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PRACTICAL SOLIDARITY: A BOND CONNECTING CONSUMERS, FUNDAMENTAL VALUES AND DIRECTIVE

The paper analyses the connection between the fundamental rights, i.e., fundamental values from the Charter, and the general objectives set by Directive (EU) 2019/1023 of the European Parliament and the Council in relation to consumer bankruptcy, with solidarity being validated in a wider sense. Consumer bankruptcy as a part of the fundamental right guaranteed by the Charter of Fundamental Rights of the European Union, or protected value, is analysed in relation to the general objectives of the Directive, with reference to the sociological meaning and definition of solidarity as a legal principle. These values are related to consumer protection in the range of social rights. The Directive stipulates that EU member states can also apply to natural persons the procedures that lead to the discharge of debt incurred by an insolvent entrepreneur. These objectives indirectly enable the protection of fundamental rights guaranteed by the Charter, and they also relate to consumer protection. If solidarity in its definition includes freewill, voluntarism, or social bond, with the adoption of the Directive, those components are absent because the obligation to achieve certain objectives is imposed on the member states. Regarding the Directive's objectives, free will, voluntarism, or social bond as an assumption of solidarity is missing. Because of that, solidarity can be considered as imposed, forced, due to the objectives that the member states must achieve in the process of implementation.

Keywords: consumer bankruptcy, law, solidarity, fundamental rights and values.

1. INTRODUCTION

Consumer bankruptcy is a procedure set to avoid the insolvency of a natural person when there is a likelihood of insolvency. It is a procedure in which the composition or structure of consumer assets is changed, based on a repayment plan, in an attempt to reimburse creditors within a certain period, and in order to partially or completely release the consumer from the remaining debts. In order to achieve that, the consumer has to

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be considered honest, and the insolvency has to last for a certain period, while financial obligations must reach a certain amount. The consumer bankruptcy procedure itself is not based on the Charter as a right or obligation, but it is closely linked to the fundamental values prescribed in its Preamble. One of these values is solidarity. Solidarity as a universal value implies consumer protection, as prescribed in Article 38 of the Charter. It is precisely this part of the Charter that connects rights, or fundamental values, on the one hand and solidarity on the other. It is not a fundamental right protected by the Charter as such, it rather represents the protection of fundamental values. The consequence of the effect of solidarity on fundamental rights and values protected by the Charter is that Union policies ensure a high level of consumer protection¹. Because of such policy, by adopting procedural and other regulations, on 26th of June 2019, Directive (EU) 2019/1023² (Directive 1023) was published in the Official Journal of the EU, which entered into force on the twentieth day after its publication, i.e., 16th of July 2019. The Charter of Fundamental Rights of the European Union (the Charter) in Chapter IV, entitled Solidarity, prescribes fundamental rights related to work and social security, i.e., the right to social protection and healthcare (see Articles 27 to 36). In addition to fundamental rights, this chapter also prescribes certain obligations relating to the protection of goods and persons. Consumer protection is, in fact, the basis that connects the Charter and Directive 1023, when it comes to the application of Directive 1023 to natural persons, because its provisions primarily apply to viable enterprises, legal persons carrying out a registered activity, and entrepreneurs. In view of that, by reading the introductory provisions, it can be concluded that the primary objective of Directive 1023 is the proper functioning of the internal market and the removal of obstacles to the exercise of fundamental freedoms such as the free movement of capital and freedom of establishment, by applying the provisions of the Charter from Chapter IV, its application to natural persons is also enabled. Likewise, Directive 1023 was adopted as a legal regulation relating to entrepreneurs, or rather to corporate law.³ Solidarity as a social phenomenon is a relatively undetermined concept which, first of all, cannot fully coincide with law, especially strict legal rules. It can be said that through its development and effect on social changes, it indirectly influences the development of law, which undoubtedly follows from the Charter, in which solidarity is one of the fundamental protected values. Solidarity itself in law, especially within the framework of the Charter, encompasses an entire sequence of guaranteed rights and protects fundamental rights in the field of labour law and social welfare.

