

## ARTICLE

# Fundamental Social Rights Protection and Covid-19 in the EU: Constraints & Possibilities

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The Covid-19 pandemic has had major socio-economic consequences, particularly for critical workers such as healthcare workers, seasonal workers and platform workers in their social rights enjoyment. This article analyses how EU law could protect social rights in times of Covid-19, with a specific focus on the possibilities and limits of the EU Charter in times of crisis for these certain categories of EU workers. The potential of EU legal instruments to protect vulnerable workers' social rights is limited both by the limited legislative competences in the social policy field and the limited scope of application of the EU Charter. Furthermore, social rights enshrined in the Charter are often formulated as principles, which means they cannot be invoked directly in court, but need to be elaborated in legislation. Nevertheless, the EU could further strengthen the potential of social rights in the EU legal order through harmonisation of social standards in two ways. First, by harmonisation of social rights using the legal bases in the Treaty. Secondly, by implementing the European Pillar of Social Rights effectively and by improving application of the EU Charter at national level, both by clarifying and broadening horizontal direct effect as by increasing application of the EU Charter by national policymakers and the judiciary and raising awareness.

**Keywords:** EU Charter of Fundamental Rights; social justice; social fundamental rights; EU social policy; solidarity; Covid-19

## 1. Introduction

As a result of the outbreak and rapid spread of Covid-19 the EU faced a crisis. The Corona pandemic and measures adopted by the EU Member States to contain the spread of Covid-19, including border restrictions and lockdowns, have had unprecedented consequences for the economy and labour market.<sup>1</sup> Member States' economies have considerably shrunk during the first wave of the Corona pandemic, which put the resilience and safeguarding of Europe's social market economy, which already faced considerable challenges such as an ageing population, growing inequality, digitalisation and migration, to the test.<sup>2</sup> With lessons learnt from the 2008 financial crisis, the current unemployment rates remain relatively low, particularly due to the policy action at the level of the EU and its Member States, including financial and income support schemes and loan schemes.<sup>3</sup> In addition, in the Netherlands, directors from CPB, PBL and SCP have urged the Dutch government in a recent appeal to protect vulnerable groups and to pay attention to the increasing social gap.<sup>4</sup>

Nevertheless, according to Commissioner Kyriakides, the Covid-19 pandemic 'has weakened the fabric of our societies' and 'has left the most vulnerable – those with fragile mental or physical health, and those

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<sup>1</sup> Eurofound 'COVID-19: Implications for employment and working life (Publications Office of the European Union 2021).

<sup>2</sup> Catherine Barnard and Sybe de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15(2) Utrecht Law Review 47.

<sup>3</sup> Eurofound (n1).

<sup>4</sup> Maria van den Mijsenbergh, Gera Nagelhout, Semiha Denktas and Charles Agyemang 'Coronarisco bij Migranten is vooral een Armoedekwestie' (13 October 2020) NRC; Marieke Stellinga 'Planbureaus: Kabinet moet meer doen dan Coronabrand Blussen' (8 October 2020) NRC.

whose life circumstances create barriers to accessible healthcare – the most exposed.<sup>5</sup> In addition, certain categories of EU workers, more specifically seasonal workers, critical workers, including those working in the health care sectors, and platform workers were particularly hit by the Corona crisis for various reasons, ranging from loss of income, while already economically vulnerable, to overwork and exposure to the virus, as will be discussed. The latter developments indicate that the Covid-19 pandemic has exposed some social inequalities of vulnerable groups that were often neglected in developed countries, which also requires Member States to rethink their social protection policies.<sup>6</sup>

This article looks into the socio-economic consequences for these different categories of EU workers, what the EU has done to protect them and more specifically, how their social rights, including for instance the rights to fair and just working conditions, social security, social and medical assistance and health care as enshrined in Articles 31, 34 and 35 respectively in the Solidarity Title of the EU Charter of Fundamental Rights, have been at stake as a result of Covid-19 and could be further protected. The focus of this article is in particular on EU fundamental social rights, and how they could constitute a counterweight to the socio-economic consequences of Covid-19 for specific categories of vulnerable workers within the EU. The set-up is as follows: Section 2 briefly examines what has been done so far by the EU to address the socio-economic consequences of Covid-19 more generally and more specifically the social rights of vulnerable workers, focusing on critical workers such as healthcare workers, seasonal workers and platform workers. Section 3 illustrates the EU Charter's constraints and possibilities for the protection of fundamental social rights in times of crisis such as Covid-19, with a particular focus on the CJEU's case law in this matter. This section then elaborates what else could be done to strengthen the protection of EU fundamental social rights of these vulnerable EU workers, taking into account the limited legislative competences of the EU in the social and health domains. The last section provides for some recommendations on what the EU could further do to strengthen the potential of social rights in the EU legal order, particularly for the analysed categories of EU workers.

## 2. Covid-19 and the protection of EU fundamental social rights: what has been done so far at EU level?

### 2.1. *The socio-economic support by the EU during the Covid-19 pandemic: a brief overview*

At the beginning of the outbreak of Covid-19 the EU was criticised for its lack of action. The original lack of European cooperation in dealing with the Corona crisis can to a large extent be explained by the relatively weak legislative powers of the EU in the field of public health, which appears to have made coordinated, substantive and targeted approach to COVID-19 difficult from the start (see hereafter: Section 3).<sup>7</sup> In the meantime, the European Commission and EU legislators have managed to step up their response to the Corona crisis.<sup>8</sup> In terms of direct socio-economic support, the Commission has in a number of ways tried to allow for flexibility and liquidity for Member States to financially support businesses, their employees and combat poverty and social exclusion. In May 2020 the European Commission proposed to amend the Regulation which establishes a fund for European aid for the most deprived (the FEAD Regulation) to meet Covid-19 challenges and to see to it that the most vulnerable ones could continue to receive aid whilst protecting the aid workers and volunteers delivering the aid.<sup>9</sup> Furthermore, additional funds have been made available, for instance through the European Social Fund, to support employment and social cohesion.<sup>10</sup>

<sup>5</sup> Commission, Keynote Speech by Commissioner Kyriakides' (Webinar 'Covid-19 in Marginalised Groups: Challenges, actions and voices' 16 October 2020) <[https://ec.europa.eu/commission/commissioners/2019-2024/kyriakides/announcements/keynote-speech-commissioner-kyriakides-webinar-covid-19-marginalised-groups-challenges-actions-and\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/kyriakides/announcements/keynote-speech-commissioner-kyriakides-webinar-covid-19-marginalised-groups-challenges-actions-and_en)> accessed 20 November 2020; see also: Andrian Liem, Cheng Wang, Yosa Wariyanti, Carle A. Latkin, and Brian J. Hall 'The Neglected Health of International Migrant Workers in the COVID-19 Epidemic' *The Lancet Psychiatry* 7, no. 4: e20. 2020.

<sup>6</sup> Jelena Arsenijvic and Erna Ruijter, 'Are vulnerable groups even more vulnerable in times of Covid-19 pandemic' (Gender Diversity and Covid-19 Platform 2 November 2020) <<https://www.uu.nl/en/background/are-vulnerable-groups-even-more-vulnerable-in-times-of-covid-19-pandemic>> accessed 4 July 2021.

<sup>7</sup> Ulla Neergaard and Sybe de Vries, 'Chapter 7 – "Whatever is necessary...will be done": time for a less one-sided view on solidarity in Europe in the shadow of COVID-19' in Dolores Utrilla and Anjum Shabbir (eds) *EU Law in Times of Pandemic – The EU's Legal Response to Covid-19* (EU Law Live 2020) 20.

