature, to case C-569/16 *Bauer* – by social rights inclusion in a ‘written constitution’ together with its horizontality⁷⁰. The Court pointed to the conditions under which specific provisions might be applied horizontally, which is to be fulfilled when Charter provisions are mandatory and unconditional (‘every worker has the right’ without referring to ‘national law and practices’)⁷¹. There is however a set of its provisions (especially Solidarity chapter) that are conditional upon national laws and practices, being a hurdle for its horizontal effect. It would even be easier to point Solidarity provisions that do not include such a statement, namely the above-mentioned Article 31, Article 29 on access to a placement service, Article 37 on environmental protection and Article 38 on consumer protection⁷². One can therefore see a light in the tunnel on the possibility of the CFR provisions horizontal enforceability, but it is too early now to treat it as ‘independent source of private parties’ duties that become activated whenever private conduct or a contract between two private parties falls within the scope of EU law⁷³.

⁶⁹ CJEU Judgment in joined cases 569 & 570/16 *Bauer and Willmeroth* (n 49), para. 85. Look also at the CJEU Judgment in Case C-684/16 *Max-Planck-Gesellschaft* (n 65) paras. 76–79.

⁷⁰ Eleni Frantziou, “(Most of) the Charter of Fundamental Rights is Horizontally Applicable. ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et al.*,” *European Constitutional Law Review* 15, no. 2 (2019): 9.

⁷¹ CJEU Judgment in Joined Cases C-569/16 and C-570/16 *Bauer and Willmeroth* (n 69) para 84.

⁷² For further, very interesting findings on the Charter’s provisions horizontal applicability especially look at: Frantziou, “(Most),” 15–19 and Eleni Frantziou, “The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality,” *European Law Journal* 21, no. 5 (2015).

⁷³ Dorota Leczykiewicz, “The Judgment in *Bauer* and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations,” *European Review of Contract Law* 16, no. 2 (2020): 10–11.

4. DELIVERING ON SOCIAL PROTECTION FROM INSTITUTIONAL AND STATISTICAL POINT OF VIEW

4.1. The European Labour Authority and the European Social Fund Plus

In order to bring an operational dimension to the EPSR, a new EU agency – the European Labour Authority (Authority) – has been established⁷⁴. It is related to the EPSR principles concerning active support for employment, secure and adaptable employment, and social protection thereof. It was announced in September 2017 by the former President of the European Commission Jean-Claude Juncker as an instrument of assistance to both Member States and the Commission in matters related to cross-border labour mobility and the coordination of social security systems within the Union⁷⁵. In order to ensure fair labour mobility in the internal market, the Authority is to: 1) facilitate access for individuals and employers to information on their rights and obligations as well as to relevant services; 2) facilitate and enhance cooperation between Member States, including joint inspections; 3) mediate and facilitate a solution in cases of cross-border disputes between Member States; and 4) support cooperation between Member States in tackling undeclared work (Article 2 of the Regulation 2019/1149). Taking into account that the EPSR is one of the sources of workers' rights, the Authority's task on information concerning labour mobility provisions is of special importance. It concerns the availability, quality, and accessibility of information available to individuals, employers and social partners' organisations regarding the rights and obligations deriving from the specific EU law provisions listed in Article 1.4 of Regulation 2019/1149. Appropriate knowledge of rights and obligations in the area of labour mobility, the free movement of services, and social security coordination is essential to allow participants of the internal market to benefit from its full potential. Those participants include

⁷⁴ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority (O.J.E.C. L186, 11 July, 2019).

⁷⁵ President Jean-Claude Juncker's State of the Union, 13 September 2017, accessed February 25, 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165.

workers, self-employed persons and jobseekers, together with citizens of the Union and third-country nationals who are legally resident in the Union, such as posted workers, intra-corporate transferees, or long-term residents, as well as their family members⁷⁶.

Obviously, the achievement of various goals is often impossible, and undoubtedly difficult without adequate financial means. This also applies to the implementation of the EPSR principles. Thus, a new European Social Fund Plus (ESF+), as a part of the EU budget 2021–2027, is designed to help in developing not only the skills needed to deal with challenges and changes on the labour market, but also employment and social actions in line with those principles⁷⁷. Its provisional budget entails €101 billion. It is planned to be a more flexible and simpler version of the current European Social Fund by merging a number of existing funds and programmes, such as: the European Social Fund, the Youth Employment Initiative, the Fund for European Aid to the Most Deprived, the EU programme for Employment and Social Innovation and the Programme for the Union's action in the field of health. It should make access to funding easier, together with combining different types of measures and simplifying the management of funding. This merger also aims to enhance coherence and synergies between complementary EU instruments, increase flexibility, allow funds to be more responsive to the challenges, and to simplify its programming and management. One of the main features of the ESF+ is to put citizens' concerns and key priorities at the centre, together with youth unemployment and social inclusion. Its programmes will thus concentrate in particular on the challenges identified under the European Semester and the EPSR. Merging the different instruments under the ESF+ will make it possible to pool appropriate resources for the implementation of the principles of the Pillar. It should therefore support investments in people and systems in the policy areas of employment, education, and social inclusion, and thereby support economic, territorial and social cohesion in accordance with Article 174 TFEU.