¹ Article 38 of Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, No. C 202/389.

² Directive (EU) 2019/1023 of the European Parliament and the Council, *Official Journal of the European Union*, No. L 172/18.

³ COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023> (12. 3. 2025).

2. OBJECTIVES SET BY THE DIRECTIVE

The legal framework for the adoption of Directive 1023 was Article 53 (formerly Article 47), Article 114 (formerly Article 95), and Article 294 (formerly Article 251) of the Treaty on the Functioning of the European Union. If only Article 53 of the Treaty should be considered, it can be concluded that one of the basic objectives for which Directive 1023 was adopted is the protection of freedom of movement and business activity for self-employed persons. Articles 114 and 294 represent a certain type of legislative and procedural framework within which the aims set by the Treaty are achieved. Article 114 of the Treaty, paragraphs 1 and 3, stipulate that, in order to achieve the objectives set out in Article 26 of the Treaty, the European Parliament and the Council shall adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States, which have as their object establishment and functioning of the internal market, while paragraph 3 stipulates the obligation to protect consumers, i.e. that the Commission will take as a base a high level of protection, considering in particular any new development based on scientific facts.⁴ It can be immediately seen that paragraph 1 refers to Article 26 of the Treaty, focused exclusively on protecting the functioning of the internal market, which includes the internal borders of the EU, in order to enable the free movement of goods, persons, services, and capital.⁵ As already mentioned, Article 294 contains rules on the adoption procedure of Directive 1023, i.e., it determines that it is an ordinary legislative procedure. The introductory provisions of Directive 1023 set the objectives to contribute to the proper functioning of the internal market and the removal of obstacles to the exercise of fundamental freedoms, such as the free movement of capital and the freedom of establishment. As already mentioned, consumer protection can also be added here because it arises from the legal framework that served as the basis for the adoption of Directive 1023. It can be noticed that one of the objectives, if not the most important one, besides the protection of fundamental freedoms and consumer protection, is also the adaptation or harmonisation of national legislation with the provisions of the Treaty. Harmonisation is necessary in order to achieve the proper functioning of EU law throughout the EU, i.e., the equal execution of the Treaty's obligations. Solidarity as a sociological component is absent in the achievement of those aims or obligations because there is no voluntariness or free will. It should be emphasised that the provisions of Directive 1023 may have a legal impact on national legislations regardless of the fact whether the member state has implemented Directive 1023 in national legislation or not. It is a supranational source of law whose provisions are unconditionally applied, especially if the provisions of national legislation are contrary to EU law. In fact, the main goal of all secondary legal sources, including directives, is the even and efficient execution of the rights and obligations assumed by the member states by signing the Founding Treaties. In conclusion, it can be stated that the main objective of all secondary sources of EU law is, in fact, to create a legal framework for achieving the aims of the Founding Treaties, as well as harmonising the legal sources of the member states for the proper functioning of the internal market.

⁴ Article 114 of Treaty on the Functioning of the European Union, *Official Journal of the European Union*, No. C 202/1.

⁵ Article 26 of Treaty on the Functioning of the European Union, *Official Journal of the European Union*, No. C 202/1.

