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The Borders Within: Socio-economic Rights and Non-discrimination in EU Law
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Can We Afford Solidarity? Socio-economic Rights Under EU Law and Their Relationship with the Internal Market Rationale Through an Economic Lens

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ABSTRACT: Socio-economic rights have always held a controversial position in EU law. They are often seen as 'costly', dependent on the economic performance of Member States, and as a mere corrective measure to potential harmful effects of the internal market. However, looking at these rights through an economic lens reveals that their protection does not necessarily conflict with the internal market rationale. Encompassing both labour rights and social security rights, socio-economic rights both depend on and influence the economic performance of the EU and its Member States. This article thus argues that they should not be perceived as mere tolerable brakes or obstacles to the EU economy, but rather as integral components of it.

KEYWORDS: EU Charter – socio-economic rights – labour rights – social security benefits – internal market – economic performance.

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1. Introduction

Socio-economic rights have always been controversial in European integration. Attempts to include them among the fundamental rights and thus in the Charter of Fundamental Rights of the EU (EU Charter) even provoked a political backlash because they were seen as 'costly', and their protection was seen as dependent on the economic performance of each Member State. The history of the Lisbon Treaty and the EU Charter negotiations implies that socio-economic rights were seen as factors that do not contribute to the economic performance of the internal market, but rather represent the consumption of the assets that the economy has produced. However, this idea presupposes that the enforcement of such rights always implies an intervention in public budgets, which is the case of social security benefits and social assistance. Nevertheless, Chapter IV of the EU Charter, entitled 'Solidarity', which groups together rights of a mainly socio-economic nature, contains more than provisions on social security and social assistance. It also covers labour-related rights, such as the right to information, the right of collective bargaining or the right to fair working conditions, which – focusing on their economic core – are pro-market aspects rather than pure opportunities to 'consume' public budgets. The legal protection of these fundamental rights in EU law inevitably means the protection of those who play a weaker role in economic relations, but who remain economically active and thus contribute directly to the EU's economic performance and welfare. Similarly, neither environmental protection, consumer protection nor health care are principles whose observance would necessarily mean only eating from the common cake, since they can be seen as incentives for economic activity, investment or innovation. Finally, even the provision of 'core' solidarity rights in forms of social benefits cannot be, from the economic point of view, viewed purely as sunk costs, as the money distributed to individuals circulate back into the economy through their spending.

This article examines the protection of socio-economic rights in the EU through the triad 'politics-economy-law' and through the prism of their respective 'codes': code of power, code of profit, and code of legality. Both the content of socio-economic values and their relative power against any competing value can be supported by economic arguments (related to decisions upon scarce resources, and based on the pursuit of profit and the common goal of economic welfare), but it requires a political choice to turn them into the code of legality, i.e. into the binary code of rights and obligations. A political component matters: some of the socio-economic rights are substantively embedded in EU law, while the content and contours of the others are decided at the level of national political decision-making and EU law respects them and pulls them into its realm through the principle of non-discrimination. However, regardless of the level in which they become operational, socio-economic

rights should be considered as an important part of the internal market. Looking at these rights through an economic lens is apt to show that their protection does not necessarily imply a step against the internal market rationale. Socio-economic rights both depend on and influence the economic performance of the EU and its Member States. Therefore, they should not be perceived as mere tolerable brakes or obstacles to the economy, but as its full components.

The overall approach of this article is analytical and explanatory rather than critical. While focusing on the issue of socio-economic rights in EU law naturally opens the door to critiques of specific legal regimes and approaches – often accused of favouring capital over labour and reflecting a neoliberal or neoclassical bias in the legal system – the primary aim of the article is not to criticize EU policies, legal frameworks, or judicial decisions related to the protection of socio-economic rights. This article aims to illuminate the interconnections between three systems – politics, economy, and law – and point out to the interrelations of their respective powers: political, economic, and legal. It does not assume that 'the market' is an omniscient and omnipotent entity that naturally produces desired outcomes and that any public intervention negatively interferes with this noble goal, nor does it assert that any economic theory is capable of normatively determining how social relations should be organized. At the same time, it does not regard the pursuit of profit or economic prosperity as inherently immoral or antisocial. Instead, it is based on the understanding that market structures are shaped by political decisions implemented through legal rules and frameworks. It also emphasizes that both the creation and redistribution of wealth depend on political decisions, while being simultaneously influenced by economic conditions and having economic consequences.

Moreover, the article asserts that the 'economic' should not be narrowly interpreted as merely 'pro-business', 'pro-capital', or 'pro-profit', but rather as concerned with the principles guiding how decisions upon the allocation of scarce resources (tangible, intangible, or human) are made in order to maximize value (encompassing both productivity and overall welfare). From this perspective, even the 'social' is inherently economic since social policies are also linked to the allocation and redistribution of scarce resources, taking costs and benefits into account. Consequently, socio-economic rights must be understood as integrating both elements contained in their name, i.e. as being both social (protecting individuals who are members of the society) and economic (having an economic rationale and economic implications).

In this context, the article seeks to examine the political decisions underlying the protection of socio-economic rights in the EU, and to explore how these decisions are influenced by economic conditions and what economic consequences they entail. The structure of the article is as follows. First, it provides a brief overview of the internal

market's underlying logic and the role of fundamental rights within it. Second, it presents the legal protection of socio-economic rights in the EU as the product of political decision-making across multiple interconnected levels. Third, it analyses the protection of specific socio-economic rights through an economic lens. It analyses labour rights and social security rights separately, highlighting their different relations to the economic conditions and economic implications. Finally, it points to the underlying political dimension, which should ideally take the economic one into account.

2. Setting the scene: internal market and fundamental rights

The European integration started as an economic project. The intention of integration was to create the common and then the internal market. The Treaty of Rome declared its goal to ensure (economic) prosperity of the Member States, and the common market was meant as a means to reach this goal through the reduction and eventually elimination of any obstacles hindering cross-border trade among the Member States. The Single European Act (SEA) upgraded the efforts into the form of internal market, which was defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.

The whole political plan behind the integration reflected certain economic assumptions and economic theories, arguably having its roots mainly in ordo-liberalism[1] or at least getting some inspiration from ordo-liberalism:[2] the reduction of barriers to the cross-border trade enables free movement of factors of production among the Member States – the capital moves where a higher return of investment is expected, and the workers move where they can earn higher wages. At the same time, the free movement of goods and services means that the producers can reach a broader range of potential consumers. Moreover, the free competition among producers promises an advantage for the consumers, since they have a better access to goods or services of a lower price and/or higher quality. Overall, the idea of free movement of both factors of production and production itself is based on the pursuit of so-called allocative efficiency, which in economic terms means that (scarce) resources are allocated where their value is

[1] P Nedergaard, 'The Influence of Ordoliberalism in European Integration Processes - A Framework for Ideational Influence with Competition Policy and the Economic and Monetary Policy as Examples' (2013) MPRA Paper No. 52331; A Lechevalier, 'Eucken under the Pillow: The Ordoliberal Imprint on Social Europe' in A Lechevalier and J Wielgohs (eds), *Social Europe - a Dead End: what the eurozone crisis is doing to Europe's social dimension* (DJØF 2015).