<sup>8</sup> Commission, 'Coordinated economic response to the COVID-19 Outbreak' COM(2020) 112 final.

<sup>9</sup> Regulation 2020/559 of the European Parliament and of the Council of 23 April 2020 amending Regulation (EU) No 223/2014 as regards the introduction of specific measures for addressing the outbreak of COVID-19 [2020] OJ L 130/7.

<sup>10</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+)' COM (2020) 447 final.

Most important with a view to help repair the economic and social damage of the Covid-19 crisis is the European Recovery Plan, an unprecedented financial aid package, which should help 'rebuild' Europe after the pandemic.<sup>11</sup> Within the Recovery Plan a large portion of the budget is reserved for 'NextGenerationEU,' specifically targeted at the immediate economic and social damage brought about by the Coronavirus pandemic.<sup>12</sup> Loans and grants are made available to EU countries to support reforms and investments that should make 'European economies and societies more sustainable, resilient and better prepared for the challenges and opportunities of the green and digital transitions.'<sup>13</sup> Key principles underlying the plan are sustainability, economic and social resilience and digital transitions.

In addition, in March 2021 the Commission published a Recommendation on effective active support to employment following the Covid-19 crisis.<sup>14</sup> In this context, Member States are encouraged to adopt specific measures to address labour market challenges with potential financial support from the Recovery Plan. It will have to be awaited what these plans actually entail for the more vulnerable categories of EU workers.<sup>15</sup>

On the 2<sup>nd</sup> of April 2021, European Commission President Ursula von der Leyen announced a new fund of up to €100 billion to support EU Member States to introduce short-time working or similar schemes, including for the self-employed, in an effort to safeguard jobs during the Covid-19 pandemic. Known as SURE (i.e. 'Support to mitigate Unemployment Risks in an Emergency'), the initiative will finance loans on favourable terms to EU countries facing a sudden and severe rise in spending on such schemes and is designed to show EU solidarity with Member States and workers that have suffered from Covid-19.<sup>16</sup> The European Network of National Human Rights institutions has urged EU Member States to prioritise the social protection of such groups when requesting financial assistance through the SURE instrument and include targeted measures to address those most vulnerable and ensure their access to social justice.<sup>17</sup>

## **2.2. Specific vulnerable categories of EU workers due to Covid-19 and the EU's response**

Recent studies have illustrated that the impact of the Covid-19 crisis has disproportionately impacted both health care workers and more vulnerable and disadvantaged workers, characterised by precarious working conditions, low wages and economic vulnerability, particularly because they are often less able to cope with income loss or unemployment.<sup>18</sup> On the one hand, the closing of borders, lockdowns and economic effects of the Covid-19 pandemic reduced the demand for certain forms of work, including seasonal workers, for example in the touristic sector and led to sudden unemployment. With respect to migrant EU workers, the European Commission particularly focused on the position of seasonal and critical workers who as a result of the pandemic faced obstacles to reach the workplace.<sup>19</sup> On the other hand, the need for workers in other sectors such as the healthcare sector and the platform economy, in particular for delivery, has considerably grown.<sup>20</sup> Covid-19 put an enormous strain on healthcare workers and our health systems and has also laid

<sup>11</sup> Commission, 'The EU budget powering the recovery plan for Europe' COM (2020) 442 final; Commission 'Europe's moment: Repair and Prepare for the Next Generation' COM (2020) 456 final.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> Commission, 'Commission Recommendation on an effective active support to employment following the COVID-19 crisis (EASE)' COM (2021) 1372 final.

<sup>15</sup> Important is that in the wake of the Recovery Plan for Europe and with the support of the EU's financial aid, Member States also launch recovery plans to boost a more resilient and sustainable economy after the pandemic: see e.g. France's Relance programme with three main themes: ecology, competitiveness and cohesion <[www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/promoting-france-s-attractiveness/france-relance-recovery-plan-building-the-france-of-2030/](http://www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/promoting-france-s-attractiveness/france-relance-recovery-plan-building-the-france-of-2030/)> accessed 8 February 2021; Commission, 'The EU budget powering the recovery plan for Europe' (11).

<sup>16</sup> Commission, 'a new funding strategy to finance NextGenerationEU' COM (2021) 250 final; Commission, 'European Commission to issue EU SURE bonds of up to 100 billion as social bonds' (7 October 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1808](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1808)>.

<sup>17</sup> European Network of National Human Rights Organisations, 'The EU must put economic and social rights at the heart of its economic response to COVID-19' <<http://ennhri.org/statement-covid-19-esr/>> accessed 28 January 2021.

<sup>18</sup> Marta Fana, Songul Tolan, Sergio Torrejón Pérez, Maria Cesira Urzi Brancati and Enrique Fernández-Macías, 'The COVID confinement measures and EU labour markets', JRC Technical Reports, Joint Research Centre, (Publications Office of the European Union 2020); Graciela Malgesini, 'The Impact of Covid-19 on People Experiencing Poverty and Vulnerability: rebuilding Europe with a social heart, European Anti-Poverty Network Report 2020.

<sup>19</sup> Commission, 'Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak' OJ C 1021/12.

<sup>20</sup> European Migration Network, 'Maintaining Labour Migration in Essential Sectors in Times of Pandemic' (Inform #3 2020) 5 <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_inform3\\_labour\\_migration\\_2020\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_inform3_labour_migration_2020_en.pdf)> accessed 20 December 2020.

bare, even more so than before, the precarious position of platform workers working for online platforms like Deliveroo or Uber in the growing so-called gig economy, due to a rapid process of digitalization and technological innovation.<sup>21</sup>

### 2.2.1. Rights of workers and self-employed within the EU's internal market in general

Free movement rights and EU social rights are intrinsically linked in the EU legal order. The starting point is that in the EU's internal market, the free movement of persons and services should be guaranteed.<sup>22</sup> Based on the free movement of workers as laid down in Article 45 TFEU and the principle of equal treatment, EU citizens have the right to seek employment in another Member State, to receive the same assistance from the national employment offices and to work under the same conditions as nationals of the host Member State.<sup>23</sup> This also means EU citizens must be subject to the laws and relevant collective agreements of the host Member State and must be treated the same way as nationals as regards their working conditions, including in remuneration, dismissal protection and occupational safety and health. It also means they have the right to access the same social and tax advantages as nationals. If EU citizens become involuntarily unemployed, they retain worker status in the host Member State for six months, provided they register with the employment services in the host state.<sup>24</sup> This is how effective free movement is intertwined with EU social rights in the internal market.

Furthermore, Articles 49 and 56 TFEU allow self-employed persons to move to another Member State, either on a long-lasting basis or temporarily, without being discriminated or restricted in their access to the market.<sup>25</sup> Several directives have been adopted with a view to facilitate the freedom of establishment and the free movement of services and ensure non-discrimination, including the Services Directive and the Directive on the Recognition of Professional Qualifications.<sup>26</sup> The above-mentioned provisions and directives are more specifically relevant for certain categories of EU workers (i.e. migrant critical workers such as healthcare workers and seasonal workers) that will be analysed in more depth hereafter.

### 2.2.2. The precarious position of vulnerable workers within the EU: critical, seasonal and platform workers

Not only the position of mobile or cross-border EU workers who have exercised their right to move and reside in another Member State in the midst of the Corona crisis (i.e. seasonal workers and critical workers such as healthcare workers) has been affected by the pandemic, but also but also that of static or non-mobile EU workers (i.e. platform workers). In the following sections, the specific impact of Covid-19 on the social rights of these workers will be analysed.

