COMBATING POVERTY AND SOCIAL EXCLUSION IN EUROPEAN UNION LAW

Ane Aranguiz

Combating Poverty and Social Exclusion in European Union Law

This book examines the potential role of European Union law in combating poverty and social exclusion in the European Union.

Anti-poverty strategies have been part of the European Union agenda for decades. Most saliently, over a decade ago, the EU's Member States pledged to lift 20 million people out of poverty. In spite of this commitment, the EU did not even meet a quarter of this target, and over 113 million people still were at risk of poverty and social exclusion by the end of 2020. This book addresses the incongruence between a quite developed EU policy strategy and a well-embedded legal objective on the one hand, and the lack of direct legal action on the other. Analysing the role of social policy instruments, fundamental rights, and the constitutional framework of the European Union, it makes a detailed case for a contribution of EU law to the policy objective of combating poverty and social exclusion.

Drawing on work in law, politics, social policy and economics, this book will interest scholars and policymakers in the areas of EU law, labour and social security, human rights, political science and social and public policy.

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Routledge
Taylor & Francis Group
a GlassHouse Book

First published 2022
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

a GlassHouse book

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
A catalog record has been requested for this book

ISBN: 978-1-032-11909-0 (hbk)
ISBN: 978-1-032-11911-3 (pbk)
ISBN: 978-1-003-22212-5 (ebk)

DOI: 10.4324/9781003222125

Typeset in Bembo
by Deanta Global Publishing Services, Chennai, India

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Preface

Back when I began doing research on what has now transformed into this book, circa 2016, the social dimension of Europe and the commitment to combat poverty and social exclusion received only marginal attention. As European spectators kept tabs on the refugee crisis and the Brexit referendum, the commitment to lift 20 million people out of poverty seemed to have completely vanished from European politics. In an alluring turn of events, soon after, the Commission launched the European Pillar of Social Rights, which many—myself included—witnessed with a dash of scepticism. But, oh boy, was I happy to be proven wrong. Almost out of the blue, writing this book became a moving target. New initiatives started to flow, the 'social' became trending and substantiating the social dimension of the EU turned into a bullseye.

A brief economic recovery and a global pandemic down the road, regrettably, we don't seem to stand too far from where we were in 2010 when the EU pledged to lift 20 million people out of poverty: amidst a major economic crisis with all eyes on an EU that has just committed to a new and downsized poverty goal of lifting 15 million people out of poverty. Although this time around, with a pinch of extra Euroscepticism powered by the previous financial catastrophe and how poorly it was managed.

If there is one thing that I wish for this book, is that this time, the crisis is handled so differently *vis-à-vis* the poverty target—and the social commitments in general—that the bulk of this book soon becomes obsolete. And, it goes without saying, that in the process of doing so, the findings of this book are proven of service. In the meantime, I'd like to dearly thank those who have stood by my side on this turbulent road.

First and foremost, I would like to extend my gratitude to Colin Perrin, Ajanta Bhattacharjee and Sushmita Ramesh as well as the rest of the Routledge team and the anonymous reviewers for their helpful comments, professionalism and smooth communication.

I would have never begun to write this book without the wonderful mentorship of Professor Herwig Verschueren, his critical thinking and heartwarming support. Equally, I would have not been able to put together the end result were it not for the flexibility, patience and support of Professor

Mijke Houwerzijl. My gratitude extends to the many gifted scholars who have dedicated their valuable time to review this book and have incessantly challenged me with their thought-provoking remarks, including (though not limited to): Professor Bea Cantillon, Professor Gijsbert Vonk, Professor Bernard Hubeau, Professor Catherine Jacqueson, Professor Elise Muir and Professor Sacha Garben.

During the last months of writing this book, I was extremely lucky to be inspired by many talented peers with whom I have the pleasure to work in the context of two EU Commission-funded ground-breaking projects: EuSocialCit and WorkYP. The hard work, passion and attention to detail that you bring to the table not only have inspired me endlessly, but will surely challenge the landscape of social Europe.

Equally, this manuscript would not have seen the light of the day without the support of my family and friends. I am particularly grateful to my quaranteam who kept me sane and going during the lockdown months and to those who remained in constant (distanced) touch through all the craziness.

I am infinitely appreciative of my family, to whom I've felt close even when many kilometres separated us for so long. I am especially thankful to my brother Asier and my sister in-law Aura, for bringing a piece of home to Antwerp and for the brightest light of this journey: little Naia. I hope for you to grow up in a better, more inclusive, Europe.

Finally, to Mathieu, who somehow managed to keep the grey skies away even in the darkest days. This *boo*k would have never materialised without your precious peer advice, pep talks, forts, and unconditional support (*air high five*).

Abbreviations

AG	Advocate General
AGS	Annual Growth Survey
AROP	At-risk-of-poverty threshold
CEPS	Centre for European Policy Studies
CFREU	Charter of Fundamental Right of the European Union
CJEU	Court of Justice of the European Union
COE	Council of Europe
CSR	Country Specific Recommendation
DG	Directorate-General
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECTHR	European Court of Human Rights
EESC	European Economic and Social Committee
EMU	European Monetary Union
EPAP	European Platform Against Poverty and Social Exclusion
EPSR	European Pillar of Social Rights
ESC	European Social Charter
ESF	European Social Fund
ESI-FUNDS	European Social and Structural Funds
ESM	European Stability Mechanism
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EUROSTAT	European Statistical Office
FEAD	Fund for European Aid to the Most Deprived
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
MIP	Macroeconomic Imbalance Procedure
MOU	Memorandum of Understanting
OMC	Open Method of Coordination
QMV	Qualified Majority Voting
SIP	Social Investment Package

SME	Small and Medium Enterprises
SPC	Social Protection Committee
SPPM	Social Protection Performance Monitor
TEU	Treaty on European Union
TFUE	Treaty on the Functioning of the European Union

Chapter 1

Introduction

1.1 Setting and background

In 2010, with the adoption of the Europe 2020 Strategy, Member States made the commitment to lift 20 million people out of poverty over the course of ten years. By the end of 2020, figures showed that 113 million people were still living in poverty and social exclusion which 'only' represented a decrease of 3.1 million as compared to the reference year in 2008.[1] This means that the strategy did not even live up to a fifth of its expectations. Granted, this was still a considerable reduction from its peak in 2012 when 123 million people were at risk of poverty and social exclusion, as the Europe 2020 Strategy began under the dreadful auspices of the great recession, which was quickly aggravated by harsh and severe austerity measures. And yet, social protection structures should be resilient enough to absorb, at least to a greater extent, the negative impacts of an economic crisis. Enter a global pandemic hand-in-hand with a new economic disaster, the EU commits to another quantifiable poverty target, though this time less ambitious, and with a particular focus on children. The discouraging results of what was once considered a major breakthrough for social Europe, begs the question of whether more, and if so what, can be done at the European level to improve the living standards in the EU and have 2030 actually reach the goals 2020 could not honour. For that, we first need to understand poverty in the context of the EU.

Poverty is a reflection of the ability of welfare systems to redistribute resources and opportunities in a fair and equitable manner. Unfair or unequitable redistribution leads to big inequalities between the few in whose hands excessive wealth is concentrated and the many that are pushed to live restricted and marginalised lives. A comparative analysis within the EU shows that the high risk of poverty and social exclusion is primarily a consequence of the way society is structured and how resources are produced and allocated.[2] In

1 Eurostat, 'Europe 2020 indicators – poverty and social exclusion' (2020).

2 Frazer et al., 'Putting the fight against poverty and social exclusion at the heart of the EU agenda: a contribution to the mid-term review of the Europe 2020 strategy' (2014) *OSE Research Paper*, 11–15.

DOI: 10.4324/9781003222125-1

the EU, there are a number of poverty drivers. Firstly, as a consequence of economic recessions, the allocation of resources for the workforce has structurally changed resulting, on the one hand, in the proliferation of non-standard forms of employment that offer less favourable conditions for the worker and, on the other, in an increase of the risk of poverty as a consequence of unemployment.[3] There has been an additional growth in the divergence between productivity and wage levels which has led to a downward pressure in wages. Subsequently, work is not a guarantee for a life in dignity, nor is economic growth sufficient to reduce poverty in a significant way, let alone reach preestablished quantifiable objectives. A second force behind the poverty trends in the EU refers to increasing income inequalities with particularly large income gains among the 10% of top earners.[4] Income inequalities grew in the context of the economic crisis where fiscal packages that were introduced by a number of Member States in times of crisis hit low income groups more than any other.[5] Income inequalities are closely linked to poverty and social exclusion as literature shows that the more equal a society is, the lower levels of poverty and social exclusion it will experience.[6] The third and last driver relates to the impairment of welfare states to respond to these risks and inequalities due to their gradual deterioration as a consequence of excessive public expenditure cuts, often geared by supranational economic constraints. By lowering the benefit levels and making the eligibility criteria far more stringent, the situation of vulnerable groups of the society such as women, migrants, people with disabilities and children has considerably deteriorated. The last decade has proven that the urgency of restoring economic growth, while being first and foremost a matter of economic and monetary policy, cannot be done in isolation from the imperative of developing resilient social protection systems.[7] The role of the EU in this regard, and generally in social affairs, however, has for years been part of a vast and heated debate.

The founding fathers of the European integration process were convinced that economic integration would by itself contribute to social integration and the development of welfare states. This view advocated for leaving social policy matters to the Member States without supranational interference. But history proved them wrong. Not only are national social protection systems unequipped to deal with modern challenges, but the interference of budgetary

3 Storrie, 'Non-standard forms of employment: recent trends and future prospects' (2017) *Eurofound*.

4 Bonesmo, 'Income inequality in the European Union' (2012) *OECD Working Paper*.

5 Avram et al., 'The distributional effects of fiscal consolidation in nine EU countries' (2012) *EUROMOD Working Paper*; De Agostini et al., 'The effect of tax-benefit changes on income distribution in EU countries since the beginning of the economic crisis' (2014) *EUROMOD Working Paper*.

6 Frazer et al., *supra* n 2, 11–15.

7 Gomez, 'The Europeanisation of policy to address poverty under the new economic governance: the contribution of the European Semester' (2017) *JPSJ* 25(2), 49–64.

constraints and internal market pressures have further hindered national social protection systems. The previous economic recession took quite a toll on social rights, not only because of the financial crises itself, but also due to the severe response to it. The implementation of fiscal consolidation measures regardless of due social stabilisers turned what originally was an economic recession into a deep social crisis.[8] As a consequence, poverty and social exclusion have remained unacceptably high despite the overall wealth of the EU.

Partly to reduce criticism for the lack of involvement of the EU on social issues, the political agenda of the EU has increasingly taken up social issues. Almost two decades ago when the Lisbon Strategy and the Open Method of Coordination for Social Protection and Social Inclusion (Social OMC) were launched, it seemed like a new era of the EU was about to begin in which poverty and social exclusion were finally anchored in the European social policy agenda. Even if this involved a non-binding process of flexible and open cooperation between Member States, the Social OMC was warmly welcomed and it was seen as a key instrument in the fight against poverty and social exclusion. Yet, it achieved little in reducing poverty and social exclusion.[9] As a matter of fact, poverty and social inequality levels increased, as well as unemployment and precarious employment.[10] Ten years after the Lisbon Strategy launched the Social OMC, the Europe 2020 Strategy introduced new elements to fight poverty and social exclusion, which included the ambitious headline target to lift 20 million people out of poverty by 2020. This initiative was again warmly received and was perceived as a major breakthrough in the social dimension of Europe. In 2021, the Action Plan to implement the European Pillar of Social Rights (EPSR) sets the headline target to lift 15 million people out of poverty, from which five million ought to be children. Notwithstanding the undisputable growing role of social issues on the political agenda of the EU and the arguable socialisation in the European Semester,[11] the policy focus essentially remains in promoting participation in the labour market and support income for an increased consumption, rather than combating the social inequalities affecting millions in the EU.[12]

8 Vandenbroucke, 'The case for a European Social Union: from muddling through to a sense of common purpose' (2014) *KU Leuven Euroforum*.

9 Cantillon, 'The paradox of the social investment state: growth, employment and poverty in the Lisbon era' (2011) *JESP* 21(5), 432–449.

10 Peña-Casas, 'Europe 2020 and the fight against poverty and social exclusion: fooled into marriage?' in Natali and Vanhercke (eds.), *Social Developments in the European Union 2011* (Brussels: OSE and ETUI, 2012), 159–185; Zeitlin, 'The open method co-ordination and the governance of the Lisbon strategy' (2008) *JCMS* 46(2), 436–450.

11 Zeitlin and Vanhercke, 'Socializing the European semester: EU social and economic policy co-ordination in crisis and beyond' (2018) *JEPP* 25(2), 149–174.

12 Copeland and Daly, 'Poverty and social policy in Europe 2020: ungovernable and ungoverned' (2014) *Policy and Politics* 42(3), 351–366; Pochet, 'What's wrong with EU2020?' (2010) *ETUI* Policy Brief; de la Porte and Heins, 'A new era of European integration? Governance of labour

The contribution of EU law to these efforts, however, has remained minimal even if the social competences of the EU have broadened over time. These competences are given to attain the social objective of the Union, which now explicitly includes the combating of social exclusion.

This constitutional landscape has, since the Lisbon Treaty, been accompanied by the Charter of Fundamental Righs of the European Union (CFREU) as a binding instrument, which codified a big part of the existing social rights in the EU, presumably increasing their enforceability and the opportunities for challenges and reinterpretations.

That social policy has gradually but surely earned its place in EU law, is indisputable. Arguably, however, these social policy concerns have largely been displaced.[13] This is visible in the particular way the EU's social dimension has evolved, whereby a significant corpus of social rights has developed under other policy areas such as EU citizenship, free movement, migration or equality law.[14] As such, much of what constitutes social Europe is divided into different policy areas, while the use of the 'social policy' title remains limited. This kind of displacement is in principle unproblematic. However, the impact of this corpus, while essential to grant equal opportunities and convergence, is indirect at best as regards the objective of combating poverty and social exclusion. Simultaneously, moreover, a different kind of displacement took place, where social objectives were demoted and to some extent diluted for the benefit of economic interests.

So far, efforts by the EU to eradicate poverty have completely failed, both on a substantive and on a governance level. The substantive shift towards activation, more inclusive labour markets and social investment has not resulted in decreased poverty trends. This suggests that more needs to be done, also at the EU level. There is a certain irony in a presumably social market economy that aims at combating social exclusion, and yet, not only does it remain to a great extent passive, but it does so while exercising downward pressure on the national social protection systems in the contexts of fiscal consolidation and the internal market.

All things considered, it might not come as a surprise that confidence in the EU's ability to overcome social challenges is dramatically dropping and that the economic and social divergences in Europe jeopardise its political cohesion.

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market and social policy since the sovereign debt crisis' (2014) *Comparative European Politics* 13(1), 8–28.

13 Term borrowed from: Kilpatrick C. (ed.), 'Special section on the displacement of social Europe' (2018) *EuConst* 14(1), 62–230.

14 Thym, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens' (2015) *CMLRev* 52(1), 17–50; Special Issue Aranguiz and Verschueren (eds.), 'Special issue on discussing strategies for social Europe: the potential role of EU law in contributing to the Union's policy objective of fighting poverty and social exclusion' (2020) *EJSS* 22(4), 367–492; Ganty, 'Poverty as misrecognition: what role for antidiscrimination law in Europe?' (2021) *HRLR* 21(4), 962-1007.

As a result, a considerable part of the European population has lost their hopes in the European dream.[15] More than ever, there is an imperious necessity for the social dimension of the EU to blossom and move towards a tangible social market economy to reduce a long-standing discontent and scepticism of many Member States and their citizens with regard to the added value offered by the EU beyond its purely economic purposes.

In light of this disbelief, and partly as a way to target the far-reaching consequences of the economic crisis, in April 2017 the Commission launched the EPSR. Its innovative and hybrid nature has led to a considerable revival of the social dimension in the EU already in its first few years of life. What some have coined as 'the last chance for Social Europe'[16] might indeed hide the key to a more active role of EU law in the fight against poverty and social exclusion by targeting the first form of the displacement of the social dimension of the EU mentioned above: the limited use of the social competences of the Union.

1.2 Aim and outline of the book

There is little doubt that fighting poverty and social exclusion is a policy objective that sits high on the political agenda of the Union, which is not only apparent from a number of policy instruments but also echoed in several treaty provisions and in the CFREU. And yet, poverty trends remain unacceptably high. One of the (many) underlying challenges in this regard relates to the discrepancy between the EU policy objective of fighting poverty and social exclusion, on the one hand, and the very modest or even marginal implementation of it in legally binding instruments of EU law on the other. As it stands, the current social legal *acquis*, which is open and flexible, lacks the necessary bite to truly address the growing incapacities of national welfare states.[17] If 2030 wants to stand out as the year in which the EU finally achieves its poverty target, social investment strategies and employment policies are important but not sufficient. Previous research has shown that steps towards poverty alleviation in Europe should take a broad perspective: minimum wages, welfare

15 Kuhn et al., 'An ever wider gap in an ever closer union: rising inequalities and euroscepticism in 12 West European Democracies, 1975–2009' (2016) *Socio-Economic Rev* 14(1), 27–45; Hobolt and de Vries, 'Turning against the union? The impact of the crisis on the Eurosceptic vote in the 2014 European Parliament elections' (2016) *Electoral Studies* 44, 504–514, 212–213.

16 EAPN, 'Last chance for social Europe? EAPN position paper on the European pillar of social rights' (2016); Brooks, 'The 'last chance for social Europe': the European pillar of social rights can only work if integrated into the EU's existing tools' (2017), available at: http://blogs.lse.ac.uk/europpblog/2017/05/22/last-chance-for-social-europe-european-pillar-social-rights/ ETUC, 'Social Europe in "last chance saloon"' (2017), available at: www.etuc.org/en/pressrelease/social-europe-last-chance-saloon#.WIHZbr-Q_Wg

17 Cantillon et al. (eds.) *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Cambridge/Portland/Antwerp: Intersentia, 2012).

state efforts to increase the take home pay of low wage earners and minimum income protection for jobless households.[18]

Activating the available EU legal tools is key in contributing to this goal and fleshing out 'the social' of the social market economy. This is precisely the purpose of this book. Its main objective is, thus, to examine how the discrepancy between law and policy can be lifted, and how EU legal instruments can be improved or developed in order to make more and better contributions towards the realisation of poverty reduction. With the purpose of providing a comprehensive and complete answer to this central question, the book raises four intertwined sub-questions that are dealt with in each subsequent chapter.

After this introduction, Chapter 2 takes account of the available stock of *policy instruments* that are being (or have been) deployed at the EU level to support the actions taken by Member States in the fight against poverty and social exclusion. This sub-question aims to analyse the strengths and limitations of the current approach to combating poverty and social exclusion and highlight the deficiencies of the *status quo*. This section covers the Social OMC, the Europe 2020 Strategy, the Action Plan to implement the EPSR and the governance of these under the European Semester, as well as the available Funds at the EU level that promote, directly or indirectly, the fight against poverty and social exclusion.

Chapter 3 deals with the potential of *fundamental social rights* under EU law in fighting poverty and social exclusion. For that matter, it studies the intricate relation between different sources of social rights in the EU, including general principles of EU law, the CFREU, and a number of international instruments, most notably, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). In addition, this chapter also looks into the EPSR as a way to address, at least to some extent, the current complexities of fundamental social rights under EU law. At the substantive level, it analyses the protective scope of rights inherently linked to the combating of social exclusion as seen by different authoritative bodies. This includes the right to human dignity, social security, social assistance and fair remuneration.

Chapter 4, instead, examines the *constitutional landscape* of the policy objective and how it is embedded in several treaty provisions. To this end, it studies poverty and social exclusion as an objective and value of the EU. Most of the discussion centres on the constitutional possibilities to implement this objective. To this end, this chapter discusses first the principles of conferral, subsidiarity and proportionality. This is followed by an extensive discussion on the social competences of the Union and their limits, which include explicit social competences and a number of alternatives.

18 Cantillon and Vandenbroucke, *Reconciling Work and Poverty Reduction: How Successful Are European Welfare States?* (Oxford: OUP, 2014); Cantillon, *supra* n 9.

Taking advantage of the constitutional possibilities offered by the treaties and the momentum created by the EPSR, the last chapter takes a look at *future possibilities* and the question of *lege ferenda*. Specifically, Chapter 5 critically analyses a number of legislative proposals that optimise EU law resources to give a comprehensive response to the discrepancy between the proclaimed policy objective to combat social exclusion and the marginal implementation of this objective in instruments of secondary law.[19] These proposals focus on increasing the level of financial resources for those at risk of poverty and social exclusion. Namely, it examines the feasibility of a Framework Directive on Minimum Income, a Framework Directive on Minimum Wage, an evaluation of the recent recommendation on access to social protection for workers and the self-employed and an analysis of the European Unemployment Benefit Scheme. This chapter is accompanied by a number of substantial considerations for these proposals regarding adequacy, coverage and take-up as well as the rationale behind these proposals and EU intervention.

The book concludes with Chapter 6, which brings together the key findings of each previous chapter and provides a number of concluding remarks.

1.3 Poverty and social exclusion in the EU

At the centre of this research lie the concepts of poverty and social exclusion, which tend to be blurry and overlapping from an academic point of view. As such, they are concepts very much debated in the literature. Because the aim of this research is to contribute to the policy objective of the EU by means of EU law, this book adopts the existing understanding of poverty and social exclusion as used in the European discourse. Accordingly, it does not intend to contribute to the academic debate on the suitability of these concepts from a sociological perspective. Rather, it builds upon an existing objective as defined by the actors in charge. However, before presenting some important data and moving on with the questions presented above, this section aims at clarifying the use of a heavily debated concept for the rest of the book and acknowledges some of its flaws in terms of definition, measurement, strategic focus and placement. These considerations should be pondered throughout the remainder of this book.

19 Note that this contribution takes the deliberate choice to exclude existing secondary law instruments that already contribute to the policy objective. These are most notably instruments on citizenship, social security coordination, employment, migration and equality. This is because, for the most part, these instruments remain neutral, meaning that they grant some level of equal treatment, but they do not provide an 'adequate' level of protection, which is left to the Member States. The purpose of the book is precisely to assess what the role of EU law can be in substantially contributing to the minimum standard of living for its population as a way of combating poverty. However, an analysis of this can be found in Aranguiz, 'The role of EU law in contributing to the policy objective of combating poverty and social exclusion' (2020) *Doctoral Dissertation*, University of Antwerp.

1.3.1 Conceptual clarifications

Even though they refer to different phenomena, the two terms are closely related and are often confused or used together. In short, poverty is seen from the point of view of individuals, the household and their distributional issues. According to the EU definition, a person is living in poverty 'if their income and resources are so inadequate as to preclude them from having a standard of living considered acceptable in the society in which they live'.[20] By contrast, social exclusion sets its starting point on society as a whole by emphasising relational issues.[21] Social exclusion focuses on the processes that cause it rather than on its victims and is often defined as an institutionalised discrimination rather than as a relationship between individuals.[22] For the EU, social exclusion embodies a process whereby people are pushed to the edge of society and are as a consequence deprived from actively participating in society either by virtue of the scarcity of resources, lack of basic competences and lifelong competences or as a result of discrimination.[23]

In the EU, these ideas date back to the 1970s when the first anti-poverty programme was introduced for the period between 1975–1980.[24] This and the following two anti-poverty programmes—from 1984–1989 and 1989–1994[25]—provided a platform for the exchange of information, experimental anti-poverty strategies, research and best practices.[26] One of the results of these programmes was a shift towards an interest in social exclusion that highlighted the different connotations between social exclusion and poverty, in particular, with regard to a more multidimensional approach, which extended the idea of financial poverty to also include different aspects of health, employment, housing and education. This resulted in the EU using the integrated idea of 'poverty and social exclusion'—sometimes referred solely as 'social exclusion'—avoiding the perhaps unnecessary task of differentiating between the

20 COM (2003) 773 final 'Joint report on social inclusion 2004'.

21 Madanipour et al., 'Concepts of poverty and social exclusion in Europe' (2015) *Local Economy* 30(7), 721–741.

22 Madanipuor, 'Social exclusion and space' in Legates and Stout (eds.), *City Reader* (London: Routledge, 2011). Levitas, 'The concept and measurement of social exclusion' in Pantazis et al. (eds.), *Poverty and Social Exclusion in Britain* (Bristol: The Policy Press, 2006).

23 COM (2003) 773 final, *supra* n 20.

24 Council Decision 75/458/EEC of 22 July 1975 concerning a programme of pilot schemes and studies to combat poverty [1975] OJ L 199.

25 Vanhercke, 'Social policy at EU level: from the anti-poverty programmes to Europe 2020' (2012) *OSE Background Paper*.

26 Hvinden and Halvorsen, 'Who is poor? Linking perceptions of poor people and political responses to poverty' in Halvorsen and Hvinden (eds.), *Combating Poverty in Europe: Active Inclusion in a Multi-Level and Multi-Actor Context* (Cheltenham/Northampton: Elgar, 2016), 25–44.

two overlapping concepts. However, many commentators have criticised this choice and insist on the importance of separating both concepts.[27]

Perhaps a more problematic aspect is not the definition in itself, but how poverty and social exclusion are measured in the EU. In its original proposal for the Europe 2020 Strategy, the Commission included a single target for calculating poverty reduction, which was to be done following the single measure of at-risk-of-poverty threshold (AROP), which is the share of people with an equivalised disposable income that is below 60% of the national median equivalised income after social transfers.[28] This is a widely accepted measurement for poverty, used regularly by the European Committee of Social Rights (ECSR, see Chapter 3) and recently also by the Court of Justice of the EU (CJEU).[29] After severe political discussions between Member States,[30] however, the Spanish presidency decided to add two other indicators:[31] severe material deprivation and jobless households. The former includes anyone who experiences at least four out of nine of the defined constituents of deprivation.[32] The latter, covers people living in households with zero or very low work intensity for the period of income reference.[33]

The decision to include three alternative indicators triggered much criticism, in particular with the last alternative, given that in neoliberal economies having a job does not guarantee poverty relief. In fact, a number of studies suggest that measuring low-intensity households does not have a great impact in terms of reducing poverty and social exclusion.[34] This concern, is at the same time linked to the emphasis on market integration as a means to tackle poverty explored below.

27 Atkinson and Davoudi, 'The concept of social exclusion in the European Union: context, development and possibilities' (2000) *JCMS* 38(3), 427–448; O'Brien and Penna, 'Social exclusion in Europe: some conceptual issues' (2008) *IJSW* 17(1), 84–92.

28 See for more on at risk of poverty rate the official Eurostat website, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:At-risk-of-poverty_rate

29 In this case the court held that, in a case of insolvency, a reduction of a pension that could leave the beneficiary with an income below the AROP threshold, was to be considered disproportionate C-168/18 – *Pensions-Sicherungs-Verein,* ECLI:EU:C:2019:1128, §44–46.

30 Copeland and Daly, 'Poverty and social policy in Europe 2020: ungovernable and ungoverned' (2014) *Policy and Politics* 42(3), 351–366; Petmesidou, 'Can the European Union 2020 strategy deliver on social inclusion?' (2017) *Global Challenges* Working Paper Series No. 3, 5–6.

31 See more on the political process: Copeland and Daly, 'Varieties of poverty reduction: inserting the poverty and social exclusion target into Europe 2020' (2012) *JESP* 22(3), 273–287.

32 (1) to pay their rent, mortgage or utility bills; (2) to keep their home adequately warm; (3) to face unexpected expenses; 4) to eat meat or proteins regularly; (5) to go on holiday; (6) a television set; (7) a washing machine; (8) a car; (9) a telephone. See for more on severe material deprivation and the defined constituents the official Eurostat website, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Material_deprivation

33 See for more information on jobless households the official website of Eurostat, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Jobless_households

34 Cantillon, *supra* n 9.

On a positive note, the extension of the indicators for measuring poverty and social exclusion included in the calculations people who were indiscernible with a sole indicator, which in turn, led to a considerable increase on the number of people considered to be at risk of poverty. Concretely, it increased from 80 to 120 million people. As a downside, the inclusion of three alternatives gave Member States the freedom to choose whichever indicator they considered more suitable as long as they could justify the link between their selection and the European target of lifting 20 million people out of poverty and social exclusion by 2020. In this vein, Copeland and Daly argue that the agreement to undertake such an objective was the result of political opportunism[35] and that the goal is constructed in a manner that is likely to support an *à-la-carte* approach by Member States.[36] Moreover, there is a risk of incoherence in the definitions and approaches taken by Member States on the three indicators, which weakens the different dimensions of poverty in Member States.

In addition to the use and choice of the three indicators, commentators have also argued that these indicators, particularly the AROP threshold, are flawed and do not depict the reality of the situation.[37] This is worsened by the fact that the samples used for these statistics often do not reach a number of groups in society, such as the homeless, elderly homes or the richest households. A more reliable measurement for monitoring progress over time, the so-called anchor-rate, shows that not only did the EU make little progress towards the objective of Europe 2020 (as shown by the current indicators) but that in fact, the rate of people at risk of poverty and social exclusion was higher in 2019 than in 2008, the reference year.[38] Some suggest that it would be beneficial for the EU social policymakers to develop and adopt a multidimensional model that would allow a more comprehensive assessment of changes of poverty and social exclusion than that allowed by the current indicators. Such a model would include a more balanced coverage of impoverishment, disempowerment and exclusion dimensions that allow for meaningful comparisons between Member States.[39]

Another major problem with how the EU approaches poverty and social exclusion is that, for years, the bulk of EU efforts has focused on social integration as inclusion in the labour market. A living example of this limitation

35 According to Copeland the target 'was articulated as a result of economic growth and employment, rather than being an independent objective of its own'. Copeland, *EU Enlargement, the Clash of Capitalisms and the European Social Dimension* (Manchester: Manchester University Press, 2014), p. 6.

36 Copeland and Daly, *supra* n 31, 276–279.

37 Goedemé et al., 'What does it mean to live on the poverty threshold?' in Cantillon et al. (eds.), *Decent Incomes for All: Improving Policies in Europe* (Oxford: OUP, 2019); Dauderstädt and Keltek, 'Inequality in Europe relatively stable, absolutely alarming' (2017) *Friedrich-Ebert-Stiftung*.

38 De Schutter, 'Visit to the European Union: report of the special rapporteur on extreme poverty and human rights' (2021), p. 5.

39 Hvinden and Halvorsen, *supra* n 26, 25–44. The authors of this book refer to a multi-dimensional approach proposed by Wagle, *Multidimensional Poverty Measurement: Concepts and Applications* (New York: Springer, 2010).

is the fact that the Integrated Guideline on social inclusion and combating poverty under Guideline 8 (previously Guideline 10) is included among the employment guidelines, which results in a narrowed scope from general social inclusion to inclusion in employment.[40] Employment is an important element of inclusion as it can provide stability, social connections and a sense of purpose. However, studies show that job growth offers only a marginal benefit to poverty alleviation.[41] And yet, Member States have often been recommended, mostly in the context of the European Semester, to increase employment rates as means to fight poverty without including considerations of wage adequacy, working conditions or social protection schemes.[42]

A third and last concern that ought to be noted, distances from the conceptualization of poverty and social exclusion and refers to its placement in relation to other policy objectives. This placement brings up the hierarchy between the social objectives and the macroeconomic and fiscal goals in which the former lie at the bottom. This is in spite of Europe 2020 being considered an integrated strategy as it brought together different policy areas under the same umbrella. Even with the launch of the European Semester, which—in principle—further integrates EU governance processes by synchronising different fields, the policy area relative to poverty and social exclusion has remained undermined by other policy areas, resulting in an asymmetry between the different dimensions of EU policy. This is visible in several examples. For one, the Europe 2020 Strategy dictated that Member States' spending for achieving poverty goals (among others) shall be restricted until 'sound' public finances are re-established.[43] This requirement clearly superimposed macroeconomic policies over social ones. Supporting this idea of imbalance is the fact that even within the goals of Europe 2020, some objectives prevail. In 2011 and 2012 the Annual Growth Surveys provided an overview of the priorities of the EU which stressed that fiscal consolidation was the number one priority, to be followed by growth and competitiveness and employment. Moreover, there was no reference made to reducing poverty and social exclusion other than in the annex of this documents.[44] This third-level positioning of social policy within the governance of the EU worsened with the adoption of the so-called 'Six-Pack' and 'Two-Pack' that were introduced to strengthen the fiscal rules

40 Bekker and Klosse, 'EU governance of economic and social policies: chances and challenges for social Europe' (2013) *EJSL* 2, 103–120.

41 Cantillon, *supra* n 9; De Graaf and Nolan, 'Household joblessness and its impact on poverty and deprivation in Europe' (2011) *JESP* 21(5), 413–431.

42 Rainone, 'An overview of the 2020–2021 Country Specific Recommendations (CSRs) in the social field: the impact of Covid-19' (2020) *ETUI*.

43 COM (2010) 2020 final, 'Europe 2020: a strategy for smart, sustainable and inclusive growth'.

44 COM (2011) 11 final, 'Annual growth survey: advancing the EU's comprehensive response to the crisis'; COM (2011) 815, 'Annual growth survey: advancing the EU's comprehensive response to the crisis' final.

under the Stability Growth Pact. This hierarchy is further discussed in the next chapter, which on a more positive note, also recognises a slow socialisation of the European Semester.[45]

Now that important concerns have been addressed, the following section provides some worrying data regarding poverty and social exclusion in the EU.

1.3.2 State of play: the data

According to the most recent figures at the time of writing, 21.1% of the population of the EU—over 92.4 million people—were at risk of poverty and social exclusion in 2019, meaning that over one in five people in the EU experienced at least one of the three forms of poverty or social exclusion: monetary poverty, severe material deprivation or living in households with very low work intensity. According to these numbers, the most widespread form of poverty was monetary income with 72.4 million people—16.5% of the EU population—having their disposable income below their national AROP threshold. Around 24.5 million people suffered from severe material deprivation and 27 million were living in a house with very low work intensity.[46] In 2019, one-third of the people experiencing unemployment were at risk of poverty and an even higher share (41%) of economically inactive people. However, 9.4% of those who did have a job were at risk of poverty too, with in-work poverty increasing in spite of economic growth. This represents a 0.9% increase in in-work poverty when compared to 2008.[47] This signals that while work is key to combating poverty, not all jobs provide the conditions to lift people out of poverty and social exclusion, which supports the argument that increasing the employment rate cannot be seen as the only, and not even the primary, avenue for poverty alleviation.

Poverty and social exclusion do not affect society in the same way and a number of vulnerable groups are prone to being at risk of poverty and social exclusion. This includes women, children, young people, people with disabilities, single parents, people with lower education level, migrants and people with a migrant background, people excluded from the labour market and, in most cases, people residing in rural areas.[48] Particularly, poverty is markedly gendered. Not only do women experience higher rates of poverty (21.8% as opposed to 20%) but this gap grows wider with old age (20.9% as opposed to 15.5%). The gap in pensions is also significant and women are also

45 Zeitlin and Vanhercke, *supra* n 11.

46 EU-SILC Survey 2019.

47 Peña-Casas et al., 'In-work poverty in Europe. A study of national policies' (2019) *ESPN*, 10.

48 EU-SILC Survey, *supra* n 46.

disproportionally represented among single parents, 40% of which are at risk of poverty and social exclusion.[49]

The share of people living at risk of poverty is, moreover, underpinned by growing inequalities both within and between Member States and, as such, poverty and social exclusion are not equally distributed across the EU. Both the economic crisis and the austerity measures that followed had a much greater impact on those less redistributive Member States with a weaker social protection system. Because Member States acted separately, the burden of the refugee crisis also aggravated these inequalities.[50] On the one side of the spectrum, Bulgaria (36.1%) recorded again the highest level of people at risk of poverty and social exclusion in the EU, closely followed by Romania and Greece, both with percentages above 30%. On the other, the lowest poverty trends were found in Czech Republic (12.5%), followed by Slovenia and Slovakia.[51] It is also interesting to look into different trends, which might seem surprising as some Member States show increases in the poverty rates, including Luxemburg, the Netherlands and Belgium, whereas Greece, Hungary, Poland and Portugal have experienced a considerable decrease.[52]

Considering the focus of this research, a necessary last point to make refers to the impact of social transfers. In this vein, social transfers reduced the at risk of poverty rate from 24.5% to 16.5% in 2019 which signals the importance of necessary social protection nets in fighting poverty and social exclusion. However, public investment for social protection nets (as well as healthcare and education), has been steadily declining since 2009. In 2019, before the coronavirus crisis hit the European economy and the EU was experiencing a stable economic growth, investment levels in this area were still below the levels seen prior to the 2008.[53]

In view of this alarming data, now that this chapter has set the tone and provided some necessary initial remarks, the next chapter begins by discussing the impact of social policy instruments in combating poverty and social exclusion.

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49 *Ibid*.; extensively: European Institute of Gender Equality, 'Poverty, gender and lone parents in the EU: review of the implementation of the Beijing Platform for action' (2017).

50 Jessoula and Madama (eds.), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020* (New York: Routledge, 2018).

51 EU-SILC Survey, *supra* n 46.

52 COM (2019) 651, 'Alert mechanism report 2020'.

53 Spasova and Ward, 'Social protection expenditure and its financing in Europe: a study of national policies' (2019) *ETUI*.

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Chapter 2

The EU social policy context

2.1 Introduction

The process of European integration has long been deemed asymmetrical due to the hierarchy between economic, fiscal and social objectives, with the latter laying at the bottom of the ladder of EU priorities. This asymmetry goes back to the ill-founded assumption that economic integration contributes to economic growth and that economic growth, in turn, will eventually result in the development of inclusive welfare states. This assumption has historically confined EU involvement in social policy to soft-governance instruments.

In the context of European social protection, there have been two main instruments since the adoption of the Lisbon Strategy in 2000: the Social OMC and the Europe 2020 Strategy. The former, on the one hand, is based on the understanding that social exclusion is a multidimensional phenomenon that can only be confronted through a wide range of interventions such as policies for proactive employment, social inclusion, education, healthcare and pensions targeting adequacy, accessibility, efficiency, and financial sustainability.[1] The Social OMC sets a number of indicators and benchmarks to evaluate the progress of Member States towards common objectives and relies on a relatively open 'bottom-up' process based on policy learning, exchange of good practices, peer reviews, the participation of a great number of non-governmental actors and, to a large extent, on a 'name and shame' method.[2] The Europe 2020 Strategy, on the other hand, refers to the EU's ten-year growth and jobs strategy launched in 2010, following the Lisbon Strategy, to create the conditions for 'a smart, sustainable and inclusive growth'. The Europe 2020 Strategy envisaged five headline targets to be achieved by the end of 2020 which, for the first time, introduced a measurable EU-wide poverty target that aimed to lift 20 million people out of poverty. Another pronounced characteristic of Europe 2020 is

1 COM(2008) 418 final, 'A renewed commitment to social Europe: reinforcing the open method of coordination for social protection and social inclusion'.

2 Lilie and Vanhercke, 'Inside the social OMC's learning tools: how "Benchmarking Social Europe" really works' (2013) *OSE Research Paper*.

DOI: 10.4324/9781003222125-2

that progress towards its targets was monitored yearly through the European Semester, the EU cycle of economic and budgetary coordination.[3]

Both the Social OMC and the Europe 2020 Strategy were warmly welcomed as a significant step forward in facilitating the integration between the social, economic and financial aspects of the EU and terminating with the constitutional asymmetry between those policy areas protecting market efficiency and those seeking social protection and equality.[4] They have, however, failed to achieve or even significantly advance towards their initial objectives. This is most clearly seen with the headline target of the Europe 2020 Strategy. Although the poverty and social exclusion levels have indeed decreased since its reference year in 2008, this decline is of a little over three million people, thus remaining far from its headline target to lift 20 million people out of poverty.[5]

More recently, the Commission launched the European Pillar of Social Rights (EPSR) Action Plan as a strategy towards a more social Europe.[6] Mimicking the headline targets of Europe 2020, the Action Plan also envisages three headline targets, the latter aiming at lifting 15 million people out of poverty, out of which, five million ought to be children. Different from the Europe 2020 Strategy, however, the Action Plan establishes a concrete timeline full of initiatives to be launched in the upcoming years that combines both soft-law and hard-law efforts.