[2] Ordo-liberalism itself is not an entirely uniform or coherent movement. For an argument that at least two distinct paradigms of ordo-liberalism have influenced European economic integration, see primarily F Bruno, 'Ordoliberal Ideas on Europe: Two Paradigms of European Economic Integration' (2023) 49 *History of European Ideas* 737.

maximized.[3] Consequently, as the economic theory explains, the allocative efficiency inevitably brings about economic growth. Against this economic background, the vision of European integration was constructed on the belief that free trade and economic exchange in a common market without internal borders would lead to the achievement of economic prosperity, which was also closely linked to the political and social stability that post-war Europe sought.[4]

At the same time, the ordo-liberal blueprint – albeit its real impact being contested[5] – required that the free exchange of production and of the factors of production need to be supported by the strong state and strong public institutions, which would guarantee that the exercise of any of the four freedoms brings about the desired economic welfare. Within the European integration, the liberalization was not conceived as clearly separating the economic interests from the political ties as such,[6] but rather as an attempt to liberate the market from political constraints having its origin at the national level.[7]

Neither economic ideas on their own nor in conjunction with political power could succeed without the framework of law and legal institutions. In this context, the political power must have translated the economic visions into laws and legal rules. Indeed, the internal market is not only an economic concept, but also – and maybe foremost – a legal concept,[8] which is embedded in primary law, and hence it has a constitutional value in EU law. In the current version of primary law, Article 3(3) of the Treaty on European Union (TEU) obliges the Union to establish an internal market aimed at promoting the sustainable development of Europe based on, among others, 'balanced economic growth and price stability'. The legal definition of the internal market, which practically copies the definition mentioned already in the SEA, appears in Article 26(2) of the Treaty on the Functioning of the European Union (TFEU). And the TFEU also elaborates upon the (fundamental) economic freedoms which shall be ensured in the internal market: the free movement of goods (Articles 34–36), the free movement of workers (Articles 45–48), the right of establishment (Articles 49–55), the free movement of services (Articles 56–62), and the free movement of capital (Articles 63–66).

[3] R A Posner, *Economic Analysis of Law* (7th edn, Wolters Kluwer 2007) 11.

[4] S Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 306–308.

[5] J Hien and C Joerges, 'Dead Man Walking? Current European Interest in the Ordoliberal Tradition' (2018) 24 *European Law Journal* 142; J Hien, 'The Rise and Fall of Ordoliberalism' (2023) 22 *Socio-Economic Review* 1947.

[6] Bruno (n 2) 740.

[7] D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 *European Law Journal* 303, 304–305.

[8] S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017).

The law as a means to reach economic goals together with the translation of economic ideas into rights and obligations turned up to be crucial for the European economic integration. First, the Treaties set the legal obligations of the Member States to eliminate barriers of trade, and these obligations could be directly enforced by the Commission through the system of the infringement procedure.[9] Second, and perhaps more importantly, the new legal system – created as a combination of the provisions in the Treaties and the pro-active case law of the Court of Justice – weaponized the private parties against the Member States. The idea of free movement of goods, services, persons, and capital was converted into fundamental economic freedoms of individuals to perform such movement, i.e. into individual rights that have direct effect in the domestic legal order and are directly enforceable before national courts. In such a setting, the fundamental right to move freely among Member States gained a prominent position within legal rules, because taking advantage of such a right is deemed to bring about positive implications for the economic performance of the European Communities (EC) and later the EU as a whole.

On the contrary, fundamental human rights, which do not have direct impact upon economic growth, have had, as a whole, a fragile position in EU law since the beginning of European integration. The original Treaties were mostly silent with regard to human rights and their protection. The principle that women deserve equal payment at work as men, i.e. right to be treated equally, was recognized in the original Treaty of Rome, but even this right was supposed to serve economic goals: a Member State, which would allow for lower wages of women would gain an economic advantage because of a relatively lower level of costs of labour in general, which would restrain the idea of free competition among the Member States.[10] Similarly, the prohibition of discrimination of workers on ground of nationality did not have a status of a human right, but it was based on a purely economic rationale: with regard to equal pay, it incentivized the workers to move to another Member State, and at the same time, it prevented so-called social dumping, which could raise unemployment rate in the host state, if incoming foreign workers were paid less.[11]

Even the Court of Justice was initially reluctant to recognize fundamental human rights as an intrinsic part of EC law claiming that the Treaty does not entrust it with a mandate to protect human rights.[12] Only later, and perhaps due to a certain pressure

[9] Currently according to Art 258 ff TFEU.

[10] C Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 643.

[11] F Pennings, 'How Do Social and Economic Rights Relate to Each Other in the Social Market Economy: An Introduction to This Special Issue' (2019) 15 *Utrecht Law Review* 1–2.

[12] Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, EU:C:1959:4; Case 2/56 *Mining undertakings of the Ruhr Basin being members of the Geitling selling*

from the national courts and with a view to solidify its own power,[13] the Court of Justice was willing to admit human rights as part of general principles of EC law.[14] Thanks to their recognition within general principles and later also thanks to the reference in the Maastricht Treaty,[15] fundamental human rights acquired the status of primary law. However, in the logic of the internal market, fundamental rights have always remained rights of the second order, lagging behind the core of internal market and fundamental economic freedoms derived therefrom.

The protection of fundamental human rights in EU law serves mainly as a correction to potentially negative side effects of the internal market or of the performance of economic freedoms. Even after the Lisbon Treaty, which upgraded the EU Charter to primary law, the EU remains primarily an economic and political organization, not a human rights organization. The political pressure to keep this setting is noticeable in a fact that there are at least three provisions repeating that despite its status of primary law, the EU Charter does not extend or change the competences and powers of the Union as defined in the Treaties.[16] Moreover, according to its Article 51(1), the EU Charter is applicable only within the scope of EU law, which means that its provisions are to be observed when another piece of EU law is in play in the first regard. As Lenaerts and Guttierez Fons describe it metaphorically, the EU Charter 'is the "shadow" of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter'.[17]

The application of the EU Charter in individual cases hence depends on the applicability of other EU rules. In practice, the EU Charter can only be invoked when another EU rule is directly relevant to the case. This triggering element may be a Treaty provision, but it most often involves secondary legislation. Two scenarios are

agency for Ruhr coal, and the Geitling selling agency for Ruhr coal v High Authority of the European Coal and Steel Community, EU:C:1957:4; and Case 40-64 *Marcello Sgarlata and others v Commission of the EEC*, EU:C:1965:36.

[13] A O'Neill and J Coppel, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669; JHH Weiler and NJS Lockhart, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part II' (1995) 32 *Common Market Law Review* 579.

[14] Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt*, EU:C:1969:57.20; and Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

[15] Art F(2) Treaty on the European Union (1992).