3. THE DIRECTIVE'S EFFECT

When speaking about the effects of directives in general, they can have a dual effect on national legislation, they can act as a primary or secondary source of law. With respect to the dual effect, a distinction should be made between directives as primary or secondary sources of law for the Member States and their characteristics as a legislative act, a part of secondary sources of EU law. In the first case, it is about the enforcing of the directives in the Member States legal system, depending on whether or not it has been implemented into national legislation, while in the second case it is about the source of law for all the Member States, the implementing acts adopted by the European Parliament, the Council and the Commission. If the member state does not achieve the objectives set by the directive, having in mind that it is a supranational source of law, the one whose rights are violated can refer directly to the directive, regardless of the fact that the national legislation is contrary to the provision of the directive. In that case, the directive is the primary source of law, because the provision of national legislation that is not in accordance with the provision of the directive may not be applied. On the contrary, if the member state has implemented the directive into national legislation, but has not done so to a sufficient extent, it can still be referred to the directive as a secondary source of law, because the primary source of law, national act, did not achieve the objectives set by the directive. Directive 1023 was adopted in order to create the same or a similar legislative framework for bankruptcy throughout the EU. It primarily applies to legal entities, viable enterprises, and entrepreneurs, but the problem of over-indebtedness of natural persons was also observed, which is why it was necessary to extend its application to natural persons as well. This is evident in the draft proposal for Directive 1023, as it is stated that the over-indebtedness of natural persons is a major economic and social problem. Over-indebtedness of natural persons is a major economic and social problem. 11.4% of European citizens are permanently in arrears with payments, often for utility bills 9. This is mostly because of unfavourable macroeconomic conditions in the context of the financial and economic crisis (e.g., unemployment) combined with personal circumstances (e.g., divorce, illness).⁶ The accuracy of the above-mentioned percentage has not been tested in this paper, with respect to the date when the proposal was drafted, and because it is not closely related to the paper's topic. It also follows that a functional insolvency framework covering all measures of the insolvency laws of the Member States is a key part of a good business environment because it supports trade and investment, helps create and preserve jobs and helps economies to better withstand shocks to the economy caused by high levels of bad loans and unemployment. These are all key priorities of the European Commission.⁷ Given that the subject of this paper is consumer bankruptcy, and consumers are natural persons,

⁶ COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023> (12. 3. 2025).

⁷ COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023> (12. 3. 2025).

the most important effect of Directive 1023 is its application to natural persons, although the primary aim was to create a unified bankruptcy framework to ensure the functioning of the internal market, in order to achieve the objectives arising from the Treaty. Starting from the fact that it can also apply to natural persons, the main advantage of such a source of law is that some EU member states have passed special laws that enabled the bankruptcy of natural persons, even though it is a legal institute primarily related to trading companies. Like wise some of them have implemented the provisions of Directive 1023 into existing laws in order to harmonise national rights with EU law, with no need to draft a special law, e.g. Belgium only passed the Act of implementing the Directive 1023 and took only three measures in the process of transposition, while Luxembourg and Ireland passed only one act and took only one measure.⁸ Hungary is the EU member state that has taken the most measures and amended the largest number of acts overall, 59 measures.⁹

4. SOCIAL ASPECT OF SOLIDARITY

Originally a legal term, solidarity became prominent from the 19th century onwards as a political and sociological concept, only to find its way back into the legal arena as an overarching legal principle. Whether solidarity is understood in the communitarian sense, as built upon community interests, or conversely, as primarily rooted in the relation between individuals (Denninger, 1967), as a legal principle, it has to be enforced through binding norms. Unlike solidarity between friends, solidarity between strangers is artificial, because it can only be accomplished by means of law (Habermas, 1998, p. 119; Kingreen, 2003, p. 252; Martinović, 2015). The difference between solidarity and the principle of solidarity encompasses the differentiation inherent in the principle of social state, that between society and state in social security (Kingreen, 2003, p. 252). Kingreen's succinct explanation perfectly illustrates the transition from solidarity to the principle of solidarity. The term solidarity, based on a specific personal bond, is reserved for the micro-level and exists with no legal or normative pressure. The principle of solidarity exists on the macro level as activity mediated through the state, as organised solidarity. As a legal principle, it implies coercion to solidarity (Kingreen, 2003; Martinović, 2015). Undeniably, solidarity is originally a legal term, and it can exist as a legal principle, but it can also be considered a relatively new sociological concept, non-inherent in law. When we speak about a social definition of solidarity, apart from voluntarism, its constituent part has to be a personal bond between individuals, which is connected on a certain level, and does not have to be a bloodline. If it is understood in the communitarian sense (Britannica, 2025a), those individuals have to be a part of a community. As a sociological definition of a certain type of social ties, regarding the development of the division of labour,

⁸ COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023> (12. 3. 2025).