This chapter departs from the premise that there are some inherent flaws to social policy in the EU that could hypothetically be tackled, at least partially, by addressing the discrepancy between the proclaimed policy objective to fight poverty and social exclusion and its (lack of) implementation into legally enforceable instruments. As such, it aims to understand why these instruments have not (sufficiently) worked and to expose existing gaps in the current social policy context that could potentially be later addressed by means of legal instruments. It also studies to what extent the recent Action Plan challenges these flaws. First, this chapter provides an overview of the Social OMC, from its origins to its role within the Europe 2020 Strategy and it concludes its section with a final assessment of the instrument. The second and most extensive part of this chapter studies the Europe 2020 Strategy and the European Semester touching on different issues therein, namely, the general architecture of Europe 2020, the headline target of lifting 20 million people out of poverty and social exclusion, the Integrated Guidelines, the European Platform Against Poverty (EPAP) and the overall monitoring cycle of the European Semester.

3 COM(2010) 2020 final, 'Europe 2020: a strategy for smart, sustainable and inclusive growth'.

4 Scharpf, 'The European social model: coping with the challenge of diversity' (2002) *JCMS* 40(4), 645–670.

5 Eurostat, 'Europe 2020 indicators – poverty and social exclusion' (2019).

6 COM(2021) 201 final, 'European pillar of social rights action plan'.

It also provides a general assessment of the strategy. The third section discusses the Action Plan implementing the EPSR and its potential in the years to come and, particularly, in confronting the current corona crisis. The fourth section briefly looks into different EU funds and their role in combating poverty and social exclusion; in particular, it examines the Social Investment Package (SIP), the European Structural Investment Funds (ESI- Funds), the Fund of European Aid for the most Deprived (FEAD) and the Next Generation EU (NGEU). Lastly, this chapter provides for a number of concluding remarks that support the initial premise that EU social policy measures, by themselves, do not suffice to effectively tackle poverty and social exclusion and, hence, these need to be reinforced, *inter alia*, by EU law to the extent of its possibilities.

The purpose of this chapter is therefore to understand how these instruments are used and explore their strengths and limitations within the EU policy framework in the context of poverty and social exclusion. Uncovering the shortcomings of the social policy framework in the fight against poverty and social exclusion aims to display where and how EU law can fill the loopholes, settle deficiencies and foster the effectiveness of these policy objectives.

2.2 The Social OMC

From 2000 onwards, the Commission and the EU Member States have been cooperating on social policy through the so-called OMC. The OMC is a voluntary self-evaluating policymaking process launched by the Lisbon European Council that aimed to spread best practices and to achieve convergence towards EU objectives that fall within the partial or full competence of Member States.[7] The OMC is a tool of soft nature that, as put by Vanhercke, represents 'the hard politics of soft governance'.[8] The tool relies on a variety of mechanisms including, guidelines, indicators, reports and national and regional targets. These mechanisms are backed by periodic evaluations and peer reviews with the purpose of learning from one another's national policies. This process of learning and improvement is often seen as 'peer pressure' or 'naming and shaming', which adds some leverage to the otherwise soft governance mechanism.[9] The Social OMC applies to the fields of poverty and social exclusion, pensions and health and long-term care. It is a process structured in three-year cycles that culminates with national reports synthesised in a Joint Report by the Commission and the Council. The process is periodically reviewed by the

7 Prpic, 'Open method coordination: at a glance' (2014) *European Parliamentary Research Service*.

8 Vanhercke, *Inside the Social Open Method of Coordination: The Hard Politics of 'Soft' Governance* (2016) Doctoral thesis, Amsterdam Institute for Social Science Research (AISSR), University of Amsterdam; Greer and Vanhercke, 'Governing health care through EU soft law' in Mossialos et al. (eds.), *Health System Governance in Europe: The Role of EU Law and Policy* (Cambridge: CUP, 2010), 186–230.

9 COM(2008) 418 final, *supra* n 1.

Social Protection Committee (SPC) in cooperation with representatives of civil societies and the Social Partners.[10] This section will briefly set the scene in which the Social OMC developed and explain the main features of this mechanism with a critical view on its opportunities and constraints.[11]

2.2.1 The origins and key features of the Social OMC

Even though it was only coined in 2000, the approach of the OMC dates back to somewhere around 1992 when the Protocol on Social Policy of the Treaty of Maastricht gave room to a similar method of governance in the form of two recommendations on social protection that provided the basis to produce biannual reports on social protection in Europe.[12] In 1997, the Amsterdam Treaty shaped up the launch of the European Employment Strategy after which the OMC on the social field was consequently modelled.[13] After initiating employment policy coordination and putting the European Monetary Union (EMU) on track, the Council endorsed the Commission's 'concerted strategy'[14] in 1999 to move forward towards social policy coordination. Shortly after, an Interim High-Level Working Group on Social Protection was established by the Council with the purpose of operationalising a social strategy.[15] This group was soon transformed into the treaty-based Social Protection Committee that was introduced by Article 144 of the Treaty of Nice (Article 160 TFE) and became the central body of the OMC on the social field.[16] In 2000, the Lisbon European Council stated that the number of people living in poverty and social exclusion within Europe was unacceptable. As a response, the Lisbon summit formally presented the OMC on the social field and authorised its application to a wide range of policy areas.[17] In turn, the Social Agenda set in Nice in

10 *Ibid*., point 2.

11 See also: De Shutter, 'The implementation of the EU charter of fundamental rights through the open method of coordination' (2004) *Jean Monnet Working Paper* 07/04.

12 Council Recommendation 94/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems [1992] OJ L 245; Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies [1992] OJ L 245; Vanhercke and Lelie, 'Benchmarking social Europe a decade on: demystifying the OMC's learning tools' in Fenna and Knuepling (eds.), *Benchmarking in Federal Systems: Australian and International Experiences* (Melbourne: Productivity Commission, 2012), 145–184.

13 Zeitlin, 'The open method co-ordination and the governance of the Lisbon strategy' (2008) *JCMS* 46(2), 436–450.

14 COM(1999) 347 final, 'A concerted strategy for modernising social protection'.

15 Barcevicius et al. (eds.), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (Basingstoke: Palgrave Macmillan, 2014), 16–44.

16 Council Decision 2000/436/EC of 29 June 2000 Setting Up a Social Protection Committee [2000] OJ L 172.

17 Lisbon European Council 23–24 March 2000 Presidency Conclusions. COM(2000) 379 final, 'Social Policy Agenda'; Pochet, 'The open method co-ordination and the construction of social

December of 2000 provided a timetable for the application of the OMC on social inclusion. Few years later, in 2006, the OMCs on social inclusion, pensions and healthcare were streamlined in the overarching Social OMC.[18]

Despite being originally launched with the objective of moving towards a knowledge-based economy that combined economic growth with more and better jobs and social cohesion,[19] the Lisbon Strategy soon turned out to be far too vague.[20] It was consequently re-launched in 2005 with a focus on jobs and growth. The newly introduced 24 Integrated Guidelines did not include social objectives (directly), breaking the promise of an equilateral triangle—between economic, employment and social policies—intended in its original launch. As such, the Social OMC was no longer part of the 'core' policy process. Even though the European Council repeatedly affirmed the importance of social policies in the EU agenda and the interaction between the Lisbon objectives and the Social OMC, in practice, little evidence was found of the promised 'feeding in' and 'out' mechanisms.[21] This and the internal streamline process of social exclusion, pensions and health and long-term care defined the future years of Social OMC.[22] To many, the streamline of the OMCs into the Social OMC had the power to treat complex and multi-dimensional challenges at once.[23] In practice, much of this decision was related to decreasing the coordination costs.[24]

Europe. A historical perspective' in ZEITLIN et al. (eds.), *The Open Method Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Brussel: P.I.E-Peter Lang, 2005), 37–82.

18 COM(2001) 362, 'Supporting national strategies for safe and sustainable pensions through an integrated approach'; COM(2003) 261 final, 'Strengthening the social dimension of the Lisbon strategy: streamlining open method coordination in the field of social protection'; SPC Indicators Sub-Group, 'Portfolio of overarching indicators and streamlined social inclusion, pensions and health portfolios' (2015); HERVEY and VANHERCKE, 'Health care and the EU: the law and policy patchwork' in MOSSIALOS, *supra* n 8, 84–133.

19 Commission, '"An Agenda of economic and social renewal for Europe" the commission's contribution to the Lisbon Special European Council' (2000).

20 KOK, 'Facing the challenge. The Lisbon strategy for growth and employment' (2004) *Report from the High-Level Group*.

21 ZEITLIN, *supra* n 13; DALY, 'Assessing the EU approach to combating poverty and social exclusion in the last decade' in MARLIER et al. (eds.), *Europe 2020: Towards a More Social Europe?* (Brussels: PIE-Pieter Lang, 2010), 143–156; FRAZER and MARLIER, 'Feeding in and feeding out: the extent of synergies between growth and job policies and social inclusion policies across the EU synthesis report' (2008) *EU Network of Independent Experts on Social Inclusion*.

22 BARCEVICIUS et al., *supra* n 15, 16–44; FRAZER and MARLIERM, *supra* n 21.

23 VANHERCKE, 'Social policy at EU level: from the anti-poverty programmes to Europe 2020' (2012) *OSE Research Paper*; BARCEVICIUS et al., *supra* n 15; MAARR et al., *The EU and Social Inclusion: Facing the Challenges* (Bristol: The Policy Press, 2007), 20–30; FRAZER et al., *A Social Inclusion Roadmap for Europe 2020* (Antwerp: Garant, 2010), 15–35.

24 COM(2003) 261 final, *supra* n 18; COM(2005) 706 final, 'Working together, working better: a new framework for the open method co-ordination of social protection and inclusion policies in the European Union'.

The newly streamlined Social OMC introduced a total of twelve common objectives, three specific to each strand and three overarching goals,[25] and a new monitoring framework comprised four portfolios, one for each strand (social inclusion, pensions and healthcare) and one overarching portfolio. Each of these portfolios contained a number of EU indicators that provided for a comparative assessment of Member States' progress, as well as national indicators specifying key information to assess the progress of Member States in relation to certain objectives.[26]

Member States were expected to prepare a National Progress Report every two to three years,[27] and in the years in between the Commission produced a number of questionnaires on specific topics. The answers to these questionnaires were later used to produce a Joint Report, which was drafted every year since 2005 and was built upon national reports, peer reviews, Eurostat statistics, studies prepared by experts as well as the questionnaires of the aforementioned 'thematic' years. This report summarised the main issues and trends in the progress of reaching the common streamlined objectives. In addition, it reviewed how social protection and social inclusion contribute to the Lisbon goals of employment and growth, and how the objectives, in exchange, were impacting social cohesion.[28] During the years of full reporting processes, the Commission also prepared country profiles assessing the national reports. Despite the Joint Reports being discussed in the SPC, adopted by the Employment Social Policy, Health and Consumer Affairs Council (EPSCO) and consequently submitted to the Spring European Council, in contrast to economic policy processes under the Lisbon Strategy, no EU institution did provide for a formal recommendation.[29]

Another feature of the Social OMC is the strong focus on mutual learning and experience exchange. Under the umbrella of the Social OMC and during the Lisbon Strategy there were two types of peer reviews, first, reviews within the SPC and second, thematic peer reviews (the so-called PROGRESS reviews), which are conducted by expert networks. These networks were

25 COM(2008) 418 final, *supra* n 1; Brussels European Council 25–26 March 2006, Presidency Conclusions; SPC and EPC, 'Joint opinion of the Social Protection Committee and the Economic Policy Committee on the commission communication on "Working together, working better: proposals for a new framework for the open co-ordination of social protection and inclusion policies"'(2006).

26 SPC Indicator Sub-Group, 'Portfolio of overarching indicators and streamlined social inclusion, pensions and health portfolios' (2015).

27 Commission, 'Guidelines for preparing national reports on strategies for social inclusion, pensions and health portfolios' (2006); Commission, 'Guidance note for preparing national strategy reports on social protection and social inclusion 2008–2010' (2008).

28 SPC Indicator Sub-Group, 'Portfolio of overarching indicators and streamlined social inclusion, pensions and health portfolios' (2008).

29 Barcevicius et al., 'Tracing the social OMC from its origins to Europe 2020' in Barcevicius et al. (eds.), *supra* n 15, 16–44.

deemed the 'ears and the eyes' of the Commission, which, in turn, usually asked them for country-specific analyses.[30] They could moreover make comments to the National Social Reports and produce *ad hoc* reports. These networks have notoriously contributed to fields such as in-work poverty, child poverty and synergies between economic and social policies'.[31]

The participation of civil societies through social NGOs and EU-level networks is another feature to earmark from the mutual learning process of the Social OMC. Among the most visible stakeholders in the policy process there are the EAPN, FEANTSA, AGE, the European Women's Lobby, Eurochild and Eurocities. The contribution of some of these has also been recognised in the Joint Reports and the supporting documents.[32]

2.2.2 The Social OMC within Europe 2020

Europe 2020 introduced a great number of changes, some of them affecting the Social OMC and questioning its future. First, the Europe 2020 Strategy works within the European Semester, a reporting and decision-making cycle that integrates macroeconomic and fiscal surveillance as well as a thematic coordination, with social exclusion and poverty being one of the themes. Because national reporting on social issues is conducted through the European Semester, Member States are no longer required to produce National Strategy Reports. However, in 2010, the SPC—endorsed by the EPSCO—decided to reinvigorate the Social OMC on its own initiative and invited Member States to prepare regular National Social Reports. In parallel, common objectives were updated, the analytical capacity of the Social OMC was strengthened and the participation of stakeholders was improved.[33] The National Social Reports make an important input on the SPC's annual social situation reports, which simultaneously, feeds into the Annual Growth Survey (AGS).[34]

30 VANHERCKE and LELIE, *supra* n 12, 145–184.

31 FRAZER and MARLIER, 'Tackling child poverty and promoting social inclusion of children in the EU: key lessons. synthesis report' (2007) *Commission*; FRAZER and MARLIER, *supra* n 21, FRAZER and MARLIER, 'Assessment of the extent of synergies between growth and jobs policies and social inclusion policies across the EU evidences by the 2008–2010 national reformed programmes. Synthesis report' (2010) *EU Network of Independent Experts on Social Inclusion*.

32 GOSME, 'Europeanisation of homeless policy: myth or reality?' (2013) *EJH* 7(2), 43–61; DIERCKX and VAN HERCK, 'Impact study on the European meetings of people experiencing poverty' (2010) *Report by the University of Antwerp on request of the EAPN*.

33 *Ad-hoc* group on Reinvigorating the Social OMC in context of the Europe 2020 Strategy, 'Draft background paper to the SPC from the Ad-Hoc group on reinvigorating the social OMC in the context of the Europe 2020 strategy' (2009); SPC, 'The Europe 2020 social dimension: delivering on the EU commitment to poverty reduction and inclusion' (2011).

34 SPC, 'The future of the social Open Method of Coordination (OMC)' (2011); SPC, 'Evaluation of the second European semester and thematic surveillance in employment and social policies' (2012).

Complementary questionnaires are still conducted in between report years.[35] Even though the Commission stopped the production of the Joint Report, this has been substituted by the SPC's own annual report, which includes similar characteristics.[36]

Besides continuing the Social OMC and drafting the annual reports, the SPC has also undertaken a significant role in monitoring, reviewing and assessing domestic reforms within the European Semester. In addition to the contributions made to the Europe 2020 Strategy's Joint Assessment Framework in monitoring the Employment guidelines, the SPC has also developed its own Social Protection Performance Monitor (SPPM). The SPPM includes a 'dashboard' of overarching context indicators used to monitor the Europe 2020 Strategy in the three strands of the Social OMC with detailed country profiles and common trends.[37] There has also been a significant intensification of mutual surveillance and peer reviews over the last years. Instead of a yearly peer review based on the National Strategy Reports, since 2011 mutual surveillance activities take place throughout the year with thematic in-depth reviews in autumn, in addition to the National Progress Reports' reviews in spring. The goal of the thematic reviews is to foster mutual learning and tackle specific policy challenges. Member States who perform weakly in a particular field are welcomed to use the SPPM indicators to achieve more positive outcomes.[38] Similarly, the SPC has continued with the thematic PROGRESS peer reviews.[39]

Mutual surveillance, peer reviews and social monitoring constitute the input of the SPC in the Country Specific Recommendations (CSR) of the European Semester. The participation of the SPC in the European Semester has become increasingly influential.[40]

35 SPC, 'Strategic social reporting 2013 guidance' (2013); Barcevicius et al., *supra* n 15; Jessoula et al., 'Multilevel "Arenas" for fighting poverty and social exclusion the Europe 2020 anti-poverty arena' (2013); FP7 Project, 'Combating poverty in Europe: re-organising active inclusion through participatory and integrated modes of multilevel governance' 26–27.

36 SPC, 'Social Europe many ways, one objective. Annual report of the Social Protection Committee on the social situation in the European Union' (2013); SPC, 'Review of the social situation and the development in the social protection policies in the member states and the union 2019 annual report from the Social Protection Committee (2019).

37 SPC ISG, 'Social protection performance monitor (SPPM) – methodological report by the indicators sub-group of the Social Protection Committee' (2012).

38 SPC, 'Evaluation of the second European semester and thematic surveillance in employment and social policies' (2012), §e; See also: SPC, '2014 Social Protection Performance Monitor (SPPM) dashboard results' (2015); SPC, '2015 Social Protection Performance Monitor (SPPM) dashboard results' (2015).

39 Jessoula et al., *supra* n 35, 28–30 and Annex II.

40 SPC, 'Social policy reforms for growth and cohesion: review of recent structural reforms 2013' (2013).

It appears that the Social OMC fulfils a dual role, on the one hand as an independent process that has its own agenda, methods, tools, objectives and outputs, and on the other hand, as an integral component of the social objectives within Europe 2020—now part of the Action Plan implementing the EPSR—and the European Semester.[41] In practice, what remains from the Social OMC could be summed up in the significant role of the SPC, both in generating exchangeable knowledge and voicing its concerns in the monitoring process, and in the system of peer reviews.

2.2.3 Assessment

When looking at the impact of EU social policy on the fight against poverty and social exclusion, the Social OMC has played a significant role, notwithstanding its evident limitations.

On a positive note, there is little to no discussion on the fact that without the Social OMC, social inclusion and poverty related issues would not have been kept on the agenda of the EU, in particular during the second half of the Lisbon Strategy. In some countries, social inclusion issues were placed there for the very first time, whereas other Member States opted for a 'multi-dimensional' approach to poverty and social exclusion because of the Social OMC.[42] For example, poverty is no longer seen as a concept solely related to monetary terms, but as an idea framed within a larger societal response that includes employment, proactive health, housing and social assistance policies.[43] In addition, the Social OMC has created a space for different social actors to voice their concerns, and programmes like PROGRESS have created the opportunity to build a European network that allows social actors to lobby on social matters.[44] The Social OMC has further provided the opportunity to emphasise that economic, employment and social policies are mutually reinforcing. It has also generated a common understanding between Member States—i.e. quantitative objectives and policy impact assessments—and has created the scenery to agree on common key policies. Moreover, the Social OMC has produced a considerable body of information regarding poverty and social exclusion and has improved existing data by developing a stronger analytical framework. Lastly, the Social OMC led to 2010 being the European Year for Combating Poverty and Social exclusion, and as a consequence, to including the poverty

41 Vanhercke, 'Under the radar? EU social policy in times of austerity' in Natali (ed.), *Social Developments in the European Union in 2012* (Brussels: OSE/ETUI, 2013), 115–130.

42 Dawson, *New Governance and the Transformation of European Law* (Cambridge: CUP, 2011), 181–185.

43 Zeitlin, 'The open method co-ordination in action: theoretical promise, empirical realities, reform strategy' in Zeitlin et al. (eds.), *The Open Method Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: P.I.E-Peter Lang, 2005).

44 For example: EAPN, 'Small steps- big changes: participation of people experiencing poverty and social exclusion' (2009).

target in Europe 2020.[45] Without this, fighting poverty would probably not be one of the headline targets of the Action Plan either.[46]

Notwithstanding its benefits, the role of the Social OMC in the fight against poverty and social exclusion has vast deficits as well. As a matter of fact, the Social OMC has shown, on its own, little progress in making a decisive impact on the eradication of poverty and social exclusion. There are a number of explanations to expound the relative failure of the Social OMC, from which one can specially note the lack of political leadership at an EU level, especially *vis-à-vis* other strands of the EU agenda, mainly macroeconomic and fiscal objectives.[47]

Another explanation for the relative impact of the Social OMC is that it continues to be a soft process. Even though the Social OMC is certainly part of the legal order,[48] the tools of the Social OMC are exclusively of a soft-law nature.[49] One could hardly pin-point interaction between EU legislation and the Social OMC.[50] Besides not imposing sanctions against Member States for failing to make progress, the Commission has also not issued recommendations strengthening their efforts in fulfilling social objectives, at least not in the context of the Social OMC.[51] As a result, there has been little pressure on Member States to move forward. Moreover, until the launch of the Europe 2020 Strategy there were no quantified social outcome targets, which diminished the status of social objectives in contrast to the economic objectives. Being a soft process, the key encouraging effort was through effective monitoring and evaluation made by other Member States, which has been insufficient

45 Frazer et al., *supra* n 23, 20–23.

46 COM(2021) 201 final, *supra* n 6.

47 The discussion on the subordination of EU social policy coordination to economic objectives of fiscal discipline, welfare retrenchment and budgetary austerity is exposed at the end of this chapter and continues throughout the remaining of the book. Dawson and De Witte, 'Welfare policy and social inclusion' in Arnull and Chalmers (eds.), *The Oxford Handbook of European Law* (Oxford: OUP, 2015), 964–990; Marlier et al., *supra* n 21, 232–235.

48 Article 153(2) TFEU.

49 Here 'soft law' is considered a mere euphemism for a policy framework which was deliberately chosen to avoid binding features generally associated with law. See more at: Trubek et al., 'Soft law, hard law and EU integration' and de Búrca, 'EU race discrimination law: a hybrid model?' in de Búrca and Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006).

50 Dawson and Witte, 'The EU legal framework of social inclusion and social protection' in Cantillon et al. (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Cambridge/Antwerp/Portland: Intersentia, 2012), 41–69; Trubek and Trubek., 'Hard and soft law in the construction of Social Europe: the role of the open method of co-ordination' (2005) *ELJ* 11(3), 343–364.

51 With the exception of a recommendation in pension provisions, child poverty and early school leaves, which would still take the form of non-binding recommendations. See more at: COM(2010) 758 final, 'The European platform against poverty and social exclusion: a European framework for social and territorial cohesion'.

due to the absence of analytical tools.[52] Even though a process of 'feeding out and in' was set to parallel the Social OMC with other programmes on the EU agenda, this interconnection, deemed to be mutually reinforcing, appeared to be weak, if even existent at all.[53]

In practice, most Member States have failed to integrate the Social OMC at the domestic level. There is evidence suggesting that national reports under the Social OMC merely have served a 'dissemination' function instead of triggering actual change.[54] EU Independent experts on poverty and social exclusion have observed that while a few Member States have achieved to make progress, the majority of Member States still have low governance in the field of social exclusion and poverty.[55]

Lastly, another explanation behind the little practical impact of the Social OMC lies in the lack of sufficient resources of the tool. For example, the usage of the ESI-Funds has not been sufficiently developed. EAPN, *inter alia*, has been critical to the limited amount of EU Structural Funds available to combat social exclusion.[56]

2.3 Europe 2020 and the European Semester

Amidst the financial and sovereign debt crisis, the launch of a novel European strategy gestured a major step in EU coordination for economic, fiscal and social objectives. Europe 2020 was particularly welcomed as a significant step forward in tackling poverty and social exclusion, and as such, as a 'major brick of Social Europe for decades'.[57] Essential to this novelty element was the unprecedented quantified poverty target to be achieved by 2020 along with the supranational governance and monitoring process of the European Semester that aims at bringing the social field to the (until then) framework of financial and economic monitoring cycle. The new governance framework triggered a multi-stakeholder engagement at different levels—i.e. supranational, national and regional—in the fight against poverty and social exclusion. Although the Europe 2020 Strategy was initially welcomed with open arms, it soon became

52 Marlier et al., *supra* n 21, 232–235.

53 Frazer and Marlier, *supra* n 21.

54 Dawson and De Witte, *supra* n 47, 964–990.

55 Frazer and Marlier, 'The EU's approach to combating poverty and social exclusion' (2010) *Kurswechsel* 3, 34–51; Dawson and De Witte, *supra* n 47.

56 EAPN, 'European anti-poverty network contribution to the commission consultation on the fifth cohesion report' (2011). However, EAPN has also showed its positive expectations towards the period of 2014–2020, available at: www.eapn.eu/what-we-do/policy-areas-we-focus-on/eu-funds/

57 Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination* (Oxford: OUP, 2010), p. 69.

the target of extensive criticisms on both its potential and effectiveness.[58] These scepticisms came on top of the persistence of poverty in the EU and the severe consequences of the austerity measures which led the Commission to ascertain already in the mid-term review of the Europe 2020 Strategy that its original target was out of reach.[59]

Europe 2020 brought three mutually reinforcing priorities: smart growth, with the aim of developing an economy based on knowledge innovation; sustainable growth, to promote a more resource-efficient, greener and more competitive economy and, most importantly for this book, inclusive growth, which aimed at fostering a high-employment economy delivering social and territorial cohesion.[60] To this end, Europe 2020 contained a number of interrelated EU headline targets in the field of employment, climate and energy, research and development, education and poverty and social exclusion, the latter being to lift 20 million people out of poverty before 2020. These headline targets were deemed to be translated into national targets and strategies to ensure that the European objectives were fulfilled. In addition to this, the Commission launched seven flagship initiatives to catalyse progress under each headline. Among these, the EPAP had the goal of guaranteeing social and territorial cohesion with the intention of sharing the benefits of growth evenly and ensuring a life in dignity and partaking in society for all.

Also pioneering was the fact that Europe 2020 introduced a new set of Integrated Guidelines, including for the first time a specific guideline on promoting social inclusion and combating poverty.[61] Articulating the objective to fight poverty and social exclusion under a specific guideline was believed to strengthen its potential to inform and influence employment and macroeconomic policies in order to guarantee their compatibility with the goal of fighting poverty and social exclusion. Member States are to report on the progress made on the Integrated Guidelines in the National Social Reports, which at the same time are assessed in parallel to the Stability Growth Pack (SGP) in the context of the European Semester. Hence, since the adoption of Europe 2020, fiscal, economic employment and social policies were, *a priori*, more aligned than ever to promote coherence and complementarity within the national and the European context.

58 Copeland and Daly, 'Poverty and social policy in Europe 2020: ungovernable and ungoverned' (2014) *Policy and Politics* 42(3), 351–366; Pochet, 'What's wrong with EU2020?' (2010) *ETUI* Policy Brief; de la Porte and Heins, 'A new era of European integration? Governance of labour market and social policy since the sovereign debt crisis' (2014) *Comparative European Politics* 13(1), 8–28.

59 COM(2014) 130 final, 'Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth', p. 25.

60 COM(2010) 2020 final, *supra* n 3.

61 Council, 'Decision on guidelines for the employment policies of the member states part II of the Europe 2020 integrated guidelines', SEC(2010) 488 final.

This section studies the Europe 2020 Strategy with its main focus on the provisions on the fight against poverty and social exclusion. It will study in more detail the Integrated Guidelines, the EPAP, the headline target and the cycle of the European Semester in order to provide an overall assessment of the policy instruments at the end of this section.

2.3.1 General architecture of Europe 2020

To secure a successful implementation, Europe 2020 was originally structured around two integrated pillars: country reporting and a thematic approach. As regards country reporting, it aimed to help Member States 'define and implement exit strategies to restore macroeconomic stability, identify national bottlenecks and return their economies to sustainable growth and public finances'. This reporting system took place in the European Semester, and although it initially 'only' included macroeconomic and fiscal surveillance, the thematic approach of Europe 2020 was later also incorporated in this reporting system. For the second pillar, the thematic coordination focused on structural reforms for a number of fields, including employment, education and social inclusion. This pillar was conducted through sectorial formations of the EU Council of Ministers, including the EPSCO. This pillar is where the former European Employment Strategy and the Social OMC were found.[62]

2.3.1.1 Headline target

Europe 2020 made it a priority to ensure inclusive growth, which is captured in the headline target of lifting 20 million people out of poverty. The quantified target replaced the vague objective of eradicating poverty under the Lisbon Strategy for the 'possibly less ambitious but potentially more incisive' objective of lifting 20 million people out of poverty.[63] In June 2010, the SPC and SPC Indicators Sub-Group together with the Commission endorsed a comprehensive target aimed at promoting social inclusion, in particular, through the reduction of poverty. More specifically, this target refers to those 'at risk of poverty and social exclusion' which includes three broad poverty indicators related to different dimensions of poverty, namely, monetary or income poverty, severe material deprivation and households with very low work intensity.[64]

Under the principle of subsidiarity countries are able to decide upon their national targets through the indicator that they decide is the most appropriate.

62 VANHERCKE, *supra* n 41, 115–130.

63 JESSOULA et al., *supra* n 35, 6.

64 See Chapter 1 for more information on the indicators and EU definition on at risk of poverty and social exclusion.

This decision, however, needs to be evidence based, meaning that Member States need to explain how their choices, both of national targets and indicators, will contribute to the overall EU target of lifting 20 million people out of poverty and social exclusion.

While the idea of setting a quantified European anti-poverty objective was not new, it was adopted with much difficulty due to the lack of agreement between Member States about using the 'at risk of poverty' indicator as a common objective. The Commission, however, defended that the combination of indicators mentioned above reflects the multiple factors underlying poverty and social exclusion as well as the diversity of problems that Member States face when attempting to alleviate poverty.[65] Besides the structural and methodological problems of the 'at-risk of poverty and social exclusion' indicators discussed in the previous chapter, there are two points of concern with this target. Firstly, the new way of measuring poverty threatened to substitute the approach on poverty reduction based on redistribution and the reduction of inequalities for a far more economically oriented approach. Following this line of thinking, economic growth and an increasing labour market participation would be sufficient to decrease material deprivation or the number of jobless households.[66] The increasing rates of in-work poverty in times of economic growth proved this assumption wrong.[67] Secondly, there is a major concern with the ample room to manoeuvre that Member States enjoy when setting their national targets. Accordingly, Member States have a considerable leeway to compose their own targets choosing the indicator they consider most appropriate, reflecting upon their priorities, relative starting point and situation. Because there are no hand-in-hand targets for each indicator and Member States have quite some flexibility; the risk exists that some Member States will choose the easiest indicator to handle.[68] As such, Member States might end up focusing their policies on economic growth and employment rather than redistribution. Looking at the national targets some of these fears can be confirmed.[69] This leeway makes a commitment from Member States highly unlikely,[70] in fact, as soon as 2011 the Commission already stated that the headline target would not be met with such national objectives.[71] National targets have also raised concerns regarding the inability to consider the needs

65 COM(2010) 758 final, *supra* n 51.

66 Peña-Casas, 'Europe 2020 and the fight against poverty and social exclusion: fooled into marriage?' in Natali and Vanhercke (eds.), *Social Developments in the European Union 2011* (Brussels: OSE/ETUI, 2012), 170–173.

67 Peña-Casas et al., 'In-work poverty in Europe. A study of national policies' (2019) *ESPN*.

68 Zsolt, 'Why is it so hard to reach the EU's 'poverty' target' (2017) *Bruegel Policy Contribution*.

69 EMCO and SPC, 'Assessment of the Europe 2020 strategy. Joint report of the Employment Committee (EMCO) and Social Protection Committee (SPC)' (2019), 21–29.

70 COM(2011) 815 final, 'Annual growth survey 2012- annex- draft joint employment report'.

71 *Ibid*. Annex 1- Progress report on the Europe 2020 strategy.

of vulnerable people.[72] According to EAPN, this proves Member States' little interest and lack of seriousness in fulfilling the European objectives of reducing poverty.[73]

Given the concerns raised herein, Copeland and Daly argue that the target to lift 20 million people is effectively ungovernable on the grounds of its 'ideational incoherence', 'insufficient political prioritisation and the inadequacies in the governance process'.[74] Many others support the idea of the limited role of the target in the overall architecture of EU governance but seemed more optimistic with regard to the possibility of enhancing economic, fiscal and social coordination in the future in order to reach such target.[75]

2.3.1.2 The Integrated Guidelines: Guideline 8

In October 2010 the Council adopted ten Integrated Guidelines for implementing the Europe 2020 Strategy.[76] Among these guidelines there were six broad guidelines for the economic policies of Member States and the EU and four guidelines for employment—and social—policies. The Integrated Guidelines were adopted under Article 121 and Article 148 TFEU for each set of guidelines respectively. The new guideline on social inclusion was one of the major innovations at the time of the launch of Europe 2020.

Guideline 10 (now Guideline 8), which deals with social inclusion, is therefore not based on Article 153 TFEU under the social policy title but under the employment title of the treaty instead, suggesting that the goals of the Guideline are to be reached by employment measures. As such, even though the wording of the Guideline draws upon the Social OMC (which is based on Article 153 TFEU), it is fundamentally intertwined with employment policies.

72 Frazer and Marlier, 'Assessment of the social inclusion policy developments in the EU- main findings and suggestions on the way forward' (2012) *EU Network of Independent Experts on Social Inclusion*; SPC, 'Combating poverty and social exclusion: an integrated approach - draft council conclusions, 26 May 2016' (2016).

73 EAPN, 'What progress for Europe? EAPN assessment of the national reform programmes 2016' (2016).

74 Copeland and Daly, *supra* n 58; Petmesidou, 'Can the European Union 2020 strategy deliver on social inclusion?' (2017) *Global Challenges Working Paper Series* no. 3, 5–6.

75 Bekker and Klosse, 'EU governance of economic and social policies: chances and challenges for social Europe' (2013) *ESLJ* 2, 103–120; Zeitlin and Vanhercke, 'Economic governance in Europe 2020: socialising the European Semester against the odds?' in Natali and Vanhercke (eds.), *Social Policy in the European Union: State of Play 2015* (Brussels: OSE/ETUI, 2015), 65–95.

76 Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States [2010] OJ L 308; amended in Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015 [2015] OJ L 268; and again in Council Decision (EU) 2018/1215 of 16 July 2018 on guidelines for the employment policies of the Member States [2018] OJ L 224 and Council Decision (EU) 2020/1512 of 13 October 2020 on guidelines for the employment policies of the Member States [2020] OJ L 344.

Moreover, Guideline 10 tackled the fight against poverty and social exclusion by means of labour market participation, which is made a priority in the Employment Guidelines. Social protection systems, in turn, should be modernised and ensure adequate income, at least insofar as these modernisation remains financially sustainable. In addition, Guideline 10 also referred to cross-cutting issues including equality, non-discrimination and special protection for the most vulnerable.[77]

Although this Guideline was first received with open arms due to the potential step forward in the fight against poverty and social exclusion in the Europe 2020 political process, relevant actors were soon disappointed by the national interpretation of the Guidelines made in the National Reform Programmes and later by the Commission and the Council in the context of the European Semester.[78] The main concerns regarding Guideline 10 referred to the fact that social objectives were subordinated to economic governance objectives because the Guideline limited social exclusion measures to getting people back to work and to combating income poverty. The fact that the Guideline was integrated within the Employment Guidelines motivated many concerns from civil society representatives, who have claimed the abandonment of the anti-poverty objectives. EAPN in particular, asked to separate Guideline 10 from the Employment Guidelines and to mainstream social concerns and sustainability objectives into all the Strategy Guidelines in order to place the fight against poverty at the core of European policy.

In March 2015, the Commission launched a new proposal aiming to substantially revise the Integrated Guidelines. Even though the revised Integrated Guidelines presented a seemingly more balanced structure between Economic and Employment Guidelines by reducing the Economic Guidelines to four instead of six, there was still a dominance of macroeconomic growth and stability in contrast with a smart, sustainable and inclusive growth. The reduction of the Guidelines also increased the lack of connection with the Europe 2020 targets and took three key priorities, namely, investment, structural reforms and fiscal responsibility, as established in the AGS of 2015, in line with Juncker's Guidelines.[79] In the case of Guideline 10 (now Guideline 8) on social exclusion and poverty this resulted in an almost entirely employment-focused wording. The 2015 Guideline 8 made no reference to the poverty target and equal opportunities seemed limited to employment situations. There was also no reference to the social investment package or key policy instruments to

77 Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States [2010] OJ L 308.

78 Peña-Casas, *supra* n 66.

79 See for more on President Juncker's political Guidelines in: Juncker, 'A new start for Europe: my agenda for jobs, growth, fairness and democratic change political guidelines for the next commission opening statement in the European Parliament plenary session, Strasbourg' 15 July 2014, available at www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf

combat poverty and social exclusion, neither was there an explicit priority to tackle homelessness. On top of this, there was an added focus on modernising social protection systems instead of their role in preventing and alleviating poverty.[80]

The Integrated Guidelines went through two subsequent (almost identical) revisions in 2018 and 2020.[81] This time, the overall wording of the Guideline seemed more socially oriented. For one, 'sustainability' of social protection is phrased generally and not only in terms of financial sustainability. The Guideline, moreover, enshrines the rights to adequate minimum income for those who lack sufficient resources. Housing and the importance of tackling homelessness are specifically emphasised. The link with Europe 2020 was already purely formalistic in 2018 (non-existent in 2020), however, the essence of the more recent EPSR is very much present in the overall text and particularly in Guideline 8.

The constant changes in the Integrated Guidelines portray a certain unsteadiness which, in turn, is likely to cause uncertainties and unpredictability.

2.3.1.3 European Platform against Poverty and Social Exclusion

The EPAP, one of Europe 2020's seven flagship initiatives, aimed at strengthening the social governance by involving Member States, EU institutions and stakeholders in the fight against poverty and social exclusion. The main goal was to create a joint commitment among Member States, EU institutions and the key stakeholders in order to ensure social and territorial cohesion so that the benefits of growth and jobs would be widely shared across Europe. The Platform consisted of five priorities, namely, delivering actions across the policy spectrum; greater and more effective use of the EU Funds to support social inclusion; promoting evidence-based social innovation; working in partnership and harnessing the potential of the social economy and enhanced policy coordination among the Member States.[82] In short, the flagship initiative acted as an umbrella platform for encouragement of multi-level and multi-stakeholder involvement as well as exchange of good practices.[83]

Even if it was warmly welcomed in its introduction, the social infrastructure of the EPAP was conceived as confusing due to its similarities with the Social OMC.[84] Confusion aside, the EPAP was received with optimism mainly due to

80 Council Decision 2015/1848 *supra* n 76.

81 Council Decision 2018/1215 and 2020/1512 *supra* n 76.

82 COM(2010) 758 final *supra* n 51.

83 Petmesidou, *supra* n 74.

84 Sabato et al., 'Europe 2020 and the fight against poverty' in Jessoula and Madama (eds.), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020* (London/New York: Routledge, 2018), p. 23.

its potential with regard to creating a window for an inter-institutional working platform between different DGs within the Commission. However, it turned out to be understaffed and was not endowed with sufficient resources. More importantly, it was never fully integrated within the European Semester as it did not contribute to the reporting process or the multiple meetings between Member States and the EU.[85] Perhaps this is why the impact of the EPAP has been rather limited, the meetings seem to have been irregular (if at all) and the last traceable Annual Convention against Poverty and Social Exclusion dates back to 2015. This lack of commitment also undermines the 'dynamic' partnership approach mentioned in the priorities.[86] As a matter of fact, while the Social OMC can still to some extent be tracked in the context of the European Semester and the EPSR, the EPAP appears to have completely vanished.

2.3.2 The European Semester

Another significant feature of Europe 2020 refers to the introduction of an iterative governance process under the European Semester. The European Semester was established in 2011 as a monitoring process in which the EU institutions work together with Member States to decide upon EU priorities and actions to be taken both at national and European level. It is a cyclical and interactive process that integrates the activities of reporting and monitoring previously related to the SGP for the coordination of economic, employment and social policies. The European Semester operates now as an umbrella of a number of different policy coordination instruments, *inter alia*, the Europe 2020 Strategy, The Stability and Growth Pact, the EuroPlus Pact, the Macroeconomic Imbalance Procedure (MIP) and part of the Two-Pack and the EPSR. Due to its meta-coordination nature, the European Semester envisages both hard and soft-law instruments.[87]

2.3.2.1 An increasing socialisation of the European Semester

While the EPAP turned out to be far less effective than expected, the European Semester, which was initially conceived as an instrument to ensure economic and fiscal discipline, has moderately but progressively become a governance arm of the Europe 2020 Strategy and, more recently, the EPSR.[88] This socialisation of the European Semester is mainly to be seen in the CSRs, but the AGS

85 *Ibid*.