[16] Art 6(1) TEU, Art 51(2) EU Charter, and Declaration no. 1 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

[17] K Lenaerts and JA Guttierez Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1567.

possible: first, secondary legislation directly elaborates on fundamental rights, concretizes them, or translates EU Charter principles into enforceable rights, hence aligns with the very purpose of the EU Charter.[18] Second, the EU Charter is activated by secondary legislation of any subject matter that might produce negative side effects infringing fundamental rights. It follows that while the EU Charter holds the status of primary law, sets the ultimate standard, with which all EU rules must be compatible, and ensures the transversal application of fundamental rights across EU policies, its application in individual cases remains accessory to the application of 'more substantive' EU rules.

3. Socio-economic rights in EU law: a legal result of a political decision

The provision of the TEU, which mandates the Union to establish an internal market (Article 3(3)) adds that the task of the Union is also to combat social exclusion and discrimination, to promote social justice and protection, gender equality or solidarity between generations. However, the status and power of socio-economic rights derived from this task remain relatively weak.

As the history shows, the social dimension of the economic project was discussed even in the early years of integration, but most aspects of social policy were kept in the hands of the Member States.[19] Although measures for coordinating social security among the Member States were already adopted as in the 1950s,[20] they primarily focused on ensuring equal treatment between domestic and migrant workers, with the goal of eliminating discriminatory social security provisions that could hinder labour mobility. The choice of form of social security arrangements and of conditions to claim entitlements of social policy was left to the national level. In other words, while the creation of economic wealth was meant to be a common interest, its re-distribution remained a matter of the national political decisions. Anyway, the employment of the principle of non-discrimination based on the nationality and the whole idea to coordinate social security among the Member States had – again – an

[18] Cf. E Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 *Common Market Law Review* 219; E Muir, 'Winds of Treaty Change? Taking Fundamental Rights in the EU *yet* More Seriously' (2023) 30 *Maastricht Journal of European and Comparative Law* 543; Y Lorans, 'Le législateur européen et la protection des droits fondamentaux dans l'Union : vers une concrétisation législative de la Charte' (2021) 57 *Revue trimestrielle de droit européen* 59.

[19] More about this in F De Witte, 'The Architecture of the EU's Social Market Economy' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017) 121–124.

[20] Council Regulation No. 3 of 16 December 1958 on the Social Security of Migrant Workers; Council Regulation No. 4 of 16 December 1958 Laying Down the Implementing Procedures and Supplementing the Provisions of Regulation No. 3 on the Social Security of Migrant Workers.

economic rationale: the risk of losing social security when moving to another Member State could prevent the worker from performing such movement, which would go against the very idea of economic integration.

Even in the early stages of the integration, the idea of free movement of workers enlightened the fact that the workers not only embody factors of production, but they are also human beings and members of the society with social needs, and this must be reflected at the EC level. The growing concerns related to potentially negative repercussions of the free movement of workers, which became acute in the 1980s mainly with the advent of the SEA,[21] led eventually to the adoption of the Community Charter of the Fundamental Social Rights of Workers ('Community Charter') in 1989. However, the Community Charter did not have binding legal force, and it presented solely a document of a declaratory nature or rather an action plan. Its provisions needed to be further elaborated into legislative acts, where some social rights of workers were finally recognised as justiciable rights.[22] Even if, e.g., the right to annual paid leave and other rights related to working time,[23] occupational health and safety,[24] protection of pregnant workers[25] and younger workers,[26] or rights of posted workers[27] were embedded in legally binding acts, these rights remained, in the hierarchy of individual rights in the EU, on the second position behind fundamental economic freedoms, which have always kept the status of primary law.

Another attempt to equalize the status of social or socio-economic rights came with the adoption of the EU Charter. The political negotiations around the EU Charter and its role in EU law highlighted a major contentious issue of whether social and

[21] For an historic overview, see, e.g. J Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 *European Constitutional Law Review* 321, 323–324.

[22] Cf. S Garben, 'Balancing Fundamental Social and Economic Rights in the EU: In Search of a better method' in B Vanhercke, D Ghailani, S Spasova and R Pochet (eds), *Social policy in the European Union 1999-2019: The Long and Winding Road* (European Trade Union Institute 2020) 57.

[23] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, later repealed by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[24] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

[25] 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

[26] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work.

[27] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

socio-economic rights should be or even can be included in the EU catalogue of fundamental rights, which was supposed to gain the power of primary law.

Some Member States welcomed including these rights into EU primary law as a step to balance the initially uneven relation between the economic (here understood mostly as encompassing capital) and the social (covering the interests of workers/individuals) in EU law, and to address the so-called social deficit. The opposing camp, including mainly the UK and Poland,[28] but with reservations also from the Netherlands or Denmark,[29] pointed to the fact that social rights are 'costly',[30] and their real enforcement is practically dependent on the economic performance and budgetary possibilities of individual Member States, which – they believed – precluded these rights from being enshrined as EU fundamental rights.

The opposing opinions are, in any case, part of a stream of belief that social or socio-economic rights can never have a proper place among rights, which are fully embedded in respective constitutions and are directly enforceable based on their constitutional value. The reason for this belief is that socio-economic rights cannot be considered 'real rights', because this category is reserved solely for civil and political rights, which require negative obligations from the state, i.e. not to interfere with such rights.[31] Sometimes such rights are labelled 'programmatic rights' or even 'rights on paper',[32] because they need to be transposed into proper legal entitlements through legislative acts and cannot be justiciable based on their mere reference in a catalogue of human rights. In this perspective, socio-economic rights are not considered self-standing rights not only because they require a further action by public powers but also because such an action is dependent on policy choices and allocation of resources based on prioritisation, which can vary in time.[33] Similarly, one can find

[28] Their reservations eventually led to the arrangement of protocol (no. 31) attached to the Lisbon Treaty in order to be protected against the direct effect of socio-economic rights. But the protocols only repeat the clause already included in Art 51(1) of the EU Charter. In Dougan's words, 'the Protocol emerges as a fantasy solution to a fantasy problem' (M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review* 617, 670).

[29] For the overview of opposing opinions, see Krommendijk (n 21) 324.

[30] For a summary of such opinions and their critical assessment see S Koukoulis-Spiliotopoulos, 'Les droits sociaux: droits proclamés ou droits invocables? Un appel à la vigilance' in B Favreau (ed), *La Charte des droits fondamentaux de l'Union européenne après le traité de Lisbonne* (Bruylant 2010) 288.

[31] M Nowak, 'Social Rights in International Law: Categorization versus Indivisibility' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 9.

[32] F Ferraro, 'The Social Dimension of Fundamental Rights in Times of Crisis' in S Civitarese, M. and S Halliday (eds), *Social rights in Europe in an age of austerity* (Routledge 2018) 208.