⁹ COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, ref. 9. Available at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023> (12. 3. 2025).

the term solidarity was first used by Emile Durkheim (2023). Social solidarity is a complex phenomenon that encompasses many different dimensions, making the testing of the relationship between the law and social solidarity problematic (Johnson *et al.*, 2017). Nevertheless, if we look at solidarity as a sociological concept, there has to be either a bond between individuals or the existence of a community as a base upon which it is established, because it cannot exist between individuals if they are not a part of a community or bonded in another way. Seeing solidarity as a legal principle, it has to be established upon a legal norm, and it has to be a binding legal norm. In that sense, the solidarity lacks voluntarism or freewill, and it is imposed by an act of state, for which reason the solidarity is forced in a certain way. This is precisely what is emphasised in regulations such as directives because they are implemented into the national legal system of member states. All the provisions of national legal rules that are opposed are not applicable or have to be adapted to the provisions.

5. SOLIDARITY AND LAW

When the EU Parliament and Council of the European Union impose specific measures or goals that have to be achieved through an act of legislation, e.g., a directive, they lack free will and voluntarism. That particular type of imposed measures or goals has to be in the form of a mandatory, legislative act. Solidarity consisting of freewill, volunteerism, and social bond can only exist between natural persons as a result of a certain personal bond, and when it has to be achieved among strangers, it's artificial (Johnson *et al.*, 2017). It can be argued whether the solidarity as a legal principle can even exist if, firstly, it lacks freewill or volunteerism and, secondly, if it is imposed by a state through a specific legal act. In the latter sense, when it is imposed, it lacks a personal bond as one component of solidarity on the micro level. It is inherent that there's no personal bond between a member state and a consumer bankruptcy, as it is defined for the micro level. However, the bond can be realised on a macro level, as organised solidarity through legal principle, if we think of citizenship, for example. Citizenship is defined as a relationship between an individual and a state to which the individual owes allegiance and, in turn, is entitled to its protection. Citizenship implies the status of freedom with accompanying responsibilities. Citizens have certain rights, duties, and responsibilities that are denied or only partially extended to aliens and other non-citizens residing in a country. In general, full political rights, including the right to vote and to hold public office, are predicated upon citizenship. The usual responsibilities of citizenship are allegiance, taxation, and military service (Britannica, 2025b). As it has already been mentioned earlier in the paper, if we consider solidarity on the macro level as activity mediated through the state, as organised solidarity (Britannica, 2025b), it has to be done in the form of a legislative act. When an act imposes an objective to be achieved and, on the other hand, consequences if they are not achieved or not fully achieved, it is without doubt coercion to solidarity. That type of solidarity lacks voluntarism and freewill, an important component of the social, communitarian concept of solidarity which exists with no legal or normative pressure (Britannica, 2025b). Durkheim saw legal regulation as a key to the maintenance of social solidarity, whilst being an expression and indicator of differences in underlying moral sentiments and forms of social solidarity (see also Prosser, 2006). However,

he held that the complexity of social relationships and solidarities is proportional to the number of promulgated legal rules (Johnson *et al.*, 2017). Nevertheless, legal regulation, e.g., a directive, can never be voluntary if they are drafted to achieve certain objectives, whose further goal is to ensure the functioning of the Founding Treaties. It can be argued, because solidarity in law can only be mediated through a binding legal norm, that all legal norms about any social right or value are practical solidarity. The presumption of such solidarity would be the existence of a connection between a legal norm and a social right, which the norm consists of, i.e., that solidarity in law cannot exist if there is no binding legal rule.