86 EAPN, 'Input to the mid-term review of the Europe 2020 strategy: can the strategy be made fit for purpose enough to deliver its promises on poverty reduction?' (2014).

87 DE SCHUTTER and DERMINE, 'The two constitutions of Europe: integrating social rights in the new economic architecture of the union' (2016) *CRIDHO Working Paper* 2016/02, 7–8.

88 ZEITLIN and VANHERCKE, 'Socializing the European semester: EU social and economic policy co-ordination in crisis and beyond' (2018) *JEPP* 25(2), 149–174.

has also shown some changes throughout the years. While earlier texts referred to the overall social impact of the crisis, 2016 and 2017 refer to poverty not only as the effects of the financial crisis but also in relation to investment of human capital and structural reforms fighting unemployment.[89] In 2018 the objective to tackle inequality and poverty was made clear as well as the need to ensure adequate and targeted income support.[90] In 2019, poverty and overall social objectives seemed to be more present in the AGS. Yet, while the AGS acknowledged the slow reduction of inequality and poverty, it also bragged about the dropping levels of poverty and social exclusion below pre-crisis periods and still, it ignored the commitments made in the Europe 2020 Strategy.[91] In this vein, the detachment of the AGS with the Europe 2020 Strategy seems rather obvious, and yet, the presence of social objectives linked to the EPSR has become more prevalent since 2017.

More interesting is how these priorities are addressed in the CSRs. In 2012, seven CSRs addressed issues related to poverty reduction, three of which referred to social inclusion of the Roma population and five CSRs mentioned the need of improvement of the social protection systems. Similarly, 17 Member States received CSRs on pension reforms and five on long-term care. Most of the recommendations also referred to education, active labour market policies and training regarding effectiveness, quality and coverage.[92] In 2013, this trend continued by referring to poverty reduction and social inclusion in eleven different CSRs. However, in three of these recommendations poverty and social inclusion were directly linked to macroeconomic imbalances. Another 15 CSRs included notes on pensions and long-term health care in addition to making nine recommendations on the effectiveness and efficiency of social protection systems.[93] Overall, secondary literature suggests that during the first years the process of the European Semester often lacked a long-term vision and failed to make connections between targets and measures as well as to balance economic, employment and social objectives.[94] In 2014, even more CSRs included a social dimension—12 Member States received recommendations on poverty and social exclusion while 19 got recommendations on pensions and healthcare systems. Many of these recommendations, nevertheless, as well as in

89 COM(2011) 11 final, 'Annual growth survey: advancing the EU's comprehensive response to the crisis'; COM(2011) 815n, 'Annual growth survey 2012'; COM(2012) 750 final, 'Annual growth survey 2013'; COM(2013) 800 final, 'Annual growth survey 2014'; COM(2014) 902 final, 'Annual growth survey 2015; COM(2015) 690 final, 'Annual growth survey 2016'; COM(2016) 725 final, 'Annual growth survey 2017'.

90 COM(2017) 690 final, 'Annual growth survey 2018'.

91 COM(2018)770 final, 'Annual growth survey 2019: For a stronger Europe in the face of global uncertainty'.

92 Zeitlin and Vanhercke, *supra* n 88.

93 Clauwaert, 'The country-specific recommendations (CSRs) in the social field: an overview and comparison update including the CSRs 2016–2017' (2016) *ETUI*, 9–16.

94 Sabato et al., *supra* n 84, 21–22; Frazer and Marlier, *supra* n 72.

the previous years, were not truly socially oriented since some recommendations aimed at better reflecting productivity, reforming employment protection or strengthening job search requirements for unemployment benefits.[95] Moreover, the upward trend towards integrating social recommendations was completely overshadowed by the number of recommendations regarding macroeconomic imbalances. By contrast, in 2015, fewer CSRs had a social dimension, only six on poverty and social exclusion, raising concerns about the loss of strategic vision for Europe 2020 and reflecting Juncker's priorities to boost investment, structural reforms and fiscal consolidation instead. No reference to the priorities of the Europe 2020 Strategy was made despite the increase of poverty in two thirds of the Member States. Most of the socially oriented recommendations were employment focused and lacked overall coherence. Moreover, the approach towards employments was mostly related to boosting competitiveness, minimising the amount of people benefiting from the welfare system and keeping wages low.[96] In 2016, however, the Commission increased the number of recommendations on poverty again to a total of 11. The reference to a stronger social investment in health, social care and housing support was warmly welcomed.[97] Poverty was, however, not mentioned in the texts and austerity remained dominant. Minimum income adequacy was undermined by cuts in the universal social protection system. On a positive note, the recommendations made some progress on inclusive education, albeit the connection with Europe 2020 objectives was avoided.[98] This trend continued in 2017 with eleven CSRs on poverty, although most of them were not consistent as deficit reductions were to some extent undermining the poverty goal. Adequacy of income made an appearance, but social protection overall was still phrased in cost-efficiency terms. Just as in the previous years, the primary focus remained on macroeconomic and fiscal objectives.[99] In 2018, there was a noticeable shift towards integrating the EPSR, even though the principles did not seem to be streamlined. However, the reporting of the progress made towards the Europe 2020 poverty target was considerably less visible and the overall ambition to reach the target among Member States seemed rather

95 Zeitlin and Vanhercke, *supra* n 88.

96 COM(2015) 250 final, '2015 European semester: country-specific recommendations'; EAPN, 'Making progress on Europe 2020: investing in people for a fairer EU | EAPN's 2015 assessment on country-specific recommendations' (2015).

97 European Alliance, 'Annual growth survey 2016: signs of change towards democratic, social, sustainable and inclusive Europe but still a long way to go' (2015).

98 COM(2016) 321 final, '2016 European semester: country-specific recommendations'; EAPN, 'EAPN assessment of the 2016 country-specific recommendations' (2016).

99 COM(2017) 500, '2017 European semester: country specific recommendations'; EAPN, 'More social Europe in the European semester? EAPN assessment of the 2017 country-specific recommendations' (2017).

absent.[100] In 2019, the CSRs showed a more uncertain picture regarding progress towards socialisation. On the one hand, the EPSR was very much present in the reports with references to public budgets, minimum income and poverty reduction. These recommendations, however, lacked an integrated approach. On the other, priority was given to cost-cutting reforms on public expenditure thereby undermining social rights.[101] The focus of 2020, while continuing the socialisation trend, still contained strong recommendations to increase employment rates as means to fight poverty without including considerations of wage adequacy, working conditions or social protection schemes.[102]

If not in the outcomes, at least there seems to be a gradual socialisation of the European Semester which was initiated with the Europe 2020 Strategy. However, the specific objective of fighting poverty and social exclusion and the headline target seemed to have blended in with the implementation of the EPSR, which to some extent seems to have diluted a specific and measurable target.

2.3.2.2 Poverty 'cornered' between fiscal and macroeconomic surveillance mechanisms

Even though the increase of anti-poverty CSRs has been very welcomed, most of the aforementioned references remain ambiguous and with a tight relation to macroeconomic imbalances. Most of the references made to poverty and social exclusion within the CSRs concern the efficiency of welfare states rather than the reduction of poverty and social exclusion. Hence, the main goal of these CSRs is not to reduce poverty but to improve the efficiency of their social protection systems. As such, social policy is to respond to efficiency rather than adequacy and quality of social protection. In this vein, Bekker and Klose provide a comparative study showing the different manners in which Member States have responded to similar CSRs.[103] This study shows how social recommendations have been undermined by the number of CSRs that focus on macroeconomic imbalances and fiscal requirements which at the same time promote austerity measures that directly affect poverty and social exclusion. While this chapter cannot dwell on macroeconomic and fiscal

100 COM(2018) 400 final, '2018 European semester: country specific recommendations'; EAPN, 'Making social rights the compass in the European semester! EAPN assessment of the 2018 country-specific recommendations' (2018).

101 COM(2019) 500 final, '2018 European semester: country specific recommendations'; EAPN, 'A step forward for social rights? EAPN assessment of the 2019 country-specific recommendations' (2019).

102 Rainone, 'An overview of the 2020–2021 Country Specific Recommendations (CSRs) in the social field: the impact of Covid-19' (2020) *ETUI*.

103 Bekker and Klose, *supra* n 75.

surveillance mechanisms, it is important to address them briefly due to the downward pressure they exercise on social objectives.

Macroeconomic surveillance aims to ensure an environment for a profitable macroeconomic atmosphere to foster growth and employment creation. This goes along with the Integrated Guidelines 1, 2 and 3, which are macroeconomic structural policies. This covers macroeconomic imbalances, macrofinancial vulnerabilities and competitiveness which have a macroeconomic dimension. In 2011, a new enforcement mechanism entered into force, the so-called 'Six-Pack' which reinforces the economic governance in the EU. The Six-Pack is composed by six measures the EU adopted in 2011, from which four apply to all Member States and the other two—those regarding sanctions—only to the Member States of the eurozone.[104] An important part of the Six-Pack refers to the MIP which establishes a procedure that enables the Commission to monitor the macroeconomic policies of Member States. The monitoring is done on the basis of pre-defined indicators that are reported yearly in the Alert Mechanism Report where the Commission can check whether Member States potentially face macroeconomic imbalances by virtue of a scoreboard that incorporates a set of indicators.[105] In case of (potential) macroeconomic imbalances, the Commission may insist on taking corrective measures, which will in turn be checked by the Council.[106] The Council might propose concrete recommendations (preventive arm), and in the event that these recommendations are not taken on board by the eurozone Member States, a deposit may be demanded or a fine imposed (corrective arm). Worth noting, one of the indicators signalling a potential macroeconomic imbalance is related to unemployment. According to this indicator, a substantially high

104 Regulation No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 on the strengthening of surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L 306; Regulation No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306; Council Regulation No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L 306; Regulation No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the Euro area [2011] OJ L 306; Regulation No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the Euro area [2011] OJ L 306.

105 Note that in 2013 the Commission, at its own initiative, decided to incorporate social indicators into this report to stress the implication of macroeconomic imbalances on social objectives. COM(2013) 690 final, 'Strengthening the social dimension of the economic and monetary union', 4; COM(2016) 728 final, 'Alert mechanism report 2017'.

106 See for more information on the indicators: Commission, 'Macroeconomic imbalance procedure scoreboard', available at: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/macroeconomic-imbalance-procedure/scoreboard_en

structural rate of unemployment might indicate macroeconomic imbalances and as such, the Commission can make recommendations when national measures may increase unemployment.[107] The monitoring of the social objective of unemployment is, however, strictly linked to the idea of destabilising the macroeconomic climate. Thus, combating unemployment for the sake of increasing employment in particular or social cohesion in general, is not a priority in this case.[108] Moreover, the scoreboard of macroeconomic indicators also refers to units of labour costs which tracks changes in the average nominal costs of labour which, according to the Commission, establishes a correlation between a rise in labour costs and exceeding increase in labour productivity which might lead the erosion of competitiveness.[109] In this regard, the Council conclusions of the 2013 AGS noted that 'wage-setting frameworks need to be monitored and where appropriate reformed to ensure that they reflect productivity developments and contribute to safeguarding competitiveness, and indexation mechanisms should be reconsidered'.[110] This interpretation links wages, which are key to ensure an adequate standard of living[111] and the economic cycle, and it might lead to freezing wages which plays against the objective to fight poverty and social exclusion. Such an incomplete approach to macroeconomic imbalances, moreover, has been criticized for neglecting the significance of adequate wages in creating and stabilizing domestic demand.[112]

As regards fiscal surveillance, the SGP aims to contribute to strengthening fiscal consolidation and fostering sustainable public finances. It has the objective of identifying the fiscal constraints between Member States to enhance the overall consistency of EU policy advice. The aforementioned Six-Pack strengthens the SGP and especially the Excessive Deficit Procedure, which allows to sanction those Member States who have breached the deficit or debt criterion. In addition to the Six-Pack, in 2012 Member States agreed on two additional Regulations, the so-called 'Two-Pack', which provides additional coordination and surveillance of budgetary processes for the eurozone Member

107 See, in turn, the EUBS as a stabilization mechanism in Chapter 5.

108 Schoukens et al., 'Fighting social exclusion under EU horizon 2020 which legal nature for social inclusion recommendations?' (2015) *ICJ* 1(1), 11–23.

109 Commission, 'Scoreboard for the surveillance on macroeconomic imbalances (2012) *Economy Occasional Papers* 92(4), 15. For an overview of the interference of CSR on several social domains including unemployment, wages and pensions see: Bekker, 'The European semester process: adaptability and latitude in support of the European social model' in Vandenbroucke et al. (eds.), *A European Social Union after the Crisis* (Cambridge: CUP, 2017), 251–270.

110 Council conclusions on the annual growth 2013 [2013], §22.

111 See more in this regard in Chapter 5.

112 Menegatti, 'Challenging the EU downward pressure on national wage policy' (2017) *IJCL* 33(2), 195–220; Holland, 'Less austerity, more growth?' (2016) *NIESR Discussion Paper No.* 400; Schulten and Muller, 'European economic governance and its intervention in national wage development and collective bargaining' in Lehndorff (ed.), *Divisive Integration: The Triumph of Failed Ideas in Europe – Revisited* (Brussels: ETUI, 2014), 331–363.

States. Under the Two-Pack the frequency of scrutiny of Member States' policymaking is enhanced, therefore complementing the surveillance requirements of the SGP. Since the introduction of the Two-Pack, Member States have to submit a budgetary draft to the Commission and the Eurogroup before mid-October every year,[113] which the Commission studies and may ask for revisions when it considers it not to comply with the obligations under the SGP.

The Commission had planned to assess the current macroeconomic surveillance framework, in particular, the two-pack and the six-pack[114] reforms.[115] This assessment, however, was temporarily suspended due to the COVID-19 outbreak, which is also why, temporarily as well, the EU fiscal rules are deactivated through the activation of the general escape clause.[116] Some have argued that if policymakers want to avoid repeating the mistakes of the 2010 sovereign debt crisis, there is a need to reform the existing framework with two clear priorities: countering the current pro-cyclical bias to ensure that all Member States can quickly recover from the crisis and to make space for public investment by making a distinction between public and private investment.[117]

From the above, it is important to note that both macroeconomic and fiscal surveillance mechanisms allow for sanctioning Member States when they do not fulfil their duties. By contrast, social policy coordination does not encompass such an enforcement mechanism and relies almost exclusively on soft recommendations. Not only does this incentivise Member States to prioritise macroeconomic and fiscal recommendations over the social ones, but it has also led to a downward pressure on social objectives. Fiscal and macroeconomic governance led to both fiscal austerity and cost competitiveness, which has translated, particularly in the context of the economic crisis, into influencing public expenditure and boosting a race to the bottom in social standards.[118]

Almost every Member State has received CSRs relating to budget consolidation and cost-efficient cuts in health services, therefore, having major implications for the living standard of the population—in particular those at risk of poverty and social exclusion—moreover, these recommendations do

113 Commission, 'European economy: the two-pack on economic governance: Establishing an EU framework for dealing with threats to financial stability in euro area member states' (2013) *Occasional Papers* 147.

114 Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L 140.

115 COM(2020) 55 final, 'economic governance review'.

116 COM(2020) 123 final.

117 De Schutter, 'Visit to the European Union: findings and recommendations' (2021); Heimberger, 'European fiscal rules: reform urgently needed' (2021) *The Progressive Post*, available at: https://progressivepost.eu/spotlights/european-fiscal-rules-reform-urgently-needed

118 See on the downward pressure on wages, also discussed in Chapter 5: Menegatti, *supra* n 112.

not include requirements with regard to affordability, quality or coverage.[119] Bekker has argued, however, that Member States have some room for implementing such recommendations and safeguard their social interests.[120] With the aim of quarantining social interests and boosting an equilateral triangle, some propose a Social Imbalance Procedure which would aim at tackling asymmetries between the economic and the social dimension of the EU by identifying and targeting excessive social imbalances.[121]

2.3.2.3 The COVID-19 response

The EU tackled the outbreak of the pandemic with a remarkable swiftness, taking rapid decisions to allow Member States to invest in public health first by loosening the economic rigidity. Important changes included bending the rules of State aid to allow Member States to support their companies and prevent them from bankruptcy; the activation of the general escape clause of the SGP fiscal rules to allow countries to respond to the needs caused by the pandemic regardless of the debt this might generate; SURE, a programme providing financial assistance up to €100 billion in the form of loans from the EU to affected Member States with the objective of addressing sudden increases in public expenditure for the preservation of employment[122] and finally, most significantly, the Commission proposed an ambitious recovery plan for the EU worth €750 billion, Next Generation EU (NGEU), complementing the EU Multiannual Financial Framework 2021–2027.[123] In essence, NGEU is an enormous pot of money in the form of a financial assistance programme of the EU to its Member States that pursues a dual purpose: to aid Member States in repairing the immediate economic and social damage brought by the coronavirus and to ensure that the post COVID-19 recovery will be greener, more digital and resilient and better fit to counter the current and forthcoming challenges. NGEU is an umbrella for seven different instruments, which required some clever legal engineering[124] on the side of the Commission followed by what can only be described as ground-breaking historic negotiations

119 EAPN, 'Getting progress on poverty and participation EAPN assessment and proposals for country-specific recommendations 2014' (2014). Rainone, *supra* n 102.

120 Bekker, *supra* n 109, 251–270.

121 Sabato et al., 'Integrating the European pillar of social rights into the roadmap for deepening Europe's Economic Monetary Union' (2019) *EESC* by *OSE*.

122 Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L 159.

123 Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433.

124 De Witte, 'The European Union's Covid-19 recovery plan: the legal engineering of an economic policy shift' (2021) *CMLR* 52(2), 635–682.

at the Council.[125] The largest among these is the so-called Recovery and Resilience Facility,[126] which has a total budget of €672.5 billion: €312.5 billion that are destined to grants and €360 billion to loans. This is the centrepiece of the NGEU and aims at supporting reforms and investments in the Member States. Another instrument, REACTEU, aims at continuing the crisis response through the Coronavirus Response Investment Initiative and it has a budget of €47.45 billion.[127] NGEU also brings additional funds to other programmes such as Horizon Europe, InvestEU, rural development and the Just Transition Fund. This is a separate budget from the Multiannual Financial Framework of the EU, which was adopted in December 2020.[128]

A priori, the NGEU seems something to receive very positively from a social Europe point of view. Not only does the general framework aim at 'solidarity and unity', provide a variety of funds for Recovery *and* Resilience—therefore leaving room for improving, updating and strengthening current and future structural challenges—but it also mentions the fight against poverty in its preamble and three out of its six pillars are social in nature: social and territorial cohesion, health and education, and skills. The Action Plan (discussed in the following paragraphs), too, explicitly refers to using the EU's long-term budget and the NGEU to finance actions to implement the EPSR. In fact, a total of €1.8 trillion (in 2018 money) is destined explicitly for sharing solidarity to overcome the crisis and building the next generation EU. However, there is no minimum expenditure for poverty reduction (as it is the case for climate) nor is there a methodology to assess the social cohesion impacts of national plans or whether Member States are indeed moving towards the social objective.[129]

Notably, the European Semester has temporarily been adapted to coordinate the Recovery and Resilience Facility. Accordingly, Member States will present their Recovery and Resilience Plans,[130] which will later be evaluated by the Commission who will draft the CSRs on the basis of these. At the time of writing, Member States are still submitting their plans, although there have

125 DE LA PORTE and JENSEN, 'The next generation EU: an analysis of the dimensions of conflict behind the deal' (2021) *Social Policy Administration* 55(3), 88–402.

126 Regulation (EU) 2021/241 of the European Parliament and of the council of 12 February 2021 establishing the recovery and resilience facility [2020] OJ L 57.

127 Regulation (EU) 2020/460 of the European Parliament and of the council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of member states and in other sectors of their economies in response to the COVID-19 outbreak (coronavirus response investment initiative [2020] OJ L 99.

128 Council Regulation 2020/2093, *supra* n 123.

129 DE SCHUTTER, *supra* n 117.

130 DARVAS and TAGLIAPIETRA, 'Setting Europe's economic recovery in motion: a first look at national plans' (2021) *Bruegel*, available at: www.bruegel.org/2021/04/setting-europes-economic-recovery-in-motion-a-first-look-at-national-plans/

already been some criticisms regarding the participatory dimension of these,[131] so while the potential is real, there remains to be seen how 'social' the recovery will be.

2.3.3 Assessment

Within the context of the Europe 2020 Strategy and the European Semester, it is safe to say that the general social *acquis* of the EU has been strengthened. Some speak of a 'socialisation' of the European Semester with regard to a growing emphasis on social objectives and EU priorities as well as an improved governance procedure that enhances the role of social and employment actors. Yet, it remains to be seen if this strengthened social dimension will at some point feed into the mainstream system of economic governance.

The role of the SPC is particularly remarkable, not only has it taken its place within the European Semester, but it has also taken advantage of the knowledge base, governance tools and working methods developed in the Social OMC to assist Member States in improving their performance to fulfil the EU social and employment objectives. Moreover, the *ex-ante* reviews are believed to take the next step improving the social debate within the European Semester.[132]

An ongoing weakness within the architecture of Europe 2020 and the European Semester is the very limited or even marginal role of NGO stakeholders both at national and EU level. Despite the high number of calls for the involvement of civil society organisations and social partners, social dialogue within the European Semester remains weak. The fact that National Social Programmes continue to be of a voluntary nature does not support social participation, in particular at a national level.

Another weakness of the Europe 2020 Strategy was its *à la carte* approach. First and foremost, Member States could selectively respond to the headline target by choosing an indicator of poverty against which compliance is assessed. This gives Member States a rather broad leeway to tailor the specific targets into the national context and report 'only' where they best perform. This, in turn, might result in Member States taking rather broad national targets, which at the same time complicates benchmarking. On this note, the poverty reduction commitment was doomed to failure both because the narrow interpretation of subsidiarity gave Member States the liberty to choose freely among the three indicators, which led to cross-country comparability constrains, and because taking advantage of such liberties, Member States chose the indicator that made it easier for them to reach the target, therefore giving

131 Eurocities, 'Briefing note on the involvement of cities in the preparation of National Recovery Plans and Operational Programmes 2021–2027' (2021).

132 Zeitlin and Vanhercke, *supra* n 75, 83–86.

an incomplete picture of the poverty situation.[133] In addition, as far as the possibility of imposing sanctions is concerned, while in the macroeconomic field there is a semi-automatic enforcement mechanism in place, the employment and social counterpart does not include the possibility of imposing 'hard' sanctions. This results in a lack of pressure and leverage regarding compliance of Member States, especially under macroeconomic constraints.

There are also wide divergences on the seriousness of Member States with regard to the European Semester as a whole, and the CSRs in particular.[134] Positions vary depending on, *inter alia*, context, political sensitivity, institutional arrangements, overall attitude towards European integration and the national fiscal situation. The level of implementation may also depend on whether a particular country is aiming to secure European funding, which would increase cooperation towards reaching the EU targets.[135]

A different concern refers to the choice of placing the Integrated Guideline 8 (formerly 10) under Employment Guidelines. Firstly, because while the treaty requires Employment Guidelines to comply with the Broad Economic Policy Guidelines, there is no equivalent obligation for the Broad Economic Guidelines to respect the Employment Guidelines. Second, much like in other areas, the anti-poverty strategy is watered down to market activation, which will not deliver poverty alleviation.[136] Similarly, the changes in the wording of the Guideline, which is likely correlated to specific political priorities at the time, provide a certain degree of instability which hinders its implementation.[137]

The introduction of the headline target, Integrated Guidelines and flagship initiatives as well as their transposition into national objectives seem to not have been particularly successful in making the fight against poverty and social exclusion an essential part of Europe 2020. If anything, it seems that the multi-dimensional character of poverty and social exclusion, and the objective of the Social OMC have been somewhat constrained to economic functions. Social issues still receive very little attention in the European Semester. Even if there are increasing references to social rights, poverty, employability and social exclusion, these recommendations have failed to address crucial issues for achieving the quantitative objective, such as income equality.

133 Sabato et al., *supra* n 84, 21.

134 For country specific cases (Germany, Belgium, Poland, the UK, Sweden and Italy) see; Jessoula and Madama (eds.), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020* (London/New York: Routledge, 2018), 36–165.

135 *Ibid.*, p. 9.

136 Cantillon, 'The paradox of the social investment state: growth, employment and poverty in the Lisbon era' (2011) *JESP* 21(5), 432–449; Marx et al., 'Can higher employment levels bring down relative income poverty in the EU?' (2012) *JESP* 22(5), 472–486.

137 Bekker and Klosse, *supra* n 75.

2.4 The Action Plan to implement the EPSR

Planned long before the COVID-19 pandemic struck virtually all fronts of our lives, the arrival of the Action Plan implementing the EPSR could not be more opportune. The Action Plan aims to translate the 20 principles of the Pillar—discussed in the next chapter—into concrete actions drawing from a large-scale consultation from citizens, EU institutions and bodies, Member States, regional and local authorities, social partners, and civil society organisations.[138] This section will briefly discuss the main content of the Action Plan and provide a preliminary assessment of its role in contributing to the policy objectives of fighting poverty and social exclusion.

2.4.1 Content

The Action Plan sets three headline targets to be achieved by 2030 which are consistent with the UN Sustainable Development Goals: to create more and better jobs which requires that at least 78% of people aged 20–64 years old should be employed; that at least 60% of the adults should participate each year in training; and lastly, reminiscent of the Europe 2020 Strategy, to decrease the number of people at risk of poverty and social exclusion by at least 15 million, among which five million ought to be children—from 91 million in 2019.

To reach these objectives, the Commission proposes an ambitious timeline (2021–2025) filled with wide-ranging initiatives that target virtually all principles of the EPSR. These are presented under five thematic areas: more and better jobs, skills and equality, social protection and inclusion, civil society involvement and the New Social Scoreboard. The first three are distinctively linked to the three headline targets and the latter two represent overarching initiatives necessary for ensuring a democratic change and a proper evaluation of the implementation of the EPSR.

Under more and better jobs, the Commission emphasizes the need to create employment opportunities, to make work standards fit for the future of labour, occupational health and safety for the new world of work and labour mobility. For this purpose, the Commission plans to present a number of initiatives, including a Recommendation for Effective Support to Employment (EASE),[139] a legislative proposal on the working conditions of platform workers,[140] an initiative to ensure that EU competition law does not stand in the way of

138 COM(2020) 14 final, 'A strong social Europe for just transitions'; SWD(2021) 46, 'The European pillar of social rights action plan'.

139 C(2021) 1372 final, 'Recommendation for Effective Support to Employment (EASE) following the Covid-19 crisis'.

140 COM(2021) 762 final, 'Proposal for a Directive of the European Parliamemt and of the Council on improving working conditions in platform work'.

collective agreements for the (solo) self-employed,[141] an EU Regulation on Artificial Intelligence,[142] a report on the implementation of the Working Time Directive, an appropriate follow-up to the European Parliament Resolution on the right to disconnect,[143] a new occupational safety and health strategy to further reduce workers' exposure to hazardous chemicals including asbestos[144] and an evaluation of the European Labour Authority in 2024.

For skills and equality, the Commission highlights the importance of unlocking opportunities for all by investing in skills and fighting discrimination (or building equality) and plans to this end to put forward an initiative on Individual Learning Accounts and legislation to combat gender-based violence against women, including work harassment on grounds of sex.

As regards social inclusion and social protection, which is most clearly linked to poverty alleviation and the headline target of reducing poverty by 15 million, the Commission underscores the need to work towards securing a life in dignity for everyone by breaking the intergenerational cycles of disadvantage, ensuring adequate minimum income schemes, access to affordable housing and to essential services. Under this grouping, the Commission plans the most socially progressive, though also more conservatively formulated, initiatives, including the EU strategy on the rights of the child alongside the Council Recommendation establishing the European Child Guarantee,[145] a Council Recommendation on minimum income, a European Platform on Combating Homelessness and an affordable housing initiative. Particular attention is also drawn to health and long-term care for which the Commission plans to propose an initiative. In order to make social protection fit for modern times, the Commission also plans to propose a European Social Security Pass.

The initiatives at the EU level are accompanied by a number of suggestions for actions at the national level which are moreover supported by the NGEU and the Multiannual Financial Framework, mainly through the European Social Fund Plus (ESF+) with support from the Recovery and Resilience Facility for eligible measures.

In order to support the engagement of different actors in the decision-making and evaluating processes, the Commission also presents an initiative to support social partner dialogue at the EU and national level. Lastly, the Commission underscores the importance of monitoring and implementing of

141 Ares(2021)102652, 'Inception impact assessment'.

142 COM(2021) 206 final, 'Artificial Intelligence Act'.

143 European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

144 C(2020) 8944 final, 'First phase consultation of the social partners under Article 154 of the Treaty on the Functioning of the European Union, on the protection of workers from risks related to exposure to chemical agents at work and to asbestos at work'.

145 COM(2021) 137, 'Proposal for a council recommendation establishing a European child guarantee'.

the EPSR and the Action Plan. In order to enhance this, it proposes a revised version of the Social Scoreboard, a compromise to expand the scope and depth of the Joint Employment Report and to continue to implement the principles set out in the EPSR in the process of the European Semester and particularly for the recovery and resilience plans.

2.4.2 Preliminary assessment

It is too soon to draw any conclusions for an initiative as young as this one, but there are a couple of remarks worth noting from this preliminary outset. Overall, the Action Plan imposes an ambitious timeline with measurable targets and clearly scheduled initiatives to achieve them, which, together, tackle virtually every area of the EPSR in a variety of forms. Probably its strongest point lies in the sum of all these efforts and its hybrid format, composed of initiatives that range from regulatory proposals in the form of regulations or directives to strategies and platforms or openly formulated initiatives. Together, these concrete actions to achieve the principles of the EPSR, could potentially contribute to building the necessary social pillar and give it a harder edge. There are, however, a couple of shortcomings.

Laudable efforts as these might be, the Action Plan cannot truly be said to 'leave no one behind'.[146] For one, the headline target to combat poverty is less ambitious than the one presented in Europe 2020, let alone the UN Sustainable Development Goal to eradicate poverty altogether. Considering that over 91 million people (20.9 million children) are at risk of poverty and social exclusion in the EU and that the COVID-19 outbreak has only added to these numbers, this is simply unacceptable. What is more, the inherent flaws to the headline target of Europe 2020 and the unacceptable margin of appreciation left to the Member States remain with this new headline target.[147] Considering that the concrete proposals are strictly of a soft nature, one may question the seriousness of this headline target.

There is also a strong focus on employment, albeit not necessarily decent employment. Rather, the core of the Action Plan centres on creation of employment, skills and modernisation, which is not necessarily paired with a decent living standard. In fact, the Commission states that temporary and, thus, insecure employment will be part of the recovery. Yet, there are efforts to improve the conditions of particularly precarious employment situations and extend existing working standards to newer forms of labour, which is something worth celebrating. So is the proposal for a directive on minimum wages. However, none of these efforts guarantees that workers will make ends meet, and much less that they will have a decent standard of living. Moreover,

146 Commission, *supra* n 6, 27.
147 De Schutter, *supra* n 117.

empirical data show that employment is not sufficient on its own to fight poverty.[148]

The initiatives under the umbrella of living a life in dignity that could cover out-of-work benefits, in turn, are formulated in a rather wary manner and refer exclusively to soft-efforts. On the positive side, initiatives regarding housing, which has traditionally been excluded from the EU realm, are now on the agenda, which is undoubtedly an achievement worth celebrating. However, after years of advocacy and the failure of the previous minimum income recommendation[149] the Commission has only committed to launch yet another soft-law recommendation for something as essential as minimum income,[150] regardless of how necessary minimum income is in effectively tackling poverty,

It seems that the comprehensive strategy presented in the Action Plan falls short on one of the sides: the one looking beyond employment, which puts into question its effectiveness as a whole and the promise to leave no one behind, in particular. Yet, it was foreseeable that the Commission would be more cautious with the more socially progressive initiatives since a large number of Member States, 11 to be precise, had already asked Brussels to keep a 'social distance', though not in the pandemic-acquired sense.[151] In their non-paper, they asked the EU to respect the national authority and limit their actions to guidance and complementary initiatives.[152]

Much of what will happen with these initiatives of course remains to be seen and will ultimately depend on their proposed form and content, the negotiations and their adoption (if at all).

Perhaps more concerning are those areas conspicuous by their absence. Most notably this is the case of the mysterious disappearance of the European Unemployment Reinsurance Scheme (EURS) which was one of the few initiatives that the von der Leyen Commission planned to present at the beginning of its mandate and, to the disappointment of some Member States,[153] is absent

148 Cantillon; Marx et al., both *supra* n 136.

149 Council Recommendation 92/441/EEC, *supra* n 12.

150 Van Lancker et al., 'Expert study on a binding EU framework on adequate national minimum income schemes: making the case for an EU framework directive on minimum income' (2020) Study Commissioned by EAPN; Aranguiz, 'Securing decent incomes at a crossroads: on the legal feasibility of a Framework Directive on Minimum Income' (2020) *EJSS* 22(4), 467–485.

151 Herszenhorn, 'Ahead of EU summit, 11 countries tell Brussels to back off on social policy' (2021) *Politico*, available at: www.politico.eu/article/porto-summit-11-eu-countries-national-authority/

152 Social Summit: Non-paper by Austria, Bulgaria, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Malta, the Netherlands and Sweden (2021), available at: www.politico.eu/wp-content/uploads/2021/04/22/Non-paper-Social-Summit.pdf

153 Ferrera, 'The lights from Porto: a small step towards a social union? (2021) *The Progressive Post*, available at: https://progressivepost.eu/debates/the-lights-from-porto-a-small-step-towards-a-social-union

from the Action Plan.[154] This is all the more surprising because, amidst the COVID-19 crisis, the EU was 'forced' to create an instrument to temporarily support Member States to mitigate their unemployment risks, better known for its abbreviation SURE.[155] The urgency to support unemployment schemes for the overall stability of the EU economy became self-evident in the face of the economic shock brought by the corona outbreak. It is, thus, alarming that something that is widely renowned[156] as essential to cope with the prevalent challenge of asymmetric shocks in single-currency economies as an EURS was no longer considered a priority.[157] And yet, the decision to drop the initiative on an EURS appears to be a fully-conscious choice to 'gradually move away from income support measures, including SURE, to actions targeting active labour market policies'.[158] Neither does the Plan clarify the future of SURE, other than a scheduled evaluation, regarding a potential restatement or extension of the instrument, particularly in the absence of a permanent replacement. This again shows that from the three main headline targets, skills and jobs are a clear priority whereas the fight against poverty beyond employment activation falls into a vastly underequipped second place. This again puts into question the entire anti-poverty approach of the EU.

This is not to say that the Action Plan is a poor initiative. Not at all. In fact, few would have expected that the social agenda of the EU would have become this ambitious in a short few years, something rather unlikely if the UK was still a part of the EU. These efforts should be received as what they are: an immense effort to redeem mistakes made in the past and steer the Union towards a more social model. The Action Plan, or the Pillar in general, should however not be taken as an all-fixer and improvements are still necessary within the social dimension.[159] Without a stronger social pillar beyond employment, and a macroeconomic surveillance framework that does not

154 Commission, 'Political guidelines for the next European Commission 2019–2024, by Ursula von der Leyen, candidate for the European Commission President' (2019).

155 Regulation 2020/672 OJ L 159, *supra* n 122.

156 Vandenbroucke et al., 'Risk sharing when unemployment hits: how policy design influences citizen support for European Unemployment Risk Sharing (EURS) policy report' (2018) *AISSR* Policy Report.

157 Andor et al., 'Saving jobs and protecting incomes: from national schemes to a European double safety net' (2020) *FEPS* Covid-response papers #8.

158 Valero, 'EU unemployment reinsurance scheme falls off Commission's radar' (2021) *Euroactive* March 4, available at: www.euractiv.com/section/economy-jobs/news/eu-unemployment-reinsurance-scheme-falls-off-commissions-radar/ Although Nicolas Schmit has apparently confirmed that a European Unemployment Reinsurance Scheme remains on the agenda. Hochscheidt, 'Social pillar action plan – longer in aspiration' (2021) *Social Europe*, available at: https://social-europe.eu/social-pillar-action-plan-longer-on-aspiration

159 Garben, 'The European pillar of social rights: effectively addressing displacement?' (2018) *EUConst* 14(1), 210–230.

undermine (national) social advancements, the commitment towards poverty alleviation remains rather weak.

2.5 Financial resources

The social policy objective to fight poverty and social exclusion is considerably strengthened by a gradually increasing share of financial resources within the EU budget that aim specifically at fostering social cohesion, promoting equal opportunities and reducing disparities between regions. These financial resources are mainly implemented through the Commission's Social Inverstment Package (SIP),[160] the European structural and investment (ESI) Funds[161] and more recently the Fund for European Aid to the most Deprived (FEAD),[162] although soon they will all be under the same ESF+ umbrella.[163] This section briefly looks into these tools and their link to the policy objective of fighting poverty and social exclusion.

The SIP refers to a number of non-binding documents adopted by the Commission in 2013 to set a framework for policy reforms 'to render social protection more adequate and sustainable, to invest in people's skills and capabilities and to support people throughout the critical moments experienced across their lives'. It was adopted following the peak of the economic crisis that threatened the accomplishment of the Europe 2020 priorities. The SIP is composed of several documents[164] and it aims to foster—or at least maintain—investment in areas of social policy. Main areas of focus include ensuring social protection systems in order to respond to people's necessities, simplifying and better targeting social policies and upgrading active inclusion strategies in Member States. The SIP also provides guidance for Member States on how to take advantage of financial support. At the same time, the Commission

160 COM(2013) 83 final, 'Towards social investment for growth and cohesion – including implementing the European social fund 2014–2020'.

161 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347.

162 Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived [2014] OJ L 72.

163 COM(2018)382 final, 'Proposal for a regulation of the European parliament and of the council on the European Social Fund Plus (ESF+)'.

164 COM(2013) 83 final, 'Towards social investment for growth and cohesion – including implementing the European social fund 2014–2020'; Commission Recommendation 2013/112/EU of 20 February 2013 Investing in children: breaking the cycle of disadvantage [2013] OJ L 59; SWD(2013) 38 final, 'Evidence on demographic and social trends social policies' contribution to inclusion, employment and the economy'.

monitors closely the performance of each Member State—mainly through the European Semester—and may provide guidance on a more effective and efficient social policy response within the CSRs with particular emphasis on the specific challenges that individual Member States face. These challenges include, *inter alia,* poverty and social exclusion as well as unemployment. In the context of implementing CSRs, in 2018 the Commission proposed a Regulation on the establishment of the Reform Support Programme, that aims at funding structural reforms identified in the context of the European Semester.[165] Although the SIP shows an important commitment made by the Commission towards a stronger European social dimension by sending the message that better social policies strengthen the people's capacity to integrate in the labour market, this message seems to be contradicted by the dominant focus on efficiency and the necessity to refocus social balances towards more 'enabling' services.[166]

The ESI-Funds, differently, refer to five EU funds that are managed by the Commission and the EU Member States among which the ESF covers the fight against poverty and social exclusion. The ESF is the main financial instrument for supporting quality, accessibility, adequacy and fairer opportunities for employment. The ESF has also been a highly relevant tool for mitigating the consequences of the economic crisis, particularly in terms of unemployment and poverty levels. According to the ESI-Funds Regulation, 20% of all the ESF aims at 'promoting social inclusion and combating poverty' and access to it is conditional upon the adoption of 'a national strategic framework for poverty reduction aiming at active inclusion of people excluded from the labour market'.[167] However, according to the Barometer Assessment on the 20% earmarked funding of poverty conducted by EAPN, the funds are not used effectively to reduce poverty and priority is given to employment-related activities, regardless of the references to quality of work and without promoting an active inclusion approach.[168] Even if Member States cannot get sanctioned for a failure to implement recommendations on the Employment Guidelines, this failure may have consequences with regard to the ESI-Funds. According to the ESI-Funds Regulation there are three situations in which the Commission might exercise leverage on Member States to implement their recommendations. The first refers to the *ex-ante* conditionality. Member States are deemed to use the Operational Programmes to tackle the priorities set on the CSRs, as such,

165 COM(2018)391, 'Proposal for a regulation of the European Parliament and of the council on the establishment of the reform support programme'.