[33] Cf. P Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201, 1213.

arguments that social rights should be considered principles, since they can be materialized by specific policies according to the level of the economic and social development of the concrete state.[34]

In any event, the arguments related to the alleged resource-dependency of socio-economic rights, and hence to the budgetary conditions of the Member States, eventually led to a kind of political compromise:[35] On the one hand, provisions on social rights were kept in the text of the EU Charter, and, on the other hand, the EU Charter includes a differentiation between provisions including subjective rights and provisions including mere principles. Article 52(5) EU Charter clarifies that provisions containing principles 'may be implemented by legislative and executive acts' by the EU institutions or by national institutions, when they implement EU law. By that Article, the institutions are invited to elaborate the (vague) principles further into (concrete) rights and to specify conditions for their exercise or enforcement. While (subjective) rights included in the EU Charter can be directly invoked by an individual before courts, principles are 'judicially cognisable' only as interpretative tools when applying legislative or executive acts, in which principles are elaborated into subjective rights, or as a yardstick for the assessment of legality of those acts.

The question is whether all social or socio-economic rights included in the EU Charter can really be considered as mere principles, which require further elaboration into subjective rights. In his opinion in case *Association de médiation sociale* (AMS), AG Cruz Villalón asserted that the social rights included in the Solidarity chapter of the EU Charter are connected to a 'strong presumption' that they belong to the category of principles.[36] He pointed out to the constitutional traditions of the Member States, which indicate that social rights related to the social policy can operate only when they are followed by action or implementation by public authorities. Therefore, those social rights as such cannot be directly enforced by individuals unless they are implemented into a form of subjective rights through the acts of public authorities. In the words of the AG, social rights are rights 'by virtue of their subject-matter', but since they are not directly enforceable, they must be considered principles 'by virtue of their operation'.[37]

However, this 'strong presumption' is easily rebutted when looking at the individual provisions of the Solidarity chapter and the case law interpreting them. While the differentiation between rights and principles can be viewed as reaching a political compromise in the time of drafting of the EU Charter, the reality shows that while

[34] C McCrudden, 'The Future of the EU Charter of Fundamental Rights' (2002) Jean Monnet Working Paper at jeanmonnetprogram.org (last accessed 17 April 2025)

[35] Krommendijk (n 21) 326.

[36] Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2013:491, para 55.

[37] Ibid para 45.

some of socio-economic rights are left to the Member States and recognized by EU law as principles, some other are even apt to gain a status of subjective rights invokable even in horizontal relations.

A closer look shows that the 'social' chapter of the EU Charter, labelled as 'Solidarity', groups provisions of different nature and of different legal quality. Concerning the subject-matter, most of the provisions refer to classic rights of workers in employment relations: right to information and consultation within the undertaking (Article 27); right of collective bargaining and action (Article 28); the right to access to a free placement service for job applicants (Article 29); protection in the event of unjustified dismissal (Article 30); right to fair and just working conditions, including a right to paid annual leave (Article 31); prohibition of child labour and protection of young people at work (Article 32); protection from dismissal for a reason connected with maternity and the right to paid maternity leave and parental leave (Article 33(2)).

In addition to labour rights, the chapter on solidarity also refers to the legal, economic and social protection of the family (Article 33), it recognises and respects the right to social security benefits and social services (Article 34) and includes various other rights or principles of a 'social nature', such as the right to health care (Article 35), environmental protection (Article 37) or consumer protection (Article 38). Some other rights of social nature or with social aspects can be found in other chapters of the Charter, e.g. freedom to choose an occupation and right to engage in work (Article 15); equality between men and women in employment, work and pay (Article 23); or the rights of the elderly (Article 25).

When it comes to the differentiation between subjective rights and mere principles, which must be elaborated into proper rights in legislative measures, it is necessary to look behind the text of provisions. The Explanations to the EU Charter, a legally non-binding document, which must, however, 'be given due regard by the courts' (Article 51(7)), points out that the environmental protection (Article 37) includes a typical principle. Furthermore, the document admits that the provision on the family and professional life (Article 33) or the provision on the social security and social assistance (Article 34) contain both elements of a right and of a principle.

So far, the Court of Justice has been mostly avoiding stating explicitly that a concrete provision entails a mere principle. The only recognition of a principle seems to be in *Glatzel*, where the Court of Justice explained that the wording of Article 26 EU Charter, according to which 'the Union recognises and respects the right of persons with disabilities', means that this provision does not entail an invokable subjective right. Although the provision refers to the right, it is, according to the Court of

Justice, a principle that is only recognised and respected at the level of the EU Charter, and its applicability is dependent on EU or national legislation, which would give it more specific expression.[38]

Otherwise, the line between rights and principles remains rather unclear. However, regardless of whether a provision contains a 'right' or an 'element of a right', the case law seems to accentuate mostly the issue of whether the given provision refers to a right, which can function as a stand-alone claim in the national proceedings, i.e. whether there is a right that is invokable as such based on the EU Charter itself without the necessity to 'materialise' this right in secondary legislation or national legislation. Going back to the provisions contained in the Solidarity chapter, the right to paid annual leave, enshrined in Article 31(2), is an example of such a perfectly invokable right as confirmed in the recent case law.[39] Not only is this right 'an essential principle of EU social law',[40] but it is a fundamental right of its own which is directly applicable even in horizontal relations.[41]

According to the Court of Justice, the reason for this conclusion lies also in the fact that Article 31(2) does not refer to the necessity to imprint the right into legislative acts. Such a reference, on the contrary, is included in Article 27 on the workers' right to information and consultation within the undertaking, which explicitly states that such a right is guaranteed 'under the conditions provided for by Union law and national laws and practices'. Interestingly, in the opinion of AG Cruz Villalón, this reference to Union and national law makes the whole provision a principle.[42] On the other hand, the Court of Justice merely asserts that the provision requires more specific expression of the right in EU law or national law to be fully effective,[43] which means that Article 27 does not 'confer on individuals a right which they may invoke as such',[44] but it does not call it a principle explicitly. In Kenner's observation, 'Article 27 […] appears to

[38] Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern,* EU:C:2014:350, paras 74–78.

[39] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874; and Case C-218/22 *Comune di Copertino* EU:C:2024:51.

[40] *Bauer and Willmeroth* (n 39) para 58.

[41] D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *European Law Review* 479; S Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) 66 *Revista de Derecho Comunitario Europeo* 407; E 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*' (2019) 15 *European Constitutional Law Review* 306.

[42] AG Cruz Villalón in *Association de médiation sociale* (n 36) paras 63 and 65.

[43] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2014:2, para 45.

[44] Ibid para 47.

blur the rights/principles distinction'.[45] Remarkably, later in the *Glatzel* case, the Court of Justice used the very same reasoning and even quoted the *AMS* case while referring to the 'principle' (of the integration of persons with disabilities).[46] So, even if the Court did not explicitly endorse the definition of a principle proposed by AG Cruz Villalón in *AMS*, its subsequent case law tends to indicate that it aligns with his approach.

In any case, whether a provision embodies a principle requiring further elaboration through legislation, or a right calling for more specific expression in such legislation, it implies – in both cases – that the provision itself does not confer a subjective right to be invoked before courts on its own. It follows that when a principle is transformed into a subjective right through EU secondary legislation, or when a right is given more specific expression in such legislation,[47] it signifies, in both cases, that a right of a social or socio-economic nature derives its enforceability from EU secondary law. From a purely formal or legalistic perspective, such social or socio-economic rights have a lesser value than fundamental economic freedoms, which are embedded in primary law, and have a direct effect based on the primary law itself. When principles or rights calling for further elaboration become operational only through the national legislation, their legal status is even weaker.