#### 2.2.2.1. Cross-border critical workers

Critical workers in the EU include those working in the emergency services, health care and food sectors, and other essential services like childcare, elderly care, and transport workers.<sup>27</sup> The border closures due to Covid-19 restricted mobility rights of critical workers. Therefore, the European Commission published guidelines identifying a non-exhaustive list of workers who exercise critical occupations and for whom continued free movement in the EU is deemed essential.<sup>28</sup> The Commission urged Member States to establish specific burden free, non-discriminatory and fast procedures to ensure free movement for such frontier workers, including proportionate health screening.<sup>29</sup> The excessive pressure on these sectors during the pandemic may well have affected critical workers' social rights as enshrined in the EU Charter.<sup>30</sup> The overloading of

<sup>21</sup> See further Jeremias Prassl, *Humans as a Service: The promise and perils of work in the Gig economy* (OUP 2018).

<sup>22</sup> Catherine Barnard, *The Substantive Law of the EU* (OUP 2019) 556.

<sup>23</sup> Article 7(3)(c) Citizens' Rights Directive; Commission 'Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak' COM (2020) 4813 final.

<sup>24</sup> *ibid.*

<sup>25</sup> Barnard (n22) 18–19.

<sup>26</sup> See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.

<sup>27</sup> Commission, 'Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak' (n19).

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> Fundamental Rights Agency 'Coronavirus Pandemic in the EU – Fundamental Rights Implications (Bulletin 1, April 2020) <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf)> accessed 30 May 2021.

the emergency services and health systems made Member States suspend limits on working time, paid leave and there are reports that in practice employers did not ensure or enforce the health and safety measures linked to the Covid pandemic.<sup>31</sup> These developments arguably impacted the right to fair and just working conditions as enshrined in Article 31 of the EU Charter and their right to health as laid down in Article 35 EU Charter.<sup>32</sup> In response to these severe consequences a third of EU Member States have introduced benefits, varying from free testing to financial bonuses, to free accommodation for cross-border healthcare workers.<sup>33</sup>

One of the problems that Covid-19 revealed is the, at least in some countries, fragile resilience of the health care systems throughout the EU, the position of often overworked (migrant) care workers and health professionals and the so-called brain drain<sup>34</sup> of health professionals from some EU countries with staff shortages as a result.<sup>35</sup> This arguably can affect the social right to healthcare for all residents, as laid down in Article 35 EU Charter. To specifically address the high shortage of healthcare workers in the wake of the Covid-19 pandemic, the European Commission issued guidance to assist Member States in speeding up the recognition of health workers' professional qualifications under the EU's Professional Qualifications Directive, clarify the rules to allow doctors and nurses in training to practise their profession and addresses practical concerns.<sup>36</sup> More specifically, the guidance explains how EU Member States can speed up procedures to facilitate the mutual recognition of qualifications in line with the flexibilities provided by the directive.<sup>37</sup> In addition, it clarifies how EU Member States can ensure that the Directive's rules on minimum requirements on doctor and nurses' trainings can be respected in where students were not able to complete their trainings because of the Coronavirus crisis, including by requesting a derogation from these rules.<sup>38</sup> To this end, the guidance affirms the Commission's availability to support EU Member States and professionals to deal with the Covid-19 crisis, maintain their free movement rights and ensure patients' safety.<sup>39</sup> All the above-mentioned measures adopted at national and EU levels are, however, often targeted at workers in the healthcare sector, but not necessarily at other groups of critical workers in the EU. The following sections will analyse the precarious position of seasonal workers and platform workers in the EU and the impact of Covid-19 on these workers' groups.

#### 2.2.2.2. Cross-border seasonal workers

Seasonal workers have been hit hard due to Covid-19 and the closing of borders and at the same time enjoy little social protection, which puts them in a fragile position.<sup>40</sup> Due to the temporary nature of their work, they

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> Fundamental Rights Agency, 'Coronavirus Pandemic in the EU – Fundamental Rights Implications: With a Focus on Contact Tracing Apps' (Bulletin 2 April 2020) <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may_en.pdf)> accessed 30 May 2021.

<sup>34</sup> Regarding the problem of 'brain drain' of healthcare workers, this has not really been addressed as such by the EU, while it has become even more visible during the Covid-19 pandemic. This effect is mostly visible in newer and economically weaker EU Member States who have suffered from a brain drain in medical professions for years, such as in Romania, Bulgaria, and Poland. The lack of qualified healthcare workers in these Member States could lead to serious public health concerns; a problem that was acknowledged by the European Commission in September 2020, thereby stipulating that countering the brain drain in the health sector mainly requires national initiatives, but that the EU will invest in health workforces. At the moment, EU law offers little possibilities to tackle the issue of brain drain. It is, for example unlikely that the public health exception under the free movement rules as laid down in Articles 45(3) and 52 TFEU and Article 29 of the Citizenship Directive can be interpreted as broadly as to enable Member States to temporarily limit free movement rights of healthcare workers in times of crisis.

See for the issue of brain drain: Frederic De Wispelaere, Jozef Pacolet and Dirk Gillis, 'De keerzijde van intra-Europese arbeidsmobiliteit voor de lidstaat van herkomst. Een vergeten perspectief?' 5 (SEW 2021) 178–185; Parliamentary Questions E-002063/2020, (3 September 2020) <[https://www.europarl.europa.eu/doceo/document/E-9-2020-002063-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-002063-ASW_EN.html)> accessed 10 February 2020; Gijsbert Vonk, 'Vrij verkeer als persoonlijk recht – Enkele juridische reflecties op 'De keerzijde van intra-Europese arbeidsmobiliteit voor de lidstaat van herkomst. Een vergeten perspectief?' door Frederic De Wispelaere, Jozef Pacolet en Dirk Gillis' 5 (SEW 2021) 186–188; Herwig Verschueren, 'De keerzijde van intra-Europese arbeidsmobiliteit: wat kan het Unierecht bijdragen?' 5 (SEW 2021) 189–192.

<sup>35</sup> Claire Dhéret and Simona Guagliardo, 'Boosting Europe's resilience with better health systems: Lessons from the COVID-19 crisis' (European Policy Centre, 4 April 2020) <[epc.eu/en/Publications/Boosting-Europes-resilience~3160a0](https://epc.eu/en/Publications/Boosting-Europes-resilience~3160a0)> accessed 17 June 2020.

<sup>36</sup> Commission, 'Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC' [2020] OJ C 156/01.