166 EAPN, 'EAPN response to the social investment package will it reduce poverty?' (2013).

167 Regulation (EU) No 1304/2013 of the European Parliament and of the council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 [2013] OJ L 347.

168 EAPN, 'Barometer reports on monitoring the implementation of the (at least) 20% of the European Social Fund that should be devoted to fight poverty during the period 2014–2020' (2016).

the Commission might decide to not approve the Operational Programmes on the basis of failing to implement these priorities. The second option is reprogramming, meaning that when the Commission requests to redirect part of the funding to certain priorities, the Member State will have to comply in order to get the funding. The last point refers to suspension. This might happen when a Member State fails to comply with the recommendations of the Commission under the corrective arm of the Excessive Deficit Procedure or the MIP. However, a number of Operational Programmes or priorities of critical importance, such as poverty reduction, are exempted from reprogramming and suspension. Moreover, the maximum rate of funding that may be suspended upon decision of the Commission is reduced for those Member States experiencing unemployment or poverty above average.[169] As such, there is little leverage to make Member States comply with the policy objective of combating poverty and social exclusion.

Lastly, in a more recent initiative the EU launched FEAD which aims at supporting initiatives to provide food and basic material assistance to the most deprived. As such, it mainly tackles one of the three forms of poverty discussed in the previous chapter: severe material deprivation. FEAD was originally conceived to curtail the severest social consequences of the economic crisis and increase the visibility of the EU social issues.[170] The budget destined for its big ambitions, however, is limited to only 1% of the overall cohesion policy funds. Even with such a limited budget, due to the urgent need of food banks in Europe, a study found that FEAD can make a great difference, particularly in the poorer Member States. This impact, however, is limited to alleviating urgent needs and not targeting redistributive failures. Worth noting, in April 2020 and as a measure to minimise the effects of the COVID-19 crisis on the most deprived, there was a Council agreement to amend the FEAD Regulation in order to make access to the fund easier while protecting the staff involved in distributing the aid.[171] Overall, FEAD might act as a catalyst for consensus in social protection standards, however, the disproportionate allocation of the funds among Member States might as well play a detrimental role in the willingness of other Member States to partake.

All in all, funds might play a key role in supporting necessary structural changes or in alleviating urgent material needs, but by themselves, they are unlikely to go beyond a supplementary role in anti-poverty and change the landscape of redistribution in the EU.

169 Article 23 Regulation (EU) No 1304/2013; Zeitlin and Vanhercke, *supra* n 75, 88–90.

170 Greiss et al., 'Europe as agent that fills the gaps? The case of FEAD' (2019) *CBS* Working Paper No 19.03.

171 COM(2020) 141 final, 'Amending Regulation (EU) No 223/2014 as regards the introduction of specific measures for addressing the COVID-19 crisis'. Council, COVID-19 outbreak: council approves measures to help the most deprived EU citizens' (2020).

2.6 Conclusions

Since the adoption of the Europe 2020 strategy, three general trends can be distinguished regarding the implementation of the social objectives in the EU policy framework. In the first place, there was little progress made until 2013. This could be attributed partly to the time-consuming effort of integrating a new initiative and to the fact that those were arguably the worst years of the economic crisis, where the EU was driven by economic and fiscal priorities. Secondly, from 2013 to 2017 one can observe a socialisation trend, with the more regular incorporation of the poverty objective in the process of the European Semester, the reinvigoration of the Social OMC and the connection between the ESF and the poverty objective. Lastly, after 2017 there is an obvious dilution of the specific poverty objective as the overarching principles of the EPSR take over and attention is diverted to this fresh initiative.[172]

Even if there has been an increase of CSRs that deal with poverty and social exclusion, the European Semester is still overridden by the SGP, and the Europe 2020 Strategy was barely visible throughout the main documents and communications of the European Semester. The Social OMC, in turn, has shown little progress on its own towards the realisation of the overall goal of making a decisive impact on the eradication of poverty and social exclusion. In addition, the limited or even marginal involvement of non-governmental stakeholders at the EU and national level to discuss poverty and social exclusion is quite worrisome, in particular when contrasted with other policy areas. For example, the EMCO meets regularly with the social partners.[173] But neither civil society organisations, nor the social partners play a significant role in the social governance of the European Semester. Moreover, the voluntary character of the National Social Reports has not compensated for the limited participation of civil societies and subnational actors at Member State level.[174]

The current governance structure of the EU has opened a Europeanised public space for debate, with increased visibility of the social arena in EU policymaking. But this governance structure is still far from effectively envisaging a binding commitment to fight poverty and social exclusion. It seems that the Commission agreed, at least to some extent, with some of these concerns and with the general idea that there are excessive social imbalances in the EU, when it officially launched the long-awaited EPSR in 2017.[175] The role of the EPSR is discussed throughout the following chapter, but it is important to note at this stage that much of what the EPSR envisages overlaps with what

172 Sabato et al., *supra* n 84, 14–35.

173 EMCO, 'Multilateral surveillance' (2015).

174 CoR, 'CoR mid-term assessment of Europe 2020: rethinking Europe's growth and job's strategy' (2014).

175 The EPSR is extensively discussed in Chapter 3 and later instrumentalised in Chapter 5.

has been discussed in this chapter and it is rather unclear how the EPSR fits within this policy framework.

Just as was the case with the Social OMC when the Europe 2020 Strategy was adopted, it is not very clear whether, and if so how, the legacy of the Europe 2020 Strategy will continue in the context of the EPSR and its Action Plan.[176] This is, for example, regarding the Social Scoreboard of the EPSR and the social indicators of the Europe 2020 Strategy and the Social OMC. Another example is the poverty target, which seems to have diluted in the bolstering of the social *acquis* that aims now at wider ambitions but at the expense of a less ambitious poverty goal. While the broader take that the EPSR envisages allows to tackle poverty in its multi-tiered fashion, the lack of stronger commitments to poverty alleviation is rather disappointing. In general, social policy seems to have gained impetus over the last years, which is also noticeable from a purely legal perspective.[177] However, the link between past and current approaches is difficult to trace. There appears to be a *matryoshka*-like effect with the social policy framework where new instruments overtake past strategies without ever truly replacing them. In this regard, the essence of the Social OMC appears to still exist (perceptible in the PROGRESS peer-review process and the role of the SPC), but it is no longer self-evident. The last years of the Europe 2020 Strategy, followed a similar path onto the EPSR.

The outcomes of the Social OMC and the Europe 2020 Strategy, when measured in numbers, are unsatisfactory to say the least, and yet, there is a clear socialisation in the process of the European Semester linked to the Europe 2020 Strategy and recently the EPSR. The importance of this process should not be underestimated, particularly given the transformative nature of such an ambitious strategy. Yet, the overall structure remains considerably weak, economic swing-dependant and constantly overshadowed by other interests.[178] Further, a rather narrow interpretation of economic recovery and fiscal stability has put pressure on the cost-effectiveness of publicly available services, social protection systems and wages. Even if the Social OMC, the Europe 2020 Strategy and the social funds have played a vital role developing the social dimension of the EU, by themselves, they lack the necessary bite to truly address the asymmetric imbalance of the EU and give the poverty objective a real chance. Against a backdrop of increasing inequality and relative steadiness in poverty and social exclusion, and in the absence of commonly agreed robust commitments by Member States, it seems rather unlikely that the EU objective of lifting 20—

176 Sabato and Corti, '"The times they are a-changin?" The European pillar of social rights from debated to reality check' in Vanhercke et al. (eds.), *Social Policy in the European Union: State of Play 2018* (Brussels: OSE/ETUI, 2018), 51–68.

177 Mostly this refers to the set of legislative initiatives launched in the context of the EPSR. See in this regard Chapter 3 and 5.

178 On wage and social contribution race to the bottom, taxation competition and macroeconomic convergence: De Schutter, *supra* n 117.

or even 15—million out of poverty will ever materialise. The lack of more adequate macroeconomic structures –that allow for public investment and are counter-cyclical—otherwise, makes poverty reduction vulnerable to economic cycles.

A similar trajectory could have been anticipated for the EPSR if this had remained a cluster of policy documents, but the EPSR in its short life has already acted as a compass to boost both soft and hard law instruments. This new wave of solidarity signifies a golden opportunity to give the fight against poverty and social exclusion a real chance. If the EU wants to score a 'Triple A', the social parameters of the Union must be concretised in a manner that not only shows they support, but also outbalance, the current economic and fiscal mantra. A truly integrated approach should partially come by improving the interplay between policy and law, thus giving poverty reduction a 'harder edge' (Chapter 5). Framing the social policies with reference to fundamental rights (Chapter 3), treaty provisions and general principles of law (Chapter 4) would, moreover, enhance performance and compliance. This would not only provide a stronger basis to hold incompliance accountable but also foster the legitimacy, coherence and effectiveness of employment and social policies in the fight against poverty and social exclusion in the EU. To this end, the next chapter begins by exploring the role of fundamental social rights in contributing to the policy objective of combating poverty and social exclusion.

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Chapter 3

The EU fundamental social rights landscape

3.1 Introduction

With the adoption of the Lisbon Treaty, the profile of fundamental rights in the European Union (EU) escalated in a number of ways. First and foremost, the Lisbon Treaty incorporated the Charter of Fundamental Rights of the European Union (CFREU) as a binding instrument under Article 6(1) TEU, which gave the CFREU a constitutional status of 'the same value as the Treaties'. Secondly, the Treaty of Lisbon provided for the legal basis for the EU to accede to the European Court of Human Rights (ECHR) under Article 6(2) of the Treaty on European Union (TEU) and lastly, the same provision also recognised the rights in the ECHR and the common constitutional traditions of the Member States as general principles of EU law in its third paragraph.

Although these novelties exhibited a hardly questionable strengthening of fundamental rights in the constitutional landscape of the EU competences,[1] fundamental rights were part of the language of the Union long before the adoption of the Lisbon Treaty. In fact, the Lisbon Treaty confirmed a pre-existing trajectory of fundamental rights in the EU,[2] since before their codification in the CFREU, the CJEU had long been protecting fundamental rights as general principles of EU law.

This chapter aims to address a number of relevant issues surrounding the discussion on poverty and social exclusion from the perspective of fundamental social rights in the EU. First, the next section analyses a number of important considerations regarding the interplay between different sources of EU law and fundamental rights. To this end, this section begins by looking into general principles of EU law and the CFREU, which sets its focal point on the

1 De Vries, 'The charter of fundamental rights and the EU's 'creeping' competences: does the charter have a centrifugal effect for fundamental rights in the EU?' in Douglas-Scott and Hatzis (eds.), *Research Handbook on EU Law and Human Rights* (Glos: Elgar, 2017), 59.

2 Weatherill, 'The internal market and EU fundamental rights' in Douglas-Scott and Hatzis, *supra* n 1, 364–379.

DOI: 10.4324/9781003222125-3

different procedural caveats that limit its application in practice. It continues with a discussion on how fundamental rights have been (disproportionately) restricted when in conflict with the economic freedoms. This section also includes a brief discussion on the much-needed synergies between EU law and other sources of international fundamental rights law and provides some intermediate conclusions to the complex landscape of social rights in the EU. Section 3 introduces the EPSR as a fresh look into social rights in the EU and an opportunity to string together the previously discussed sources to reinvigorate social rights in Europe. This section argues, that as legally weak as the original form of the EPSR might seem, it may in fact provide the necessary tools to reboot social Europe. Section 4 sets forth the substantive law contained in these EU and international instruments that relate (most directly) to the fight against poverty and social exclusion. To this end, it discusses a number of provisions in different instruments that are associated with guaranteeing a certain degree of income protection. On this note, it explores the different possibilities in relation to the rights to human dignity, social security, social assistance and fair remuneration. The last section concludes with a number of final remarks.

3.2 The intricate fundamental rights landscape in EU law

While in the early stages of European integration the treaties did not refer to fundamental rights, the EU has significantly developed an effective protection of fundamental rights within the scope of EU law.[3] It was only with the Maastricht Treaty in 1992 that the EU formally incorporated fundamental rights into its legal framework. Yet, fundamental rights came into the spectrum of EU law long before that, largely through the creation and application of general principles. In fact, after an initial refute,[4] the Court took fundamental rights on board rather early in the history of European integration.[5] This is partly because national courts were concerned by the increasing authority of the Community that claimed supremacy over national law, yet it did not protect fundamental rights.[6] Far from referring to nationally recognised fundamental rights, however, the Court used the unwritten category of general principles to create an analogous protection of fundamental rights at the EU level, which allowed the Community to maintain its autonomy and supremacy. The Court was also quick to emphasise the importance of international human rights instruments and already, in 1974, the Court had also referred to their

3 Cuyvers, 'General principles of EU law' in Ugirashebuja et al. (eds.), *East African Community Law Institutional, Substantive and Comparative EU Aspects* (Leiden/Boston: Brill Nijhoff, 2017), 220.

4 Case 1/58 *Stork and Cie v High Authority*, ECLI:EU:C:1959:4, §26.

5 Case 11/70 - *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, §4(a).

6 Case 4/73 - *Nold*, ECLI:EU:C:1974:51, §13.

significance in determining the protection offered by the general principle on fundamental rights.[7]

According to Article 6 TEU, the sources of fundamental rights in the EU are fourfold: General principles, the CFREU, the ECHR and national constitutions. Other provisions in the treaties, such as Article 151 of the Treaty on the Functioning of the European Union (TFEU) or Article 53 CFREU also refer to other instruments such as the European Social Charter (ESC) or the Community Charter of the Fundamental Social Rights of the Worker (hereinafter the Community Charter). There is, however, no guidance in the treaties that clarifies the relationship among these different sources of fundamental rights, nor does it draw any priority rule. In addition, as it is inherent to their nature, there is no information concerning the function or status of general principles, nor criteria indicating their recognition. This conglomerate of sources and their specific hurdles, draw a rather complex landscape of fundamental rights protection in the EU. While this contribution cannot dwell on the complexity of this interplay, there are a number of remarks worth noting.

3.2.1 General principles and the CFREU

Fundamental rights in the EU were first considered through the general principles of EU law and later the CFREU. However, the application of these sources is rarely straightforward and remains very much contested.

On the one hand, the application of general principles, as well as their functions[8] and scope,[9] are widely contested. For one, the lines of what constitutes a general principle of law are blurred and sometimes it is difficult to differentiate between general principles of law, values and rules. Much of the controversy on general principles lies in their *intra ius* yet *extra legem* character and their complicated relationship with legal positivism.[10] Because of their unwritten nature there are concerns regarding their genesis, particularly, on the question of whether any given interest could be ascertained as a general principle and thus a source of (primary) law. Moreover, their constitutional status[11] generates

7 *Ibid*.

8 Tridimas, *General Principles of EU Law* (Oxford: OUP, 2006), 7; Semmelmann, 'General principles in EU law between a compensatory rule and an intrinsic value' (2013) *EJL* 19(4), 457–487.

9 Lenaerts and Gutierrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) *CMLRev* 47(6), 1629 ff.

10 Semmelmann, *supra* n 8, 459; Expression borrowed from Metsger, *Extra legem, intra ius: Allgemeine Rechtgrundsätze im europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009).

11 Constitutional status refers to the fact that general principles may override secondary legislation and national law (in the context of EU law). This overriding constitutional status should be clear enough as to comply with the principles of legal certainty, unless uncertainty cannot be avoided. Following the principle of legal certainty, a general principle will only have direct effect as long as the content of the general principle is clear in any circumstance in which it applies. Yet, a degree of uncertainty as for when the general principle applies is also reserved to the CJEU. Lang, 'Emerging

considerable confusion regarding the coexistence of general principles with other instruments of law[12] that ranges from, on the one hand general principles being self-standing sources of law to, on the other, having absolutely no added value.[13] What remains pretty much under consensus is the fact that general principles should not serve as a competence creep, meaning that while the application of general principles requires a more proactive role of the judiciary, this should not lead to judicial activism.[14]

On the other, it has been mentioned above that since the Lisbon Treaty, fundamental rights are also part of the constitutional landscape of the EU via the CFREU.[15] Yet, because some feared that the CFREU would have a federalising effect and extend the scope of EU competence, a number of 'break mechanisms' were introduced under title VII CFREU to prevent it from becoming a 'centripetal force at the service of European integration'.[16] These provisions are intricate and troublesome and have considerably limited the application of the CFREU.[17] These limitations can be grouped in two types of constraints. On the one hand, limitations to the scope of application *vis-à-vis* the EU institutions and Member States, as well as neglecting the horizontal application of the CFREU. The latter, at least partly, was however disregarded in three recent judgments.[18] On the other hand, by limiting social rights in the balancing exercise between the economic freedoms and fundamental social

European general principles in private law' in Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Alphen an de Rijn: Kluwer, 2013), 68–69; See for example the following cases: C-249/96—*Grant,* ECLI:EU:C:1998:63; C-267/06— *Maruko*, ECLI:EU:C:2008:179; C-101/08—*Audiolux*, ECLI:EU:C:2009:626.

12 See C-144/04— *Mangold*, ECLI:EU:C:2005:709, §74 ff; C-555/07— *Kücükdeveci*, ECLI:EU:C:2010:21, §20; C-147/08— *Römer*, ECLI:EU:C:2011:286, §59; C-447/09—*Prigge*, ECLI:EU:C:2011:573; C-282/10— *Dominguez*, ECLI:EU:C:2012:33; C-67/14— *Alimanovic*, ECLI:EU:C:2015:597; C-299/14— *García-Nieto*, ECLI:EU:C:2016:114.

13 Von Bogdany, 'Founding principles of EU law: a theoretical and doctrinal sketch' (2010) *ELJ* 16(2), 103. See more extensively: Von Bogdany and Bast (eds.), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2009). Lenaerts and Gutierrez-Fons, *supra* n 9, 651.

14 Lenaerts and Gutierrez-Fons, *supra* n 9, 668.

15 Which does not, however, make the Court of Justice of the European Union (CJEU) a fundamental rights Court:

> as supreme interpreter of the law of the European Union, it falls to the Court to ensure respect for fundamental rights in the sphere of competence of the European Union. Contrary to the European Court of Human Rights, the Court does not have, a specific mandate to penalise all fundamental rights violations committed by the Member States.

AG Tanchev in C-192/18 - *Commission v. Poland (Indépendance des juridictions de droit commun)*, ECLI:EU:C:2019:529, §70.

16 Lenaerts, 'Exploring the limits of the charter of fundamental rights' (2012) *EuConst* 8(3), 376.

17 De Vries, *supra* n 1, 75.

18 C-684/16 - *Max-Planck-Gesellschaft*, ECLI:EU:C:2018:874; C-414/16 - *Egenberger*, ECLI:EU:C:2018:257; C-68/17— *IR*, ECLI:EU:C:2018:696; Joined Cases C-569/16 and C-570/16—*Bauer*, ECLI:EU:C:2018:871.

rights. Koukiadaki argues, and rightly so, that such twofold process of reinforcing the primacy of economic objectives while demoting the importance of social rights questions the effectiveness of social rights.[19]

As regards the scope of application of the CFREU, two variants exist. On the one hand, the scope of application related to the acts of EU institutions to establish the grounds for judicial review, and on the other hand, the scope of application with regard to Member States. It flows from Article 263 TFEU that any act adopted by EU institutions, which has legal effect *vis-à-vis* third parties, must comply with the CFREU.[20] Whether EU institutions comply with the CFREU, especially as regards social rights, became particularly contentious in the context of the economic crisis. In this vein neither the macroeconomic surveillance framework nor the European Stability Mechanism (ESM) include an obligation to respect or even consider fundamental social rights in the preparation and implementation of the macroeconomic adjustment programmes.[21] The marginalisation of social objectives has become clear in the context of the European Semester, as discussed in the previous chapter, where CSRs are primarily driven by economic and budgetary interests that not only 'corner' social rights, but also undermine them by imposing economic and fiscal constraints to Member States. In the case of the ESM, the obligation of the Commission to respect social rights outside the walls of EU law was also contested,[22] although the Court later confirmed that the Commission shall always act as the 'guardian of the treaties' and refrain from adopting a MoU where the consistency with EU law is doubtful.[23] Thus, whether or not they are acting in the margins of EU law, EU institutions should always act in accordance to EU law, and therefore in accordance to the principles and rights enshrined in the CFREU. If they fail to do so, they should be found liable.[24]

On the other hand, Article 51(1) CFREU provides that the scope of application for Member States is limited to when they are 'implementing EU law'

19 Koukiadaki, 'Application (Article 51) and limitations (Article 52(1)' in Dorssemont et al. (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Oxford: Hart Publishing, 2019), 104–105.

20 Ward, 'Article 51— Scope' in Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary'* (Oxford: Hart Publishing, 2014), 1416–1418.

21 De Schutter and Dermine, 'The two constitutions of Europe: integrating social rights in the new economic architecture of the union' (2016) *CRIDHO Working Paper* 2016/02, 8–13.

22 C-370/12— *Pringle*, ECLI:EU:C:2012:756, §176. Opinion AG Wahl C- 8/15 P *Ledra Advertising*, ECLI:EU:C:2016:701; §40.

23 *Ledra Advertising, supra* n 22, §67. Later confirmed in: C-105/15 P—*Mallis and Malli*; ECLI:EU:C:2016:702. Markakis and Dermine, 'Bailouts, the legal status of memoranda of understanding, and the scope of application of the EU charter: Florescu' (2018) *CMLRev* 55(2), 643–671.

24 De Schutter and Dermine, *supra* n 21, 18–23. Fischer-Lescano, 'Human rights in times of austerity policy: the EU institutions and the conclusion of memoranda of understanding' (2014) *ZERP*; van Malleghem, 'Pringle: a paradigm shift in the European Union's monetary constitution' (2013) *GLJ* 14(1), 141–168. Markakis and Dermine, *supra* n 23.

only. What 'implementing EU law' constitutes, however, remains very much contested.[25] Whereas in *Kamberaj* (discussed below) a mere reference in the Directive at stake to respecting rights and principles sufficed to apply the principle under Article 34(3) CFREU,[26] in *Glatzel,* the Court looked into the objective of the implementing act to determine whether Article 26 CFREU was applicable.[27]

Beyond its application *vis-à-vis* EU institutions and Member States, the CFREU incorporates a fundamental normative distinction between principles and rights under Articles 51 and 52 CFREU that creates different legal consequences between the two. Different from rights, principles are only justiciable as long as they have been implemented by either a legislative or an executive action.[28] Rights, by contrast, give rise to positive enforceable actions. In this regard, there is little doubt that the EU follows the *ubi ius ibi remedium* principle, meaning that where there is a right, remedy should exist.[29] However, this does not mean that even those provisions lacking a 'mandatory nature' (principles) are not binding. In any case they entail duties and in principle, the Union needs to comply with these duties. Equally, while the breach of a principle does not automatically result in a remedy, it should be considered by a court when the principle is being implemented.[30]

Whether a provision is therefore catalogued as a right or a principle is crucial to define the entitlement that gives to the right/principle holder.[31] The CFREU, however, does not clarify which provisions are deemed to be catalogued as rights or principles. Though not an exhaustive list, the explanatory text of the CFREU does provide examples that may shed some light on which provisions are to be considered principles or that contain elements of rights and principles. According to this, Articles 25, 26, 34(1) and 35-38 contain principles while Articles 23-33 and 34 contain elements of both rights and principles.

25 Koukiadaki, *supra* n 19, 109–112; De Vries, *supra* n 1, 83–86. C-617/10 - *Åkerberg Fransson,* ECLI:EU:C:2013:105, §27–28. C-112/00 - *Schmidberger*, ECLI:EU:C:2003:333, §29.

26 C-571/10— *Kamberaj*, ECLI:EU:C:2012:233, §79.

27 C-356/12— *Glatzel*, ECLI:EU:C:2014:350, §75.

28 Kornezov, 'Social rights, the charter, and the ECHR: caveats, austerity, and other disasters' in Vandenbroucke et al. (eds.), *A European Social Union after the Crisis* (Cambridge: CUP, 2017), 422–423.

29 See on this: Case 6/60-IMM - *Humblet*, ECLI:EU:C:1960:48; §571; Opinion AG Mengozzi C-354/04 P - *Gestoras Pro Amnistía,* ECLI:EU:C:2006:667, §101. More critically: Beal, '*Ubi Ius, Ibi Remedium:* do the union courts have the "Latin for Judging"' (2015) *Judicial Rev* 20(3), 115–140; Hofmann and Warin, 'Identifying individual rights in EU law' (2017) *University of Luxembourg Law* Working Paper No. 004-2017.

30 See overview: Lock, 'Rights and principles in the EU charter of fundamental rights' (2019) *CMLRev* 56(1), 1201–1226, 1222–1223.

31 Ward, *supra* n 20, 1416–1418.

The explanations are no more precise than that.[32] Instead, the decision about which provisions are to be catalogued as principles seems rather arbitrary and needs to be made case by case

Whereas some have argued that the provisions of the Solidarity title are principles just because socioeconomic rights are inherently non-justiciable,[33] this is not coherent with the case-law of the CJEU. In *Viking* and *Laval* the CJEU recognised that the right to collective action—to be found under the Solidarity title—is a fundamental right.[34] More recently, *Bauer* confirmed that other provisions under the Solidarity title might also be considered to be rights and therefore, (horizontally) directly applicable.[35]

Notwithstanding the efforts towards clarifying the dichotomy between rights and principles (most clearly in the *Bauer* saga),[36] and in as much as this goes 'some way towards redressing the imbalance between the economic and social constitutions of the EU',[37] the CJEU is still far from anchoring the horizontal direct effect doctrine, as it is rather ambiguous how this 'mandatory nature' of the CFREU's provisions can be determined. In this note, Panascì claims that in spite of the possibilities offered by the recent case-law of the CJEU, the horizontal application of the CFREU is 'treated as a palliative for the lack of horizontal direct effect of directives'.[38]

It needs to be noted, however, that even if principles do not generate claim-rights under the CFREU, the possibility still exists that general principles consider 'rights' what the CFREU understands as 'principles' and that as such, they gain justiciability. This brings another sore point in the application of fundamental rights in the EU: the relationship between the CFREU and general principles.[39] This interaction is confusing for a number of reasons,

32 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303. Lock, *supra* n 30, 1218–1220.

33 Article 1(2) pf Protocol No 30, the so-called op-out protocols for the UK and Poland, seems to strengthen this view by stating that nothing in Article IV of the Charter generates a justiciable right. See De Schutter, 'The CFREU and its specific role to protect fundamental social rights' in Dorssemont, *supra* n 19, 25–27. Also in Opinion AG Cruz Villalón C-176/12— *Association de médiation sociale*, ECLI:EU:C:2013:49, §55.

34 Barnard, 'The evolution of EU 'social' policy' in Barnard (ed.), *EU Employment Law* (Oxford: OUP, 2012), 29.

35 These cases put AMS (*supra* n 33, §46) into an 'isolated corner'. See also Opinion AG Tstenjak in C-282/10— *Dominguez*, ECLI:EU:C:2012:33, §28–31. Frantziou, '(Most of) the charter of fundamental rights is horizontally applicable. CJEU 6 November 2018, Joined cases C-569/16 and C-570/16, *Bauer et al.*' (2019) *EuConst* 15(2), 306–323; Ciacchi, '*Egenberger* and comparative law: a victory of the direct horizontal effect of fundamental rights' (2018) *EJCLG* 5(3), 207–211.

36 *Supra* n 18.

37 Koukiadaki, *supra* n 19, 119–120.

38 Panascì, 'The right to paid annual leave as an EU fundamental social right. Comment on *Bauer et al.*' (2019) *MJ* 26(3), 448.

39 See for more in: Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Glos: Elgar, 2018); Lenaerts and Gutierrez-Fons, *supra* n 9, 1629–1669; Hofman and Mihaescu,

starting with the fact that the jurisprudence of the CJEU considers unwritten fundamental rights to be general principles of EU law and that the CFREU, instead, provides for written binding provisions. Problems with this interaction may rise regarding, *inter alia,* the distinction between principle and rights[40] or to the limitation of the CFREU to when EU law is being implemented (Article 51 CFREU).[41] The challenge underpinned to this relationship is the reason why increasingly both judges and advocate generals have been aligning fundamental rights protection to the provisions in the CFREU.[42] Even though this practice puts the legal uncertainty of the application of general principles to safe harbour, it also abolishes the dynamism of general principles and with it the development capacity of fundamental rights, thereby risking their evolution altogether.

3.2.2 *Balancing fundamental rights against fundamental freedoms*

A different limitation to the application of fundamental social rights in the EU refers to restricting certain rights in conflicting cases. In such cases, the CFREU enshrines the principle of proportionality as a necessary step before limiting the scope of fundamental rights.[43] Accordingly, limitations to the CFREU might apply if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52(1) CFREU).[44]

A common case in this balancing exercise refers to the exceptions to free movement, which can be seen as an ally but also as an enemy of social protection. On the one hand, free movement of persons can be the motor to transnational solidarity.[45] This transnational solidarity, however, is conditional upon

'The relationship between the Charter's fundamental rights and the unwritten general principles of EU law: good administration as the test case' (2013) *EuConst* 9(1), 73–101.

40 Knook, 'The court, the charter and the vertical division of powers in the European Union' (2005) *CMLRev* 42(2), 371. Lenaerts and Gutierrez-Fons, *supra* n 9, 1660. Bell, 'The principle of equal treatment: widening and deepening' in Craig and de Búrca (eds.), *The Evolution of EU Law* (Oxford: OUP, 2011), 628–629. De Vries, 'Balancing fundamental rights with economic freedoms according to the European court of justice' (2013) *ULRev* 9(1), 186–187.

41 Semmelmann, *supra* n 8, 473.

42 Bell, *supra* n 40, 611–639.

43 This balancing exercise was recently endorsed in *Egenberger*, *supra* n 18; §68–69.

44 This section only looks into the proportionality test in the exercise of balancing fundamental freedoms and social rights. For an extensive comment on Article 52 CFREU see: Koukiadaki, *supra* n 19, 120–133; Peers and Perchal, 'Article 52— scope and interpretation of rights and principles' in Peers, *supra* n 19, 1455–1522.

45 Mantu and Minderhoud, 'EU citizenship and social solidarity' (2017) *MJ* 24(5), 703–720; Thym, 'The elusive limits of solidarity. Residence rights and social benefits for economically inactive union citizens' (2015) *CMLRev* 52(1), 17–50; Heindmaier and Blauberger, 'Enter at your own risk: free movement of EU citizens in practice' (2017) *WEP* 40(6), 1198–1217.

a right to reside and a degree of integration. On the other hand, when looked from the perspective of balancing market interests against national social protection, the fundamental freedoms have often clashed with domestic social standards and the Court has opted for prioritising the economic interests leading to a social displacement in the internal market.[46] Worth noting, while fundamental freedoms do indeed have a 'fundamental status' and they represent the backbone of EU law, they should not be considered to have 'a higher status than that awarded to other fundamental rights and values of the Community legal order',[47] but neither do fundamental rights prevail over economic freedoms.[48] Note, however, that recently the European Court of Human Rights (ECtHR) clearly stated that fundamental freedoms—while an important element in the proportionality test—cannot be used to counterbalance fundamental rights.[49] In practice, however, there have been clear imbalances that have favoured the economic interests at the expense of social rights.[50]

There are no clearer cases than *Viking* and *Laval*.[51] In these two cases the Court recognised for the first time the right to collective action—including the right to strike—as a fundamental right integral to the general principles of EU law. The Court also explicitly said that beyond its economic purpose the EU also has a social purpose and that the four fundamental freedoms must be balanced against the Union's social objectives. The Court even stressed that the protection of workers is an overriding reason of public interest. And yet, the Court concluded there was room for limiting the collective rights insofar as the burden placed on the freedom of establishment and freedom to provide services had been disproportionate.[52]

46 See Kilpatrick (ed.), 'The displacement of social Europe' (2018) *EuConst* 14(1), 62–230.

47 Maduro, *We the Court/The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998), 166.

48 de la Rochere, 'Challenges for the protection of fundamental rights in the EU at the time of the entry into force of the Lisbon treaty' (2011) *FIL* 33(6), 1787; Shuibhne, 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) *ELRev* 32(2), 254 ff.

49 ECtHR, *LO and NTF v. Norway*, App. No. 45487/17, ECLI:CE:ECHR:2021:0610JUD004548717. Graver, ''The demise of viking and laval: the Holship Ruling of the ECtHR and the protection of fundamental rights in Europe' (2021) *Verfassungsblog* 16 June, available at: https://verfassungsblog.de/holship/

50 See cases where the Court has favoured fundamental rights over economic freedoms, *Schmidberger*, *supra* n 25, §78; C-36/02— *Omega*, ECLI:EU:C:2004:614.

51 C-438/05 - *The International Transport Workers' Federation and The Finnish Seamen's Union (Viking)*; ECLI:EU:C:2007:772; C-341/05 - *Laval un Partneri*, ECLI:EU:C:2007:809. See also: C-346/06— *Rüffert*, ECLI:EU:C:2008:189; C-319/06 - *Commission v. Luxembourg*; ECLI:EU:C:2008:350.

52 In the case of *Viking*, the Court said that the measures taken to protect their employment rights (in this case striking) could be disproportionate since the trade union had other less restrictive means at their disposal. In *Laval*, the Court concluded that it was a disproportionate measure because Sweden's collective bargaining system was not sufficiently precise and accessible. For more on these and following cases see: Bücker and Warneck, 'Viking— Laval— Rüffert: consequences and

Proportionality was in fact one of the most contested issues in *Viking* where the CJEU applied a rather strict proportionality test suggesting that the use of collective action would only be possible if no other less restrictive means were available or such means had already been exhausted.[53] This *de facto* derogated collective rights to a 'last resort' issue undermining therefore the fundamental nature of the social right and the idea that there is no hierarchy between fundamental rights and fundamental freedoms.[54] AG Trstenjak agreed with this point of view in *Commission v. Germany*.[55]

In *Viking* as well as in *Laval* the Court put market freedoms above (and at the expense of) social standards. *Viking* and *Laval* were later followed by *Rüffert* where the Court precluded Member States from requiring contractors to pay the remuneration set by the collective agreement in the case of public procurement.[56] These three cases downgraded the fundamental status of social rights, while simultaneously narrowing the justifications of free movement restrictions on social grounds. In other words, because of these three cases it became easier to decline possible limitations to free movement on the basis of their impact on social standards:

> the CJEU's "restrictions" analysis gives primacy to the economic freedoms […] and creates a presumption that the national rule is unlawful. This puts the defendant, usually the state, on the back foot, defending national social policy choices and showing that the legislation is proportionate.[57]

Recently, the ECtHR took a completely opposing view on this matter, while explicitly referring to *Viking*. In *Holship*, the Strasbourg Court clarified that under the Convention, restrictions to fundamental rights must be necessary or proportional and that fundamental freedoms are only one element to consider and do not enjoy a privileged position.[58]

While some commentators welcomed a needed clarification of the internal market rules in *Viking* and *Laval*, for the most part, these two cases and the ones that followed represented the primacy of EU economic rules over fundamental

policy perspectives' (2010) *ETUI* report 111; The Adoptive Parents, 'The life of death foretold: the proposal for a Monti II Regulation' in Freedland and Prassl, *Viking Laval and Beyond* (Oxford: Hart Publishing, 2014); Barnard, 'Social dumping or dumping socialism' (2008) *CLJ* 67(2), 262–264; Davies, 'One step forward, two steps back? The *Viking* and *Laval* cases in the CJEU' (2008) *ILRev* 37(2), 126–148; De Vries, *supra* n 40.

53 Weatherill, 'The court's case-law on the internal market: 'a circumloquacious statement of the result, rather than a reason for arriving at it?' in Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case-Law of the European Court of Justice* (Oxford: Hart Publishing, 2013), 87–108.

54 Barnard, *supra* n 52; Davies, *supra* n 52.; De Vries, *supra* n 40, 189.

55 Opinion AG Trstenjak in C-271/08 - *Commission v Germany,* ECLI:EU:C:2010:183, §183–184.

56 *Rüffert*, *supra* n 51; See similarly C-576/13 - *Commission v. Spain*, ECLI:EU:C:2014:2430.

57 Barnard, 'Restricting restrictions: lessons for the EU from the US?' (2009) *CLJ* 68, 576.

58 *LO and NTF v. Norway*, *supra* n 49.

rights, which in turn, entailed a risk of unfair competition and 'social dumping'.[59] In all certainty, these cases signified the most extreme form of conflict between the economic interests of the EU freedoms and the social dimension of both the EU and the national legal systems. Not only did these decisions create an imbalance between the EU's single market and the national social dimension, but as a result, it also alienated worker's movements from the integration project.

There are many reasons that could explain the drastic position that the CJEU took in the balancing test, *inter alia,* that the rights concerned were not considered absolute,[60] that *Viking* and *Laval* dealt with the risk of protectionism or that private bodies (trade unions) were the ones engaging in the protection of public interest. However, these reasons do not justify why the Court did not look into the specific constitutional traditions of the Member States at issue, Finland and Sweden, when balancing social rights and economic freedoms.[61] Some argued that while Member States have a margin of appreciation when defining their social objectives to which the CJEU must respectful, this cannot be at the expense of a fundamental EU value, which could arguably be embodied in the prohibition of protectionism in these cases.[62] Others argued that the deference to the national traditions between Finland and Sweden suggests that fundamental rights associated with moral considerations of those essential for a democratic society are above those based on economic or social rights, which would undermine the indivisibility of human rights.[63] It is equally true that the facts that surrounded *Viking* and *Laval* were rather particular, which might have urged the reasoning of the CJEU to a certain extent to favour freedom of services over collective rights in view of the objective of the posting of workers directive. In this vein, it is notable that the CJEU has already adjusted its stance in more recent cases where Member States have been given more leeway to impose minimum pay conditions. This goes in line with the revision of the posting of workers Directive which is more favourable to social standards, particularly ensuring the 'equal pay for equal work' principle.[64] However, the displacement of social standards in the internal market can still be found in other cases where the CJEU again gave preference to the freedom of establishment at the expense of social rights.[65] In *Sotiropoulou*, which concerned austerity

59 COM(2012) 130 final, 'Proposal for a council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services'.

60 Koukiadaki, *supra* n 19, 120.

61 Lenaerts and Gutierrez-Fons, *supra* n 9, 1666; De Vries, *supra* n 40, 189–190.

62 Lenaerts and Gutierrez-Fons, *supra* n 9, 1667.

63 For example the Court could have considered the fact that the right to strike is protected under the Finish Constitution. See Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: OUP, 2010), 258.

64 C-396/13 - *Sähköalojen ammattiliitto*, ECLI:EU:C:2015:86; C-115/14— *RegioPost*, ECLI:EU:C:2015:760; C-533/13-*AKT*, ECLI:EU:C:2015:173.

65 C-678/11 - *Commission v. Spain*, ECLI:EU:C:2014:2434; C-201/15 - *AGET Iraklis*, ECLI:EU:C:2016:972. Markakis, 'Can governments control mass layoffs by employers? Economic freedoms vs labour rights in case C201-12 AGET Iraklis' (2017) *EuConst* 13(4), 724–743.

measures and not internal market interests, the CJEU also limited social rights, in this case Articles 1 and 34 CFREU without much of a balancing exercise, solely on the basis that fiscal consolidation in the Eurozone supposes an objective of general interest and that the lowering of pensions might be necessary to meet such objective.[66]

Leaving the acceptable standard of social protection as low as these cases did, projects an unrealistic role of national authorities who are given ample room to eliminate or lower a hard-fought social protection system without much of a political debate, making social rights vulnerable both at the national and the European fora.[67]

These cases exposed the kind of problems that arise from EU interference when economic interest are protected in EU law but social objectives do not play at the same level.[68] The lack of social protection at the EU level in contrast to the interference of economic and budgetary constraints of the EU in national protection systems, beg for a solution to combat these asymmetries and protect individuals, *inter alia*, from falling into poverty.