To date, the only fundamental socio-economic right that appears to hold the status of primary law based on the EU Charter itself is the right to paid annual leave. While this right does not require specific expression in legislation to be fully effective and is directly applicable even in horizontal relations, it still cannot be invoked in isolation before a court. This limitation arises from the accessory nature of fundamental rights and the mechanisms for their protection under EU law. As already recalled above, the provisions of the EU Charter apply to a case only if it falls within the scope of EU law,[48] and a case is considered within this scope only if another relevant piece of EU law is applicable to it in the first place. Given the nature of the right to paid annual leave, it is difficult to envision a situation where it would be invoked with a link to an EU law measure other than the Working Time Directive.[49]

[45] J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T Hervey and J Kenner (eds), *Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective* (Hart Publishing 2003) 19.

[46] *Glatzel* (n 38) para 78.

[47] E Muir, 'The Fundamental Rights Implications of EU Legislation' (n 18).

[48] B De Witte, 'The Scope of Application of the EU Charter of Fundamental Rights' in M González Pascual and A Torres Pérez (eds), *The right to family life in the European Union* (Routledge 2017); B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 *European Papers* 133, 156.

[49] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

The horizontal direct effect of the EU Charter's provisions primarily addresses situations where this directive has not been properly transposed into national law. With the aim to circumvent the problem that the provisions of the directive lack horizontal direct effect, an individual can invoke Article 31(2) of the EU Charter even in horizontal relations.

It follows that even from a legal perspective, the Solidarity chapter of the EU Charter does not contain a homogenous group of socio-economic rights, because different provisions have different legal status. There are several axes, which explain the differences. First, it matters whether the given socio-economic right is of a labour law nature or falls under social security. Second, it is important to distinguish between a right that can be directly relied upon before a national court and a right or principle that requires specific expression in legislation. Third, it is crucial to determine whether this specific expression is contained in EU secondary legislation or left to national legislation. In any case, as it holds true for the EU Charter as a whole, the applicability of all socio-economic rights depends on the application of another measure of EU law. Therefore, regardless of how relatively strong the individual provisions of the Solidarity chapter may be, they retain an accessory character and, despite having the status of primary law, they require legislative action either at the EU or national level to become fully operational.

4. Socio-economic rights from an economic perspective

Variations among socio-economic rights are also evident from an economic perspective. The most visible are those related to the subject matter of the 'social' provisions and the rights or principles they encompass. Most of the provisions in the Solidarity chapter concern work-related rights with a strong economic and even pro-market element. They must be distinguished from provisions calling for 'genuine solidarity', such as the provision referring to social security and social assistance. While both these categories have a strong economic dimension and are closely tied to the economy as a whole, they do so in distinct ways.

4.1. Labour rights through an economic lens

Labour rights protect either current workers, i.e. those who are economically active, or jobseekers, i.e. those who are willing and objectively able to enter the explicit labour market.[50] Since labour rights are closely linked to workers as economic

[50] On the issue of labour beyond the explicit labour market, see K Rittich, 'In the Middle of Things: The Political Economy of Labour beyond the Market' (2022) 1 *European Law Open* 781.

agents, the exercise of such rights inevitably leads to economic implications. As economic studies show, labour laws and labour standards in general can have both positive and negative effects – both on different individuals and on the economy as a whole; they can be assessed differently depending on whether the perspective is microeconomic or macroeconomic; and they can manifest themselves differently in the short term compared to the long term.[51] In any case, it is not the purpose of this paper to go into the details of how concrete labour rights affect the internal market, and the whole economy of the EU. The following lines will only highlight the economic dimension of the work-related rights protected by the EU Charter.

Looking at the protection of labour rights through a microeconomic lens leads to several remarks related to the costs of the respect of these rights by the employer, but with a varying intensity depending on the content of a concrete right. At the same time, the recognition and use of such rights is likely to have even macroeconomic repercussions. Let us closely look at three labour rights: the right to information and consultation (Article 27), the right to fair and just conditions (Article 31) and the right of collective bargaining and action (Article 28).

The right to information and consultation implies an obligation on the part of the employer to provide such information and thus to engage in a certain positive behaviour, which may entail some costs. However, the mere fulfilment of such an obligation does not jeopardise the employer's economic activity in general, could not endanger its economic interests covered by EU law, and hence could not affect the economic performance of the EU as a whole. Moreover, the respect of this right strengthens the bargaining power of the employee, and hence it has a pro-market effect in general.

With regard to the right to fair and just working conditions (including right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave), the exercise of this right affects the economic activity of the employer to a greater extent. Firstly, the limitation of maximum working hours has an impact on the organisation of production. Secondly, the right to an annual period of paid leave means that the employer must also pay for the time when the employee does not perform any tasks. However, while respecting the right to fair working conditions may entail costs for the employer in the short term, it protects the employer's interests in the long term: allowing an employee to take a break is not only an act of solidarity with a worker who happens to be a human being but also

[51] See the overview of the economic literature in S Deakin and F Wilkinson, 'Right vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *Industrial Law Journal* 289. For a more recent empirical study see, e.g., Z Adams, L Bishop, S Deakin, C Fenwick, S Martinsson Garzelli and G Rusconi, 'The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013' (2019) 158 *International Labor Review* 1.

has a positive impact on economic performance in general. It does not require a robust empirical analysis to conclude that a worker, who has had sufficient rest, is likely to be more efficient, less likely to make mistakes and less likely to cause damage to the employer. As the economic studies show, the reduction of working hours and flexible working arrangements really increase the productivity, and therefore they have positive effects on the economic performance of the firm.[52] From a broader perspective, efficient production of one firm contributes to the good economic performance of the whole society.[53]

A socio-economic right, which appears to be extremely interesting from an economic perspective is the right of collective bargaining and to strike. In general, the purpose of the collective action is based on the presumption that there is a significant imbalance in bargaining power between a worker and an employer.[54] As an individual, a worker has a weaker position with regard to negotiating the wage or the working conditions. The collective action allows for workers to unite and use the aggregated power in the negotiations with the formally stronger employer. Therefore, the exercise of the right of collective action helps to equalize the weapons on both sides. Furthermore, as shown in a study made for the Organisation for Economic Co-operation and Development (OECD), collective bargaining – if it is performed according to well set rules – can even increase productivity, improve skills in the workplace, spread good practices, and in the long term, it can lead to the decrease of unemployment.[55] Deakin adds that the positive impact on employment and productivity can be induced by the fact that the unionizing and the collective action support or increase motivation and commitment of workers.[56] In this sense, collective bargaining is a perfect pro-market tool, and not something that would go – *prima facie* – against the values or the pillars of the internal market as a whole.[57]

[52] See e.g. L Golden, 'The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper' (2012) ILO: Conditions of Work and Employment Series No. 33 at www.ilo.org.