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak (n23); Commission, 'Coronavirus: European Commission calls for action in protecting seasonal workers' (Press Release 16 July 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1342](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1342)> accessed on 22 July 2020.

can be more vulnerable to precarious working and living conditions than other working groups.<sup>41</sup> Covid-19 has made these conditions more visible, and in some cases conditions have deteriorated and have increased the risk of Covid-19 clusters.<sup>42</sup> Moreover, they may have trouble accessing (national) social support and the financial support measures specific to the Covid-19 crisis.<sup>43</sup> As a result, seasonal workers' right to fair and just working conditions as laid down in Article 31 of the EU Charter has arguably been affected during the pandemic, just as their social security and social assistance as enshrined in Article 34 of the EU Charter. To tackle the precarious social rights position that seasonal workers faced and continue to face during Covid-19, several EU Member States have introduced programmes specifically targeting these workers.<sup>44</sup> France for instance introduced a temporary extension of job seekers' allowance for workers, including intermittent performing artists and technicians, and short-term contract workers.<sup>45</sup> In the same order, the Greek government extended the financial support mechanism to people in precarious employment (specifically targeted at those categories of workers who had been employed in 2019) due to the seasonality of their profession.<sup>46</sup>

At EU level, the European Commission presented guidelines to ensure the social protection of seasonal workers in the EU in the context of the Coronavirus pandemic.<sup>47</sup> The Commission's guidelines provide assistance to national authorities, labour inspectorates, and social partners to guarantee the rights, health and safety of seasonal workers and to ensure that seasonal workers know what rights they have under the EU legal framework.<sup>48</sup> These guidelines complement those on the exercise of free movement of workers during Covid-19 published on 30 March 2020 and are a response to the European Parliament's resolution of 19 June 2020 regarding the protection of cross-border and seasonal workers.<sup>49-50</sup>

The Commission's guidelines include the right of seasonal workers to work in an EU Member State regardless of whether they are EU nationals or third country nationals, the right to suitable living and working conditions, including physical distancing and appropriate hygiene measures, the right to clear communication of their rights and, furthermore, undeclared work and social security aspects.<sup>51</sup> In these circumstances, Member States should treat those persons as critical workers and should communicate to the employers the necessity to provide for decent working and living conditions for seasonal workers and adequate health and safety protection.<sup>52</sup> These could provide first steps in protecting their social rights in the EU Charter, such as the right to fair and just working conditions, social security, social and medical assistance and health care as enshrined in Articles 31, 34 and 35 respectively. It still remains to be seen whether Member States will adhere to these guidelines in practice.

### 2.2.2.3. Platform workers

Existing pitfalls in the social protection of platform workers became evident in the context of the Covid-19 crisis,<sup>53</sup> especially of those working for food delivery platforms such as Deliveroo and Uber Eats.<sup>54</sup> Platform workers' lack of stable income forced them to continue working outside of their homes while society was in lockdown and in conditions which exposed them to the virus.<sup>55</sup> These circumstances were often combined

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> Fundamental Rights Agency (n33).

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> I.e. these workers include miners, forest workers, tobacco leaf collectors, shoemakers, cinema and theatre cashiers, cinema and television technicians, musicians, dancers and actors, touristic and catering employees: see *ibid.*

<sup>47</sup> Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak (n23).

<sup>48</sup> *ibid.*

<sup>49</sup> Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (n19) 12.

<sup>50</sup> European Parliament resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis ({}).

<sup>51</sup> Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak (n23).

<sup>52</sup> *ibid.*

<sup>53</sup> In this article, platform work is understood as all labour provided through, on or mediated by online platforms in a wide range of sectors, where work can be of varied forms and is provided in exchange for payment.

<sup>54</sup> Bénédicte Apouey, Alexandra Roulet, Isabelle Solal and Mark Stabile, 'Gig Workers during the COVID-19 Crisis in France: Financial Precarity and Mental Well-Being' (Journal of Urban Health 2020) <<https://doi.org/10.1007/s11524-020-00480-4>> accessed 11 May 2020.

<sup>55</sup> OECD, 'What have platforms done to protect workers during the coronavirus (COVID-19) crisis?' (21 September 2020) <<http://www.oecd.org/coronavirus/policy-responses/what-have-platforms-done-to-protect-workers-during-the-coronavirus-covid-19-crisis-9d1c7aa2/>> accessed 31 October 2020.

with a lack of social protection of platform workers as self-employed workers, such as no access to social benefits for loss of income, nor the luxury of taking sick leave.<sup>56</sup> These circumstances strongly impacted platform workers' right to fair and just working conditions as laid down in Articles 31 of the EU Charter. On 13 March 2020, the European Commission published a study on the working conditions of platform workers, including the challenges platform workers have to face in the current Covid-19 crisis.<sup>57</sup> The main challenges identified in this study included: employment status, information available to the workers about their working conditions, dispute resolution, collective rights and non-discrimination.<sup>58</sup> Covid-19 illustrated that platform workers are not eligible to apply for the public income support measures for reduced working time offered in all Member States of the EU, short-time working or temporary lay-off support since these instruments mainly target employees.<sup>59</sup>

It has long been unclear whether platform workers should be considered as 'workers' or not. Social rights protection is typically linked to the status of workers or employees. At national level, a number of court judgments indicate that platform workers should be considered as workers and thus having the right to be protected by national labour legislation.<sup>60</sup>

At EU level the Directive on Transparent and Predictable Working Conditions applies to workers (i.e. a broader category than just employees) and is relevant to platform workers to a limited extent, because it includes some material rights including the right to request a more stable form of work and to compensation if the employer cancels an assignment after a specific deadline.<sup>61</sup> As such, improvements are necessary to ensure that this group of workers enjoys enhanced social protection in the EU legal order. The announcement by the Commission that it will come up with a legislative proposal on the working conditions of platform workers in the last quarter of 2021 after the consultation of social partners is a step forward in this regard.<sup>62</sup>

### 3. Could the EU do more to protect the rights of vulnerable workers?

In terms of legislation, the EU's social policy response to the Covid-19 crisis has been relatively weak. The Commission's plans for building a European Health Union are rather focused on the strengthening of health security and health emergencies than on tackling long-term structural health and social problems of more vulnerable citizens or countries, or health professional migration.<sup>63</sup> With a view to implementing the European Pillar of Social Rights, the Commission published an Action Plan in March 2021.<sup>64</sup> This is a good development, however, there are still some bottlenecks in protecting social rights in crisis times at EU level, in particular in invoking EU Charter rights. This part will assess both the current constraints and the possibilities for the EU to protect and strengthen social rights of the more vulnerable EU workers, especially looking at how despite existing constraints, the effective protection of the EU Charters' social rights can be ensured and strengthened.

#### 3.1. Constraints for EU social rights protection during Covid-19

##### 3.1.1. The EU's limited legislative competences in the social and health domains

According to Article 4 TFEU, social policy is a shared competence between the EU and its Member States and only regarding the aspects covered by the Treaty.<sup>65</sup> Article 5(3) TFEU adds that 'the Union may take initiatives to ensure coordination of Member States' social policies.'<sup>66</sup> Furthermore, the principle of subsidiarity must be taken into account, which stipulates in Article 5(3) TEU that in areas which do not fall within the EU's

<sup>56</sup> *ibid.*

<sup>57</sup> European Commission, 'Study to gather evidence on the working conditions of platform workers' (EU Publications March 2020), <<https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8280>> accessed 10 May 2021.

<sup>58</sup> *ibid.*

<sup>59</sup> Eurofound, 'Platform economy: Developments in the COVID-19 crisis' <<https://www.eurofound.europa.eu/data/platform-economy/dossiers/developments-in-the-covid-19-crisis>> accessed 28 February 2021.

<sup>60</sup> *Gerechthof Amsterdam Deliveroo v. FNV* [2021] ECLI:NL:GHAMS:2021:392; *UKSC Uber BV v Aslam* [2021] UKSC 5.

<sup>61</sup> Barnard and de Vries (n2).

<sup>62</sup> Commission, 'The European Pillar of Social Rights Action Plan' (EPRS Action Plan) (Publications Office of the European Union 2021) <[https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-action-plan\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-action-plan_en)> accessed 10 May 2021.