3.2.3 Interactions with international sources of social rights

In addition to general principles or the CFREU, EU law also has a clear connection with other instruments of fundamental rights. This relationship is clear from a number of provisions which can be traced in both primary and secondary law as well as in non-binding instruments. Most notably, Article 6(2) and (3) TEU establish a relationship between the EU and the ECHR. The second paragraph of the provision refers to the promise to accede the ECHR, while the third recognises its content as constituting general principles of EU law.[69] The CFREU too, specifically protects the content of the ECHR both by establishing a presumption of legal synergy (Article 52(3) CFREU) and by explicitly including it in a general non-regression clause (Article 53 CFREU).[70]

66 T-531/14 - *Sotiropoulou*; ECLI:EU:T:2017:297, §88–89.

67 Garben, 'The constitutional (im)balance between 'the market' and 'the social' in the European Union' (2017) *EuConst* 13(1), 36.

68 See more in, *inter alia*: Tuori, 'The many constitutions of Europe' in Tuori and Sankari (eds.), *The Many Constitutions of Europe* (Abingdon: Routledge, 2010); Kornezov, *supra* n 28, 407–432; Ferraro, 'The social dimension of fundamental rights in times of crisis' in Matteucci and Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (London/New York: Routledge, 2017), 197–213.

69 See in this regard: Opinion 2/13, ECHR, ECLI:EU:C:2014:2454; Editorial comments, 'The EU's Accession to the ECHR——a "NO" from the CJEU!' (2015) *CMLRev* 52(1), 1–16; Kokott and Sobotta, 'Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European convention and national standards of protection' (2015) *YEL* 34(1), 60–73; Douglas-Scott, 'The relationship between the EU and the ECHR five years on from the treaty of Lisbon' in Bernitz et al. (eds.), *Five Years Legally Binding Charter of Fundamental Rights* (Oxford: Hart Publishing, 2015).

70 See contrary to this presumption of legal synergies: Krommendijk, 'The use of ECtHR case-law by the court of justice after Lisbon: the view of luxemburg insiders' (2015) *MJ* 22(6), 812–835.

The latter provision also conveys a general reference to international law instruments which should guarantee, in principle, that social rights under, *inter alia*, the ESC and the ILO and UN Conventions are being respected.

Unlike the ECHR, Article 6 TEU does not refer to the ESC or provide any guidance in clarifying the relationship between the different sources of European social rights. However, the relationship between EU law and the ESC can be traced in a number of other provisions, both explicitly and implicitly. Even though the TEU only refers to 'the attachment to fundamental social rights as defined by the ESC', the interaction between the EU law and the ESC is evident in the CFREU whose explanations refer to the ESC in a number of provisions that have been modelled after the same. This is particularly the case of the Solidarity title where most provisions have been shaped after the ESC. In the case of Article 34 CFREU, all three paragraphs of the provision build upon this instrument. Also explicitly, the Social Policy title in the treaties compels the Union and the Member States to 'have in mind' fundamental social rights as enshrined in the ESC (and the Community Charter) which suggests that the Union shall promote the social dimension of the EU, at the very least, respecting the ESC. Note that the wording of the provision suggests that the list of fundamental social rights sources in this provision is not exhaustive,[71] which would imply that other sources of international law (such as the ILO Conventions) should also be considered. The CJEU has in fact referred to the ESC and the ILO and the respective commitment of Member States as signatory parties to them (at least to the original ESC or the specific ILO Conventions).[72] This is reinforced by the non-regression clause under Article 153(4) TFEU which states that any provisions adopted pursuant to this legal basis shall not prevent Member States from maintaining or introducing more stringent protective measures as long as they are compatible with the treaties. Given that most Member States are party to these instruments, such as a non-regression clause could also be understood as instructing any provision adopted under these premises to respect the level of protection granted by such international instruments. A coherent and harmonious relationship between different sources of fundamental social rights, in turn, seems essential in exploiting (and respecting) the horizontal social clause under Article 9 TFEU.[73]

Explicit commitments aside, there are other reasons why international law instruments and EU law should have better interactions. In the case of fundamental social rights, this is particularly important with regard to the ESC. For one, the ESC is a more experienced and ripened instrument of social rights which could (and should) feed into the interpretation of the social provisions under EU law. Although the social rights enshrined in the ESC are

71 'The Union and the Member States, having in mind fundamental social rights *such as those* (emphasis added) set out in the European Social Charter' (Article 151 TFEU).

72 *Max-Planck-Gesellschaft*, *supra* n 18, §70; C-350/06 - *Schultz-Hoff and Others*, ECLI:EU:C:2009:18 §37–38; C-579/12 RX-II - *Strack*, ECLI:EU:C:2013:570; §27–28.

73 See Chapter 4 for an analysis of Article 9 TFEU.

not enforceable rights before a court, the standards that have developed and matured under the supervision of the European Committee of Social Rights (ECSR) should be used to interpret national and EU provisions. This would not be without precedent also at the CJEU level. In *Impact* the Court referred to the ESC and decided that the legislation at stake should be interpreted as expressing a principle of EU social law which could not be interpreted restrictively.[74]

Secondly, and closely related, it has been mentioned that many provisions of the CFREU, including the right to social security and social protection, are modelled after the ESC. This 'model' should encourage EU and national legislators and judiciaries to interpret of implement such provisions in the light of the referring instruments.[75]

Thirdly, the presumption that the EU is compatible with international instruments has been rather controversial in many areas, which became palpable in the aftermath of the *Viking* and *Laval* case-law[76] and the imposition of austerity measures (particularly in the case of the Greek bailout).[77] As regards the former, even though the CJEU referred to the right to take collective action as envisioned by the ESC in *Viking* and *Laval*, it did not refer to the case-law of the ECSR which, in turn, reacted to these cases stating that the economic freedoms in the context of EU law 'cannot be treated as having a greater *a priori* value than core labour rights'.[78] This position was recently confirmed by the ECtHR.[79] Conflict between this case-law of the CJEU and the ILO also arose when the airline British Airways claimed that collective action taken by the British Airline Pilots' Association was against the *Viking* doctrine. In this case the Committee of Experts of the ILO rejected the application of the principle of proportionality to the right to strike and claimed, moreover, that the doctrine articulated in those judgements was likely to have a restrictive

74 C-268/06— *Impact*, ECLI:EU:C:2008:223, §112–113; See similarly: C-116/06— *Kiiski*, ECLI:EU:C:2007:536.

75 Schlachter, 'The European social charter: could it contribute to a more Social Europe?' in Countouris and Freedland (eds.), *Resocialising Europe in a Time of Crisis* (Cambridge: CUP, 2013), 105–117; Świątkowski and Wujczyk, 'The European social charter as a basis for defining social rights for EU citizens' in Pennings and Seeleib-Kaiser (eds.), *EU Citizenship and Social Rights* (Glos: Elgar, 2018), 11–23; Douglas-Scott and Hatzis, 'EU law and social rights' in Douglas-Scott and Hatzis, *supra* n 1.

76 ECSR, *LO and TCO v. Sweden*, Complaint No. 85/2012, 3 July 2013. CoE, 'State of democracy, human right and the rule of law in Europe' (2014), 41; ILO, '2010 report of the committee of experts on the application of conventions and recommendations' (2010), 209; ILO, 'Observation (CEACR) -adopted 2010, published 100th ILC session' (2011); ILO, 'Observation (CEACR)- adopted 2012, published 102nd ILC session' (2013).

77 ECSR, *GSEE v. Greece*, Complaint No. 111/2014, 23 March 2017; ILO, 'Individual case (CAS)— discussion: 2018, publication 107th ILC session' (2018).

78 This statement was actually a response to the set of measures launched by the Swedish government, the so-called *lex Laval*, in an attempt to bring Swedish law in compliance with the *Laval* judgement. ECSR, *LO and TCO v. Sweden*, Complaint No. 85/2012, 3 July 2013, §122.

79 *NTF v. Norway*, *supra* n 49.

impact on the exercise of the right to strike in practice, which the Committee of Experts of the ILO saw contrary to Convention No. 87.[80]

A second example of the conflict between EU law and other international instruments throve in the context of the austerity measures taken in the aftermath of the economic crisis, particularly, in relation to the national measures implementing the Memorandum of Understanding (MoUs).[81] The ECSR upheld on several occasions that national measures were contrary to the ESC. These tensions became apparent in the case of the Greek bailout. In relation to a measure introducing 'apprenticeship contracts' for young employees, the ECSR saw this contrary to the ESC as it set minimum wages below the poverty line, did not provide a three weeks' paid annual leave and did not mandate any type of training.[82] Similar decisions were reached with regard to a compensation-free dismissal during the trial period of up to one year and against the pension reforms due to the 'cumulative effect of the restrictive measures and the procedures envisioned in the reform'.[83] Furthermore, the ECSR argued that whether or not Member States were seeking to fulfil the requirements of the MoUs by adopting these national measures, they were not excused from fulfilling their obligations under the ESC. At the ILO, the Committee on Freedom of Association also condemned a number of austerity measures taken by Greece in the context of the MoUs and stated that, while the measures taken as a consequence of the MoU happened in an exceptional and grave context provoked by a deep economic crisis, there were still a number of red flags with respect to the right to take collective action. The Committee referred particularly to a number of repeated and extensive interventions and to the elaboration of procedures that favour systematically decentralised bargaining of exclusionary provisions. It noted that these provisions are less favourable than those adopted at the higher level, thereby weakening the freedom of association and collective bargaining.[84]

Interpretative divergences are extremely problematic in cases of overlapping membership, which is the case for most Member States. In cases of utter conflict, Member States are forced to choose between the EU and the international norm which generates a fundamental problem of the international rule

80 ILO, *supra* n 77.

81 The complaints were only against the national measures and not against the MoUs themselves because even when they would be considered EU norms (which is questionable given the legal status of the MoUs), they would still not be subject to direct scrutiny by the ECSR or the ILO enforcement bodies because the EU itself is not a signatory to these instruments. See in this regard, Kilpatrick, 'Are the bailouts immune to EU social challenge because they are not EU law?' (2014) *EUConst* 10(3), 405–409.

82 ECSR, *GENOP-DEI / ADEDY v. Greece*, No. 66/2011, 12 June 2012.

83 ECSR, *I.S.A.P. v. Greece*, No. 78/2012, 20 December 2012, §77–78.

84 ILO, 'Report of the committee on freedom of association, 365th report of the committee on freedom of association' (2012) §381–384 and §879.

of law.[85] In this regard two considerations need to be noted. First, that because of primacy, Member States will be inclined to follow EU law, and secondly, that the CJEU has explicitly ruled that when a national law is in conflict with an international instrument (in this case the ECHR), EU law does not require Member States to disapply the national rule.[86]

In light of this, it is essential to improve the legal synergies between EU law and international fundamental social rights law.[87] Some have argued in favour to accede to the ESC to complete the parallel accession to the ECHR,[88] but better synergies between instruments could be achieved just by means of an effective judicial dialogue and by incorporating the underlying responsibilities under these instruments more strongly in the framework of the EU. Accession to the ESC is not only highly unlikely, particularly considering the obstacles that the accession to the ECHR is already facing, but would also threaten the autonomy of EU law.[89] This argument runs also for acceding to ILO Conventions.[90]

If nothing else, the EPSR is the living proof that these instruments are all considered to be part of one and the same social *acquis*, as each principle enshrined therein builds upon different sources of fundamental social rights. This, in turn, could in fact symbolise the opportunity to rekindle EU law and international fundamental social rights instruments. Section 3 discusses the fresh input that the EPSR has to offer and studies whether the EPSR has the potential to change the existing complex landscape of fundamental social rights

85 Rocca, 'Enemy at the (flood) gates: EU "exceptionalism" in recent tensions with the international protection of social rights (2016) *ELLJ* 7(1), 52–80. Garben, 'The problematic interaction between EU and international law in the area of social rights' (2018) *CILJ* 7(1), 77–98.

86 *Kamberaj, supra* n 26, §63.

87 Schutter (UN Special Rapporteur on extreme poverty and human rights), 'Visit to the European Union-findings and recommendations' (2021).

88 De Schutter, 'The accession of the European Union to the European social charter: a fresh start' (2019) *EJHR* 2019(3), 155–197; Jimena-Quesada, 'Social rights in the case-law of the court of justice in the European Union: the opening to the Turin process' (2017) Conference on Social Rights in today's Europe: The role of domestic and European Courts.

89 Garben, *supra* n 85, 97–98.

90 For more on the relationship between EU law and international law in social rights see, *inter alia:*; Schlachter, *supra* n 75, 105–117; Barnard, 'The protection of fundamental social rights in Europe after Lisbon: a question of conflicts of interest' in de Vries et al. (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford: Hart Publishing, 2013), 37–58; Gerards, 'The ECtHR's response to fundamental rights issues related to financial and economic difficulties. The problem of compartmentalisation' (2015) *NQHR* 33(3), 274–292; Rocca, *supra* n 85; Khaliq, 'The EU and the European social charter: never the twain shall meet? (2017) *CYELS* 15, 169–196; Douglas-Scott and Hatzis, 'EU law and social rights' in Douglas-Scott and Hatzis, *supra* n 1; Jimena-Quesada, *supra* n 88; Świątkowski and Wujczyk, *supra* n 75, 11–23; Garben, *supra* n 85, 77–98; De Schutter, *supra* n 88, 155–197; Brems, 'Protecting fundamental rights during the financial crisis: supranational adjudication in the council of Europe' in Ginsburg et al. (eds.), *Liberal Constitutionalism in Times of Financial Crisis* (Cambridge: CUP, 2019), 163–184.

in the EU, which, in turn, can be used to promote the fight against poverty and social exclusion by means of EU law.

3.2.4 Intermediate conclusions

From the previous section, it should be clear that as much as fundamental rights have been recognised to be 'at the heart' of the EU's legal structure, the protection of (particularly social) rights is at its best a 'peripherical force'.[91] The protection of fundamental rights is compromised by a number of limitations, such as the scope or balancing exercise with other fundamental rights and freedoms. Also at the fundamental rights level, just as at the policy level (see Chapter 2), there is a clear asymmetry between the different strands of EU law which is most evident on the one hand in the reluctance to fully-embrace social rights, for example by not acknowledging their justiciability—especially in the case of principles—and on the other by limiting their scope in the face of promoting the economic freedoms.

This is topped by an existing but problematic interaction between different sources of international fundamental social rights. For a number of reasons explained above, the legal synergies between EU law and other instruments of fundamental rights need to be developed both by means of judicial dialogue and by proper incorporation of the complete social *acquis* in EU law and national transposition. This is why the proposals outlined in Chapter 5 build both on EU law and other international instruments and as such, the part respective to substantive rights of this chapter (section 3.4) considers rights that emanate from different sources.

Beyond these external constraints on EU institutions and Member States, however, fundamental social rights might also entail positive duties. In this regard, the sources discussed hereby might serve their purpose beyond the confines of negative duties that work as a set of prohibitions and, instead, operate as a tool to guide action. Granted, these fundamental rights sources, even when they leave room for judicial innovation, do not extend the competences of the EU. But where the EU already has competences, such as in social policy (see Chapter 4), the fundamental rights provisions may guide the exercise of such competences towards the fulfilment of social rights. In order to fulfil this guiding role, however, progress with regard to fundamental rights should be adequately monitored.[92] The more recent revitalisation of the social *acquis* in the EPSR might possess the necessary tools for such monitoring.

91 Koukiadaki, *supra* n 19, 133.
92 De Schutter, *supra* n 33, 33–38.

3.3 The European Pillar of Social Rights: a game changer?

Amidst the rather tumultuous front of fundamental rights sources in the EU, in 2017, the Commission launched the EPSR, which has quickly become central to the social discourse in the EU. In line with the five presidents' report,[93] the EPSR was conceived with that aim of tackling inequalities, imbalances and to help buffer the effects of the recent economic crisis and has made it its mission to put the social at the core of the EU.[94]

There are a number of reasons why the EPSR is set apart from the previous section. For one, the EPSR is not, *per se*, a source of EU law, but rather a compilation of the existing social *acquis*. As solemnly proclaimed as it may be, it is not a legally binding instrument, neither does it extend the competences of the EU. Instead, it envisages a hybrid instrument that combines both soft and hard forms of governance and has relaunched the semi-forgotten idea of a social Europe. It is in its idiosyncrasies that the key to unleash social rights in the EU may lie since it creates bridges between the problematic application of fundamental rights discussed in the previous section and a proper implementation of the substantive rights discussed below.

Firstly, different from most of the instruments addressed above, the EPSR focuses solely on social rights and calls for the strengthening of the so-called second-generation rights in the EU, which are portrayed in a rather concrete way. For instance, where the CFREU enshrines the right the social security and social protection, the EPSR dedicates an entire chapter to social inclusion, thereby extracting a number of rights, such as the right to minimum income or housing from a more general and abstract right to social protection. Where the EPSR recognises the right to minimum wages, this is conspicuously absent from Article 31 CFREU. This level of specification not only brings clarity to the existing social floor, but might complement fundamental rights by clarifying its substance. Mostly in the case of provisions considered 'principles', the EPSR might play a key role in making provisions 'specific enough' as to be able to apply them before the Court.

Secondly, for each of these provisions, the EPSR builds on existing instruments, not only on the CFREU and EU policy, but also on a number of international instruments, particularly, on the ESC and various ILO Conventions.

93 Commission, 'Completing Europe's economic monetary union' (2015), available at: https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf

94 Juncker, 'State of the Union 2015: Time for honesty, unity and solidarity', State of the Union Speech Strasbourg 9 September 2015, available at: http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm While initially conceived for the EMU, this limitation was left behind when the Council solemnly proclaimed the EPSR therefore opening it to the EU. Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European pillar of social rights [2017] OJ L 113.

As such, the EPSR is also pivotal in rekindling the relationship between the EU and international human rights instruments.

Thirdly, the EPSR is deemed to serve as a compass, and in its short life has already proven to do so. In this regard, the EPSR could play a leading role in ensuring that social rights effectively guide the EU's legislative and political agenda. The Social Scoreboard, which is used to monitor progress *vis-à-vis* Member States and previous performances, might be key in identifying areas in which great divergences appear between Member States thereby threatening the integration project and potentially undermining the ability of Member States to protect their fundamental rights systems. The legislator, in turn, could use the Social Scoreboard as an alert mechanism to trigger positive action in problematic areas both by means of policy and law.[95] Later in this contribution, Chapter 5 looks precisely into the later possibility and instrumentalises the EPSR in the form of legislative proposals that would contribute to fighting poverty and social exclusion in the EU.

Lastly, the timing of the EPSR comes at a turning point for the EU. Right after the imposition of merciless austerity measures that followed the great economic recession and after the Brexit referendum, the EPSR has fittingly been coined 'the last chance for Social Europe'.[96] Against the backdrop of increased euroscepticisms fuelled by economic hardship and EU intervention,[97] the EPSR offers an opportunity to reconnect with EU citizens by showing that the added value of the EU is not limited to economic development. This is particularly true in the aftermath of a global pandemic that has jeopardised incomes and puts and added pressure on improving the European economy.

3.3.1 Background and Content

The EPSR was the result of a broad public two-step consultation launched in March 2016 by the Commission that aimed at gathering feedback from different stakeholders, civil organisations and other actors. The Commission received over 16.500 online replies as well as roughly 200 position papers. This phase of the consultation culminated in a high-level conference in January

95 De Schutter, *supra* n 33, 34–38.

96 EAPN, 'Last chance for Social Europe? EAPN position paper on the European pillar of social rights' (2016); Brooks, 'The 'last chance for social Europe': The European pillar of social rights can only work if integrated into the EU's existing tools' (2017), available at: http://blogs.lse.ac.uk/europpblog/2017/05/22/last-chance-for-social-europe-european-pillar-social-rights/; ETUC, 'Social Europe in 'last chance saloon'' (2017), available at: https://www.etuc.org/en/pressrelease/social-europe-last-chance-saloon#.WIHZbr-Q_Wg>

97 Kuhn et al. 'An ever wider gap in an ever closer union: rising inequalities and euroscepticism in 12 West European Democracies, 1975–2009' (2016) *Socio-Economic Rev* 14(1), 27–45; Garben, 'The European pillar of social rights: effectively addressing displacement? (2018) *EuConst* 13(1), 212–213; Koukiadaki and Kretsos, 'Opening pandora's box: the sovereign debt crisis and labour market regulation in Greece' (2012) *ILJ* 41(3), 276–304.

2017 gathering over 600 participants. In April 2017, the Commission presented the results of the public consultation alongside its final proposal for the EPSR. This was presented together with a number of other documents related to the EPSR, also known as the 'Pillar Package'.[98] Later in November, the EPSR was officially proclaimed and signed by the Council, the European Parliament and the Commission during the Social Summit for fair jobs and growth hosted in Gothenburg.[99] The Commission also used the occasion of the Social Summit to start a second round of consultations on some of the initiatives for legislative measures.[100] In March 2018, the Commission launched the 'Social Fairness Package', including a couple of proposals and a revised explanatory document.[101] Most recently, in March 2021 the Commission presented the Action Plan to implement the EPSR, discussed in the previous chapter, which at the time of writing still needs to be proclaimed, although most priorities were echoed in the Porto Social Summit in May of the same year.

The EPSR is primarily composed by two instruments, a recommendation presented in April 2017 on the one hand and an interinstitutional proclamation signed by the Council the Parliament and the Commission on November 2017 on the other. Whilst the nature and impact of the inter-institutional proclamation remains unknown, it is safe to affirm that both the recommendation and the proclamation are soft-law instruments that by themselves lack a legally binding force. As such, the EPSR, as it stands now, refers more to a promise rather than an actual binding pledge to develop a more substantial social dimension of Europe parting from the principles enshrined in the EPSR.

Both instruments are identical in their content and they convey a list of 20 principles which (although formulated as individual rights) build upon three main themes: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion.[102] The rights enshrined in the EPSR range from matters with clear EU legislative competence, such as health

98 SWD(2017) 206 final; SWD (2017) 200 final and SWD (2017) 201 final, 'Establishing a European pillar of social rights'. C(2017) 2610 final, 'First phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European pillar of social rights'. SWD(2017) 257 final.

99 Government offices of Sweden, 'Social summit for fair jobs and growth' (2017), available at: www.government.se/socialsummit

100 C(2017) 7773 final, 'Consultation document of 20.11.2017 second phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European pillar of social rights'.

101 COM(2018) 131 final, 'Proposal for a regulation of the European parliament and of the council establishing a European labour authority'; COM(2018) 130 final, 'Monitoring the implementation of the European Pillar of Social Rights'; COM(2018) 132 final, 'Proposal for a Council Recommendation on access to social protection for workers and the self-employed'.

102 COM(2017)250 final, 'Establishing the European pillar of social rights'.

and safety at work, to areas with a strong EU legal framework, for example gender equality, but also include areas where the EU has rather limited competences, like housing. As for the personal scope of the EPSR, it is interesting that it applies to EU citizens, but also to third-country nationals who are legally residing in the territory of the EU. Except for its limitation on illegally residing migrants, the EPSR operates somewhat like a human rights instrument in this regard. In addition, there where the EPSR refers to the term 'worker' this should be understood following the jurisprudence of the CJEU, meaning that it applies to all persons in employment regardless of their employment status, modality and duration of employment (Preamble 15).[103]

Almost every principle in the EPSR relates, in one way or another, to the fight against poverty and social exclusion, especially when conceived in the broader sense. Yet, there are a number of principles directly addressing the issues of sufficient resources and access to welfare. The first chapter, on equal opportunities includes, besides provisions on equal treatment, the right to timely and tailor-made assistance to improve employment prospects. In the second chapter on working conditions, principle 6 enshrines the right of workers to receive fair wages that provide a decent standard of living. Importantly this provision makes a direct link between adequate minimum wages and in-work poverty, and it refers to guaranteeing a level of wage that will satisfy the need of the worker and her family regarding the national socioeconomic circumstances in addition to providing incentive to seek work. The entirety of the third chapter on social protection and inclusion includes vital provisions in the fight against poverty and social exclusion, namely, childcare, social protection, unemployment benefits, minimum income, old-age income and pensions, health care, inclusion of people with disabilities, long-term care, housing assistance for the homeless and access to essential services (respectively principles 10-20).[104] The general wording of most principles is something to be welcomed, as social rights in the EPSR are connected to having a life in dignity and measured in adequacy rather than on the sustainability of the welfare state or in terms of boosting competition and the internal market.

The 'Pillar package' is also composed by a number of explanatory and accompanying documents. One of these, updated in March 2018,[105] clarifies the content and background of the EPSR providing insightful explanations that are pivotal in understanding each principle, and, as such, it operates similarly to the Explanation of the CFREU. These explanations are used throughout this

103 See, *inter alia*, C-46/12— *N.*, ECLI:EU:C:2013:97, §42, Case 53/81 - *Levin*, ECLI:EU:C:1982:105, §17, Joined cases C-22/08 and C-23/08 - *Vatsouras and Koupatantze*, ECLI:EU:C:2009:344, §26, or more recently in C-483/17— *Tarola*, ECLI:EU:C:2019:309.

104 Some of these principles are used later in Chapter 5 to propose a number of legislative proposals: minimum wage (principle 6), social protection (principle 12), unemployment benefits (principle 13) and minimum income (principle 14).

105 SWD(2018) 67 final, 'Monitoring the implementation of the European pillar of social rights'.

and other chapters to unfold the social *acquis* of the EU respective to poverty and social exclusion. Another interesting instrument is the Social Scoreboard, which offers a set of indicators that allow for benchmarking new actions taken on the social field and in addition, it represents the first actual implementation of the EPSR. It aims at benchmarking Member States' performances *vis-à-vis* the EU averages. It also provides for the opportunity to compare the performance of the EU with different international actors. The Social Scoreboard presents a total of 12 headline indicators[106] that are used to measure and compare Member States' performance. This performance is based on two different criteria. On the one hand, the level of the indicator as it stands, and on the other, on the basis of the progress made respective of the previous year.[107] While the Social Scoreboard can prove to be a highly practical tool that complements the qualitative study of social rights, the fact that the indicators in the Social Scoreboard do not correspond to the principles set in the EPSR has already generated some scepticism.[108] This could potentially result in a hierarchy among the rights within the EPSR and in some of the principles being derogated to a second stand or being totally overlooked in the feeding in and out process. Example of this is that although principle 19 provides for the right to housing there is no indicator in the Social Scoreboard, as it could be, for instance, house affordability. There is also no indicator with regard to minimum income benefits, wage developments or pensions. There is, however, an overarching indicator on 'impact of public policies on reducing poverty', which includes expenditure on social protection, health, education and pensions. A relevant ETUI paper scrutinised the Social Scoreboard indicator-to-indicator and, where relevant, proposed alternative or additional indicators for a better assessment of the social dimension of Europe.[109] Different concerns regarding the utility of the Social Scoreboard relate to its overlap with other instruments, such as the Europe 2020 Strategy and the Social OMC. It is not yet clear how the Social Scoreboard could interact with instruments that are already in place to monitor social performance, which adds to the *matryoshka*-like effect (see Chapter 2). Anyhow, adding indicators based on the rights reflected on the EPSR is likely to allow for a more refined and well-informed analysis, potentially enhancing the overall relevance and legitimacy of outputs under the European Semester.

106 Note that the action plan presented in March 2021, see Chapter 2, amends the social scoreboard.

107 SWD (2017) 200 final, *supra* n 98.

108 Sabato and Vanhercke, 'Towards a European pillar of social rights: from a preliminary outline to Commission's recommendation' in Vanhercke et al. (eds.), *Social Policy in the European Union: State of Play 2017* (Brussels: OSE/ETUI, 2017), 85.

109 Galgóczi et al., 'The social scoreboard revisited' (2017) *ETUI Working Paper* 2017.05.

3.3.2 Implementation and added value

As outstanding as it might be from a social policy perspective, the EPSR is seen as a weak instrument from a legal standpoint. The EPSR *stricto sensu*, that is in its recommendation and interinstitutional proclamation form, however 'obscure',[110] is not a legally binding instrument and it requires further action by the EU or Member States to enforce the principles therein.[111] This legal 'weakness', however, can also be contested. This section sets forth a number of reasons why the legal value of the EPSR, mostly *sensu lato*, should not be quickly dismissed and comments on how it can be (and has already to some extent) implemented to give the principles therein a 'harder edge'.

For one, the EPSR represents a social consensus that establishes certain minimum social standards that are deemed to be common to all Member States. In fact, the EPSR was initially conceived as a '*socle*', what roughly translates as 'foundation', 'floor' or 'basis' instead of 'pillar'.[112] Even though the Commission decided to take a different direction in the development of the EPSR, traces of its more ambitious commencement can be found in the French version of the EPSR. While this is not the case for most of the translations, the French version of all EPSR is translated as 'du socle européen des droits sociaux'.[113] It could have been translated as *'pilier'* and not '*socle'*, yet the Commission decided to stick to its original designation. At the very least, this difference points at the intention of using the EPSR as an instrument setting minimum social standards and covering the loopholes of the existing floor of social dimension of the EU. If nothing else, the EPSR reassures the existence of an extensive and thriving existing social *acquis*.

Importantly, besides being important for increasing the legitimacy of the EPSR, the links between the EPSR and other sources of social rights are key in creating bridges between existing instruments of social rights that build this social 'floor'. This might be essential in reinvigorating the social *acquis* of the EU. By collecting different sources of international law, the EPSR might reconnect the EU fundamental rights realm with other international human rights instruments, which, as seen above, has not always been an unproblematic relationship. Improving legal synergies between different instruments would not only bring much clearance to the content of substantive rights (see below) but also reduce potential conflicts in the international rule of law order.[114]

110 Rasnača, 'Bridging the gaps or falling short? The European pillar of social rights and what it can bring to EU level policymaking' (2017) *ETUI Working Paper*.

111 Editorial, 'The European social pillar' (2018) *ELLJ* 9(3), 1–5.

112 Garben, 'The pillar: the current state of play' presentation 1 June 2017 at the workshop on the EPSR at KU.

113 Commission, 'Socle européen des droits sociaux', available at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_fr

114 See more: Jimena-Quesada, 'The asymmetric evolution of the social case-law of the Court of Justice: new challenges in the context of the European pillar of social rights' (2017) *ELJ* 3(2), 4–19; Rocca; Garben, both, *supra* n 85.

At first, the Commission committed to implement the EPSR mainly within the European Semester through CSRs and the Joint Employment Report.[115] The European Semester is the perfect scenario for benchmarking, exchanging good practices and monitoring especially when implementing the Social Scoreboard to push Member States to deliver on the EPSR. It has been discussed in the previous chapter that the more recent AGS and CSRs have included several references to the EPSR further contributing to the so-called 'socialisation' of the European Semester. However, taking history as evidence, only soft-law mechanisms are unlikely to be sufficient in effectively delivering on the fight against poverty and social exclusion. Considering the aforementioned social policy instruments—particularly the Europe 2020 objective of reducing poverty with 20 million and the Integrated Guideline number 8 on combating social exclusion—there is little promise on non-binding tools having a transformatory impact on achieving social objectives.[116]

But the implementation of the EPSR does not stop with the European Semester. In this vein, while it is not a legally binding instrument in itself, the EPSR is not only written in a rights-based language, but also possesses the tools to engage the EU into positive action. This facilitates to effectively stir the EU's legislative and policy agenda towards fulfilling the fundamental social rights therein.[117] In this regard, the Social Scoreboard, which follows the rights-based language too, offers a unique opportunity to identify gaps and evaluate progress made by Member States to effectively pinpoint areas where EU action might be needed. In this vein, de Schutter argues that besides gradually influencing the orientation of macroeconomic policies in the EU (by contributing to the socialization of the European Semester), the Social Scoreboard, because of its 'process' indicators[118] is a source of accountability where 'poor outcomes can more directly be traced to a failure by the state to improve social support or to match macroeconomic choices with its commitment to poverty reduction'.[119] This is supported by Article 9 TFEU, which embodies the treaty-based obligation to mainstream social objectives throughout all EU actions.[120] The EPSR, in turn, brings the content that the horizontal social clause has been missing since its introduction in the Lisbon Treaty, thereby setting an imposition for European institutions to introduce some checks and balances.[121] This rationale is further supported by the fact that recital 6 of the EPSR foresees that the

115 COM(2017) 250, 'Establishing the European pillar of social rights', 8.

116 COM(2010) 2020 final.

117 De Schutter, *supra* n 33, 28–38.

118 UNHCHR, 'Report on indicators for promoting and monitoring the implementation of human rights' (2008), 17–26.

119 De Schutter, *supra* n 33, 38.

120 See Chapter 4 on Article 9 TFEU.

121 Aranguiz, 'Social mainstreaming through the European pillar of social rights: shielding 'the social' from "the economic" in the EU policymaking' (2018) *EJSS* 20(4), 341–363; Rasnača, *supra* n 110, 6.

initiatives shall be implemented in policy areas other than the social, *inter alia,* in the internal market, economic and social cohesion, the formulation and surveillance of economic guidelines and in the approximation of laws (enshrined in Articles 114 and 115 TFEU).[122] Such social mainstreaming is echoed by the compromise to introduce the EPSR in the European Semester and furthering its process of 'socialization'. However, even if the EPSR is effectively implemented in the European Semester, research has shown that there is a relatively low rate of CSR implementations at the national level.[123]

Differently, the EPSR might be (and is already) a catalyst for a renewed use of the Social Policy title in the TFEU. While the EPSR in itself is legally weak, it has undoubtedly been acting as a facilitator for updating and renewing EU legislative measures in the social field. Some of the legislation that is already in place is being reviewed in order to be fit-for-purpose and the EPSR provides for a way to assess whether this legislation is suitable to properly address current challenges,[124] and where not, the legislative measures will have to be updated. The Commission has on the one hand, linked a number of existing initiatives to the EPSR,[125] and on the other, launched a brand-new set of legislative initiatives on several matters such as work-life balance, transparent and predictable conditions, access to social protection and the instalment of the European Labour Authority (ELA).[126] Even if the legacy of the EPSR would be limited to these initiatives, the EPSR is already to be considered a success for progress towards a social Europe, also from a legal point of view. Fortunately, the power of the EPSR has not stopped there, as the new Commission also seems to be using the EPSR as a catalyst for new initiatives. The numerous initiatives depicted in the Action Plan including the proposal for a directive on minimum wages or a recommendation on minimum income, are proof of this.[127] As such, the EPSR plays an important role in tackling the first form of social displacement in the EU: the marginal use of the Social Policy title.[128] On this note, Chapter 5 formulates a number of initiatives on the basis of EU social competences that are geared by the EPSR.

That the CJEU will be confronted with questions regarding the new instruments is clear, which will bring some clarity to the principles these instruments emanate from. But the CJEU could also use the provisions of the Pillar as a

122 Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European pillar of social rights c/2017/2600 [2017] OJ L 113, Recital 6.

123 European Parliament resolution of 11 March 2015 on general guidelines for the preparation of the 2016 budget [2015] OJ C 316.

124 This is the case of the revision of the posting of workers directive or social security coordination regulations.

125 *Supra* n 98.

126 COM(2017) 250, *supra* n 115, 8.

127 See Chapter 2.

128 Muir, 'Drawing positive lessons from the presence of "the social" outside of EU social policy *Stricto Sensu*' (2018) *EuConst* 13(1), 75–95.

source of inspiration directly when making deliberations with regard to social rights in the EU. In this vein, a rights-based language is also more familiar to the language of the CJEU, which increases the chances of the Court referring to the EPSR as a source of interpretation. Here, the links that the EPSR makes with other instruments of social law are key. This would not be the first time that the Court has used soft-law instruments as auxiliary source of EU law in its interpretation. The CFREU was used before it became legally binding when defining the responsibilities of institutions. Perhaps a more straightforward resemblance lies between the EPSR and the Community Charter, which, even though is declaratory, has frequently been used by the CJEU as a source of inspiration.[129] Since the EPSR has been inter-institutionally proclaimed, it could also be the case that the CJEU uses the provisions therein to interpret the legality of EU actions.[130] In fact, there has already been a preliminary question referred to the CJEU which might have motivated the CJEU to interpret a number of provisions of the EPSR had this case not been declared inadmissible.[131] If not in this case, it is inevitable that the Court will soon interpret social rights in light of the EPSR, either as part of the CFREU or perhaps more likely as enshrined in one of the binding instruments that have emanated from the EPSR.

For all its possibilities, however, the EPSR is not an all-fixer instrument. For one, as much as the EPSR can contribute to building the social dimension in the EU, in itself, it is insufficient to redress the displacement in the two legislative processes where most important social decisions are made, namely, the internal market at macroeconomic governance.[132] Resolving this social displacement would require a much more ambitious project entailing structural changes in the EU. Equally, the EPSR cannot do much in improving parliamentary participation in these areas, thereby resolving the displacement of the social decision-making process that has, in the context of the internal market and macroeconomic governance, shifted from the national (and to a lesser extent European) legislator to the judiciary—mostly in its balance between internal market and social objectives, and the executive—in the case of macroeconomic governance, both ordinary (European Semester) and extraordinary (ESM). Even if part of the EPSR is to be implemented in the European Semester, which in all likelihood will further the 'socialization' of the European Semester (see Chapter 2), the European Semester remains oriented towards

129 For example in recent cases see: *Max-Planck-Gesellschaft*, *supra* n 18, §70; C-306/16 - *Maio Marques da Rosa*; ECLI:EU:C:2017:844. See on the relationship between the Community Charter and the EPSR: Garben, *supra* n 97, 219–220.

130 Rasnača, *supra* n 110, 33 and the references therein.

131 C-789/18 - *Segretariato Generale della Corte dei Conti*; ECLI:EU:C:2019:417; Opinion AG C-33/17— *Čepelnik*, ECLI:EU:C:2018:311, footnote 19.

132 Kilpatrick, *supra* n 46, specifically see Garben, *supra* n 97.

financial sustainability, which will undoubtedly play against social objectives in future 'hard cases',[133] unless the current fiscal rules are revisited.

Even though the weaknesses of the EPSR do not go unnoticed, and while it is still too early to evaluate the substantial impact of the EPSR (whether directly or indirectly through the actions that emanate from it), the EPSR has been the central motor to the recent wave of solidarity in the EU. Even if in itself it is a legally weak instrument, it still encompasses a number of features that might be key in stirring the future of the EU towards a more social Europe, which could potentially lead to a more fundamental revision of the whole integration process. For all its potential, as well as its impeccable timing, the EPSR takes a pivotal role in this contribution, particularly, with regard to the formulation of new EU legislative initiatives that could contribute to the Union's policy objective to fight poverty and social exclusion in Chapter 5. Due to its relevance, the substantive rights discussed in the following section, although with a focus on binding instruments, also refer to the EPSR as a key to unlocking current challenges in the justiciability of social rights.

3.4 Substantive rights

Even though the interaction between different sources of fundamental rights is a complicated one, and even if the presumption of legal synergies is very much disputed, substantive rights tend to draw from one another and are in practice very much intertwined. As such, the following discussion is structured thematically and combines complementary approaches in as much as possible. The following sections discuss a number of rights, enshrined in different instruments, that relate to the rights associated with poverty reduction, mostly by means of access to welfare either by social security or social assistance rights. The purpose is to study what the meaning of these provisions is, how courts and authoritative bodies have interpreted them and to what extent these provisions entitle individuals to a financial or other form of claim. To this end, the next section focuses on the more general and fundamental right to human dignity and the next three sections study the right to social security, the right to social assistance and the right to a fair remuneration as enshrined in the different instruments discussed in the previous sections. The latter part draws some intermediate conclusions.

3.4.1 Human dignity

Human dignity is a two-dimensional fundamental right. On the one hand, it acts as a self-standing and independent right, in spite of what some have

133 Garben, *supra* n 97, 227–230.

argued,[134] and on the other it represents the foundation of every other human right. As the basis of all fundamental rights, human dignity must be respected in every other right enshrined in the CFREU, even when such rights are being restricted.[135] Accordingly, human dignity could be understood as the bare minimum, or the 'essence' of every other right, even when the broader protection of the second provision can be limited (Article 53 CFREU).