⁷⁶ Regulation 2019/1149, motive 7 and 13 of the preamble.

⁷⁷ Proposal for a regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+), COM(2018) 382 final.

4.2. *The European Semester and Social Scoreboard*

The European Semester was introduced in 2010 as an annual cycle of policy coordination between the European Commission and EU Member States. Its aim is to attain the following four goals: ensuring sound public finances; preventing excessive macroeconomic imbalances in the EU; supporting structural reforms; and creating more jobs and growth and boosting investments. As can be seen, these aims are not only of an economic but also of a social nature, in the latter case generally by promoting progress in the implementation of the EPSR. The European Semester process is based on three key documents which are published each year. One is the Annual Sustainable Growth Strategy, establishing the basis for building a common understanding about the objectives and rules agreed upon at the EU level; the second is the National Reform Programmes submitted by the Member States regarding how these targets have been taken into account; and the final document consists of Country-Specific Recommendations for actions to be taken according to each country's economic and social performance during the previous year⁷⁸. The watchword of the Annual Sustainable Growth Strategy 2020 is “an economy that works for people & the planet” – focusing on four main aims, e.g. environment, productivity, stability, and fairness. The latter aim is especially important for people and provides for implementing the EPSR by investing in skills and health, fighting poverty, gender equality, social cohesion and job quality⁷⁹. To strengthen its economic and social performance, the EU must fully deliver on the principles of the EPSR. Special actions are needed to ensure the enjoyment of social rights and to counter the risks posed by a growing social divide. The above mentioned Annual Sustainable Growth Strategy clearly underlines the importance of the EPSR's principles. It provides, for example, for fair working conditions (involuntary part-time work, atypical forms of work, a fair wage for each worker, and open-ended full-time contracts); ending discrimination against women in the labour

⁷⁸ These documents for 2020 are available at https://ec.europa.eu/info/publications/2020-european-semester-country-reports-and-communication_en, accessed April 20, 2020.

⁷⁹ COM (2019) 650 final.

market (closing the gap between men in terms of employment rate and pay); investments in skills; adequate and sustainable social protection systems; and fighting against exclusion (promoting inclusiveness, the quality of education and training systems, reducing early school leaving, and investing in healthcare and long-term care). The European Semester is therefore one of the measures for implementation of the EPSR, especially its principles on minimum wages, minimum income and social housing, through the country-specific recommendations, as ‘a particularly coercive form of soft law’, to introduce or improve their minimum wage and income schemes⁸⁰. It is very important to pay equal attention to economic and social issues, because economic governance can have unquestionable social consequences, especially in times of an economic crisis, like the current global COVID-19 pandemic⁸¹.

The Social Scoreboard is an instrument which aims to monitor implementation of the EPSR in the European Semester. It was first presented in April 2017 and is a kind of ‘screening device’ that allows for assessment of the ‘social’ situation in each Member State⁸². Its main task is tracking trends and performances across Member States in the following twelve areas, grouped into three social dimensions:

- 1) Education, skills, and lifelong learning;
- 2) Gender equality in the labour market;
- 3) Inequality and upward mobility;
- 4) Living conditions and poverty;
- 5) Youth.

⁸⁰ Garben, “The European Pillar of Social Rights: Effectively,” 8.

⁸¹ See the very interesting conversation with Professor Sacha Garben: A FEPS Podcast on Social Europe in times of COVID-19 crisis, accessed May 6, 2020, <https://podcasts.apple.com/be/podcast/24-feeps-talks-advancing-social-europe-in-times-covid/id1490408965?i=1000469586081>. As to the European Semester. compare also: Jonathan Zeitlin and Bart Vanhercke, “Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020,” *Swedish Institute for European Policy Studies* 7 (2014).

⁸² Commission Staff Working Document on Social Scoreboard, SWD(2017) 200 final. A special website has been created to carry out its activities: <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>, accessed March 1, 2020.

II. Dynamic labour markets and fair working conditions: 6) Labour force structure; 7) Labour market dynamics; 8) Income, including employment-related.

III. Public support/Social protection and inclusion: 9) Impact of public policies on reducing poverty; 10) Early childhood care; 11) Healthcare; 12) Digital access.