<sup>63</sup> Commission, 'Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats' COM(2020) 724; See also the report Open Society Foundations, 'Working Together to Address Health Workforce Mobility in Europe' (Open Society Foundations 2020) <<https://www.opensocietyfoundations.org/uploads/2cb79839-1599-41ff-9f65-6940c83e62f3/working-together-to-address-health-workforce-mobility-in-europe-20200914.pdf>> accessed 30 November 2020.

<sup>64</sup> Commission EPRS Action Plan (n62).

<sup>65</sup> Article 4 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

<sup>66</sup> Article 5(3) TFEU.

exclusive competence, the EU can act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>67</sup> Additionally, the powers for the EU to actually legislate in the social policy field are limited by the caveat included in Article 153(5) TFEU, the specific legal basis for EU legislation in the field of social policy: ‘the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.’<sup>68</sup> And Article 114 TFEU, which allows the EU legislator to adopt all measures ‘that have as their object the establishment and functioning of the internal market’, has a limited scope of application in the social domain as it explicitly excludes the competence to adopt harmonisation measures ‘relating to the rights and interests of employed persons’.<sup>69</sup>

Linked to the EU’s social policy and to the protection of EU fundamental social rights in the wake of the Covid-19 pandemic are the EU’s competence in the field of public health and the right to access healthcare as enshrined in Article 35 of the EU Charter.<sup>70</sup> However, the EU’s health competence is, according to Article 168 TFEU, even more limited than the powers of the EU in the social policy field.<sup>71</sup> The EU merely has the competence to ‘support, coordinate or supplement the actions of the Member States’ in the area of human health under Article 6(a) TFEU. Member States thus remain the main regulators of their health care system, in which tasks such as the organisation of health care delivery including the institutional organisation of care and the division of labour between the various groups are in Member States’ hands.<sup>72</sup> This restricted role for the EU in the health area is furthermore subject to the subsidiarity principle too under Article 5(3) TEU.<sup>73</sup> The limited competence of the Union in the social and health domains and their strongly national character make it difficult for the EU to enact specific legislation and protect social rights at EU level during crisis times such as the COVID-19 pandemic.

### 3.1.2. Limited scope of application of fundamental social rights in the EU Charter

Another constraint for protecting fundamental social rights at EU level derives from the limited scope of application of the EU Charter. The EU Charter is binding upon Member States when they act ‘within the scope of Union law,’ according to Article 51(1) of the Charter and the CJEU’s case law.<sup>74</sup> Furthermore, Article 51(2) of the EU Charter states that the Charter ‘does not extend the field of application of Union law.’<sup>75</sup> This constitutes an obstacle for the protection of fundamental social rights in the EU. During the economic and financial crisis, for instance, the Court of Justice found different referrals by national courts, in particular Portuguese courts, in which questions were asked about the application of EU Charter provisions, inadmissible on the grounds that the reforms to national labour standards were not a matter for EU law.<sup>76</sup>

The *Dano* case constitutes another illustration of the limited scope of application of the EU Charter in the social policy domain.<sup>77</sup> *Dano* concerned an economically inactive Romanian citizen, who had applied for social benefits in Germany where she had obtained a residence permit.<sup>78</sup> The question was whether she could rely on the principle of equal treatment under Article 18 TFEU, the Citizenship Directive 2004/38 and the EU Charter,<sup>79</sup> although she had stayed less than five years in Germany. Despite the fact that the case

<sup>67</sup> Article 5(3) Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13.

<sup>68</sup> Article 153(5) TFEU.

<sup>69</sup> Article 114 TFEU; Barnard and De Vries (n2) 58–59.

<sup>70</sup> Article 35 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EU Charter).

<sup>71</sup> Article 168 TFEU.

<sup>72</sup> Article 6(a) TFEU; Thomas Gerlingen and Rolf Schmucker, ‘Transnational migration of health professionals in the European Union’ (2007) *Cad. Saúde Pública* 23(2) <[http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0102-311X2007001400008&lng=en&nrm=iso](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-311X2007001400008&lng=en&nrm=iso)> accessed 30 November 2020.

<sup>73</sup> Article 5(3) TEU.

<sup>74</sup> Case C-617/10, *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

<sup>75</sup> Article 51(2) EU Charter.

<sup>76</sup> See in this regard: CJEU Case C- 333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358; CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117; CJEU Case C-128/12 *Sindicato dos Bancários do Norte* EU:C:2013:149; Case C-264/12 *Fidelidade Mundial* EU:C:2014:2036. See also Catherine Barnard ‘The Silence of the Charter: Social Rights and the Court of Justice’ in: Sybe De Vries, Ulf Bernitz and Stephen Weatherill, *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* (Oxford: Hart Publishing 2015) 174–175.

<sup>77</sup> Gijsbert Vonk, ‘EU freedom of movement: no protection for the stranded poor’ (European Law Blog 2014) <<http://europeanlawblog.eu/2014/11/25/eu-freedom-of-movement-no-protection-for-the-stranded-poor/>> accessed 22 May 2021.

<sup>78</sup> Case C-333/13 *Dano* (n76).

<sup>79</sup> Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004, L 158/77 (Citizens’ Rights Directive).

was decided against the backdrop of the EU Citizenship Directive, the Court decided that Member States are not implementing EU law when they lay down the conditions for social benefits, in particular the granting of special non-contributory cash benefits and the extent of such benefits, and could still make granting of benefits to non-economically active citizens conditional upon meeting the criteria for the right to residence under the EU Citizenship Directive.<sup>80</sup> As a result, Ms Dano could not rely on the EU Charter to claim her social rights, specifically respect for human dignity and non-discrimination.<sup>81</sup>

This narrow view of the CJEU on the scope of application of the EU Charter combined with the limited legislative powers of the EU in the social policy domain has important implications for EU citizens, because it means that in practice citizens often cannot invoke their EU Charter rights in courts vis-à-vis national authorities.

### 3.1.3. Rights versus principles dichotomy in the EU Charter

Even if a dispute at hand falls within the scope of EU law and thus the EU Charter, the limited justiciability of social rights presents further barriers for citizens wishing to invoke their social rights at EU level. The EU Charter rights are not absolute and can be limited, as clarified in Article 52 of the EU Charter. Limitations are possible if 'provided for by law,' 'respect the essence of those rights and freedoms,' are proportionate, necessary and 'genuinely meet objectives of general interest.'<sup>82</sup> The EU Charter distinguishes between provisions containing 'rights' and 'principles'. Article 52(5) of the EU Charter stipulates that principles 'may be implemented by legislative and executive acts' and 'shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.'<sup>83</sup> It therefore seems that the 'principles' in the EU Charter cannot be invoked as such in Court by individuals, and only be used by courts for the interpretation of instruments that implement such principles.<sup>84</sup> The EU Charter does not specify which provisions contain 'principles' rather than 'rights.' In the *AMS* case, the Court carefully avoided clarifying whether Article 27 of the EU Charter, which contains workers' right to information and consultation within the undertaking, could be classified as a right or a principle under Article 52(5).<sup>85</sup> AG Cruz Villalón in the *AMS* case explained that both in the Charter as well as national constitutions, designation as 'social rights' often indicates that no individual subjective rights can be derived from them. Instead, they must be implemented or made more concrete through Member States' secondary legislation. As such, these social rights are thus rights in terms of their content and nature, but principles in terms of their operation.<sup>86</sup> Additionally, the AG argued the right to information is not absolute, but made conditional upon 'good time' and 'the conditions provided for by Union law and national laws and practices.'<sup>87</sup> The conclusion of both the AG and the Court was that Article 27 could not be invoked in court directly neither by the individual Mr. Laboubi nor the trade union.<sup>88</sup> As such, the difference between rights and principles in the Charter seems to be whether they can be directly invoked as such in Court.<sup>89</sup>