Article 2 TEU, which is discussed in the following chapter, puts human dignity among the values of the EU, which is explicitly provided for in Article 1 CFREU. Together with Article 21 TEU on external action, these provisions place human dignity at the core of the foundational values of the EU which symbolises a benchmark commitment for the EU to respect human rights within and outside the EU.

Human dignity is most traditionally seen as embracing civil and political rights, but it also embodies solidarity and labour rights. As a matter of fact, the Universal Declaration of Human Rights (UDHR) refers to the necessity of fulfilling the right to social security as means of ensuring human dignity and the free personality of individuals under Article 22 UDHR. Moreover, Article 23 UDHR refers to the right to just and favourable remuneration for work that is sufficient to ensure human dignity for the worker and her family and when necessary, in order to guarantee a life in dignity, means of social protection would have to be in place. Although with a less authoritative stand, the EPSR reads a number of rights in light of securing a life in dignity, *inter alia*, the right to minimum income (principle 14), the right to old-age income and pensions (principle 15), the right to income support for the inclusion of people with disabilities (principle 17) and though less directly the right to secure and adaptable employment (Principle 5), the right to fair wages (principle 6), and the right to healthy, safe and well-adapted work environment and data protection (principle 10). The ESC, curiously, does not refer to human dignity, but rather to a right to secure a 'decent standard of living'. It will be argued later that there seems to be a difference between a 'dignified' and an 'adequate' standard of living, where the former appears to be inviolable and can therefore not be limited, and the latter shall be strived for and protected, but can, under certain circumstances be limited. Although the ESC does not recognise the right to human dignity *per se*, the ECSR has held that 'living in a situation of poverty and social exclusion violates the dignity of human beings'.[136]

134 Olivetti, 'Article 1— dignity' in Mock and Demuro (eds.), *Human Rights in Europe. Commentary to the Charter of Fundamental Rights of the European Union* (Durham: North Carolina Academic Press, 2010), 9.

135 Explanations relating to the charter of fundamental rights [2007] OJ C 303, Explanation on Article 1.

136 ECSR, *International Movement ATD Fourth World v. France* Complaint No. 33/2006, §163; ECSR, *FEANTSA v. the Netherlands*, Collective Complaint No. 86/2012, §219.

Although human dignity has been internationally accepted as a foundational principle for human rights both in the international and the domestic sphere since WWII, it is very much contested what exactly it entails, which is perhaps a reflection of the level of abstraction required to read human dignity as the basis of any human right.[137] But human dignity is also a self-standing right that on its own should be able to find successful claims.[138] In fact, the broad wording of human dignity should not be quickly dismissed as it may lead to the discovery of new fundamental rights.[139] Nevertheless, in practice, due to its level of abstraction, applicants are more likely to intertwine human dignity with other rights in order to emphasise their point.[140] In the case of making a claim for financial or other forms of support for those at risk of poverty in the EU, human dignity is likely to be invoked together with Article 34 CFREU on the right to social security and social protection. This leads to the question of what the relationship between human dignity and access to welfare is.[141]

The premise behind this relationship is a simple one: a life in dignity requires a certain standard of living which those at risk of poverty and social exclusion might only attain with the assistance of financial or other forms of claim, such as welfare benefits or fair working conditions. Arguing that human dignity cannot relate to solidarity or labour standards would be contrary to the principle of indivisibility of fundamental rights.[142] Simply put, if human dignity is to apply only to civil and political rights, and not to social or economic rights, then the CFREU's (as well as other human rights instruments') claim to the indivisibility of the rights would not stand. The explanations of the CFREU clearly state that human dignity represents the foundation of every other human right therein and that it is this substance of human dignity in each right, that cannot be restricted. Accordingly, human dignity could be said to represent the unlimitable core or the 'essence' of every other provision.[143] As this is contemplated for every right, there is no reason to believe that a division between rights is possible, at least, to the extent that human dignity is applicable to all of them. As a matter of fact, human dignity has often been associated

137 See for discussion O'Mahony, 'There is no such thing as a right to dignity' (2012) *IJCL* 10(2), 551–574; MacCrudden, 'Human dignity and judicial interpretation of human rights' (2008) *EJIL* 19(4), 655–724; Alternatively, Vanneste, 'Living a life in human dignity: a concrete, not and abstract legal question' in Lemmens et al. (eds.), *Human Rights with a Human Touch. Liber Amicorum Paul Lemmens'* (Cambridge/Antwerp/Chicago: Intersentia: 2019), 735–753.

138 Jones, 'Human dignity in the EU charter of fundamental rights and its interpretation before the European court of justice' (2012) *LLRev* 33, 207; Vanneste, *supra* n 137, 735–753.

139 Dupré, 'Article 1— human dignity' in Peers et al. (eds.), *supra* n 19, 7–8.

140 *Ibid.*, 7–8.

141 *Ibid.*, 17–18.

142 Goldewijk et al., *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002).

143 See in this regard: Special Issue, 'Interrogating the essence of EU fundamental rights' (2019) *GLJ* 20(6), 763–936.

with the recognition of the right to minimum subsistence or to an obligation to guarantee an adequate standard of living both by the CJEU and in the constitutional traditions of some Member States.

As regards the CJEU, human dignity has most often been used in cases of international protection and minimum reception conditions, which is simultaneously often linked to accessing some minimum resources. In *Saciri and Others*, a case concerning an asylum-seeking family whose reception application and application for financial aid had been declined even when they were unable to pay rent, the Court explicitly recognised the obligation of Member States to provide a dignified standard of living for third-country nationals that is adequate for the health of the applicants and capable of ensuring subsistence. The Court found that this obligation towards people seeking international protection emanates from the fundamental right to human dignity and made a direct link between this obligation and Article 1 CFREU.[144] In *Abdida*, the CJEU held that when an illegally staying migrant against whom there has been a return decision but cannot yet be removed due to a 'serious risk of grave and irreversible deterioration of health', Member States are required to provide basic needs to said third-country national. In this case, the Court, and more clearly AG Bot, linked the obligation to cover basic needs and human dignity under Article 1 CFREU.[145] In a number of recent cases, the CJEU explicitly linked human dignity to extreme material conditions.[146] *Jawo* and *Ibrahim*, concerned applicants of international protection who had moved to one Member State after their application in another Member State. The CJEU recalled that it is possible to transfer an asylum seeker to the Member State that is normally responsible for processing their application (or has already granted subsidiarity protection). However, if this transfer were to expose the applicant to a situation of extreme material poverty, this transfer would be in breach of the prohibition of inhuman and degrading treatment and the right to human dignity. The Court was careful to emphasize that mere inadequacies in the social protection system of a given Member State do not suffice, by themselves, to conclude that there is a risk of such treatment. Instead, deficiencies in the protection offered by a Member State would only attain such severity as to breach the right to human dignity and the prohibition of inhumane and degrading treatment where:

> the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his

144 Case C-79/13 *Saciri and Others*, ECLI:EU:C:2014:103, §35–42.

145 C-562/13— *Abdida*, ECLI:EU:C:2014:2453, § 42 and AG Bot, C-562/13— *Abdida*, ECLI:EU:C:2014:2167, §106.

146 Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17— *Ibrahim*, ECLI:EU:C:2019:219, §90, C-163/17— *Jawo*; ECLI:EU:C:2019:218.

> wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.[147]

More recently, in *Haqbin*, the CJEU applied similar reasoning to a situation concerning an applicant of international protection who had been sanctioned with a reduction of material reception conditions, including the withdrawal or reduction of the daily expenses allowance. Importantly, the Court explicitly linked a situation of extreme poverty to Article 1 CFREU stressing that the competent authorities must comply with the principle of proportionality when imposing such sanctions to not undermine the dignity of the applicant.[148]

The fact that the CJEU linked a right to an adequate standard of living with the concept of human dignity under the Charter suggests that human dignity is a right for every human being regardless of their citizenship or economic status. However, there are two idiosyncrasies to be noted from the above cases. In the first place, it cannot be ignored that in all the cases above, the applicants were in extreme circumstances and were completely reliant on the Member State for survival. In this vein, there seems to be a mandatory protection for a 'dignified' standard of living that represents an absolute minimum protection that must be granted to individuals. To the extent that certain minimum resources are necessary for the survival of a dependant individual, the CJEU has consistently maintained the obligation of Member States to provide those 'dignifiable' resources. In this vein, there seems to be a differentiation between 'dignified' and 'decent' standards of living, where the protection of the latter, contrary to the former, can be limited under certain circumstances.

These judgments followed closely the case-law of the ECtHR—which interprets the respect for human dignity as the very essence of the ECHR[149]—where the risk of extreme poverty has also played an important role in the situation of applicants of international protection. In some cases, this has led the ECtHR to accept that there might be a breach of the prohibition of inhumane and degrading treatment (Article 3 ECHR) when the State has failed to provide essential support, especially in cases related to health, housing and

147 *Ibid.*, *Ibrahim*, §90; *Jawo*, §92. See further: DEN HEIJER, 'Transferring refugee to homelessness in another Member State' (2020) *CMLRev* 57(1), 539–556.

148 C-233/18— *Haqbin*, ECLI:EU:C:2019:956, §46–51.

149 ECtHR, *Bouyid v. Belgium*, App. No. 23380/09, ECLI:CE:ECHR:2015:0928JUD002338009. Similarly: ECtHR, *Lambert v. France*, App. No. 46043/14, ECLI:CE:ECHR:2015:0605 JUD004604314; ECtHR, *Pretty v. the United Kingdom*, App. No. 2346/02, ECLI:CE:ECHR:2 002:0429JUD000234602.

social benefits.[150] In these cases too there is a requisite to surpass a threshold of severity. In *O'Rourke v. UK*, for example, the ECtHR declared the case inadmissible because 'mistreatment must attain a minimum level of severity'. The case concerned a former inmate who claimed that he was forced to sleep in the streets after an eviction and a consequent breach of Article 3 ECHR. However, the Court did not agree on the basis that the claimant had refused to attend a night shelter (as he was advised by the national authorities) and had previously refused temporary accommodation.[151] In *Budina v. Russia*, the ECtHR clarified that on the basis of Article 3 ECHR State responsibility could arise 'for "treatment" where an applicant wholly dependent on State support faced official indifference when in a situation of serious deprivation or want incompatible with human dignity'.[152] Differently, in *M.S.S. v. Belgium and Greece*, a case that concerned an asylum seeker who, due to State inaction, was living on the streets for several months lacking access to resources or sanitary facilities, the Court found that the claimant had been a victim of humiliating treatment incompatible with human dignity. Such conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving, attained the level of severity required by the ECtHR to breach Article 3 ECHR.[153] More recently, in *V.M. and Others v. Belgium*, the applicants for asylum were ordered to leave Belgium following the decision to return them to France. Following this order, the applicants were expelled from the reception centre which led them to spend a month in homelessness. The ECtHR ruled that the Belgian authorities had not given sufficient consideration to the vulnerability of the applicants and had failed their obligation to not expose them to extreme poverty conditions with no access to sanitary facilities, no means of meeting their basic needs, and with no prospect of improvement.[154]

150 With regard to social benefits, the ECtHR recalled that it could not substitute national authorities in assessing or reviewing the level of financial benefits that are available but that a complaint about a wholly insufficient amount of social benefits may in principle give raise to claims under Article 3 ECHR. ECtHR, *Larioshina v. Russia*, App. No. 56869/00, ECLI:CE:ECHR:2002:043DEC005686900.

151 ECtHR, *O'Rourke v. United Kingdom*, App. No. 39022/97 (decision), ECLI:CE:ECHR:2001:0626DEC003902297.

152 ECtHR, *Budina v. Russia*, App. No. 45603/05 (decision), ECLI:CE:ECHR:2009:0618DEC004560305; ECtHR, *Paposhvili v. Belgium*, App. No. 41738/10, ECLI:CE:ECHR:2016:1213JUD004173810; ECtHR, *N. v. United Kingdom*, App. No. 26565/05, ECLI:CE:ECHR:2008:0527JUD002656505.

153 ECtHR, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609, §263.

154 ECtHR, *V.M. and Others v. Belgium*, App. No. 60125/11, ECLI:CE:ECHR:2015:0707JUD006012511. See previously: ECtHR, *Amadou v. Greece*, App. No. 37991/11, ECLI:CE:ECHR:2016:0204JUD003799111.

Both courts have underscored the importance of the principle of proportionality when deciding if the measures imposed by a given Member State breach the right to human dignity. In this balancing exercise, both the risk of vulnerability of the applicant, —such as exposure to extreme poverty—and the prospect of the situation improving ought to be considered.[155] Under extreme circumstances as the ones in these cases, the causal link between resources and human dignity appears to be more self-evident and, as a result, more justiciable. The second marked characteristic of these judgments is that international protection represents a very strong international commitment which is moreover enshrined in secondary legislation.[156] Importantly, this secondary legislation explicitly connects the minimum resources condition and human dignity. Implementing acts such as these directives, may be essential in the justiciability of a right, as they make invoking rights much simpler, even when a right like human dignity, as opposed to a principle, is self-standing. As a result, while there is little doubt that a clear relationship exists between human dignity and access to resources, only in extreme cases such as the ones above appears the right to human dignity to be sufficient to substantiate these claims. The fact that human dignity is further implemented in the contested directive, differently, forces a court to read the directive with Article 1 CFREU in mind.

Lastly, the importance of fundamental rights in Member States' constitutions should also be considered, on the one hand because they may serve as a source of inspiration for fundamental rights (Article 6 TEU) and, on the other hand, because the level of protection set in the constitutions of Member States may not be restricted by the Charter (Article 53 CFREU). A number of Member States, *inter alia*, Portugal[157] and Germany,[158] has recognised a right to minimum subsistence based on the constitutional bases for human dignity. The German provision, after which Article 1 CFREU was inspired,[159] has recently

155 C-233/18— *Haqbin*, ECLI:EU:C:2019:956, §451; ECtHR, *V.M. and Others v. Belgium*, App. No. 60125/11, ECLI:CE:ECHR:2015:0707JUD006012511. In other case the ECtHR found no violation of Article 3 ECHR because there was prospect of improvement: ECtHR, *N.T.P. and Others v. France*, App. No. 68862/13, ECLI:CE:ECHR:2018:0524JUD006886213.

156 Recital 5 and 7 of the preamble, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31; Recitals 11. 18, 25 and 35 of the preamble Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180; Recital 3 and 17 of the preamble as well as Article 8(4) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348.

157 Tribunal Constitucional Portugal, ACÓRDÃO N.º 509/0, Proc. nº 768/02, §13.

158 Bundesverfassungsgericht [Federal Constitutional Court] 9 Feb. 2010 (Hartz IV), 125. Egidy, 'Casenote— The fundamental right to the guarantee of a subsistence minimum in the Hartz IV decision of the German Federal Constitutional Court' (2011) *GLJ* 12(11), 1961–1982.

159 Dupré, *supra* n 139, 11–12.

been interpreted as prohibiting mandatory reduction of benefits.[160] In this case, the German Constitutional Court emphasised the role of the principle of proportionality in considering the effects of such reduction for particularly vulnerable groups and decided, that such far-reaching reductions as the one in the case ought to be substantiated by clear empirical research proving that welfare sanctions contribute to the market reintegration of the unemployed.[161]

Whereas it may lead to substantial claims on its own, as explained above, human dignity will more likely be used in combination to more specific rights, in the case of fighting poverty and social exclusion, this is most clearly the case of access to social security, social assistance and fair remuneration.

3.4.2 The right to social security

3.4.2.1 Social security in EU law

Together with other provisions on the protection of workers, health care, family life, access to services of economic interest, environmental and consumer protection, Article 34 CFREU is part of the solidarity title of the CFREU and enshrines the right to social security in its first two paragraphs.

> The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

The second paragraph enshrines the right to social security coordination and mobility rights as protected in secondary legislation and, thus, falls out of the scope of this research. The third paragraph, in turn, envisages the right to social assistance which is discussed in the following section as a separate right.

According to the explanations of the CFREU, the 'principle' set out in the first paragraph of Article 34 CFREU is based on Articles 153 and 156 TFEU as well as on Article 12 of the ESC (on the right to social security, see below) and point 10 of the Community Charter which enshrines the right to adequate social protection and to enjoy, whatever their status and size of the undertaking, an adequate level of social security benefits. Pursuant to the explanations, where they do not already exist, social services will not have to be created.

As far as the EPSR is concerned, it recognises a number of independent rights that relate to Article 34(1) CFREU, namely, active support and

160 BVerfG, Urteil des Ersten Senats vom 5 November 2019, ECLI:DE:BVerfG:2019:ls20191105.1bvl000716.

161 Gantchev, 'Judgment of the German Constitutional Court on the (un)constitutionality of welfare sanctions BVerfG, 05.11.2019— I BvL 7/16' (2019) *EJSS* 21(4), 378–383.

employment (principle 4), secure and adaptable employment (principle 5), social protection (principle 12), unemployment benefits (principle 13), old-age income and pensions, inclusion of people with disabilities (principle 17) and long-term care (principle 18).

The case-law of the CJEU, however, has not served to shed much light onto Article 34(1) CFREU. Even if it has been confronted with the nature of Article 34(1) CFREU in a number of occasions, in all these cases the Court decided to not interpret the provision, either because there was no point in examining the question in light of the CFREU, because the CFREU was not applicable or because the question did not fall within the scope of EU law.[162] In *Melchior* and later in *Wojciechowski*[163] AG Mengozzi was clear in that Article 34(1) CFREU constitutes a principle and not a right and, consequently, it only has a programmatic character for public authorities, as opposed to 'rights' which have a prescriptive character. He argued that, in the absence of a legislative implementation, Article 34(1) CFREU does not create rights to positive action and may only be invoked as 'interpretative reference or as parameters for ruling on the legality' of the implementing act.[164] The literature seems to agree.[165]

The fact that Article 34(1) CFREU is catalogued as a principle limits its enforceability considerably to being invoked only when an implementing act exists. In such cases, moreover, principles are only justiciable insofar as interpretation of these acts goes, including in the ruling of their legality. Accordingly, Article 34(1) CFREU does not represent a claim-right, which suggests a rather scant judicial safeguard of the right to social security under EU law. The lack of enforceability of Article 34 CFREU is further undermined by the specific recognition of the General Court that the financial stability of the eurozone constitutes an objective of general interest that may justify restrictions to the right to social security and reductions of public spending. This is what the CJEU decided in *Sotiropoulou*, where the Court ruled that insofar as they are necessary to meet such objective of general interest, pensions might be reduced in the context of fiscal compliance in the eurozone and to pursue the financial stability of the same.[166]

162 T-462/17 - *TO v. EEA*, ECLI:EU:T:2019:397; C-647/13 - *Melchior*, ECLI:EU:C:2015:54; C-408/14— *Wojciechowski*; ECLI:EU:C:2015:591; C-395/15— *Daouidi*; ECLI:EU:C:2016:917; C-89/16— *Szoja*, ECLI:EU:C:2017:538; C-447/18 - *Generálny riaditeľ Sociálnej poisťovne Bratislava*, ECLI:EU:C:2019:1098; C-496/14— *Văraru*, ECLI:EU:C:2015:312.

163 *Wojciechowski*, *supra* n 162, §64–67.

164 *Melchior*, *supra* n 162, §60.

165 Kornezov, *supra* n 28, 422–423; Mol et al., 'Inroepbaarheid in Rechte van het Handvest van de Grondrechten van de Europese Unie: Toepassingsgebied en het Onderscheid Tussen 'rechten' en 'beginselen' (2012) *Tijdschrift voor Europees en Economisch Recht* 6, 232; White, 'Art 34— social security and social assistance' in Peers et al. (eds.), *supra* n 19, 936.

166 *Sotiropoulou*, *supra* n 66, §88–89.

While it is not clear what 'implementing legislation' really strives for, it certainly has had a limiting effect on the justiciability of principles under the CFREU. To the end of boosting the effectiveness of these principles, many have called for a broader interpretation of such principles that would provide a certain degree of protection against measures, either by the EU or national authorities, by allowing principles to be invoked also when the act does not implement the principle but when it clearly violates it.[167] Such an interpretation would further be in line with the social objectives of the EU to strive towards the realisation of a social market economy, as analysed in the following chapter.

In the absence of enlightening case-law of the CJEU in this regard, it is difficult to argue that such broad interpretation is feasible. However, the limited nature of Article 34 CFREU could also be overcome by a recognition of the general principle of social security under EU law.[168] On this note, it is important to remark that a high degree of consensus of acceptance is necessary in order to be elevated to the status of a general principle. Common constitutional traditions may play an important role with regard to the genesis of general principles (as well as representing a limit that ought to be respected under Article 53 CFREU). In the case of the right to social security, while scope and range vary widely depending on the national priorities and budgets, all Member States have a social security system in place and most of them also include a right to social security among their constitutional traditions. Moreover, they all are parties to the ESC (either to the original 1961 or the revised version) which is far more ambitious as regards social security rights, which should at least prove that there is sufficient consensus of acceptance among the Member States. In addition, fundamental rights as guaranteed by the ECHR may also constitute general principles of EU law. What follows discusses what the case-law of the ECtHR and the ESC would bring to the protection of the right to social security.

3.4.2.2 Social security in international human rights law

Many instruments of human rights law envisage the right to social security. These include, *inter alia*, Article 22 UDHR—which sees social security as indispensable for human dignity and the free development of peoples'

167 Guðmundsdóttir, 'A renewed emphasis on the Charter's distinction between rights and principles: is a doctrine of judicial restraint more appropriate?' (2015) *CMLRev* 52(3), 685–719; Ladenburger, 'Protection of fundamental rights post-Lisbon - the interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions' in Laffrange (ed.), *The Protection of Fundamental Rights Post-Lisbon* (Tallinn: Reports of the XXV Fide Congress, 2012).

168 De Becker, 'The (possible) role of the right to social security in the EU economic monitoring process' (2016) *GLJ* 17(03), 277–314.

personalities–, Article 9 ICESCR and its General Comment No. 19—that also connects social security and human dignity–, and the ILO Convention 102 on minimum standards for social security.[169] The ILO, in fact, targets social security in a number of specific conventions,[170] whose compliance is monitored through two different monitoring systems, one based on periodic reports presented by the State Parties in the implementation and progress made respective of each Convention and a complaint mechanism of general application, both of which are compliant to the ILO Constitution.[171] Because of the particular connection between the EU and the CoE, however, the following discussion centres in the ESC and the ECHR.

3.4.2.3 Social security in the ESC

Mostly, Article 34 CFREU draws upon the ESC, particularly, on Article 12 ESC, which encompasses a fourfold obligation for contracting states that aims at ensuring an effective right to social security. According to these obligations, states must establish or maintain a social security system (paragraph 1) that maintains at least the level required by the ILO Convention 102 (paragraph 2), to progressively raise the level of the social security system (paragraph 3) and to take steps to ensure: a) equal treatment between nationals of other State parties in terms of social security rights including the retention of social security benefits in case of migration of persons between the state parties and b) the granting, maintenance and resumption of social security right via accumulation of insurance under the legislation to each party to the ESC (paragraph 4).

The ECSR has further developed the obligations under Article 12 ESC. According to the ECSR, Article 12 ESC does not impose a specific system of social security that parties must adopt but rather it creates an obligation for States to progressively establish (and maintain) an adequate level of social security. In this regard, the ECSR has further developed what is to be understood under these obligations. Firstly, every contracting party should cover every

169 C102 - Social Security (Minimum Standards) Convention, [1952] (No. 102).

170 C118 - Equality of Treatment (Social Security) Convention [1962] (No. 118) Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (Entry into force: 25 Apr 1964); C130 - Medical Care and Sickness Benefits Convention [1969] (No. 130) Convention concerning Medical Care and Sickness Benefits (Entry into force: 27 May 1972); C157 - Maintenance of Social Security Rights Convention [1982] (No. 157) Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security (Entry into force: 11 Sep 1986). C183 - Maternity Protection Convention, 2000 (No. 183) Convention concerning the revision of the Maternity Protection Convention (Revised), [1952].

171 WHITE, *supra* n 165, 24; VAN LANGENDONCK, 'The meaning of the right to social security' (2008) *Doutrina Estrangeira* 2(2), 13–21; VERSCHUEREN, 'Het recht of sociale zekerheid al seen grondrecht. Een overzicht van het internationale en nationale juridische kader' in VAN REGENMORTEL and VERSCHUEREN (eds.), *Grondrechten en sociale zekerheid* (Brugge: die Keure/La Charte, 2016), 11–14.

branch of social security corresponding to the ILO Convention 102—medical care, sickness, unemployment, old-age, occupational injuries, family benefits, maternity, invalidity and survivor's benefits.[172] Secondly, such social security systems must be collectively financed and shall ensure that minimum benefits are higher than the poverty line, therefore, enabling individuals to maintain a decent standard of living.[173] Thirdly, the conditions for entitlement must be reasonable and the loss of income must be addressed in a timely manner. Fourthly, in order to comply with the ESC, social security schemes must cover a majority of the employees with at least basic benefits, health care as well as family benefits. Lastly, state parties must provide for an appeal body before an independent authority and ultimately before the judiciary.[174] The latter is essential in providing a remedy for social security, as Article 34(1) CFREU, has a limited justiciability. In this vein, Member States are deemed to have appellative and review procedures, in line with the requirements under Article 47 CFREU, which offer the possibility to challenge adverse decisions.[175]

As for the level of benefits that must be provided, a replacement income must amount to at least 40% to the previous income, as long as this percentage reaches 50% of the average national median income. If any income were to fall below 50% of the median equivalised income calculated on the basis of the at-risk-of-poverty (AROP) threshold, the state party in question would be in breach of the ESC.[176] Where an income replacement is between 40% and 50%, however, the ECSR will also take into account supplementary benefits such as social assistance.[177] There seems to be a mismatch with regard to this percentage, as the ECSR sets the level of benefits below the AROP threshold which, and as seen above, lies on 60% of the median equivalised income.[178] In this regard, it seems that the ECSR finds a breach only when the social security benefit is 'manifestly' inadequate, which is equivalent to 40% (or 50% when no other benefit can be accounted for).[179]

Social security rights as guaranteed by the ESC, despite what the wording of Article 12(3) ESC may suggest, can be restricted.[180] In this scenario it is important to distinguish between restricting measures for the purpose of dismantling the social security systems and arrangements aiming at preserving such

172 ECSR, 'Conclusions XIII-4, statement of interpretation on Article 12' (1906), 36.

173 ECSR, 'Conclusions 2006, Bulgaria', 118; ECSR, 'Conclusions 2006, Estonia', 107.

174 See for a detailed overview: ECSR, 'Digest of the case-law of the European Committee of Social Rights' (2018), 137–142.

175 White, *supra* n 165, 24.

176 ECSR, *IKA-ETAM v. Greece*, Collective Complaint No. 76/2012, §74; ECSR, 'Conclusions 2009, Ireland', 'Conclusions 2009, France' and 'Conclusions 2009, Finland'.

177 ECSR, *Finnish Society of Social Rights v. Finland*, Complaint No. 88/2012, 9 September 2014, §63; ECSR, 'Conclusions 2013, Hungary'.

178 See in this regard also Chapter 1 and the official website of Eurostat.

179 *Finnish Society*, *supra* n 177, §64.

180 ECSR, 'Conclusions XIV-1' (2002), 46.

systems.[181] Accordingly, contracting parties are not allowed to reduce their social security systems to a system of solely social assistance under the ESC, and must maintain a basic and compulsory social security system.[182] When a measure aims at preserving a social security system, however, it may only be justified as a legitimate aim to restrict Article 12 ESC as long as it is proportionate.[183] Importantly, in the proportionality test conducted by the ECSR, the effect of a restricting measure on different vulnerable groups of the society needs to be considered.

In principle, Article 34 CFREU could 'learn' from Article 12 ESC and provide a protection-centred approach to the right to social security under EU law according to which Article 34(1) CFREU would entail a duty to protect the existing social security rights. As such, Article 34(1) CFREU would prevent Member States and EU institutions from adopting measures that would significantly deteriorate or abolish existing systems of social security.[184] For now, however, it does not seem that Article 34 CFREU has been developing in this line, nor has the ECSR been acceptant of a number of EU interventions that have affected the rights as enshrined in the ESC. In fact, as anticipated above, the ECSR has, on a number of occasions, manifested its discontent with EU involvement in national social protection, which has occasionally breached the ESC.[185] Most notably, in the five collective complaints against Greece's pension reforms (No. 76–80/2012), the ECSR found that while the reforms did not by themselves breach Article 12 ESC, the cumulative effect of all the reforms entailed a significant degradation of the standard of living of pensioners. It also found that the Greek government had not conducted the necessary research to assess the full effect of the reform package, particularly on vulnerable groups such as pensioners.[186] These cases made clear that the social protection floor as provided by the ESC, national constitutions and other international instruments, cannot be eliminated by a State party regardless of

181 See *inter alia*: ECSR, 'Conclusions XIII-4', 139; ECSR, 'Conclusions XIV-1', 48; ECSR, *Sindicato dos Magistrados do Ministerio Publico v. Portugal*, Collective Complaint No. 43/2007, §42.

182 See *inter alia*: ECSR, 'Armenia, Conclusions 2013', 12; ECSR, 'Georgia, Conclusions 2013', 14; ECSR, 'Moldova, Conclusions 2013', 28; ECSR, 'Georgia, Conclusions 2013', 14.

183 See *inter alia*: ECSR, 'Conclusions 2009', 615; ECSR, 'Conclusions 2013', 29; ECSR, 'Austria, Conclusions XV-1' (1998), 44; ECSR, 'Luxemburg, Conclusions XV-1', 63.

184 Peers and Prechal, 'Scope of interpretation of rights and principles' in Peers et al. *supra* n 20, 1455–1508.

185 *LO and TCO v. Sweden*, *supra* n 76. See in detail: Rocca, 'A clash of kings. The European Committee of social rights on the "Lex Laval" … and on the EU framework for the posting of workers'(2013) *EJSL* 3 (2013), 217–232.

186 *IKA-ETAM*, *supra* n 176; ECSR, *POPS v. Greece*, Collective Complaint No. 77/2012; ECSR, *I.S.A.P. v. Greece*, Collective Complaint No. 78/2012; ECSR, *POS-DEI v. Greece*, Collective Complaint No. 79/2012; ECSR, *ATE v. Greece*, Collective Complaint No. 80/2012. Salomon, 'Of austerity, human rights and international institutions' (2015) *LSE* Working Paper; De Becker, *supra* n 168.

whether a State at issue is 'forced' to take such measures in order to comply with the MoU.[187] These cases, as well as others at the national level,[188] show that not only does EU law not extensively protect (in as far as it is justiciable) the right to social security but, what is more worrisome, that Member States enter into conflict when the implementing legislation is challenged. Even if there is a presumption of compliance, these situations put Member States in a conflictive position that is moreover disruptive of the international rule of law. Moreover, since the EU is not bound by the ESC, the ECSR cannot review the decisions taken by the EU in the context of economic governance.

3.4.2.4 Social security in the ECHR

While Article 34 CFREU does not draw upon the ECHR, unlike the ESC, the CFREU specifically refers to the ECHR in its non-regression clause and Article 6(3) TEU, importantly, establishes that fundamental rights as enshrined in the ECHR shall constitute general principles of EU law. As such, EU law is bound to the rights discussed in this section.

The ECHR does not contain a specific right to social security or social protection, however, applicants before the ECtHR have successfully invoked the right to property enshrined in Article 1 of Protocol 1, often combined with Article 14 ECHR on the prohibition of discrimination, to bring matters related to social protection before the Court. Even though the older case-law the ECtHR only recognised a right to property when there was a direct link between the level of contributions paid and the benefits awarded,[189] later on, the Court extended its scope to non-contributory benefits to constitute property.[190] Most notably, in *Stec v. UK* the ECtHR acknowledged the wide range of social security entitlements that are financed in a variety of manners and decided that both contributory benefits and non-contributory benefits paid through general taxation fall within the ambit of the right to property under

187 *IKA-ETAM*, *supra* n 176; §78.

188 See for an overview of the Greek case: Psychogiopoulou, 'Welfare rights in crisis in Greece: the role of fundamental rights challenges' (2014) *EJSL* 1, 12–24; de Becker, 'The constraints of fundamental social rights on EU economic monitoring: collective complaints no. 76-80/2012, IKA-ETAM, Panhellenic Federation of Public Service Pensioners, ISAP, POS-DEI, ATE v. Greece' (2014) *EJSS* 17(1), 123–134.

189 ECtHR, *Müller v. Austria*, App. No. 5819/72, ECLI:CE:ECHR:1974:1216DEC000584972, 49; ECtHR, *G. v. Austria*, App. No. 10094/82, ECLI:CE:ECHR:1984:0514DEC001009482, 86; ECtHR, *F.P.J.M. Kleine Staarman v. the Netherlands*, App. No. 10503/83, ECLI:CE:ECHR:1985:0516DEC001050383, 166.

190 ECtHR, *Bucheň v. the Czech Republic*, App. No. 36541/97, ECLI:CE:ECHR:2002:1126JUD003654197, §46; ECtHR, *Koua v. France*, App. No. 40892/98, ECLI:CE:ECHR:2003:0930JUD004089298, §37.

the ECtHR.[191] Deciding otherwise would have excluded individuals in certain welfare states where contributions to social security are not paid directly by contributions.[192] This protection, however, only applies for existing 'possessions', and as such, States are not required to grant social security benefits that are not already in place.[193] Yet, when read in conjunction to Article 14 ECHR, Article 1 of Protocol 1 may preclude social authorities from refusing benefits (including *inter alia* unemployment, pensions and housing)[194] where they exist, on grounds of sex, marital status or nationality.[195]

The ECtHR has further held that contracting parties may limit the right to property but that in doing so limitations must comply with national legislation, pursue a legitimate interest and respect the principle of proportionality.[196] This limitation shall not constitute an excessive burden on an individual.[197] Importantly, in *N.K.M. v. Hungary* the ECtHR referred to Article 34 CFREU in a case concerning a Hungarian national who had been taxed excessively on her statutory entitlement corresponding to an unused leave of absence after being dismissed. The Court reflected on Article 34 CFREU in the proportionality test as means to support the argument of such high taxation being a disproportionate burden on the individual by holding that 'the aim pursued by severance—helping dismissed employees find new employment—belongs within legitimate employment policy goals'.[198] This interpretation has consequently been reiterated in similar cases.[199] In more recent cases, the ECtHR held that when conducting such proportionality test, whether the applicant

191 ECtHR, *Stec v. the UK*, App. No. 65731/01and 65900/01, ECLI:CE:ECHR:2006:0412JUD006573101, §51–54.

192 Note that because of this interpretation the right to social security under the ECHR has also dealt with benefits of social assistance.

193 ECtHR, *Sukhanov v. Ukraine*, App. No(s). 68385/10 and 71378/10, ECLI:CE:ECHR:2014:0626JUD006838510, §36; ECtHR, *Kolesnyk and Others v. Ukraine*, App. No(s). 57116/10,78847/10 and 10642/11, ECLI:CE:ECHR:2014:0603DEC005711610; §89–91.

194 ECtHR, *Sali v. Sweden*, App. No. 67070/01, ECLI:CE:ECHR:2006:1010JUD006707001; ECtHR, *Goudswaard-Van Der Lans v. the Netherlands*, App. No. 75255/01, ECLI:CE:ECHR:2005:0922DEC007525501.

195 ECtHR, *Willis v. the United Kingdom*, App. No. 36042/97, ECLI:CE:ECHR:2002:0611JUD003604297; ECtHR, *Wessels-Bergervoet v. the Netherlands*, App. No. 34462/97, ECLI:CE:ECHR:2002:0604JUD003446297; *Koua, supra* n 190. See for more on this: Tulkens, 'La Convention européenne des droits de l'homme et la crise économique. La question de la pauvreté' (2013) *Journal européen des droits de l'homme* 1, 13–14; Lavrysen, 'Strengthening the protection of human rights of persons living in poverty under the ECHR' (2016) *NQHR* 33(3), 300–301; White, *supra* n 165, 931–932.

196 See overview of cases in the context of austerity measures: ECtHR, 'Factsheet—austerity measures' (2018) Press unit.

197 ECtHR, *N.K.M. v. Hungary*, App. No. 66529/11, ECLI:CE:ECHR:2013:0514JUD006652911.

198 *Ibid*., §70.

199 ECtHR, *Gáll v. Hungary*, App. No. 49570/11,ECLI:CE:ECHR:2013:0625JUD004957011, §69; ECtHR, *R.Sz v. Hungary*, App. No. 41838/11, ECLI:CE:ECHR:2013:0702JUD004183811, §59.

received a subsistence minimum ought to be considered, even when the conditions for entitlement of such benefit have not been met.[200] To some extent, the requirements of the ECtHR regarding the application of Article 1 Protocol 1, are similar to those developed by the ECSR under Article 12 ESC, in that both provisions require that changes in social security systems are justified and proportionate paying due regard to the already existing level of protection and the particular situation of claimants.[201] This case-law exhibits a clear trend towards protecting claimants' minimum subsistence benefits through an increasingly social interpretation of the right to property under the ECtHR, which has drawn positive obligations from this right in order to favour the poor.[202]

At this point, it is necessary to discuss Article 14 ECHR, since it has provided protection from discrimination to those at risk of poverty. Even though this provision does not have an independent existence and it needs to be invoked with other provisions under the ECHR—as is the case for many cases discussed previously—it may in some situations have an independent impact. For those people living at risk of poverty and social exclusion, this provision has mostly been invoked in the context of social benefits in combination with Article 1 Protocol 1, but also in conjunction to Article 8 ECHR on the right to respect for private and family life.[203] Under Article 14 ECHR, different treatment requires an objective and reasonable justification, meaning that it must pursue a legitimate aim and that there must be a proportionality between the measure that is being employed and the aim sought.[204] Article 14 ECHR forbids discrimination on grounds of sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. As such, the grounds of discrimination, are broader than those explicitly recognised under EU law. Importantly, in *Gaygusuz*, the applicant invoked Article 14 ECHR in a case concerning emergency assistance. The applicant had been denied such a service on the basis that he did not have an Austrian nationality.[205] The Court stressed that such different treatment would only be justified by very weighty reasons, and while

200 ECtHR, *Béláné Nagy v. Hungary*, App. No. 53080/13; ECLI:CE:ECHR:2016:1213 JUD005308013; ECtHR, *Baczùr v. Hungary*, App. No. 8263/15, *Čakarević v. Croatia*, App. No. 48921/13, ECLI:CE:ECHR:2018:0426JUD004892113.

201 De Becker, *supra* n 168, 300.

202 For an extensive discussion on this trend and the possibilities to protect the right to social security under Article 1 Protocol 1 ECHR see: Leijten, 'The right to minimum subsistence and property protection under the ECHR: never the twain shall meet?' (2019) *EJSS* 21(4), 307–325. More generally on the potential role of the ECHR, Kagiaros, 'Austerity measures at the European court of human rights: can the court establish a minimum of welfare provisions' (2019) *EPL* 25(4), 535–558.

203 Lavrysen, *supra* n 195, 302–303.

204 *Koua*, *supra* n 190.

205 ECtHR, *Gaygusuz v. Austria*, App. No. 17371/90, ECLI:CE:ECHR:1996:0916JUD001737190.

the Austrian government claimed its special responsibility to protect their own nationals, the Court did not accept the argument.[206]

From a more procedural point of view, but equally relevant to the objective of fighting poverty and social exclusion, some claims have been successful in requiring States to provide free legal aid under the right to access to justice (Article 6 ECHR). [207]

> Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a vicious cycle of impunity, deprivation and exclusion. The inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems.[208]

Considering the often-limited enforceability of social rights and the increased vulnerability of the poor to violations of their rights, an effective right to remedy is likewise essential to combat poverty and social exclusion. This is similar to the right to effective remedy, including legal aid, under Article 47(3) CFREU.

What is also interesting to discuss, regarding the ECHR, is how the Court has been balancing opposing fundamental rights. In cases of conflicting fundamental rights, ECtHR usually uses the 'margin of appreciation test' that follows three different steps. First, as is the case for the CFREU, any restriction to fundamental rights must be prescribed by law. Second, the objective of such a restriction must go in accordance with the legitimate aim enshrined in the article, and lastly, the restriction must be necessary in a democratic society.[209] Similar to how the CJEU did in *Dynamic Medienand* and *Sayn-Wittgenstein*,[210]

206 Ataç, '*Gaygusuz v. Austria*: advancing the rights of non-citizens through litigation' (2017) *AJPS* 46(1), 21–31; Świątkowski and Wujczyk, *supra* n 75, 20–23.