[53] S Deakin, J Malmberg and P Sarkar, 'How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010' (2014) 153 *International Labour Review* 1, 17.

[54] T Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press 2003) 49.

[55] OECD, 'Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy' (OECD 2018) at www.oecd-ilibrary.org (last accessed 13 February 2024).

[56] S Deakin, 'The Contribution of Labour Law to Economic Development and Growth' in R Blanpain, F Hendrickx and D Du Toit (eds), *Labour law and social progress: holding the line or shifting the boundaries?* (Kluwer Law International BV 2016).

[57] However, for an opinion that trade unions are negatively affecting markets similarly to cartels, see R Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92 *Yale Law Journal* 1357.

However, the exercise of the right to strike can also have negative implications. The strike directly affects the firm by limiting or even stopping the production, and it can bring about additional costs (related, for example, to the contractual penalty for late delivery of goods). A strike, which lasts too long, can even lead to the bankruptcy of the firm, which results in a loss of jobs and thus in the increase of unemployment. Next, a strike can negatively impact consumers and also other firms within the supply chain.[58] The overview of both positive and negative aspects of the right of collective bargaining and the right to strike show that the concrete parameters of the exercise of such rights must be set carefully, and that the exercise itself must always be assessed in the light of its consequences.

The economic dimension of the right to strike in relation to the internal market rationale was even discussed in a series of cases before the Court of Justice: *Laval*,[59] *Viking*,[60] and *Rüffert*.[61] The *Laval* case involved a Latvian company that posted workers to Sweden for construction work but did not want to abide by Swedish collective agreements, which led to collective action by the trade unions. A similar collective action was triggered by a decision by *Viking Line*, a Finnish shipping company, to reflag its vessels to Estonia in order to pay lower wages under Estonian rules. Finally, the *Rüffert* case concerned a public contract in Germany that required contractors to pay wages in accordance with local collective agreements; a subcontractor from Poland employed workers at lower wages, and this led to the question of whether the contractual requirement violated the freedom to provide services. Although the cases were decided before the EU Charter came into effect, and hence before the right of collective bargaining and action was formally recognised as an EU fundamental right, the reasoning of the Court is still worth reminding mostly because it reveals the uneven relation between fundamental economic freedoms and socio-economic rights, and the political dimension behind.

Simply put, in legal terms, all three cases included a clash between freedom of establishment or freedom to provide services on the one hand and right of collective bargaining and to strike on the other hand. In economic terms, the cases involved an effort on the part of the companies to reduce costs by paying lower wages, and a counter-effort on the part of the workers to obtain higher (or at least not lower)

[58] For a detailed overview of potential threats or harms of the strike, see T Novitz (n 54) 75 ff.

[59] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

[60] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772.

[61] Case C-346/06 *Dirk Rüffert v Land Niedersachsen*, EU:C:2008:189.

wages. The nature of the interest at stake on both sides was virtually the same: economic gain. However, the Court of Justice applied the asymmetrical internal market balancing formula, in which the economic interest covered as a socio-economic right did not have a chance to win.

These cases induced a wave of criticism,[62] mostly framed as a loss of social Europe against 'market Europe'.[63] The commentators remarked that the Court of Justice 'gave precedence to market freedoms over social objectives'[64] or that its approach 'structurally subordinates social policies to the economic power of market actors'.[65] From an economic perspective, however, the clash of values in these cases can be presented not as a struggle between the 'economic' and the 'social', but rather as a struggle between two unequal economic powers. Even workers, united in trade unions, represent market actors with economic interests, but their position in the balancing test is weaker.

According to some commentators, the weaker position of trade unions and eventually the very result of the balancing test can be explained by (perhaps unconscious) inclination of the Court of Justice towards the neoclassical/neoliberal economic theory: as Kaupa puts it with regard to the *Viking* case, neither the textual, nor the teleological interpretation of the provisions on fundamental economic freedoms in the Treaty leads to a clear-cut conclusion that the exercise of the right of collective bargaining and the right to strike can never prevent the relocation/re-flagging of the companies and it is 'only from a neoclassical perspective that the decision appears inevitable'.[66] He also points out that albeit the 'neoclassical bias' is rather implicit in the text of the judgment in *Viking*, it appears to be more visible in the opinion of the Advocate General who

[62] Out of many, see, e.g. M Lasser, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms' (2014) 15 *Theoretical Inquiries in Law* 1; S Giubboni, 'The Rise and Fall of EU Labour Law' (2018) 24 *European Law Journal* 7; C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199. For an overview of the reactions and comments, see C Barnard, 'The Calm after the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in Viking and Laval' in A Bogg, C Costello and A Davies (eds), *Research handbook on EU labour law* (Edward Elgar publishing 2016).

[63] J Louis, 'Constructing the *Viking* and *Laval* Cases as a Major Defeat for Social Europe: A Contextual and Processual Analysis' (2023) 2 *European Law Open* 724.

[64] Garben (n 22) 61.

[65] F De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 38.

[66] C Kaupa, 'Maybe Not Activist Enough? On the Court's Alleged Neoliberal Bias in Its Recent Labor Cases' in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice. Causes, Responses and Solutions* (Edward Elgar Publishing 2013) 66.

claims that 'the exercise of the right to freedom of establishment is […] instrumental to increasing the economic welfare of all the member states'.[67]

The judgment in *Viking* does not elaborate upon the link between the exercise of the economic freedom and the resulting economic welfare, but it still considers it 'indisputable' that the collective action 'has the effect of making less attractive, or even pointless […] Viking's exercise of its freedom of establishment, because it prevents Viking […] from enjoying the same treatment in the host Member State as other economic operators established in that State'.[68] Mulder points to critiques according to which the judgment reflects a 'renewed neoclassical economic theology of free markets' in the light of which 'the constitutional foundation of the European Union has converted economic power into a fundamental right and collective labour rights are today considered mostly as an obstructive power that have to be limited'.[69]

It follows from the judgment that the economic interest of the workers to keep their original wages was not taken into account, because only the pursuit of reducing production costs is considered as the main value contributing to the economic welfare in the EU. The presentation of the conflict as an opposition between the economic (represented by firms) and the social (represented by workers) seems to be based on the idea that only producers (firms/companies) are responsible for economic growth and prosperity in general.

In any case, the reasoning of the Court of Justice gives the impression that the internal market and the content and contours of the fundamental economic freedoms together constitute a perfectly neutral setting, which is exempt from and independent of any political decisions,[70] and that such a neutral system will inevitably bring about economic welfare. However, as critics of the neoclassical approach or proponents of alternative economic theories point out, there are other forces that can contribute to economic welfare, such as strong institutions, re-distribution, investment into innovations, or the reinforcing of the demand side of the market.[71] It is therefore important to emphasize that the choice of the allegedly neoclassical perspective, even if it may have been rather unconscious within the EU judiciary, represents a deeply political decision.

[67] Opinion of AG Maduro in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line APB*, EU:C:2007:292, para 57.

[68] *Viking* (n 60) para 72.

[69] J Mulder, 'Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in "Good Governance"?' (2018) 34 *Utrecht Journal of International and European Law* 4, 20.