Following the rights and principles dichotomy and the reasoning of the Court in *AMS*, most social rights in the Solidarity Title of the EU Charter such as social and housing assistance, legal, economic and social protection of the family would be 'principles' rather than self-standing rights, which entails that citizens cannot invoke all EU Charter rights in the Solidarity Title before Court. While fair and just working conditions and the right to healthcare seem to be formulated as rights, just as the right to protection against unjustified dismissal, this is a lot less clear for the provisions on social security including and the right to social and housing assistance. This creates confusion as to whether social rights can be invoked in a national court, for instance, where these social rights have been infringed by national measures related to the Covid-19 crisis.<sup>90</sup> But, a new development in the case law of the Court, in particular the *Bauer et al.* case, provides some hope

<sup>80</sup> Case C-333/13 *Dano* (n76), para 83; EU Citizenship Directive and Regulation 883/2004 on the coordination of social security systems OJ L 166/1.

<sup>81</sup> Case C-333/13 *Dano* (n76), paras 85–91; see also Citizens' Rights Directive.

<sup>82</sup> Article 52 EU Charter.

<sup>83</sup> *ibid.*

<sup>84</sup> Article 52 EU Charter.

<sup>85</sup> See CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2.

<sup>86</sup> Advocate General Opinion in CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, paras 45, 55.

<sup>87</sup> *ibid.*, para 53.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*, para 45.

<sup>90</sup> Olivier de Schutter 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights' (Directorate General for Internal Policies European Parliament, study for the AFCO Committee 2016) 17 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL\\_STU\(2016\)536488\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf)> accessed 28 March 2018.

for individual protection of some social rights, specifically Article 32(2) of the EU Charter which guarantees the right to paid annual leave,<sup>91</sup> as will be illustrated in section 3.3.2 on opportunities.<sup>92</sup>

### **3.2. Possibilities to strengthen fundamental social rights protection during Covid-19**

As mentioned above, the protection of social rights in the EU is limited due to the EU's limited competences in the social and health policy domains, and the limited scope and justiciability of the EU Charter. If the EU Charter would fully and clearly apply, the discussed categories of workers would be able to rely on their affected EU social rights, such as the right to fair and just working conditions, social security, social and medical assistance, and health care.<sup>93</sup> With a view to better protect EU vulnerable workers in future crises, the extent to which they can rely on fundamental social rights must thus be clarified and the level of protection strengthened. Despite the identified constraints of the EU Charter, EU law does offer various possibilities to strengthen the social dimension of the EU, which will be discussed below.

#### **3.2.1. Using the full potential of the Treaty legal bases**

There are various potential legal bases for EU legislation in the social policy domain. The most specific provision is Article 153 TFEU, which states that the EU can 'support and complement the activities of the Member States' in a number of social areas.<sup>94</sup> It stipulates that directives can be adopted by ordinary legislative procedure to *inter alia* improve workers' health and safety, working conditions, equality between men and women both in opportunities as at work and measures to tackle social exclusion or exclusion on the labour market.<sup>95</sup> Although the provision does emphasise Member States' competence to design the fundamental principles of their social systems, this provision grants the EU legislature the possibility to contribute to workers' rights and health and safety.<sup>96</sup> A clear example is the Commission's recent proposal for a Directive on EU minimum wages based on Article 153 TFEU.<sup>97</sup>

Next to Article 153 TFEU, Article 114 TFEU, which is the EU's basis for internal market harmonisation, can be relevant.<sup>98</sup> According to the Court's case law, this legal basis is rather broad and may even include measures in policy fields for which the Treaty expressly excludes harmonisation, for example in the field of public health, provided that there is a link with the internal market.<sup>99</sup> It therefore presents an opportunity for the protection of social and economic rights at EU level.<sup>100</sup> An important limitation is, however, that Article 114 TFEU, as stated above, does not apply to rules 'relating to the free movement of persons nor to those relating to the rights and interests of employed persons.'<sup>101</sup> The EU can connect social measures to the free movement of workers, which is one of the building blocks of the internal market, but in order to do so the special legislative procedure of 115 TFEU must be followed, which requires unanimity in the Council.<sup>102</sup> Another option is Article 352 of the TFEU, reserved for unforeseen cases, but it is not often used and also requires unanimity.<sup>103</sup> With respect to the provision of services, Articles 53(1) TFEU and 62 TFEU are relevant.<sup>104</sup> The revised Posted Workers Directive offers an interesting example of how internal market

<sup>91</sup> Article 31(2) of the Charter stipulates that: 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

<sup>92</sup> Case C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn (Bauer)* ECLI:EU:C:2018:871.

<sup>93</sup> Articles 31, 34 and 35 EU Charter.

<sup>94</sup> Article 153 Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union' COM (2020) 682.

<sup>98</sup> 114 TFEU; Case C-376/98 *Germany v European Parliament and Council (Tobacco Advertising I)* [2000] ECR I-8419, paras 83, 84; Case C-380/03 *Germany v European Parliament and Council (Tobacco Advertising II)* [2006] ECR I-1885, para 37; Diamond Ashiagbor, 'Economic and social rights in the European Charter of fundamental rights', 1 (2004) *European Human Rights Law Review* 63; Paul Craig and Gráinne De Búrca, *EU Law text, cases, and materials* (OUP 2015) 617.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> Article 114(2) TFEU.

<sup>102</sup> Note that Article 115 TFEU only allows for the harmonisation of legal or administrative provisions that 'directly affect the establishment of the functioning of the internal market'; Article 115 TFEU.

<sup>103</sup> Article 352 TFEU; Barnard and de Vries (n2) 54.

<sup>104</sup> Articles 53(1) and 62 TFEU.

legislation may strengthen the social face of the EU.<sup>105</sup> The latter Directive offers more social protection to posted workers as it contains, for instance, the right to request a more stable form of work.<sup>106</sup>

Where the EU legislator has been successful in legislating in fields of social policy, those areas will fall under the scope of EU law and the EU Charter may come into play and further strengthen social rights of EU citizens. In addition, EU legislation can clarify how and in which contexts people can rely on these social rights in courts. A good example is the field of non-discrimination, where the EU legislator adopted various directives on the basis of Article 19 TFEU, prohibiting discrimination on a number of grounds,<sup>107</sup> or Article 157(3) TFEU on equal opportunities and equal treatment of men and women in matters of employment and occupation.<sup>108</sup> This has constituted an important avenue to further elaborate and strengthen fundamental social rights of EU citizens, even more so with the help of the EU Charter.<sup>109</sup>

Although the impact of Covid-19 on EU citizens' social rights has been touched upon in various policy documents of the European Commission, it has so far resulted in only a few proposals for secondary EU legislation. This is, considering the limited competences of the EU in the field of social policy, perhaps not surprising.<sup>110</sup>