The Social Scoreboard allows one to look in on Member States' activities on social issues over time, monitor convergence between them and general trends, and compare the performance of each of them at a given moment of time. As mentioned above, its main aim is both the implementation of the Pillar by tracking trends and performances across EU countries and feeding into the European Semester of economic policy coordination. It does not cover all 20 principles of the EPSR and practice shows that more work is needed in defining how the relevant indicators can be used to adequately monitor them in order to ensure upward social convergence.⁸³ Despite the above mentioned shortcomings, it is however still a key tool for informing and reinforcing the social dimension of the European Semester process, mainly by providing clear social indicators and data. The analyses provided by the Social Scoreboard feed into the preparation of the Country Reports prepared in the context of the European Semester and in the dialogue with Member States throughout the year. It complements the more qualitative assessment of economic and social challenges across the EU. It also allows one to look at EU Member States' performances on social issues over time, measure and monitor their progress in achieving convergence towards better working and living conditions in Europe, compare the performance of each of the 27 Member States at a given moment in time, and create one's own graphs, tables and maps. Data for the majority of the indicators is provided by Eurostat and come from different sources, mainly social statistics such as the EU Labour Force Survey (LFS) or the EU Statistics on Income and Living Conditions (EU SILC).

⁸³ Agnieszka Piasna, *The Social Scoreboard Revisited* (Brussels: ETUI European Trade Union Institute Background Analysis, 2017).

5. CONCLUSION

Social rights are indeed protected at the EU level and have their legal source not only in the CFR, but also in relevant treaty and secondary law provisions. They can be generally divided into those related with taking up and carrying out work and those which do not show such a linkage. The principles of the EPSR indeed help with the actual exercise of these rights by supplementing and sometimes even adopting or planning to adopt new instruments. A comparison of the above-mentioned documents shows that all social rights provided for in the Charter have their counterparts in the Pillar.

Analysis shows however also that in many instances the latter is much broader in the scope of rights than the former, like e.g. in case of persons with disabilities and their right to live in dignity thanks to income support, participation in society and the labour market with an appropriate work environment. The same conclusion can be drawn with regard to extension of worker's right to information on employment conditions also to probation period or their right to fair wages, minimum income and workplace accommodation appropriate to their occupational needs in area of fair and just working conditions. The EPSR adds a new content to the CFR also by quality and inclusiveness when it comes to the right to education, the right to a free placement service including employment services, such as job-search counselling and guidance, training, hiring subsidies and re-insertion support and housing support in-kind, when it comes to the right to housing assistance. In some instances the EPSR is also broader in the personal scope of rights than the CHR, like e.g. social security rights entailing both workers and self-employed or work-life balance not only for parents but also carers of disabled or elderly family members.

In many instances the Pillar affects the implementation of the CFR, even if the actions proposed do not take a legally binding form. Here one can just take the example of the proposal for the European Unemployment Reinsurance Scheme, with its actual importance for the fighting the effects of the COVID-19 pandemic by its emergency operation to mitigate unemployment risks in an emergency. In some instances the EPSR simply confirms the social rights of the Charter without (so far) any proposed initiatives, like for example the freedom to choose an occupation and right

to engage in work. There are also legal instruments adopted in order to implement specific principles of the EPSR which at the same time strengthen or extend the protection provided by the provisions of the Charter, like the Work-life Balance Directive and the right to a family and professional life. The financial aspects of social rights implementation seems also to be of unquestionable importance, like the European Social Fund+, the Youth Guarantee, or the one planned for children.

The EPSR indeed develops existing social rights, that are already part of the EU legal order, but the level of its protection still depends on the scope of division of competences between the EU and its Member States. The words of O. De Schutter deserve attention here, that ‘on the one hand, the EPSR (...) could lead to identify the need for new legislative initiatives of the EU. On the other hand, the EPSR could encourage the EU Member States to take action, in their own field of competences, implementing the commitments of the EPSR, thus contributing to a convergence in the fulfilment of fundamental social rights’⁸⁴. It is generally noticeable in the form of legal acts adopted by EU institutions to implement the principles of the EPSR. In areas where the EU can act, like e.g. equality between men and women, integration of persons with disabilities or fair and just working conditions binding secondary law in a form of directives or to a lesser extent regulation has been provided. In other cases, like e.g. right of access to placement of services, right to education, some social security or health care rights, Member States have been encouraged to activity by recommendations, financial schemes and guarantees as well as Social Scoreboard indicators aiming to monitor implementation of the EPSR in the European Semester.

In January 2020 the European Commission proposed some planned initiatives that will contribute to the implementation of the EPSR, such as a European Gender Equality Strategy, an updated Skills Agenda for Europe, a Platform Work Summit, a Green paper on Ageing or a Strategy for persons with disabilities⁸⁵ – to mention just a few examples. A strict Action plan to implement the EPSR is to be presented in early 2021. This

⁸⁴ De Schutter, “The European Pillar,” 3.

⁸⁵ Communication from the Commission – A strong social Europe for just transitions, COM(2020) 14 final.

shows that the social aspects of EU integration are and will remain a subject of interest for the foreseeable future, additionally taking into account the economic and social consequences of the COVID-19 pandemic and constantly present problem of an aging European society.

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