6. FUNDAMENTAL RIGHTS, THE DIRECTIVE, AND PRACTICAL SOLIDARITY

As already mentioned, consumer protection represents the basis connecting the Charter and Directive 1023 when it comes to the application of Directive 1023 to natural persons. Its provisions primarily apply to legal persons carrying out a registered activity, in order to secure the proper functioning of the internal market and the removal of obstacles to the exercise of fundamental freedoms such as the free movement of capital and freedom of establishment. Consumer protection as a fundamental right or, rather, fundamental value contained within the Charter has to be linked to a legal rule, as a directive, in order to achieve the protection more precisely. The Charter alone does not form part of the Treaty, it was adopted at the Nice Summit in December 2000 by the Parliament, the Council, and the Commission. It is a product not of the constituent authorities of the Treaties but of the three political institutions (Lane, 2007). The charter is legally binding for all EU member states. In accordance with Article 6 of the Treaty on European Union, it has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU countries when they are implementing EU law (Charter of Fundamental Rights, 2000). In order to make fundamental rights or values applicable in practice, they have to be a part of legal rule, because of the Charter's constitutionalised nature and the fact that the Charter is not a part of the Founding Treaties. Legal regulation of fundamental rights and values, especially of those concerning social rights and solidarity, is set to achieve a higher-level practical solidarity, with respect to what has been outlined earlier in the paper. The Charter, yet alone, if we include a second paragraph in Article 51, is only applied when member states are implementing Union law (Charter of Fundamental Rights, 2000), so it is inherent that a binding legal rule must be drafted in order to apply its provisions in all EU member states. Since the Charter isn't a part of the founding treaties and it is a product not of the constituent authorities of the Treaties but of the three political institutions (Charter of Fundamental Rights, 2000), it is mandatory for fundamental rights to be enforced via a binding legal rule. EU fundamental rights must be respected by: (1) the EU institutions and bodies when making, interpreting, and applying primary or secondary EU law in private law; and (2) the Member States when they are 'implementing EU law' in the broad sense outlined above. Considering the need to respect the division of competences of the EU in relation to a multilevel system of private law, the following legal constructs can be identified, which may serve as gateways to the constitutionalisation of European contract law (Cherednychenko, 2017).

7. CONCLUSION

Consumer bankruptcy is not a fundamental right set by the Charter, but rather a protected value in the scope of solidarity, i.e., consumer protection. As of the Charter's constitutional character, having in mind that it's not a part of the Founding Treaties and regarding the provision of Article 51 section 2, consumer protection as a value had to be achieved by adopting a legislative framework, a legally binding rule imposed on all EU member states. Directive 1023 represents a legislative act which was adopted in ordinary legislative procedure, and member states had to implement its provisions into national legal systems. With respect to its provisions, they are subordinately related to consumers, since it is an act essential to legal entities, viable enterprises, and entrepreneurs. The Directive 1023 itself is set to create a unified bankruptcy framework in the whole EU, in order to ensure the functioning of the internal market, and achieve the goals arising from the Treaty. The most important effect is that its provisions can also apply to natural persons, and not only to legal entities connected by their business activity. Directive 1023 is a legal act that primarily relates to legal entities, such as trading companies and entrepreneurs. Relating to solidarity in terms of fundamental value, it implies consumer protection, as prescribed in Article 38 of the Charter. It is precisely this part of the Charter that connects rights, or fundamental values, on the one hand and solidarity on the other. In order to materialise the effects of solidarity in practice, or to carry out the protection of fundamental values set by the Charter, Directive 1023 was implemented in all member states. This was done by adapting the existing legal acts to the provisions of Directive 1023, or by drafting a completely new regulation. The consequence is that some EU member states have adopted special laws on consumer bankruptcy, which formerly did not exist in their national legal system, and it can be considered as one of the positive effects. From the sociological point of view, there is no solidarity if it has to be done by a binding legal rule, and such solidarity is considered artificial and under coercion. It cannot exist on a micro level if it has no connection between individuals. The term solidarity can be defined as a legal principle at the macro level. As a legal principle on the macro level, it is articulated through a legal rule, a binding legal norm. It can be argued that there can be a connection between an individual and an EU member state based on one's citizenship. If so, the solidarity as a sociological term can be articulated as well, with no need for a legal rule as coercion to solidarity, or without the existence of solidarity on the macro level. Bringing solidarity into practice by adopting a binding legal rule, in order to protect the fundamental values set by the Charter, can be considered as practical solidarity.

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