### 3.2.2. Implementing the European Pillar of Social Rights

There is also room for improvement in the instrumentalisation of the EPSR, which could support social rights protection in the EU.<sup>111</sup> The EPSR and the political support it received arguably mandates increased social action and a more social orientation of the Commission's policies, rather than a purely economic focus. This could also mandate more legislative action in the social policy field, potentially further anchoring social rights in the EU legal order and broadening the scope of application of the EU Charter to those areas. In the EPSR Action Plan, the Commission aims to turn the social principles into reality by establishing concrete actions in order to 'enhance social rights and to strengthen the European social dimension across all policies of the Union as enshrined in the Treaties.'<sup>112</sup> The introduction of an action plan only four years after the proclamation of the EPSR shows that a real plan for effective implementation of the Social Pillar and sense of priority was missing until now. Given Member States' mixed attitudes towards the EPSR, political commitment, close coordination, and a sense of priority at EU level will be necessary to fully exploit the opportunities of the EPSR and strengthen social rights in the EU.<sup>113</sup>

### 3.2.3. Using the full potential of the EU Charter strengthening its horizontal application

Fundamental rights traditionally protect citizens from abuse by their governments by curbing the government's powers. Whether a situation is horizontal (litigation between private parties) or vertical (litigation between the State and a private party) can therefore be decisive for determining which fundamental rights can be invoked in court.<sup>114</sup> The issue of horizontal direct effect became especially relevant after the Eurozone crisis, where the economic crisis and increased unemployment highlighted the importance of social rights in labour disputes between private parties. Full horizontal direct effect of EU Charter rights can have far reaching consequences for litigants in labour disputes.<sup>115</sup> There are some provisions in the EU Charter that imply their horizontal application. Article 23, for example, guarantees equality between men and women *in all areas*. In the same vein, Article 24(2) of the EU Charter covers actions relating to children 'whether taken

<sup>105</sup> Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 2018, L 173/16; Barnard and De Vries (n2) 58–59.

<sup>106</sup> *ibid.*

<sup>107</sup> Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Egenberger) [2018] ECLI:EU:C:2018:257 para 75.

<sup>108</sup> Including the principle of equal pay for equal work or work of equal value.

<sup>109</sup> Elise Muir, 'The Fundamental Rights Implications of EU legislation: Some Constitutional Challenges' (2014) 51 CMLRev 224.

<sup>110</sup> Fundamental Rights Agency (n30).

<sup>111</sup> Zane Rasnača, 'Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking' (Working Paper 05, European Trade Union Institute 2017).

<sup>112</sup> EPSR Action Plan (n62).

<sup>113</sup> Dhéret and Guagliardo (n35).

<sup>114</sup> James Fraczyk, 'EU fundamental rights and the Charter' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2019) 480.

<sup>115</sup> Sybe de Vries and Barbara Safradin, 'The impact of the Social and EU Charters in times of crisis', (ETHOS Report D6.3, 2019) 40 <<https://ethos-europe.eu/>> accessed 12 June 2020.

by public authorities or private institutions.<sup>116</sup> What has become clear from the case law of the CJEU however is that the EU Charter can only be invoked between private parties in certain specific situations.<sup>117</sup>

In the CJEU cases *Mangold*, *AMS* and *Kücükdeveci* the CJEU seemed to imply that certain EU social rights enshrined in the EU Charter could have horizontal direct effect.<sup>118</sup> The Court ruled in *inter alia Küçükdeveci* that the principle of non-discrimination based on age has horizontal direct effect as a codification of a general principle of EU law.<sup>119</sup> Some years later, the Court in the *Bauer et al.* judgment – similarly to, for instance, the *Egenberger* and *Max Planck* judgments – unequivocally affirmed that some specific social rights enshrined in the Solidarity Title of the Charter can be applied directly in a dispute between private parties.<sup>120</sup> According to the Court a worker's right to paid annual leave under Article 31(2) of the EU Charter could not only be applied vis-à-vis a public employer, i.e. the City of Wuppertal, but also horizontally vis-à-vis the private employer Mr. Willmeroth. The Court held that Article 31(2) 'concerning certain aspects of the organisation of working time' is an essential principle of social law, which is mandatory and unconditional, and can be relied upon in a dispute between two private individuals.<sup>121</sup> The Court added that even though Article 51(1) of the Charter does not directly address private parties, it does not 'systematically preclude such a possibility.'<sup>122</sup> Thus, the right to fair and just working conditions in Article 31 and specifically the right to paid annual leave of the EU Charter can have horizontal direct effect.

The *Bauer et al.* ruling is significant as the Court, according to *Frantziou*, affirms the constitutional status of some social rights by aligning them with the right to equal treatment, and makes some specific EU social rights more useful for individuals, especially in economic crises and other situations where social rights are jeopardised.<sup>123</sup> Moreover, the *Bauer et al.* case illustrates that in some situations the application of the EU Charter should not be dependent on the status of the employer (either public or private). Nevertheless, it is necessary to put *Bauer et al.* into perspective. The right to paid annual leave as enshrined in Article 31(2) is unequivocally formulated as a right contrary to other social rights or principles mentioned in the EU Charter. Furthermore, *Bauer et al.* was decided against the backdrop of the Directive concerning certain aspects of the organisation of working time, which obliges Member States 'to take the measures necessary to ensure that every worker is entitled to paid annual leave'.<sup>124</sup> It has therefore been argued that 'Bauer cannot yet be seen as a judgment that decisively converts the EU Charter of Fundamental Rights into an 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 law.'<sup>125</sup>

### **3.3. Protecting and strengthening the social rights of vulnerable EU workers: two avenues**

As was illustrated in the above-mentioned sections, vulnerable workers' rights have been particularly affected by Covid-19. We therefore suggest two potential avenues with a view to enhance the social rights of vulnerable workers within the EU. Firstly, the EU legislator could seek to further harmonise certain social

<sup>116</sup> Sionaidh Douglas-Scott and Nicholas Hatzis, 'EU law and social rights', *Research Handbook on EU law and Human Rights*, (Edward Elgar Publishing 2019) 501.

<sup>117</sup> Fraszyc (n114) 480.

<sup>118</sup> Case C-176/12 *AMS* (n85), para 45; CJEU Case C-144/04 *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709. In the *Mangold* case, the CJEU held that discrimination on the basis of age concerned a general principle of Union law. Since the deadline for the implementation of the Directive (2000/78) did not expire yet, the Directive could not be invoked to bring the case in the scope of Union law. To solve this, the court relied on the fact that the national legislation at issue was implementing another directive to bring the matter in the scope of Union law.

<sup>119</sup> Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21.

<sup>120</sup> Cases C-414/16 *Egenberger* (n107); C-569/16 and C-570/16 *Bauer* (n92); C-684/16 *Max-Planck-Gesellschaft v Tetsuji Shimizu* [2018] ECLI:EU:C:2018:874.

<sup>121</sup> *ibid*, paras 80–92; Daniel Sarmiento, 'Sharpening the teeth of EU Social fundamental rights' (Despite our Differences, 8 November 2018) <<https://despiteourdifferencesblog.wordpress.com>> accessed 15 November 2018.

<sup>122</sup> Case C-569/16 and C-570/16 *Bauer* (n92), para 87; See also Elise Muir, 'The horizontal effects of Charter rights given expression to in EU legislation, from *Mangold* to *Bauer*' (2020) *REAL* 12(2), 185; Lucia Serena Rossi 'The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations' (EU Law Analysis 25 February 2019) <<https://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html>> accessed 23 September 2020.

<sup>123</sup> Sybe de Vries, 'The *Bauer et al.* and *Max Planck* judgments and EU citizens' fundamental rights: An outlook for harmony' (2019) 1 *European Equality Law Review* 29; Eleni Frantziou, 'Joined cases C-569/16 and C-570/16 *Bauer et al.*: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' (European Law Blog 19 November 2018) <<https://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/>> accessed 12 December 2020.