[70] B Bugaric, 'Europe Against the Left? On Legal Limits to Progressive Politics' (2013) LEQS Paper No. 61/2013, 12 at eprints.lse.ac.uk (last accessed 5 May 2025).

[71] For the overview of such economic theories and their main arguments, see Kaupa (n 66) 62.

Regardless of the critiques, these cases and their judicial outcomes nicely illustrate the interrelationship between economic considerations, political decision-making and legal solutions when it comes to labour rights in EU law. In the absence of a predetermined legal rule for resolving the conflict between a fundamental economic freedom and a fundamental right with economic implications, it fell to the Court of Justice to determine the resolution. However, even the judicial decision required a political choice on how to address the conflict between two competing economic interests through a legal framework. The balancing exercise and its outcome demonstrate that even judicial decision-making contributes to the shaping of the overall political economy of the EU.

4.2 Economic conditions for and economic implications of social security rights

In contrast to provisions on labour rights, the provision of social security and social assistance (Article 34) recognises rights of those who are – for various reasons – not present or active in the explicit labour market, and therefore are not direct contributors to the economic performance of the whole society, or those who are economically active but are entitled to additional form of social security (housing benefits, child benefits) anyway.[72] It does not matter whether a claimant is an economically active worker or not. The key point is that such rights are not dependent on the active performance in the labour market and do not require any specific economic activity as a counter-performance for the provision of such rights. In other words, an individual is either entitled to a form of access to social services (e.g. assistance in the case of loss of employment), or to social security benefits and allowances in terms of monetary contributions paid from public budgets, but such a person is not obligated to engage in any specific economic activity in exchange for these services or contributions.

These types of social rights are considered extremely costly. However, it would be incorrect to consider them 'costly' as opposed to 'cost-free' civil or political rights,[73] since '[a]ll rights are costly because all rights presuppose taxpayer funding of effective supervisory machinery for monitoring and enforcement'.[74] This means that positive obligations to protect fundamental rights require positive action of the state which is inevitably funded by the public budget. Nevertheless, the reality is that providing social benefits and similar aids can be 'more costly' than the protection of

[72] See e.g. E De Becker, 'Social Security in the Combat of In-Work Poverty' in L Ratti and P Schoukens (eds), *Working yet poor: challenges to EU social citizenship* (Hart Publishing 2023).

[73] V Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151, 168.

[74] S Holmes and CR Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton 1999) 44.

other fundamental rights, sometimes to a considerable extent. For example, as Eurostat figures from 2021 show, the expenditures on pensions, which are paid from the national budgets, vary from 4,5 % of the national Gross Domestic Product (GDP) (Ireland) to 16,4 % of the national GDP (Greece).[75] Although the payment of other social benefits do not reach the amount of pensions, it holds true that those socio-economic rights, which require monetary performance on the side of the Member State, are enormously budget dependent.

In any event, such budget dependency and considerable costs of the provision of social benefits and similar aid remain the reason why – from the political perspective – the decision upon the design of social systems, concrete social entitlements and the legal conditions for claiming them are left to the Member States. This is reflected in the wording of Article 34. According to the Explanations to the EU Charter, this provision includes both elements of a right and of a principle. A concrete right seems to be present in paragraph 2, which explicitly says that '[e]veryone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices'. This implies that individuals are entitled to social security benefits under EU law, but only when they are covered by EU law through the exercise of their economic freedom to move and reside in the EU. Additionally, the provision of these benefits is dependent on the national laws that determine the specific amounts, and the conditions required to qualify for them.

The necessity to reside and move legally within the European Union in order to be covered by Article 34 only reflects the principle that the EU Charter as a whole is applicable only when the case is already within the scope of EU law. It is not in the competence of the EU to set substantive rules on the social security benefits and allowances; EU law only regulates the social security coordination[76] linked to the movement of people, and it forbids – through the principle of non-discrimination – differences in treatment based on nationality. Similarly, paragraph 1 of Article 34 says that the EU 'recognises and respects' the entitlements to social security benefits, while these entitlements must be based on national legislation. There is no entitlement for individuals, which could be based directly on the EU Charter, but the EU Charter only refers to principle to provide for social security.

[75] Available at Eurostat, 'Social protection statistics - pension expenditure and pension beneficiaries' (2024) at ec.europa.eu.

[76] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

There is an interplay between the EU level and the national level, where EU law only recognises substantive social security rules set by the national laws. The economic considerations behind such rules thus remain in the national hands, since social benefits are dependent on public budgets and hence on the taxation systems and the consecutive allocation of resources. This covers spheres where the EU does not directly interfere with the Member States' policy choices, as long as the national legal rules do not violate EU law and its principles.[77]

Nonetheless, viewed from the broader economic perspective and in terms of the internal market rationale, social security benefits should not be seen merely as a drain on the resources generated by economically active entities. Of course, they are dependent on the public resources collected through taxes or direct social contributions. But the economy is dynamic, not static. Money makes money, and public investment in various sectors or spheres of the society results in economic assets being recirculated within the economy. Giving money into pockets of those who are not economically active as workers (or producers in general) boosts overall economic demand. Public investments through unemployment benefits, caregiver allowances, pensions, and other social welfare programs are then translated into consumer spending. This spending, in turn, triggers a multiplier effect, further elevating the demand for goods and services.[78] As empirical economic studies confirm, social security in the form of benefits and allowances functions as an economic stimulus.[79] Moreover, since private spending is a standard part of the calculation of the GDP, it is worth noting that even a person, who is formally considered to be economically non-active and is entitled to social allowances, contributes to the GDP of the state by spending the money given by that state.

It follows that the national decisions on the social security schemes and on the amount of money invested into people through them influence the national demand, which further affects the circulation of goods and services in the EU, and therefore the EU economy as a whole. Consequently, the economic stimulus can affect back the extent of public resources, because the investment through social security returns to the public budget through taxes. *Ceteris paribus*, higher spending generates more

[77] Case C-35/19 *BU v État belge*, EU:C:2019:894, para 31.

[78] R Balakrishnan, D Elson and R Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53 *Development* 27, 37.

[79] See e.g. empirical evidence in Germany: S Gechert, C Paetz and P Villanueva, 'The Macroeconomic Effects of Social Security Contributions and Benefits' (2021) 117 *Journal of Monetary Economics* 571. For a study based on the data from the USA, see, e.g. C Romer and D Romer, 'Transfer Payments and the Macroeconomy: The Effects of Social Security Benefit Changes, 1952-1991' (2014) National Bureau of Economic Research 20087, at www.nber.org (last accessed 28 April 2024).

money collected through the value added tax (or indirect taxes in general), and enhanced demand in goods or services is apt to boost production, which generates profits that are subject to direct taxes.