207 See in this regard: ECtHR, *Airey v. Ireland*, App. No. 6289/73, ECLI:CE:ECHR:1981:0206 JUD000628973; ECtHR, *Mehmet and Suna Yiğit v. Turkey*, App. No. 57658/99, ECLI:CE:EC HR:2007:0717JUD005265899; ECtHR, *Stankov v. Bulgaria*, App. No. 29331/95 and 29225/95, ECLI:CE:ECHR:2001:1002JUD002922195; See more on access to justice and poverty: Brems, 'Procedural protection: an examination of procedural safeguards read into substantive convention rights' in Brems and Gerards (eds.), *Shaping Rights in the ECHR— The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: CUP, 2013); 137 ff.; Tulkens, *supra* n 195, 12–13.

208 Sepúlveda Camona and Donald, 'Access to justice for persons living in poverty: a human rights approach' (2014).

209 ECtHR, *Chassagnou and Others v. France*, App. No. 25088/94, 28331/95 and 28443/95, ECLI:C E:ECHR:1999:0429JUD002508894, §113.

210 C-244/06 — *Dynamic Medien*, ECLI:EU:C:2008:85; ECtHR, C-208/09 — *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

the ECtHR is known for leaving a wide margin of appreciation for States with regard to which national restrictions on fundamental rights are allowed, therefore, favouring local values to a great extent in the interplay between universalism and particularism of human rights.[211] However, as we have seen, under certain cases where a national measure would put an excessive burden on individuals, this margin of appreciation may be limited.[212] For example, in cases of discrimination on grounds of nationality, restrictions can only be justified by 'very weighty reasons'.[213]

Although the ECtHR has increasingly interpreted a number of provisions towards protecting claimant's right to minimum subsistence, particularly for those more vulnerable, from the above, it cannot be concluded that there is a Convention-based 'social minimum' that entitles individuals to a certain degree of welfare protection. Rather, this interpretation has allowed the possibility of requiring State parties to extensively assess matters of substantive equality when imposing measures affecting the right to social protection of individuals. On this note, the case-law of the ECtHR lightens the burden of such measures on those who are more affected, often at risk of poverty. Instead of reviewing whether applicants have the right to a minimum subsistence, what the ECtHR reviews in these cases is the procedural obligation of States to take the adequate steps to ensure that (austerity) measures are, in as far as possible, distributed fairly.[214] This procedural requirement should feed into EU law through general principles. This would ensure a more balanced redistribution of austerity measures in the future that not only requires an objective justification to limit social security, such as fiscal consolidation in the EU as it was the case in *Sotiropoulou*, but also that the measures imposed to attain such an objective do not pose an excessive and discriminatory burden upon certain (more vulnerable) individuals. This is perhaps with the exception of discrimination cases, where the protection of the ECHR, as seen above, seems stricter and not only procedural.

211 Sweeney, 'A 'margin of appreciation' in the internal market: lessons from the European Court of Human Rights' (2007) *Legal Issues of Economic Integration* 34(1), 27–52; Gerards, 'Pluralism, defence and the margin of appreciation doctrine' (2011) *ELJ* 17(1), 80–120.

212 Wolfgang, 'Human rights in the EU: rethinking the role of the European convention on human rights after Lisbon' (2011) *EuConst* 7(1), 64–95; O'Gorman, 'The ECHR, the EU and the weakness of social rights protection at the European level' (2011) *GLJ* 12(10), 1834–1861.

213 *Gaygusuz*, *supra* n 205, §42.

214 Kagiaros, 'Austerity measures at the European court of human rights: can the court establish a minimum of welfare provisions' (2019) *EPL* 25(4), 535–558. See how the ECtHR requires such measures to be quite disproportionate to find a breach: ECtHR, *Šeiko v. Lithuania*, App. No. 82968/17; ECLI:CE:ECHR:2020:0211JUD008296817, §34.

3.4.3 The right to social assistance

Although often seen as part of a more general right to social protection, a separate right to social assistance also exists separate from social security, which is recognised under international, European and national law. However, drawing the line between the two is not an easy task.[215] There is no doubt that Article 34 CFREU goes beyond social security and extends to social assistance in general and housing assistance, in particular, while health related social security entitlements are left to Article 35 CFREU. As for other benefits, social assistance is markedly universal while social security tends to be on the basis of contributions. Even in EU law, however, there are a number of benefits that share common features also known as 'mixed benefits' of special non-contributory benefits.[216] What follows aims at bringing some clarity to the right of social assistance.

3.4.3.1 Social assistance in EU law

Article 34 CFREU recognises the right to social and housing assistance as a separate right from social security in its third paragraph:

> In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

According to the explanations of the CFREU, the last part of the provision draws on Article 13 of the ESC and Article 30 and 31 of the Revised Social Charter, which are discussed below, as well as on point 10 of the Community Charter which envisages the right of persons who have been unable to enter or re-enter the labour market and have no means of subsistence to receive sufficient resources. The explanations further envisage the respect for policies based on Article 153 TFEU. The fact that this provision directly addresses the issue of combating poverty and social exclusion, seems to emphasise the commitment

215 White, *supra* n 165, 934. See for example: 'A benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71' now Article 3 of Regulation 883/2004: Sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. C-215/99— *Jauch*, ECLI:EU:C:2001:139, §25. This case refers at the same time to previous case-law (see §25).

216 In this case AG Kokott refers to C-78/91— *Hughes v. Chief Adjudication Officer*, ECLI:EU:C:1992:331, §15; C-160/02— *Skalka*, ECLI:EU:C:2003:636, §50–56.

of the EU to the social objective as stated in Article 3(3) TEU, and Articles 9 and 153 TFEU, which are discussed in the following chapter.

Similar to the right to social security, the EPSR too associates a number of separate rights to Article 34(3) CFREU, namely, the right to social protection (principle 12) - which embraces both notions of social security and social assistance-,[217] the right to minimum income (principle 14) - which appears to recognise social assistance as being part of minimum income and recognises for the first time the self-standing right to minimum income-, and the right to housing (principle 19). This goes beyond the CFREU by guaranteeing not only the right to housing assistance but also access to social housing including, *inter alia*, housing benefits, income support, rental disabilities and tax reductions.[218]

Only once has Article 34(3) CFREU been invoked successfully before the CJEU. This was in *Kamberaj*, a case concerning the entitlements to housing assistance of a legally residing long-term third-country national. The question was whether third-country nationals could rely on the right social assistance under the CFREU in order to claim equal treatment with EU nationals. The dispute concerned an Albanian national who had been residing long-term in Italy and had recently been declined housing benefits on the basis that the Italian regional government claimed that the funds to provide housing benefits for third-country nationals were exhausted. Mr. Kamberaj complained that this breached his right to equal treatment under Article 11 of Directive 2003/109 since the basis to calculate the amount available for EU citizens and third-country nationals was different.[219] While under this Directive Member States are allowed to limit equal treatment with regard to social assistance and social protection, 'core benefits' would have to be protected at all times. The Court then was left to decide whether the benefits at stake were to be considered 'core'.

The Court stressed that when defining the national social security and social assistance measures, Member States are subject to the principle of equal treatment under Article 11(1)(d) Directive 2003/109 and to comply with the principles and the rights enshrined in the CFREU.[220] The Court noted that 'core benefits' as defined by the Directive shall cover at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term

217 However, the recommendation that has drawn upon this principle only refers to classic social security rights COM(2018) 132 final and SWD (2018) 70 final, *supra* n 101.

218 For more on this principle see: Aranguiz, 'What future for housing rights? The potential of the European pillar of social rights' (2017) *Housing Rights Watch*, available at: http://www.housingrightswatch.org/content/what-future-housing-rights-potential-european-pillar-social-rights

219 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 016.

220 *Kamberaj*, *supra* n 26, §90–92.

care.[221] Despite housing not being among the listed 'core benefits' the CJEU stressed that this was not an exhaustive list and that housing assistance must be considered as tackling basic needs. Further, the Court established that the EU recognises the right to social and housing assistance to ensure a 'decent' existence for those lacking sufficient resources and gave a strong steer to the referring court by stating the following:

> in so far as the benefit in question in the main proceedings fulfils the purpose set out in [Article 34(3) CFREU], it cannot be considered, under European Union law, as not being part of core benefits.[222]

It follows from this case that those benefits that have the objective of combating poverty and social exclusion for those lacking sufficient resources to cover their basic needs, are to be considered 'core benefits'. Core benefits, in turn, are deemed to respond to basic needs such as food, accommodation and health.[223] This was also the reasoning of Bot who stressed that:

> Article 34(3) of the Charter, in so far as it expressly refers to 'housing assistance' as intended to 'ensure a decent existence for all those who lack sufficient resources', '[i]n order to combat social exclusion and poverty', is to be interpreted as favouring the inclusion of housing assistance such as that at issue in the main proceedings in the concept of 'core benefits.[224]

Kamberaj proved that even though the provision has a soft wording that resembles more a principle than a right, Article 34(3) CFREU still provides a compelling guide of interpretation for EU legislation.[225] Only in one other case did the CJEU receive a question regarding Article 34(3) CFREU, which concerned a Spanish national who had lost his house to a bank consequent to not complying with the payments of the mortgage. Although in this case the CJEU did not see necessary to rule on its interpretation, it did clarify that the provision does not enshrine the right to housing, but instead the right to housing assistance.

Because the implementing act (*in casu* Directive 2003/109) made specific reference to 'respecting the rights and observing the principles', the case did not clarify whether Article 34(3) CFREU represents a right or a principle. In any case, however, the Court interpreted the Directive in light of Article 34(3) CFREU even though the Directive vaguely referred to the CFREU, where

221 *Ibid.*, §87.
222 *Ibid.*, §92.
223 *Ibid.*
224 Opinion AG Bot, C-571/10 *Kamberaj*, ECLI:EU:C:2011:827, §95.
225 White, *supra* n 165, 940.

in *Glatzel,* by contrast, the Court required the objective of the legislative act (Directive 2006/126) to implement the principle of the CFREU.[226] While there was a clear difference in the approaches taken by the CJEU when interpreting 34(3) CFREU and Article 26 CFREU (in *Glatzel*), this alone cannot be used to conclude that Article 34(3) enshrined a right and not a principle. As such, whether this provision could be enforceable where there is not an implementing act, remains to be seen in future case-law. For now, it is important to note that Article 34(3) CFREU might be invoked in EU instruments that regulate to some extent welfare rights, such as free movement or migration instruments.[227]

3.4.3.2 The right to social assistance in international instruments

Within a broader notion of the right to a standard of living that is adequate to the health and well-being of individuals, Article 25 UDHR recognises the right to food, clothing, housing and medical care and necessary social services. The right to an adequate standard of living is also recognised under Article 38 of the UN Convention on the Rights of the Persons with Disabilities, ratified by all the Member States, and includes, *inter alia,* food, clothing and housing and to the continuous improvement of living conditions.[228] Further, the CESCR has interpreted Article 9 ICESCR on the right to social security as enshrining an obligation for States to work towards a social assistance system,[229] which was brought up in the complaint procedure in *Maria Cecilia Trujillo Calero v. Equador* where the CESCR stressed that States should provide non-contributory old-age benefits, social services and social assistance for older people.[230] The ILO does not have an instrument on social assistance, but its Recommendation No. 202 on national floors of social protection does refer to social assistance in relation to a basic income to allow a life in dignity (Article 8(b)) and to include universal benefit schemes (Article 9(3)).[231] The importance of social assistance as an anti-poverty measure was further brought to the attention in the recent general survey of the Recommendation.[232] The following

226 *Glatzel*, *supra* n 27, §75.

227 Aranguiz, *The Role of EU Law in Contributing to the Policy Objective to Fight Poverty and Social Exclusion* (2020) Doctoral Thesis, University of Antwerp, Chapter 5.

228 Convention on the Rights of Persons with Disabilities [2007].

229 CESCR, 'General comment no.19- right to social security (Art. 9)' (2008), §50.

230 CESCR, *Maria Cecilia Trujillo Calero v. Equador,* Case 10/2015, Consideration §14.1 and §14.2.

231 ILO, R202— Social Protection Floors Recommendation, 2012 (No. 202). See more on this recommendation: Dijkhoff, 'The ILO social protection floors recommendation and its relevance in the European context' (2019) *EJSS* 21(4), 351–369.

232 ILO, 'General survey concerning the social protection floors recommendation, 2012 (No. 202)' (2019), §217.

sections, however, focus on social assistance as interpreted by the ECSR and the ECtHR.

3.4.3.3 Social assistance in the ESC

Article 13 ESC enshrines the right to social and medical assistance and provides that any person who lacks adequate resources (including social security entitlements) should be granted adequate assistance and care when needed (paragraph 1) and that receiving such an assistance shall not result in diminishing a person's political and social rights (paragraph 2). Article 13 ESC includes, moreover, an obligation to provide appropriate services such as advice and personal help as may be required to prevent, remove or alleviate personal or family want (paragraph 3). Lastly, the ESC requires equal treatment between nationals of other State parties that legally reside in their territory in compliance with their obligations under the European Convention on Social and Medical Assistance.[233]

Article 13 ESC enshrines a right to social assistance that breaks from the moral duty of charity and recognises the obligation of contracting States to provide social assistance.[234] This provision, moreover, emphasises that in social assistance schemes, different from social security, need is the main eligibility criteria regardless of having an affiliation to a social security scheme, payments or professional status.[235] With regard to the dichotomy, the ECSR recognizes, however, that state parties may have different consideration as to whether a benefit is seen as social security or social assistance.[236]

As far as the conditions for entitlement are concerned, the ECSR has claimed that a social assistance system must be universal and payable to any individual on the mere ground that this person is in need.[237] This statement, nonetheless, does not exclude that specific benefits are directed to a particular group of people or acquirable under a certain age as long as every individual in need is entitled to an appropriate level of assistance.[238] Further, social assistance benefits might be subject to the willingness to be in employment or to receive vocational training as long as this is done in a reasonable manner and in accordance with a legitimate aim. Moreover, reducing or suspending a social assistance benefit must be done in conformity with the ESC and in a way that

233 European Convention on Social and Medical Assistance [1953].

234 ECSR, 'Conclusions I, statement of interpretation on Article 13§1' (1969), 65–67.

235 ECSR, *Finish Society for Social Rights v. Finland*, Complaint No. 88/2013, §110. ECSR, 'Conclusions XIII-4, statement of interpretation on Articles 12 and 13' (1996), 34–36.

236 ECSR, *supra* n 174.

237 ECSR, *ERRC v. Bulgaria*, Complaint No. 48/2008, §38.

238 ECSR, 'Conclusions 2009, France'; ECSR, 'Conclusions X-2, Spain' (1990), 121; ECSR, 'Conclusions XIII-4, statement of interpretation on Article 13'(1996), 54–57.

does not deprive the beneficiary of minimum means of subsistence.[239] Same as for the social security rights, and in relation to the right to access to justice, the right to social assistance may not depend only on administrative authorities but individuals should have a right to appeal.[240]

Under Article 13 ESC, there is an obligation to provide adequate assistance to a level that ensures a decent life and meets the basic needs of an individual.[241] According to the ECSR, basic needs will be understood to be covered when the level of assistance provided—basic benefits, additional benefits altogether—is not manifestly below the at-risk-of-poverty threshold.[242] Just as with social security benefits, social assistance is also considered to be 'manifestly' below the poverty line when a benefit does not reach 50% of the median equivalised income that is calculated on the basis of the AROP threshold.

Article 13 ESC does not enshrine a specific form of social assistance. Instead, it provides criteria to ensure an adequate social assistance system that offers sufficient protection for those in need. As far as the length of the social assistance benefits is concerned, the benefits should be provided as long as the need persists, at times subject to participation in training or employment as mentioned above.[243] Whereas the ECSR has not explicitly mentioned an obligation to adopt an income guarantee system, it has held that every state without one is non-compliant with Article 13 ESC.[244]

Even though the ECSR allows for a requirement of minimum periods of residence to apply equal treatment, emergency assistance should be provided to all as it is intended to provide relief in an emergency situation.[245] Regarding emergency assistance, the ECSR has issued a number of authoritative rulings in favour of foreign nationals without legal residence who were denied emergency assistance.[246]

The ESC also recognises a separate right to protection against poverty and social exclusion under Article 30 ESC, which requires contracting parties to

239 ECSR, 'Conclusions 2006, Estonia', 208; ECSR, 'Conclusions 2009, Estonia'; ECSR, 'Conclusions XIII-4, statement of interpretation on Article 13' (1996), 52–55.

240 ECSR, 'Conclusions I, statement of interpretation on Article 13§1' (1969), 64.

241 ECSR, 'Conclusions XIII-4, statement of interpretation on Article 13§1'(1996), 54–57; ECSR, 'Conclusions XIV-1, Portugal' (1998), 701, 702.

242 *Finish Society Finland*, *supra* n 235;§111; ECSR, 'Conclusions 2004, Lithuania', 373; For a more in-depth study of Article 13 ESC see: DE BECKER, *Het recht op Sociale Zekerheid in de Europese Unie* (Brugge: Die Kure, 2019), 120–137.

243 ECSR, 'Conclusions XVIII-1, Spain' (1998), 745.

244 ECSR, 'Conclusions XIII-4, statement of interpretation on Article 13§1' (1996), 54–57; ECSR, 'Conclusions 2006, Moldova', 122–123.

245 ECSR, 'Conclusions XIII-4, statement of interpretation on Article 13§1' (1996), 56; ECSR, 'Conclusions 2006, Estonia'.

246 ECSR, *FIDH v. France*, Complaint No. 14/2003; ECSR, *Defence for Children International v. The Netherlands*, Complaint No. 47/2008; *FEANTSA v. the Netherlands*, *supra* n 136; ECSR, *CEC v. The Netherlands,* Complaint No. 90/2013.

undertake a coordinated approach in order to promote effective access to employment, housing, training, education, culture and medical assistance for those who are at risk of poverty and social exclusion and their families. The right to adequate housing is more specifically developed under Article 31 that enshrines a right to adequate and affordable housing and to the responsibility of contracting parties to adopt measures for a gradual elimination of homelessness. This provision, is worded in line with a human rights approach to poverty[247] where poverty is defined as deprivation because of lacking resources that arise 1) from State parties' failure to ensure the right to access to healthcare,[248] 2) from failure to provide a minimum income to persons in need 3) or to adopt a coordinated approach that promotes access to housing for people at risk of poverty.[249] According to the ECSR, this provision is strictly linked to accessing fundamental rights and adequate resources (in quantity and quality).[250] Consequently, there should be an increase in the resources being deployed to accessing social rights as long as poverty and social exclusion persist. Once again, the ECSR has relied on the AROP threshold with respect to the definition and methodologies that are to be applied at the domestic level. In this case, compliance with Article 30 ESC is measured in relative poverty terms, which is 60% of the median equivalised income (the AROP threshold).[251] The ECSR, moreover, has been clear in that following the accession to the CFREU, Member States remain bound to the rights enshrined therein, including Article 1 and 34 CFREU requiring them to take all necessary steps to its implementation during economic crises, when in fact, beneficiaries need protection the most.[252] In relation to labour rights, the ECSR also decided that it is reasonable to restrict certain items in the public spending, but these cuts should not 'destabilise' the situation of beneficiaries.[253]

3.4.3.4 Social assistance in the ECHR

The ECHR does not enshrine social rights *per se*, but as seen above, the interpretation of the ECtHR has increasingly followed a trend towards providing (at least procedural) safeguards with regard to access to welfare. While there is no provision on social assistance, other provisions than the ones that have

247 ECSR, *Defence for Children International v. The Netherlands*, Complaint No. 69/2011, §81; ECSR, *COHRE v. Italy*, Complaint No. 58/2009 §117.

248 ECSR, *DCI v. Belgium*, Complaint No. 69/2011, §100.

249 *ATD supra* n 136, §169–170.

250 ECSR, 'Statement of interpretation on Article 30'; ECSR, 'Conclusions 2003, France', 214.

251 ECSR, 'Conclusions 2005, Norway', 580; ECSR, 'Conclusions 2005, Slovenia', 674.

252 ECSR. 'General introduction to conclusions XIX-2' (2009).

253 ECSR, *GENOP-DEI and ADEDY v. Grèce*, Complaint No. 65/2011, §17. See extensively: ECSR, 'The right to be protected against poverty and social exclusion under the European Social Charter' (2014); ECSR, *supra* n 174, 221–224. DALLI, 'The content and potential of the right to social assistance in light of Article 13 of the European Social Charter' (2020) *EJSS* 22(1), 3–23.

already been discussed (Articles 3, 14 ECHR and Article 1 Protocol 1), might also give rise to certain claims for assistance. This is the case of Article 2 ECHR on the right to life and Article 8 ECHR on the right to respect private and family life.

In the case of claims brought in the premises of Article 2 ECHR, most of these have been related to healthcare in situations where an individual's life was risked through the denial to access to the healthcare system.[254] The Court has limited the obligation of States to a prohibition of denying healthcare to someone by reason of lack of financial resources only when the person's life is at risk.[255] This obligation does not include, however, a resource-demanding treatment when basic health care is available.[256]

Article 8 ECHR, differently, enshrines the right to private and family life which includes a respect for home. This provision has also proven to be useful with regard to its social implications for those in financial distress. Regarding the right to family life, the ECtHR has been clear in that in order to comply with the proportionality test, welfare authorities will have to guide individuals through the necessary steps and advise them on the possibilities to avoid taking too drastic measures. This reasoning is seen in *R.M.S. v. Spain*, a case that concerned a Spanish national who in a situation of financial distress reached out to social services. The applicant claimed a breach of the right to family life because the social authorities, taking note of the financial situation of Ms. R.M.S, had placed her daughter in a children's home. The Court agreed with the applicant and found that the Spanish authorities should have considered less drastic measures before placing the child in the children's house.[257]

Regarding the respect for a home, Article 8 ECHR does not entail a positive obligation to provide a home, neither does it enshrine a housing right *per se*, but rather it protects existing homes.[258] In this context, Article 8 ECHR has been invoked in cases of eviction, with a focus on vulnerable individuals or groups that may suffer from eviction in a disproportionate manner.[259] In *MacCann v. the UK*, the Court stressed that '[t]he loss of one's home is a

254 ECtHR, *Cyprus v. Turkey*, App. No. 25781/94,ECLI:CE:ECHR:2014:0512JUD002578194, §219.

255 ECtHR, *Nencheva v. Bulgaria*, App. No. 48609/06,ECLI:CE:ECHR:2013:0618JUD004860906, §117 ff; ECtHR, *Mehmet Şentürk and Bekir Şentürk v. Turkey*, App. No. 13423/09,ECLI:CE:ECHR:2013:0409JUD001342309, §89 and §97.

256 ECtHR, *Nitecki v. Poland*, App. No. 65653/01(decision), ECLI:CE:ECHR:2002:0321DEC006565301.

257 ECtHR, *R.M.S. v. Spain*, App. No. 18775/12, ECLI:CE:ECHR:2013:0618JUD002877512, §84–86; ECtHR, *Wallova and Walla v. the Czech Republic*, App. No. 23848/04, ECLI:CE:ECHR:2006:1026JUD002384804; ECtHR, *Zhou v. Italy*, App. No. 33773/11, ECLI:CE:ECHR:2014:0121JUD003377311.

258 ECtHR, *Chapman v. the United Kingdom*, App. No. 27238/95, ECLI:CE:ECHR:2001:0118JUD002723895, §99.

259 Lavrysen, *supra* n 195, 293–325.

most extreme form of interference with the right to respect for the home',[260] and that as such, any eviction measure would have to be reviewed under a proportionality test to comply with the ECHR. However, different from the approach taken in the aforementioned case of *Kamberaj* by the CJEU, in *Bah v. the UK*, the ECtHR did not see a violation of Article 8 ECHR (or Article 14 ECHR), when the UK refused to give priority a Turkish national for the allocation of a grant social housing, giving the UK a wide margin of appreciation because the benefit in question was predominantly socioeconomic in nature.[261] This case did not keep the ECtHR from steering in a different direction on the following judgments of *Yordanova* and *Winterstein* where the Court required contracting parties to establish sufficient procedural safeguards against eviction for individuals that would otherwise be left homeless and stressed, in addition, that under exceptional circumstances Article 8 ECHR may embody an obligation to secure shelter.[262] Tulkens argues that these judgments inevitably point towards a right to housing under the ECHR. While not being a right that is enshrined in the ECHR, she argues, it certainly represents and interest that has been part of the case-law of the ECtHR, in particular when exercising a balancing test.[263] In this vein, just as for other provisions under the ECHR, Article 8 too seems to provide (at least) a procedural obligation for Member States to conduct a balancing test when the right to respect someone's home is jeopardised.

3.4.4 The right to fair remuneration

Much has been said about the right to access to welfare, whether to contributory or non-contributory benefits. Most of these rights protect individuals in situations outside of work (whether permanently or temporarily for risks associated to work) or benefits that may be complementary to work. However, given the growing levels of in-work poverty, and the focus on active inclusion at the EU it is necessary to look at the right to fair remuneration.

The right to 'fair remuneration' is notoriously absent from the wording of Article 31(1) CFREU on fair and just working conditions. This choice

260 ECtHR, *McCann v. the United Kingdom*, App. No 18984/91, ECLI:CE:ECHR:1995:0927 JUD001898491, §50.

261 ECtHR, *Bah v. the United Kingdom*, App. No. 56328/07 ECLI:CE:ECHR:2011:0927 JUD005632807, §47.

262 ECtHR, *Yordanova*, App. No. 25446/06, ECLI:CE:ECHR:2012:0424JUD002544606, §118, §126 and §130; ECtHR, *Winterstein v. France*, App. No. 27013/07, ECLI:CE:ECHR:2013:1017 JUD002701307.

263 Tulkens, *supra* n 195, 8 ff ; See on this matter : ECtHR, *Hutten-Czapska v. Poland*, App. No. 35014/97, ECLI:CE:ECHR:2006:0619JUD003501497; ECtHR, *Almeida Ferreira and Melo Ferreira v. Portugal*, App. No. 41696/07, ECLI:CE:ECHR:2010:1221JUD0041696; ECtHR, *A.M.B. and Others v. Spain* App. No. 11842/12, ECLI:CE:ECHR:2014:0128DEC007784212.

appears to have been deliberate as the right was initially included in the list of social rights under the heading of working conditions but it was not retained later on.[264] However, an increasing number of scholars argue that Article 31(1) CFREU, whose horizontal direct applicability was recently confirmed in *Bauer*,[265] includes (or at least does not exclude) the right to fair remuneration.[266] In the context of the CFREU, Bogg has also argued that the explicit exclusion of 'pay' under Article 153(5) TFEU[267] should not limit the substantive scope of the right to fair working conditions under Article 31(1) CFREU, which in his opinion is implicitly part of 'working conditions' under the said provision.[268] In fact, according to the Court, working conditions also include 'pay'.[269] Nonetheless, when asked whether Article 31(1) CFREU protected fair remuneration in the context of austerity measures, the Court held that 'it had no jurisdiction' as the order for reference was not implementing EU law, which reads uneasily alongside *Bauer*.[270] Lörcher argues that since Member States have ratified instruments that protect the right to fair remuneration (see below), it follows from Article 53 CFREU the Article 31(1) CFREU should also include the right to a fair remuneration as well.[271]

Such interpretation is backed by the fact that the EPSR, under its chapter on fair working conditions, recognises the right to wages (principle 6) which enshrines the right to fair wages that provide a decent standard of living and it refers to Article 31(1) CFREU as part of the existing EU law in this field. This is further supported by the recent proposal of the on a directive on adequate minimum wages.[272] Much prior to any of this, the Community Charter already held that 'all employment shall be fairly remunerated' (Point 5).

The right to fair wages in the EPSR, in turn, reads quite similarly to the right of workers to a fair remuneration for a decent standard of living under

264 Draft charter of fundamental rights of the European Union [2000] Charte 4112/0/00 Rev 2 Body 4, 6.

265 *Bauer*, *supra* n 18.

266 Hunt, 'Fair and just working conditions' in Hervey and Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Oxford/Portland: Hart Publishing, 2003), 54; Lörcher, 'Article 31— Fair and just working conditions' in Dorssemont et al. (eds.), *supra* n 19, 555.

267 See on this exclusion Chapter 4 and Chapter 5.

268 Bogg, 'Art 31 fair and just working conditions' in Peers et al. (eds.), *supra* n 20, 856–857.

269 C-395/08 - *Bruno and Others*, ECLI:EU:C:2010:329, §39–40; C-307/05 - *Del Cerro Alonso*, ECLI:EU:C:2007:509, §39–46 and Opinion AG Maduro, ECLI:EU:C:2007:3 §23. This is further discussed in the next chapter.

270 C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*, ECLI:EU:C:2014:2036, §19

271 In the context of judicial independence, however, the CJEU has held that judges must receive a remuneration that goes in line with their functions. C-64/16 *Associação Sindical dos Juízes Portugueses*; ECLI:EU:C:2018:117, §45; Lörcher, *supra* n 266.

272 This principle, the initiative and its potential are further discussed in Chapter 5. C(2020) 83 final, 'First phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges related to minimum wages'.

Article 4 ESC. The ECSR has interpreted the concept of decent standard of living as covering both rudimentary necessities such as food, clothing and housing as well as necessary participation in cultural, educational and social activities.[273] In order to secure such a standard of living, wages need to at least reach a certain percentage of the national average equivalised wage, mostly between 50-60%.[274] To be considered 'fair' in light of the ESC, the net value of the minimum wage provided by the statutory rule or collective agreement is compared to the net average wage.[275] Where the wage lies between 50% and 60%, it is up to the Member State to prove that such a wage is sufficient to ensure a decent standard of living.[276] However, any less than 50% would be considered 'unfair'.[277]

Other instruments of international law too protect fair remuneration or wages. Article 23(3) UDHR, for one, enshrines the 'right to just and favourable remuneration' that ensures a life of dignity. Article 7 ICESCR, differently, envisages the right to fair wages and the principle of equal pay for equal work. The ILO as well refers to wages in a number of instruments, to which most Member States are party, including Convention No. 131 on Minimum Wage Fixing, requiring Member States to set a system of minimum wage fixing that has the force of law or to the older Convention No. 26 on Minimum Wage Fixing Machinery with a narrower scope.[278] Moreover, in 2019 both the EU institutions and Member States declared that all workers should enjoy an adequate minimum wage whether it is statutory or negotiated.[279]

3.4.5 Intermediate conclusions

As far as substantive rights go, there are a number of rights enshrined in a variety of instruments that relate to the objective of fighting poverty and social exclusion including, *inter alia*, the right to human dignity, the right to social security, the right to social assistance and the right to a fair remuneration.

However, the different provisions examined in this chapter provide a very different protective content. As regards Article 34 CFREU, beyond its implications for equal treatment and social security coordination, it has served to cover

273 ECSR, 'Statement of interpretation on Article 4§1' (2010).

274 See ECSR, Conclusions XIV-2, statement of interpretation on Article 4§1' (1998), 50–52; ECSR *GENOP-DEI and ADEDY v. Greece*, Complaint No. 66/201, §57.

275 ECSR, 'Conclusions XVI-2 -Denmark- Article 4-1' (1997).

276 ECSR. 'Conclusions 2003— France- Article 4-1' (2003).

277 CoE, 'The European committee of social right's conclusions 2018/ protection of worker's rights in Europe: shortcomings found, but also positive development in certain areas' (2019); ECSR, *supra* n 174, 85–86; *GENOP-DEI and ADEDY, supra* n 274,§60–70.

278 ILO C131—Minimum wage fixing convention [1970] (No. 131); ILO, C026—Minimum wage-fixing machinery convention [1928] No. 26.

279 ILO centenary declaration for the future of work adopted by the conference at its 108th session, 21 June 2019.

the most basic needs, namely, food, accommodation and health. Most often this has been associated with the international obligation to offer international protection and to provide a 'dignified' standard of living for applicants of international protection in rather extreme circumstances. In *Kamberaj*, differently, the Court read the right to housing assistance in the CFREU as representing a 'core benefit' which consequently, precludes the Member States from limiting the right to equal treatment for long-term third-country nationals. Some have argued, that if Article 34 CFREU is to be interpreted in light of Articles 12 and 13 ESC, it should act at the very least in the form of a safeguard against the deterioration of social security and social assistance rights.[280] Following this interpretation, Article 34 CFREU would entail a duty to protect existing social security rights, therefore complying with article 51(2) CFREU. However, *Sotiropoulou* exemplifies not only that Member States might limit these rights, but also that they might do so by using the justification of fiscal consolidation in the Eurozone, without so much as a conclusive proportionality test to substantiate such limitation.

What might be concluded, alternatively, is that fundamental rights in EU law provide a judicial safeguard not to limit social security and assistance rights beyond these 'core' benefits, which are the very minimum necessary to comply with the absolute right to human dignity. Arguably, this would represent the essence of Article 34 CFREU, that if violated would breach the right to human dignity. Where (core) benefits have been protected under EU law, however, there was an implementing legislative act (even if 'implementing' only required a mere reference to the CFREU). As such, it remains to be seen, whether a similar outcome would have been possible without a directive, or in other words, whether Article 34 CFREU, or at least part of it, can be considered a right.

A different possibility would be to argue in favour of a general principle of EU law on social protection. Interpreting the right to social protection, as a safeguard to 'core benefits' would ensure its direct effect regardless of whether or not, social protection is implemented by a Directive, as long as the conflict falls within the scope of EU law. For now, this is rather speculative and raises much too many questions regarding the interaction between the CFREU and general principles. However, considering that this safeguard is intrinsically intertwined with the protection of the right to human dignity, this interpretation is rather reasonable. Whether the CJEU grants social protection direct effect, either by considering it a 'right' and not a 'principle' or by granting it the status of general principle, remains to be seen.

280 De Becker, *supra* n 168, 299–300; Peers and Prechal, *supra* n 184, 1455–1508; More extensive analyses of Article 12 ESC can be found in: de Becker, *supra* n 242, 97–120 and Verschueren, *supra* n 171, 16–20.

The ESC, which is far more insightful and protective, seems to create several 'degrees' of protection regarding social security, social assistance, the right against poverty and social exclusion and the right to a fair remuneration. The different protective layers are conveniently correlated to the AROP threshold, which is particularly interesting when discussing the role of these rights in contributing to the fight against poverty and social exclusion. In this vein, it appears that the ESC considers an income below 40% to be 'manifestly' below what is acceptable and to be insufficient to ensure a life in dignity, which *a contrario* reads that at least 40% is necessary to cover basic needs such as food, accommodation and healthcare. Covering these needs is imperative to live a life in dignity which, in turn, seems to align with the case-law of the CJEU regarding 'core' benefits that are necessary to have a 'dignified' standard of living. A second layer, which is sufficient to life a 'decent' standard of living, lies in the 50% median equivalised income, which suffices not only to cover basic needs but also to participate in cultural, educational and societal activities that are equally necessary. In the case of wages, any less than 50% of the median equivalised wage is considered 'unfair'. In order to live a life out of the risk of poverty and social exclusion, however, the ECSR requires an income above 60%, which suggests that at least that much is necessary to have an 'adequate' standard of living. This precision in measuring the adequacy of social protection systems allows for a much more concrete evaluation of the performance of States with regard to the objective to fight poverty and social exclusion also at the EU level. This quantifiable minimum may prove useful in a scenario where the EU would decide to expand its secondary legislation in the social field, as such, this is later used to make specific proposals in the context of Chapter 5.

Even though the ESC provides the most extensive and protective catalogue regarding social rights, both the reporting and complaint mechanisms are highly dependent on state parties' commitment, given the reliance on the provided information and the lack of direct enforceability of the conclusions and decisions of the ECSR. As far as the justiciability of the rights in the ESC under EU law is concerned, since the ESC is not, *stricto sensu*, EU law (as much as these provisions build on the ESC and all Member States are signatory to the ESC), it remains largely ignored by the CJEU. This not only limits synergies between different human rights systems, but also allows the CJEU to restrict (or to some extent ignore) social rights when in conflict with economic interests, no matter what the ECSR has considered appropriate.

Unlike the ESC, EU law remains bound to the ECHR. However, the protective content *vis-à-vis* social rights is considerably lower in the latter instrument. Increasingly, however, the ECtHR has interpreted its provisions to guarantee quite some degree of protection regarding social protection. Beyond the walls of discrimination, where the Court has visibly been stricter and allowed limitations only where 'very weighty reasons' exist, the ECtHR has applied a rather broad margin of appreciation. In these cases, protection has either only been granted in extreme circumstances that would otherwise

breach the absolute right to human dignity (in the same line as the CJEU has protected 'core benefits' or the ESC has seen a breach of basic needs), or in the form of a procedural safeguard that should oblige Member States to conduct a proportionality test that considers personal circumstances before implementing limitations to their rights. At the very least, EU law should take due note of the latter and explicitly consider the personal implications, particularly regarding vulnerable groups, within its proportionality test under Article 52 CFREU.

3.5 Conclusions

Putting the fight against poverty and social exclusion at the core of its discussion, this chapter has studied both procedural and substantive aspects of different instruments of fundamental rights in order to flesh out a number of relevant provisions that in one way or another contribute to alleviating the situations of those under economic distress.

As to the question of whether there is a right not to be poor in EU law, a strict interpretation answers in the negative. Poverty, however, could be understood as a violation of several different fundamental rights such as equal treatment, human dignity, social security, social assistance and fair remuneration.[281] Fortunately, this chapter has shown, that these rights, even if it is to a minimum extent, are protected in the EU. The discussion provided in this chapter is not unchallenged, *inter alia*, in terms of legitimacy, enforceability, overlap and legal uncertainties.

For one, the different provisions and case-law of the main three (quasi)judicial bodies examined in this chapter provide a very different protective content regarding living standards, with EU law protection laying at the bottom of these. In spite of contradicting the EU's apparent commitment to respect human rights, however, EU law has not always been in line with other instruments of social rights which has in the past led to conflicts between the different sources. Given the principle of primacy of EU law, moreover, Member States are more likely to implement EU law even when this is in conflict with their national or international commitments.

In addition, the application of social rights is trumped by a number of provisions under EU law. In this vein, the CFREU includes a number of constitutional breaks that extensively limit the justiciability of the provisions therein, including its scope of implementation, distinction between rights and principles and the possibility to limit rights when there is a legitimate aim—accentuated by the tendency of favouring economic rights at the expense of social ones.

This lack of justiciability could partly be circumvented through the use of general principles of EU law, but the interaction between the two sources is

281 Doz Costa, 'Poverty and human rights: from rhetoric to legal obligations' (2008) *IJHR* 5(9), 81–109.

still far from clear. Even if this were possible, due to the very nature of the general principles, it would raise questions on already sore points regarding the legitimacy of the Court related to far-reaching judicial activism, legal uncertainty and their potential arbitrary application. On this note, it is understandable that the CJEU is keener on using provisions of the CFREU as a point of reference of fundamental rights instead, suggesting a limited residual application of general principles of EU law. In principle, however, it could be argued that the CJEU could use general principles to improve the judicial dialogue between the different sources of fundamental rights, and interpret the provisions in the CFREU in their light, for example in the context of macroeconomic policy.[282] This interpretation would agree with Tridimas, who argues that general principles of EU law serve as the cement of fundamental rights, in that they bring together several sources.[283] For now, it remains unclear to what extent the CJEU is willing to invoke general principles in areas that are already covered by the CFREU.

While the complicated application of fundamental rights draws quite an obscure picture on the status of such rights in EU law, this does not need to be the case in the future. In the first place, this could require that existing instruments and new initiatives would include a reference to the CFREU or the principles therein, which would avoid procedural limitations of the application of CFREU. Better synergies, in turn, could similarly be accomplished by taking advantage of the powerful arsenal of social rights protection both at national and international levels through an effective judicial dialogue.[284]

A complementary point of discussion relates to a question of *lege ferenda*, which is key in unblocking the procedural limitations of the CFREU and the overall justiciability of fundamental social rights. If the EU remains true to its social objectives and values (see next chapter), then the legislator should regain its intended power to increase the legitimacy and democratic value of the EU. It needs to be noted that this would only address one out of several problems of the displacement of social Europe, namely, the marginal use of the social competences of the EU.[285] It could, nonetheless, improve the social prospect of the EU in ensuring that, at least to some extent, economic and social objectives play at the same supranational level.