<sup>124</sup> See Article 7 Directive 2003/88/EC concerning certain aspects of the organisation of working time, OJ L 299/9.

<sup>125</sup> Dorota Leczykiewicz, 'The Judgment in *Bauer* and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations' (2020), *ERCL* 16(2), 333.

standards and to implement the EPSR. The priorities of the Portuguese Presidency of the Council of the EU are important here as well. Secondly, the application of the EU Charter at the national level could be improved, thereby acknowledging its limited scope application.

### 3.3.1. Strengthening social rights through harmonisation of national laws and EPSR implementation

On the basis of Article 114 TFEU the EU legislator could contribute to the EU internal market whilst taking better into account social rights.<sup>126</sup> Harmonisation of social measures facilitates free movement and ensures a degree of level playing field between Member States. At the same time minimum harmonisation in the social policy field can strengthen the protection of social rights across the European Union. As explained, the use of Article 114 TFEU in the social policy domain is limited.<sup>127</sup> Article 153 TFEU, though, also offers opportunities for increased social rights, improving workers' health and safety and more resilience in times of crisis. The Commission's plans for fair wages for workers and strengthening social dialogue could reinforce social rights, counter brain drain and improve public services, such as health services by reinforcing a relative 'level playing field' per Member State as regards to attractive wages.<sup>128</sup> Ultimately though, in order to effectively protect social rights and make the EU more resilient to crises, both health and economic crises, the EU needs increased powers in the social and health areas.

Worth mentioning in this context as a first step towards political commitment are the action plans of the current Portuguese Presidency of the Council of the EU.<sup>129</sup> The Portuguese Presidency has prioritised 'to strengthen Europe's resilience and its citizens' confidence in the European social model, promoting a Union based on shared values of solidarity, convergence and cohesion – a Union capable of coordinated action to recover from the crisis.'<sup>130</sup> One of the plans is to implement the EPSR as a key element for ensuring a fair and inclusive climate and digital transition. Still, this remains a matter of political commitment at the moment, as measures in the social domain are not easy to adopt since, as was illustrated in section 3.1.1., the EU only has limited competences in this area.<sup>131</sup>

A number of concrete measures and initiatives have been announced at EU level, such as a legislative proposal for the working conditions of platform workers, a legislative proposal for gender-based violence against women and recommendations to extend social protection and to implement a Council recommendation on Roma equality, inclusion and participation.<sup>132</sup> Still, the number of proposals for secondary legislation remains relatively limited.

### 3.3.2. Improving the application of the EU Charter

What has become clear is that the EU Charter only applies when EU law is engaged. Moreover, the utility of social rights as laid down in the EU Charter's Solidarity Title is limited due to the possible lack of horizontal direct effect, which constitutes a constraint for the effective protection of social rights at EU level.<sup>133</sup> Still, there is reason for optimism to argue that the EU Charter can be of help in protecting social rights for individuals in future crises. As seen in the *Bauer* judgement, certain social rights should be seen as fundamental principles and can under certain circumstances have horizontal direct effect.<sup>134</sup> This shows the potential force of the EU Charter, also in the social domain, and presents opportunities for the enhanced protection of social rights of workers in the EU legal order.

In addition, improvements can also be made in the application of the EU Charter by national policymakers and the judiciary, according to a critical report by the EU Fundamental Rights Agency (FRA).<sup>135</sup> In this context, the CJEU should not take the route as it did in the wake of the EMU crisis, in which it found the references by the national courts, in particular Portuguese courts, inadmissible on the grounds that the reforms to

<sup>126</sup> Article 114(2) TFEU; Barnard and de Vries (n2).

<sup>127</sup> *ibid.*

<sup>128</sup> Dhéret and Guagliardo (n35).

<sup>129</sup> Portuguese Presidency of the Council of the European Union, Priorities, <<https://www.2021portugal.eu/en/programme/priorities/>> accessed on 26 May 2021.

<sup>130</sup> *ibid.*

<sup>131</sup> Douglas-Scott and Hatzis (n116).

<sup>132</sup> Commission 'EPSR Action Plan' (n62).

<sup>133</sup> Fraszyc (n114) 480.

<sup>134</sup> Case C-569/16 en C-570/16 *Bauer* (n92).

<sup>135</sup> Fundamental Rights Agency, 'Fundamental Rights Report' (2018) 35 <<http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018>> accessed 1 October 2018.

national labour standards were not a matter for EU law.<sup>136</sup> The potential of the EU Charter has thus not yet been used to the fullest in crisis times.<sup>137</sup> In fact, progress can still be made with regard to raising awareness on the use of the EU Charter at national levels, especially within the judiciary. Increased application of the EU Charter at national level may also lead to more awareness of this instrument among vulnerable groups of EU workers. National governments, civil society organisations and rights defenders have a role to play here to promote awareness on the EU Charter at national levels, for example through workshops and campaigns.<sup>138</sup>

#### 4. Conclusion

In this article we looked at the role of the EU in protecting social rights in times of Covid-19, and more specifically at the (im)possibilities of the EU Charter in times of crisis for certain categories of EU workers. Covid-19 has had major socio-economic consequences, particularly for critical workers such as healthcare workers, seasonal workers and platform workers in their social rights enjoyment. The possibilities within EU law to enhance social rights of vulnerable workers are, however, limited, mainly due to the limited legislative competences in the social policy domain and the limited scope of application of the EU Charter. Furthermore, social rights enshrined in the EU Charter are often formulated as principles, which need to be elaborated in legislation first before they can be enforced in courts.

At the same time, we have also pointed at the possibilities to strengthen social rights at EU level, through a better, more frequent and more imaginative use of the legal bases and harmonisation of social standards, through the implementation of the European Pillar of Social Rights and through increased application of the EU Charter at national level. In this respect it is important to mention an important development in the case law of the Court of Justice, especially in the *Bauer et al* judgement, which relates to the horizontal application of some fundamental social rights of the EU Charter.

However, harmonisation of social standards, the effective implementation of the EPSR, its Action Plan and the recommendations put forward in this paper greatly depend on the political will and action of EU Member States, who hold the primary responsibility in social policy matters. Therefore, the collective commitment of all Member States to build a stronger socially resilient Union will be crucial for the achievement of full social resilience in the wake of Covid-19.<sup>139</sup>

#### Competing Interests

Simona de Heer declares that she works as a digital policy advisor in the European Parliament for the Dutch delegation of the Greens/EFA (GroenLinks). Sybe de Vries declares that he works as an honorary judge at the District Court of Rotterdam. Barbara Safradin declares that she works as a project coordinator at NGO Academie van de Stad. There are no other competing interests to declare.

#### Author Information

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<sup>136</sup> See in this regard: Case C- 333/13 *Dano* (n76); Case C-64/16 *Associação Sindical dos Juízes Portugueses* (n76); Case C-128/12 *Sindicato dos Bancários do Norte* (n76); Case C-264/12 *Fidelidade Mundial* (n76). See also Barnard (n76).

<sup>137</sup> *ibid.*

<sup>138</sup> Note that the Eurobarometer survey shows that despite the fact that the situation has slightly improved since 2012, only four in 10 citizens have heard of the EU Charter and only one in 10 have an idea of what this instrument is. Six out of 10 would like more information on Charter rights and on where to turn to if their rights are violated. See FRA, Fundamental Rights Report 2018 (n135) 4.

<sup>139</sup> Dhéret and Guagliardo (n35).

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