Social security entitlements can also appear in non-monetary forms, such as in forms of training or re-training courses for free, or even in the form of children's daycare facilities or facilities providing for other types of care. These kinds of social services are also dependent on the budgetary conditions of the Member State, and they also have economic implications. The provision of these services enables individuals who would otherwise remain outside the explicit labour market to enter it and thereby to contribute to the economy.[80]

Naturally, distributing social security benefits or social services can sometimes lead to negative outcomes or, at least, it can pose challenges. A public budget is not a bottomless pit. A decision to allocate public money into social security schemes means that those resources are not available for other sectors or areas of society where the (multiplication) effect of such a monetary boost can be bigger or where they can simply be more needed. Regarding unemployment benefits specifically, some research indicates that overly generous systems can discourage work, leading to a negative macroeconomic impact by increasing unemployment rates.[81]

The politics and policy choices play a crucial role here. The economic theories and the empirical evidence can provide for arguments on how to design the rules on social security and they can show what consequences the application of the rules may bring about. However, the final decision on the concrete scheme is a matter of the political choice. Against the background of the division of competences between the EU and the Member States, the power to settle such a delicate issue was left to the latter. EU law recognises and respects the social security entitlements, which are embedded in national law, rather through a pragmatic approach linked to the free movement of persons. As long as the system does not violate EU law and its principles, e.g. by dissuading individuals from free movement or by enabling discriminatory treatment, the national legislators can settle legal rules on social security on their own. The decisions upon the form and content of the solidarity remain at the national level, and EU law starts being interested in the national system only in the moment when the solidarity arrangements affect internal market principles or come into conflict with EU law in general. The main logic of EU law is highly economical and still linked to the old principles already contained in the regulations on social security

[80] K Kalíšková and D Münich, 'The Impact of Childcare Availability on Maternal Employment: Evidence from Czech Municipalities' (2023) 18 *PLOS ONE* 1.

[81] A Pereira and J Andraz, 'On the Long-Term Macroeconomic Effects of Social Security Spending: Evidence For 12 EU Countries' (2015) 3 *Journal of International Business and Economics* 63.

coordination from 1950s: the threat of losing the entitlements to social security or of being subject to discriminatory treatment could prevent individuals form moving to another Member State, which would endanger the very purpose of the internal market. Derivatively, through the principle of non-discrimination, the provision of such rights is even extended to third country nationals and their family members,[82] for which the initial economic assumption does not apply.

It follows that socio-economic rights having the character of social security remain mostly a matter of national law. They become an issue of EU law and trigger applicability of the EU Charter only in 'qualified situations' when they are capable of affecting legal rules, on which the internal market is based. In practice, however, even the national legal rules on social security are linked to the EU economy. Their application in the given Member State influences its economy, and the economic performance of individual Member States together has implications upon the EU as a whole.

4.3. The importance of using an economic lens in political decision-making

It is therefore evident that the social and socio-economic rights protected by EU law not only reflect the ideals of humanity and the values of a democratic society but also possess a strong economic dimension. At the micro level, they reflect the economic interests of individuals – both workers, and economically non-active persons who claim for social security benefits. The desire of workers to earn enough money under fair conditions, or to take an annual vacation while being paid, and even the need to get social benefits while being unable to work – they all represent the same kind of economic pursuit as the efforts of firms to sell more, to reduce costs, and hence to maximize profits.

At the macro level, the protection of socio-economic rights and exercising them also carry economic implications. Protecting workers can enhance their productivity, thereby improving overall efficiency of the firm, which in turn benefits the entire economy. Furthermore, the provision of social benefits can stimulate the economy by boosting aggregate demand. Naturally, there may be adverse economic effects, particularly if specific rights are exercised without appropriate limits or if the overall system lacks proper design. But these flaws somehow mirror the fact that the limitless exercise of the fundamental economic freedoms could have negative consequences as well.

[82] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

The protection of socio-economic rights as fundamental rights under EU law has traditionally been seen as a remedy for the potentially harmful side effects of the internal market, which is designed to promote economic prosperity and, in turn, political stability and peace within the EU. From this viewpoint, the pursuit of economic objectives through the internal market is considered the primary goal, while the protection of fundamental rights, including social and socio-economic rights, is viewed as secondary. However, the analysis of social and socio-economic rights reveals that while the 'economic' and the 'social' can be put in contrast, such a sharp distinction would be incorrect. The social sphere also covers the economic interests – and this means not only the interests of the individuals claiming such rights, but also the economic interests of the whole EU. Consequently, while the protection of socio-economic rights may be formally perceived as a corrective to the exercise of economic freedoms and the functioning of the internal market, in practice, these rights are inherently economic, and they should hence be regarded as an inseparable part of the internal market.

In this context, politicians, policymakers but also judges deciding on socio-economic rights should be aware of their economic nature and familiarize themselves with both the economic conditions under which the provision of these rights is feasible and the economic implications they entail. To this end, they should work with empirical economic evidence and understand the economic arguments related to the protection and enforcement of socio-economic rights in the EU.

5. Conclusion

Social and socio-economic rights are usually seen as a regrouping of the 'social' value in the EU as opposed to the 'economic' value represented by the internal market and its rationale. The logic of the internal market is based on the idea of free competition in the market without cross-border barriers and has been translated into law through the recognition of four fundamental economic freedoms – the free movement of goods, services, persons, and capital. In other words, the economic rationale has been translated into subjective rights that have direct effect and can be invoked directly before the courts. This is based on the assumption that the free exchange of production and factors of production leads to economic growth and contributes to economic prosperity.

From the perspective of the internal market, socio-economic rights lag behind the fundamental freedoms, because they are not seen as directly contributing to the economic welfare, and because they are sometimes considered as dependent on the economic assets generated by the producers, or as limits of making these assets.

Moreover, although socio-economic rights are protected by EU law, even at the level of primary law, their content often depends on national legislation and thus on national political and policy choices, as they do not always fall within the competence of the EU.

In any event, regardless of whether socio-economic rights 'materialize' at the EU level or at the national level, they not only reflect the idea that people deserve a certain protection as members of the society, but they also bear a strong economic element. The exercise of some of them is dependent on public budgets, and some of them affect the production of firms. But in both cases, the protection of socio-economic rights is not a passive or negative aspect of the economy, which would consume the assets created by others. The recognition and exercise of such socio-economic rights can have a positive impact on economic performance of the society, and hence on economic welfare.

While it may be tempting to contrast the social with the economic, a closer look at the nature of socio-economic rights accentuates their economic dimension. These rights inevitably involve economic interests – but the interests of those who are usually the weaker party in economic relations. Whether it is a worker in relation to an employer or a social security claimant in relation to the State, their relationship is clearly economic in nature. Moreover, the wealth they receive in the form of wages or social benefits is not a sunk cost, because they put it back into the economy through their spending, which is also part of the economic output of society. In discussions about the internal market, socio-economic rights should not be viewed merely as barriers, limits, or obstacles to economic growth, but rather as essential economic elements in their own right.

Ultimately, the question should not be whether we can afford solidarity within the EU through legally enforceable socio-economic rights, but rather how we should design the legal system that provides them in order to achieve both the economic and social goals of the EU. Given the inherently economic nature of these rights, along with their dependence on and influence over the economy, politicians and policy-makers deciding on these rights and the conditions for claiming them should ideally be guided by economic arguments and empirical evidence.