This kind of action by the EU legislator would allow the implementation of the content of other international instruments into EU law, therefore improving synergies, avoiding rule of law conflicts and allowing EU law to develop alongside more matured and specific social rights. In this vein, fundamental

282 DE BECKER, *supra* n 168, 277–314.

283 TRIDIMAS, *supra* n 8, 10.

284 See on specific lessons to be learnt through better synergies: ARANGUIZ, 'Bringing the EU up to speed in the protection of living standards through fundamental social rights: drawing positive lessons from the experience of the Council of Europe' (2021) *MJ*, 28(5), 601-625.

285 KILPATRICK, *supra* n 46; Specifically: MUIR, *supra* n 128.

social rights as discussed in this chapter would serve as a compass, arguably steered by the EPSR, to identify and tackle problematic areas, where necessary also by means of legal instruments, to address the challenge of poverty and social exclusion.

If this is indeed the 'last chance for social Europe' the momentum generated by the EPSR needs to be seized to provide for a properly patched minimum floor that covers the current gaps of the social dimension of the EU. To this end, the next chapter investigates the objectives and competences of the EU to contribute to the fight against poverty and social exclusion by means of legislative instruments. Chapter 5, in turn, proposes a number of instruments on these bases.

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Chapter 4

The EU constitutional framework

4.1 Introduction

Since the enactment of the Lisbon Treaty, the EU recognises that social inclusion, social justice and social protection are part of the general objectives of the EU and that the respect for human dignity, solidarity and equality belong to its founding values. These values are accompanied by a share of competences, although the power that these grant the Union vary considerably. Until recently, these powers have remained largely ignored, which has contributed to the inherent asymmetries between 'the market' and 'the social'.[1] Some, including the European Parliament, have been critical on the marginal use of these competences, which remain 'untapped'.[2] Others argue that only a complete renegotiation of the treaties can fix the EU's social deficit and enable EU law to tackle social challenges such as poverty and social exclusion.[3] At the opposite end stand those who believe that developing further social obligations at the EU level should be avoided by all means.[4]

What follows in this chapter sheds some light on the question of the role of EU primary law in the fight against poverty and social exclusion by analysing its constitutional embedding. To this end, the next section discusses poverty and social exclusion as an intrinsic value and objective of the EU that

1 Kilpatrick (ed.) 'The displacement of social Europe' (2018) *EuConst* 14(1), 62–230; Garben, 'The constitutional (im)balance between 'the market' and 'the social' (2017) *EuConst* 13(1), 23–61.

2 European Parliament resolution of 20 November 2012 with recommendations to the Commission on the report of the Presidents of the European Council, the Commission, the European Central Bank and the Eurogroup, 'Towards a genuine economic and monetary union' [2015] OJ C 419.

3 Dawson and de Witte, 'The EU legal framework of social inclusion and social protection' in Cantillon et al. (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Cambridge/Antwerp/Portland: Intersentia, 2012), 41–71.

4 For example, those who advocated for a treaty protocol seeking to exclude domestic enforcement of the CFREU. See in this regard: Barnard, 'The 'opt-out' for the UK and Poland from the charter of fundamental rights: triumph of rhetoric over reality?' in Griller and Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Vienna/New York: Springer, 2008), 257–284; Kazalska, 'British-Polish protocol in the light of the court of justice of the European Union jurisprudence' (2016) *Studia Iuridica* 68(1), 125–140.

DOI: 10.4324/9781003222125-4

can easily be traced in a number of provisions. This section covers the values of the EU (Article 2 Treaty of the European Union (TEU)), the general objective of the EU (Article 3 TEU), the social objective (Article 151 Treaty on the Functioning of the European Union (TFEU)) and the so-called horizontal social clause (Article 9 TFEU). It follows a discussion on the three 'must-respect' principles for the activation of EU shared competences: conferral, subsidiarity and proportionality.The fourth part of this Chapter offers an analysis on the competences of the EU to actually implement the objective to fight poverty and social exclusion . This includes, on the one hand, specific legal bases, including competences on social policy *sensu stricto* under Article 153 TFEU and some areas of EU social policy *sensu lato*, such as social cohesion, free movement of persons, equal treatment and migration, which could potentially be used as a legal basis to develop secondary law to fight poverty and social exclusion outside the social policy title.[5] On the other hand, it also explores the possibility of adopting measures by means of the general legal bases offered in the treaty, meaning legal bases that can be used to achieve the aims of the Union without being linked to any specific field. The following sections offer some general remarks that ought to be considered before adopting any instrument. The last section concludes the chapter.

4.2 The objective of combating poverty and social exclusion in EU primary law

The Lisbon Treaty, at least rhetorically speaking, rewrote and expanded the basic values and the objectives of the EU in a manner that balanced the weight of the market and non-market values within the fundamental provisions of the Union. While values and objectives do not provide for grounds of competence for the EU to act, they are still essential for the development of EU legal tools because they provide the framework for certain competences to be applied. Article 5 TEU explicitly contemplates that competences are conferred in the treaties in order to achieve the objectives set therein. This means that the EU can only exercise its powers in actions directed to the realisation of the objectives set in the treaties. Therefore, Member States do not confer powers on a certain matter so much as they confer competences to accomplish a specific objective, which is also known as a functional competence.[6] These competences, in turn, must be exercised respecting the values of the EU. Overall, this section explores what the social objective of the Union is by studying the

5 De Baere and Gutman, 'The basis in EU constitutional law for further social integration' in Vandenbroucke et al. (eds.), *A European Social Union after the Crisis* (Cambridge: CUP, 2017), 344–384.

6 Schoukens, 'From soft monitoring to enforceable action: a quest for new legal approaches in the EU fight against social exclusion' (2013) *KU Leuven Euroforum*, p. 6.

different provisions where it is enshrined. These provisions, it will be discussed, are necessary to activate the competences of the EU.

4.2.1 Values of the EU: Article 2 TEU

Article 2 TEU establishes the fundamental and common values that characterise the EU.[7] The content of Article 2 TEU—also known as the homogeneity clause—is only partially new to the EU. In comparison to the previous formulation of the provision, Article 2 TEU clarified and deepened the catalogue of EU values by making a specific reference to human dignity and specifically addressing persons belonging to minorities. In addition, for the first time—beyond its traditional quote in the preamble—the Treaty of Lisbon introduced solidarity among its values. This expansion of the EU values is complemented by the legally binding nature of the CFREU, discussed in the previous chapter.

Article 2 TEU codifies the axiological heritage upon which the EU is built, which is apparent in its preamble (recital §2). These values implicitly assist in defining what constitutes a European State when accessing the EU (Article 49 TEU). Further, Article 3 TEU sets among the objectives of the Union to ensure the promotion of EU values both within the EU and abroad (paragraphs 1 and 5, respectively).

The wording of the provision suggests that there are two levels of values, on the one hand, those striving for a free democracy and, on the other, the values characteristic from the civil society. Both levels are dependent on one another.[8] The former, recognises *inter alia* the respect for human rights and, in particular, for human dignity, which the previous chapter fundamentally links to poverty. The second level of values, differently, enshrines non-discrimination, tolerance, justice, solidarity and equality between women and men among the values that are common to Member States. The notion of solidarity, relevant for this research, gained particular importance during the previous economic crisis.[9] Some of these values—dignity, freedom, equality, solidarity and justice—are central to the Charter of Fundamental Rights of the EU (CFREU) and represent the different titles therein.

It is unclear, however, what the exact substantive scope of these values are, although the Court of Justice of the EU (CJEU) has referred to the values on several occasions. This part focuses on the values that are directly relevant to the fight against poverty and social exclusion, namely, human dignity, freedom, equality, respect for human rights and solidarity.

7 Nicolosi, 'The contribution of the court of justice to the codification of the founding values of the European Union' (2015) *RDCE* 51, 613–643.

8 Geiger et al. (eds.), *European Union Treaties: Treaty on the European Union. Treaty on the Functioning of the European Union* (Munchen/Portland: C.H. Beck-Hart, 2015).

9 Ploscar, 'The principle of solidarity in EU internal market law' (2013) Doctoral Thesis, University of Antwerp; Stjernø, *Solidarity in Europe: The History as an Idea* (Cambridge: CUP, 2004).

Heading the list, the value of human dignity represents the fundamental rights-based approach of the legal order of the EU.[10] Just as in the CFREU, human dignity in the TEU represents the baseline for the rest of the values enshrined in Article 2 TEU the reason why human dignity is been referred to as 'the mother basic right'.[11] Even though human dignity is often mentioned in case-law, it was not until 2001 in *Kingdom of the Netherlands v. European Parliament and Council* that the CJEU interpreted the value as a general principle and a fundamental right.[12] In the opinion of the same case, AG Jacobs took it a step further by stating that 'the right to human dignity is perhaps the most fundamental right of all'.[13]

Freedom and equality are similarly linked to the idea of protecting fundamental rights. However, the CJEU has constructed these values providing for diverse connotations which interrelate to different areas of EU policy. In the case of freedom, the value is intrinsically linked to the four basic economic freedoms, namely, free movement of goods, persons, services and capital. Beyond this functionalistic approach, the broader scope entails a number of rights-based liberal–democratic ideals, echoed in the second chapter of the CFREU, such as the right to property, freedom of expression, freedom of assembly, freedom of religion, freedom of thought, the right to engage in work, and the right to information and education.[14] The value of equality was originally conceived as non-discrimination on grounds of nationality, also as a functional realisation of free movement. The CJEU, however, has opened the scope of equality and non-discrimination to different areas, such as sex or religion.[15] As of 1977, the CJEU recognised equality as one of the general principles of law and only a year after as a part of fundamental human right.[16] Similar to the value of freedom, equality also evolved to encompass numerous areas enshrined in the equality chapter of the CFREU, such as linguistic diversity, equality for minors, the elderly, and persons with disabilities.[17] Notably, the CJEU applied these rights of the CFREU emanating from the value of equality as a primary source of law in *Association Belge des Consommateurs*. Although the value of equality started by being oriented solely to economic integration, it has been key in opening the door towards achieving a social purpose. In

10 Nicolosi, *supra* n 7, 621–624.

11 EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of the European Union' (2006).

12 C-377/98—*Netherlands v. Parliament and Council*, ECLI:EU:C:2001:523, §70.

13 *Ibid*., §179. See Chapter 3 on human dignity and fundamental rights.

14 EU Network of Independent Experts on Fundamental Rights, *supra* n 11.

15 Bell, 'The principle of equal treatment: widening and deepening' in Craig and De Búrca (eds.) *The Evolution of EU Law* (Oxford: OUP, 2011), 611–640.

16 Case 117/76—*Ruckdeschel adalší v. Hauptzollamt Hamburg-St. Annen*, ECLI:EU:C:1977:160, §7; C-13/94—*P v. S and Cornwall County Council*, ECLI:EU:C:1996:170, §19.

17 This reflects the inclusion in the Treaty of Amsterdam of Article 13—now Articles 18, 19 and 157 TFEU—which provided for a number of instruments to fight discrimination.

Schröder, the Court stated that the economic aim pursued by Article 119 TFEU on the elimination of distortions of competition, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.[18] Equality has also had a significant impact on poverty and social exclusion by opening national welfare to non-nationals which has given individuals, including migrant workers, the right to claim social benefits on a (somewhat) equal footing, although subject to limitations.[19] Although equality is important to grant access by putting citizens on an equal footing, it remains neutral in the sense that is does not guarantee a certain level of adequacy but simply equal treatment. Still, considering that many vulnerable groups are discriminated against, equality plays a key role in granting these vulnerable groups equal treatment.[20]

The second level of Article 2 TEU aims at contextualising the previous values that are common to all Member States in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. This second level represents the ethical subtract of the EU values that strengthen the European identity. Solidarity, importantly, demands a significant level of coherence between Member States and their peoples while forbidding any Member State from pursuing their own national interests regardless of the burdens that these interests may create for other Member States. This is an interesting value to keep in mind when proposing instruments that require a degree of risk and budget-sharing, as it is the case in Chapter 5.

But what is the added value of this provision? *A priori*, it seems that the Lisbon Treaty only assigns a rhetorical charge to the values enshrined in Article 2 TEU because it is not specifically fleshed out elsewhere in the treaties by new competences and decision-making procedures.[21] Yet, the values are deemed to have a decisive importance for the activities of the Union institutions as it is the overall task of the entire European institutional framework to enforce the values expressed hereby. Literature has argued that as a matter of fact, the values enshrined in Article 2 TEU must be considered as principles of EU law because not only do they represent the ethical essence upon which the EU is

18 C-450/09—*Schröder*, ECLI:EU:C:2011:198, §57.

19 In *Hoeckx*, the Court established that a claim to a social benefit is not subject to a residence period of time where this same requirement is not imposed to nationals of that Member State, Case 249/83—*Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout,* ECLI:EU:C:1985:139, §25; or in *ONEM* where the Court stressed that children of a national of a Member State had the right to request a benefit for youth unemployment regardless of their nationality as a consequence of the equal treatment principle, Case 94/84—*ONEM v. Deak,* ECLI:EU:C:1985:264, §23–25.

20 Ganty, 'Poverty as misrecognition: what role for antidiscrimination law in Europe?' (2021) *HRLR* 21(4), 962-1007); A number of secondary law instruments are essential in this regard, while this contribution excludes instruments on substantial equality from its scope, this was explored in: Aranguiz, *The Role of EU Law in Contributing to the Policy Objective of Fighting Poverty and Social Exclusion* (2020) Doctoral thesis, University of Antwerp.

21 Dawson and de Witte, *supra* n 3, p. 54.

constructed, but also stand as a primary and constitutive legal norm.[22] In fact, in some of the cases above, the CJEU interpreted the values as general principles. However, the decisive importance of the values enshrined in Article 2 TEU follows from the objectives set in Article 3 TEU and Article 13(1) TEU which establishes that it is the overall task of the institutional framework to enforce these values.

In theory, membership can only be acquired by respecting and promoting the values of the EU—Article 49 TEU. From an internal point of view, similarly, all Member States are bound by the Treaty to respect and promote such values, and a persistent failure to do so may result in sanctions –which include losing some rights linked to their membership—under Article 7 TEU. However, up until this point it has not fully been activated, although proceedings have started against Poland and Hungary.[23] Recently, the respect of EU values has also been used as conditionality to access the NGEU funding, which had to be considerably watered down because Poland and Hungary where threatening to veto the adoption of the whole budget.[24]

4.2.2 General objectives of the EU: Article 3 TEU

Article 1(1) TEU provides that the EU is established on the competences conferred by Member States to attain the objectives in common, which are to be found under Article 3 TEU. Therefore, the role of Article 3 TEU is to give legitimacy to the actions of the EU while limiting the scope of the Union.[25] In a Union that lacks original competence to define its objectives, the objectives agreed upon by the Member States are essential for its foundation.

According to Article 3 TEU, the EU shall establish a highly competitive social market economy. This idea was first coined by Müller-Armack and later

22 von Bogandy, 'Founding principles of EU law: a theoretical and doctrinal sketch' (2010) *Revus* 12, 35–56.

23 COM (2017) 835 final, 'Proposal for a council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law'; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [2019] OJ C 433. See on this issue: Editorial Comments, 'Hungary's new constitutional order and European unity' (2012) *CMLRev* 49, 871–883; Kochenov and Pech, 'Better late than never? On the European Commission's rule of law framework and its first activation' (2016) *JCMS* 54(5), 1062–1074; Sargentini and Dimitrovs, 'The European Parliament's role: towards new Copenhagen criteria for existing member states?' (2016) *JCMS* 54(5), 1085–1092; Toggenburg and Grimheden, 'Upholding shared values in the EU: what role for the EU Agency for fundamental rights?' (2016) *JCMS* 54(5), 1093–1104.

24 Editorial Comments, 'Compromising (on) the general conditionality mechanism and the rule of law' (2021) *CMLR* 58(2), 267–284.

25 Sommerman, 'Article 3 [The objectives of the European Union] (ex-Article 2 TEU)' in Blanke and Mangiamely (eds.) *The Treaty on the European Union (TEU): A Commentary* (Heidelberg/NewYork/Dordrecht London; Springer, 2013), p. 159, §2.

promoted by Ludwig Edhard as *Soziale Marktwirtschaft*, and refers to a regulatory model that aims at combining the free initiative with social progress.[26] The idea of a social market economy is based on the assumption that all market players, businesses, consumers and workers, play a significant role in the single market and in the pursuit of a highly competitive market.[27] While a social market economy relies on the forces of a competitive economy, it attributes a major role to the State in ensuring a 'fair play' in order to enable as many subjects as possible to participate in said economy. Measures to ensure fair play go from cartel control to the promotion of equal opportunities.

More recently, the Commission drew from the concept of a competitive social market economy when launching the EPSR.[28] It is particularly interesting how it presented the relationship between the economic goals and social policy of the EU:

> [S]ocial policy should also be conceived as a productive factor, which reduces inequality, maximises job creation and allows Europe's human capital to thrive. This conviction is confirmed by evidence on employment and social performance. The best performing Member States in economic terms have developed more ambitious and efficient social policies, not just as a result of economic development, but as a central part of their growth model. Key to this is the design of welfare systems and labour market institutions fulfilling their role and supporting job creation.[29]

According to this, social policy is considered a productive factor, one that contributes to growth and competitiveness as well as key to 'reducing inequality, exploiting job creation and fostering human capital'.[30] Social policy is deemed as playing a particularly important role in supporting the EU in times of economic recession, but even more remarkably, because social policy has this specific role in the 'deepening' of the EU, it thereby contributes to integration. From this it has to be understood that rather than being a tool reserved for turbulent times of crisis, social policy is necessary in order to ensure the endurance of a stable and successful EU. Deakin calls these the two functions of social policy. On the one hand the 'market reversing' function refers to when social policy is used to reverse growing inequalities that result from

26 Müller-Armack, 'Soziale Marktwirtschaft' in Becherath, Bente and Brinkmann (eds.) *Handwörterbuch der Sozialwissenschaften Vol. 9* (Stuttgart: Vandenhoeck & Ruprecht, 1956), 390–392, mentioned in Sommerman, *supra* n 25, p. 172, §34.

27 COM (2010) 608 final, 'For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another'.

28 Deakin, 'What follows austerity? From social pillar to new deal' in Vandenbroucke et al. (eds.), *supra* n 5, 192–210.

29 COM (2016) 127, 'Launching a consultation on a European Pillar of Social Rights', §2.1.

30 Deakin, *supra* n 28, 200–201.

economic integration and, on the other hand, the 'market constituent' function implies that social policy is an input into growth and integration and not a consequence of it.[31]

Although this approach goes in line with the goal to achieve a 'highly competitive market' that aims at 'full employment and social progress', Article 3(2) TEU reveals a broader understanding of the 'social' in the social market economy. This paragraph refers to the mandate to combat social exclusion and discrimination which is complemented by Article 34 CFREU (discussed in Chapter 3) and combines the principle of non-discrimination on grounds of social origin—matched by Article 21(1) CFREU with a mandate to engage into positive action.[32] As far as the concept of social justice is concerned, it is linked to distributional opportunities and to the institutional set up for its implementation.[33] Yet, considering its vagueness, social justice cannot be implemented on its own. As a result, it should be read in conjunction with the more concrete social principles, primarily set in the social policy title (Articles 151–156 TFEU) and the Solidarity chapter (Article 27–35 CFREU). The social objectives set in Article 3(3) TEU are further strengthened and mainstreamed in the cross-sectional Article 9 TFEU, discussed below.

These objectives go beyond formulating a general programme, they are legally binding. Accordingly, EU legislation—while based on an explicit competence—has to follow the orientation given by Article 3 TEU. The broad formulation of these objectives allows EU institutions to enjoy a certain margin of appreciation to decide the concrete scope of the objectives and what steps are needed to attain them. The implications of Article 3 TEU for Member States are similar. When acting within the framework of the EU, and particularly when implementing EU law, they are bound by the objectives enshrined in this provision. However, because objectives are formulated in a rather broad way—necessary to give sufficient leeway to the legislator—it would be difficult to find a violation unless there is an evident failure to comply with Article 3 TEU. A higher level of determination, would make Article 3 TEU more justiciable in this sense,[34] but at the expense of the necessary flexibility general objectives need to have.[35] As such, the binding character of this provision is

31 *Ibid*., p. 200.

32 Sommerman, *supra* n 25, p. 175, §39.

33 Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), 6–9.

34 Sommerman, *supra* n 25, p. 159, §6.

35 'In pursuing those objectives, the Community Institutions must secure the permanent harmonization made necessary by any conflicts between these objectives taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made' in Case 29/77—*Roquette v. France*, ECLI:EU:C:1977:164, §30; Case 203/86—*Spain v. Council*. ECLI:EU:C:1988:420, §10; and C-280/93—*Germany v. Council*, ECLI:EU:C:1994:367, §47. Sommerman, *supra* n 25, p. 166, §18.

reduced to an obligation to interpret EU law in light of these objectives.[36] This provision is therefore comparable to the legal situation of constitutional principles at national level, which do not empower State organs when competences are lacking, but drive institutional action.[37]

The implementation of the objectives under Article 3 TEU must respect the principle of conferral, however, this principle is rather flexible in regard to the general legal bases, such as Article 114–115 TFEU or Article 352 TFEU, discussed below. The objectives of Article 3 TEU have an important practical relevance as a precondition for admitting actions not specifically provided for in the Treaties. This refers mainly to Article 352 TFEU, which represents a substitute of legal basis for legislating in fields where tasks are given but competences are lacking. At the time of the Single European Act and the Maastricht Treaty, this provision (formerly Article 235 TEEC) served to adopt directives in the fields of equal treatment and employment law, since the Community had the objectives but lacked the competences. However, this provision notably lost its significance after the treaties were equipped with specific competences.[38] Article 3(6) TEU clarifies that while the aims of the EU are essential to enact new legislation, alone they do not suffice for authorising new actions by the Union.[39] The aims rather ensure that the objectives are pursued by means of the established competences that have been transferred to the Union. Yet, where competences are not found and it appears to be urgent to reach an objective in a specific case, then Article 352 TFEU might help in creating an *ad hoc* competence to reach such an aim. The possibility of creating an *ad hoc* competence for an instrument combating poverty and social exclusion is discussed in the following paragraphs.

It has similarly been argued that constitutional objectives imply a principle of non-regression, meaning that this provision guarantees that the *status quo* of the objectives will be maintained. Article 3 TEU would then prohibit taking a step backwards from the degree of achievement of an objective, in this case to have a highly competitive social market economy and to combat social exclusion, once it has been attained.[40] Yet, Sommerman argues that this is not the case for the objectives in the EU, because under certain circumstances a 'temporary step backwards' needs to be taken when justified by a careful weighting of (conflicting) interests, as long as this regression does not affect the core of

36 C-85/76—*Hoffmann-La Roche v. European Commission*, ECLI:EU:C:1979:36, §125; C-314/89—*Rauh v. Hauptzollamt Nürnberg-Fürth*, ECLI:EU:C:1991:143, §17.

37 Sommerman, *supra* n 25, p. 164, §13.

38 See Articles 19, 79, 83, 153, 157 and 168 TFEU.

39 Geiger et al., *supra* n 8.

40 Corazza, 'Hard times for hard bans: fixed-term work and so-called non-regression clauses in the era of flexicurity' (2011) *ELJ* 17(3), 385–402.

the objective.[41] This seems to replicate the discussion in the previous chapter relating to restraining fundamental rights.[42]

4.2.3 The 'untapped' horizontal social clause: Article 9 TFEU

As regards the social dimension of Europe, possibly one of the most important innovations of the Lisbon Treaty was the so-called horizontal social clause under Article 9 TFEU that together with other horizontal clauses, in particular those enshrined in Article 8 and 10 TFEU, and in due consideration of fundamental rights, should represent a strong anchor towards full social mainstreaming and finding an adequate and somewhat stable balance between economic and social objectives of the EU.

The so-called horizontal clauses[43] are used in several fields of EU law as a regulatory tool with the aim of defining perspective goals that are applicable across different policy areas. The content of these provisions correlates on the one hand to the EU objectives enshrined in Article 3 TEU and, on the other, to specific competences of the Union enshrined in the TFEU, aiming at ensuring consistency between the fundamental mission of the EU and its activity.[44] The horizontal clauses do not, by themselves, constitute competences as in their case too, the Union is limited to abide by the set of powers that have been conferred to it.[45]

The horizontal social clause in Article 9 TFEU needs to be interpreted in the context of the social market economy as it echoes many of the social demands of Article 3(3) TEU.[46] However, there are a number of obstacles in 'untapping' the potential of this clause. First, it uses vague and abstract legal terms such as 'adequate' or 'high level', which are not elaborated elsewhere. Second, its purpose, especially compared to the other horizontal clauses, is particularly ambiguous and ill-worded.[47] Third, its degree of obligation (whether it is a binding provision or not) is also unclear.[48]

41 Sommerman, *supra* n 25, §15–16.

42 See generally on 'the social market economy': Special Issue *ULRev* 15(2), 1–100.

43 On gender equality (Article 8 TFEU), social protection (Article 9 TFEU), non-discrimination (Article 10 TFEU), environmental protection (Article 11 TFEU), consumer protection (Article 12 TFEU) and protection of the animals (Article 13 TFEU).

44 Vielle, 'How the horizontal social clause can be made to work: the lessons of gender mainstreamin' in Bruun et al. (eds.) *The Lisbon Treaty and Social Europe* (Oxford/Portland: Hart Publishing, 2012), 105–122.

45 Kotzur, 'Article 8 [Horizontal clause: equality' in Blanke and Mangiamely (eds.) *supra* n 25, p. 216, §1.

46 European Parliament, *supra* n 2, recital AP.

47 In the case of equality and non-discrimination the union 'shall aim' (Articles 8 and 10 TFEU respectively), the wording of the environmental clause is particularly strong in this regard as 'Environmental protection requirements must be integrated' (Article 11 TFEU).

48 Dimmel, 'Statement on Art 9 TFEU: horizontal social clause' (2013) *EASPD*.

The horizontal social clause makes important bridges between the general objectives of the EU and the social competences. Regarding the 'high level' of employment, which clearly corresponds to Article 3(3), the wording of the horizontal social clause seems more realistic by aiming at a 'high level of employment' instead of 'full employment'.[49] The Belgian Presidency remarked that the notion of a high-level of employment is to be understood both as quantitative and qualitative, with special emphasis being made on the notion of quality of employment.[50] The demand to commit to a high level of employment is set under Article 147 TFEU.

Differently, while the notion of social protection was not new to the language of social Europe, it acquired a special place in the Lisbon Treaty, probably to tackle the fears of a narrow interpretation of the liberal market. It parallels with Article 3(3) TFEU that, as discussed above, combines social protection with the abstract idea of social justice. The legal basis for this is found in Social Policy title, which is discussed below. Here too, the semantics seem to be less ambitious, downgrading a 'high level of protection' under Article 3 TEU to an 'adequate social protection' in the horizontal social clause. The latter is likely making a reference to the Lisbon Strategy and the Social OMC, where adequacy is measured in terms of a balance between the benefits given and the needs it intends to cover.[51] Interestingly, Article 151 TFEU takes a step backwards by merely referring to a 'proper social protection'. Combating social exclusion would fall under a category of social protection, but it is particularly emphasised due to its focus on anti-discrimination. The scope of the prohibition of social exclusion is further enhanced under Article 34 CFREU and explicitly mentioned as well under Article 153(1)(j) TFEU.

According to Article 9 TFEU, EU institutions are deemed to implement social aims beyond the realm of the social policy competences, across all their policies and activities. Therefore, the social implications of any sort of legislation, policy or programme should be assessed in all areas and on all levels. Hence, Article 9 TFEU aims at ensuring full consideration of the social dimension in all EU activities within the scope of its responsibilities.[52] In spite of being binding for EU institutions, Article 9 TFEU does not constitute a new conferral of competences. Therefore, Article 9 TFEU cannot be used as the

49 Kotzur, 'Article 9 [Horizontal clause: social protection' in Blanke and Mangiamely (eds.) *supra* n 25, p. 217, §2.

50 Opinion SPC on the open method of coordination and the social clause in the context of Europe 2020 [2011] OJ C 44.

51 Frazer and Marlier, 'Minimum income schemes in Europe: a study of national policies 2015' (2016) *ESPN*.

52 Opinion of the EESC on 'Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU' own initiative opinion [2012] OJ C 24.

legal basis for any EU act. Rather, the provision is formulated in the form of a balancing clause that demands for the procedural integration of social policy issues at the EU level. As such, it can be referred to as a binding provision from the procedural point of view, but not on a substantive level.

In the past, Article 9 TFEU has mostly been used as an expression of general interest that weighs in favour of Member State's margin of appreciation when limiting the fundamental freedoms.[53] Accordingly, AG Cruz Villalón stressed that Article 9 TFEU authorises Member States to restrict a freedom for the purpose of safeguarding a certain level of social protection[54]

In essence, what the horizontal clause provides for is an imperative method of good governance for the European institutions that are entrusted to ensure that Article 9 TFEU is satisfactorily applied and fully considered in all relevant areas. As such, even if the horizontal social clause does not *per se* add to the social dimension of the EU, it mainstreams social values into all other initiatives.[55] The treaty speaks in broad terms about all EU action, nevertheless, it appears to aim mainly at measures with a possible negative effect on the social field. This would mean that the horizontal social clause would be limited to measures that adversely affect the social *acquis* of the EU and Member States and that these, since they are contrary to the treaty, should either not be implemented, be prohibited or should at least be kept to the minimum negative effect in proportion with the objective thereby. In the case of the latter, the respective EU institution shall justify the reason behind supporting a measure with a detrimental effect and explain how it will be kept to a proportionate minimum.[56]

Especially when read in conjunction with Articles 2 and 3 of the TEU and the CFREU, the horizontal social clause could ensure that EU social policy aims are guaranteed in the process of adopting (new) measures throughout the whole EU policy spectrum, as well as in considering it in the balancing exercise when derogating from EU law. At the very least, Article 9 TFEU should guarantee that in every major policy initiative undertaken by the Commission, which needs to be accompanied by an integrated impact assessment, the potential impact this policy is likely to have on all fields, including the social one, is duly analysed.[57] In fact, in a recent case, the CJEU specifically acknowledged

53 C-544/10—*Deutsches Weintor,* ECLI:EU:C:2012:526, §49. C-626/18—*Poland v. Parliament and Council*, ECLI:EU:C:2020:1000; C-620/18—*Hungary v. Parliament and Council*, ECLI:EU:C:2020:1001, §41–46.

54 Opinion Cruz-Villalón C-515/08—*dos Santos Palhota and Others*, ECLI:EU:C:2010:245, §53; see more recently Opinion Wahl C-201/15—*AGET Iraklis*, ECLI:EU:C:2016:429, §56.

55 Vanderbroucke with Vanhercke, 'A European Social Union: 10 nuts to crack' (2014) *Friends of Europe*.

56 Schoukens, *supra* n 6.

57 For the Commission's impact assessment see: http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm.

the obligation of the EU legislator to apply Article 9 TFEU when enacting new rules.[58]

The basic principle of an impact assessment is to assess the possible consequences of new initiatives in terms of positive and negative impacts, opportunities and threats while bearing in mind possible alternatives for regulatory tools. In the case of social impact assessments, they have the potential to favour accountability and ensure that sufficient attention is paid to the social sphere when applying them to the adoption of such measures. Notably, while the role of impact assessments at the EU level has been strengthened since becoming systematic for EU legislative measures in 2002, and later generalised within the 'Better Regulation' agenda, there has been no systematic assessment about the impact of the austerity measures adopted consequent to the sovereign debt crisis on social rights. This is all the more surprising, bearing in mind the UN Guiding Principles on human rights impact assessments of economic reforms.[59]

In general terms, even if it can be said that the overall visibility of fundamental social rights has increased within the impact assessments, there remain big deficiencies.[60] For one, a study analysing how the impact assessment of different horizontal mainstreaming agendas are implemented, such as the one for the horizontal social clause, concluded by saying the following:

> The mainstreaming objectives were also screened to a different extent. Social and environmental concerns were most often taken into account, although the 'success story' of the social clause is mitigated when one assesses its several subcategories, with social exclusion, for instance, receiving very little consideration.[61]

In addition, it found that Directorate Generals (DGs) with a market-oriented focus tend to take the mainstreaming of objectives less into consideration.

More troubling is the fact that the impact assessments are not a generalised practice across the social and economic policies and that they have played little to no role in the design of macroeconomic adjustment procedures. As a matter of fact, the Commission has insinuated that impact assessments are, *a priori*,

58 In this case the CJEU recognized the legislator's obligation to implement the precautionary principle of Article 191(1) TFEU where there is uncertainty as to the existence or extent of risks to human health. C-616/17—*Blaise and Others*, ECLI:EU:C:2019:800, §42.

59 Human Rights Council, 'Guiding principles on human rights impact assessments of economic reforms' (2019) A/HRC/40/57; UN Special Rapporteur on Extreme Poverty and Human Rights, 'Visit to the European Union—findings and recommendations' (2021).

60 De Schutter and Dermine, 'The two constitutions of Europe: integrating social rights in the new economic architecture of the union' (2016) *CRIDHO* Working Paper 2016/02, 9–32.

61 Smismans and Minto, 'Are integrated impact assessments the way forward for mainstreaming in the European Union?' (2016) *Regulation & Governance* 11(3), 231–251.

not necessary in the context of economic governance.[62] Notably, after former president Juncker stressed the importance of subjecting support and reform programmes to the impact assessments,[63] the Commission announced to pay greater attention to the 'social fairness'.

Vielle argues that there are many lessons to be learnt from the gender mainstreaming clause (Article 8 TFEU) in terms of structure, methodology, consultation and concentration requirements. In order to achieve an engagement and commitment, there is a need to provide training on social issues for the DGs and create a special unit to coordinate efforts towards social mainstreaming. This takes us to the point on methodology, which would entail that an external body would bear the responsibility of raising awareness and training both European actors and institutions for the collection of data and to ensure that appropriate tools and procedures are effectively put in place. For these tools and procedures to work at an institutional level, there needs to be an exchange of practices and information between the European institutions and other actors involved. Finally, what Vielle calls the 'social test'—the *ex-ante* and *ex-post* evaluation—should be generalised throughout the whole European economic and social spectrum to truly achieve the social mainstreaming.[64]

Beyond the need for educating and coordinating EU institutions, there are arguably two main challenges regarding the implementation of the horizontal social clause. In the first place, it has been argued previously in this chapter, that the content of Article 9 TFEU remains rather abstract. In this regard, the recently adopted European Pillar of Social Rights (EPSR), which is meant to operate as a compass, could assist in providing means of interpretation for EU social objectives, which are formulated in a concrete manner. The Social Scoreboard that accompanies the EPSR, in turn, could feed into the impact assessments.[65] The second challenge lies in effectively applying impact assessments across all EU action. In this vein, the CJEU could conduct a procedural review to ensure that all due social impact assessments are regularly and effectively carried out. Future decisions considering the horizontal social clause would lead to a stronger social dimension and to tackle the existing displacement of social Europe.[66] Together with the CFREU and the EPSR, the

62 Better Regulation, 'Toolbox' complementing: Commission, *Better Regulation Guideline*, SWD(2015), #5 When is an IA necessary?, 33–35, available at: http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf

63 Opening Statement in the European Parliament Plenary Session Strasbourg, 22 October 2014 Candidate for President of the Commission Strasbourg, 15 July 2014 Jean-Claude Juncker.

64 Vielle, *supra* n 44, 115–118.

65 Aranguiz, 'Social mainstreaming through the European Pillar of Social Rights: shielding "the social" from 'the economic' (2018) *EJSS* 20(4), 341–363.

66 Kilpatrick, *supra* n 1. Frazer and Marlier, 'The EU's approach to combating poverty and social exclusion ensuring a stronger approach in the future by learning from the strengths and weaknesses of the current approach' (2010) *Kurswechsel* 3, 34–51.

horizontal social clause presents an ideal opportunity for the Court to interpret EU law in light of far more clearly defined social objectives and rights.[67] Similarly, the accession of the EU to the ECHR, if ever materialised, would epitomise a vibrant occasion to interpret the horizontal social clause in light of the Convention.[68]

4.2.4 The social policy objective: Article 151 TFEU

Following an identical wording to its predecessor Article 136 TEC, Article 151 TFEU states that both the Union and the Member States

> shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.[69]

From this provision it can be interpreted that a social market economy is not only an approach to policy-making but also a constitutional guiding principle in itself.[70] In addition to making a specific reference to combating social exclusion, the provision refers to the fundamental social rights enshrined both in the European Social Charter (ESC) and the Community Charter. Similar to the provisions above, Article 151 TFEU inspires and guides EU law's interpretation.

Article 151 TFEU plays a crucial role in the development of new (legal) social measures because it provides the specific framework in which a concrete competence can be applied.[71] Much like Article 3 TEU, this provision frames a functional competence (particularly Article 153 TFEU), meaning that the EU has the social competence to act only to fulfil the objectives of Article 151 TFEU.

Differently, the CJEU has recognised that the provisions on the four freedoms must be balanced against the objectives pursued by social policy', in particular those enshrined in Article 151 TFEU.[72] This mirrors the discussion above, regarding the need to include the respect social policy when derogating from the EU freedoms.[73]

67 Vielle, *supra* n 44, 118–119.
68 *Ibid*., p. 119.
69 Article 151 TFEU.
70 Geiger et al., *supra* n 8.
71 Schoukens, *supra* n 6, 2–6.
72 C-201/15—*AGET Iraklis*, ECLI:EU:C:2016:972, §76–77.
73 For the Commission's impact assessment, *supra* n 57.

Another interesting aspect of this Article is the fact that it is not directly linked to the internal market and as such, Article 151 TFEU sets social objectives on their own regardless of the economic objectives, therefore breaking free from the liberal connotations of the 'social market economy' discussed above.

Lastly, some authors have argued that the first part of Article 151 TFEU could be considered a non-regression principle. This would entail that the Union and Member States are precluded from lowering the existing social standards, both at national and EU level and, hence, they are bound to a progressive harmonisation.[74] The CJEU has not directly addressed the principle of non-regression, yet, there are a number of so-called 'non-regression' clauses in many instruments of secondary legislation as well as on Article 153(4) TFEU, that stipulate that the implementation of such a measure may not negatively alter the prior level of protection.[75] This discussion is important for several reasons. For one, many Member States are signatory parties to a number of international instruments that provide social rights (or even have these embedded in their own constitution) related to the fight against poverty and social exclusion. As a non-regression clause, this minimum should be respected in EU interventions. However, as has been discussed in the previous chapter, this has not always been the case, particularly amidst the previous economic crisis, and several international actors have heavily refuted EU interventions and their impact on social rights. Second, this level provides a starting point for any new EU social instruments, as those discussed in the following chapter. This level should demonstrate a consensus between the different Member States and serves as a counter argument for those who argue that social policy in the EU is too diverse to formulate a common instrument.

4.3 Conferral, subsidiarity and proportionality

To be able to implement the objective of combating social exclusion, the Union must first have competences, and then consider whether it is in fact the appropriate body to act and to what extent it might do so. These three steps refer to the principle of conferral, subsidiarity and proportionality respectively, which are necessary steps to undertake before the adoption of any EU legislative instrument. Accordingly, this section looks into a number of considerations worth noting with each principle before jumping into the legal bases in the following section.

74 Corazza, *supra* n 40, originally referring to the article of Ales, '"Non regresso" senza dumping sociale ovvero del "progresso" nela modernizzazione (del modello sociale europeo)' (2007) *Diritti lavori* 15, 5–24.

75 C-378/07—*Angelidaki*, ECLI:EU:C:2009:250; Peers, 'Non-regression clauses: the fig leaf has fallen' (2010) *ILJ* 39, 436–443.

4.3.1 Conferral

The principle of conferral aims at ensuring that any EU action is subject to the limits of the competences conferred by the Member States to the EU in order to attain the objectives established therein, *inter alia*, the social objectives discussed above. As such, before taking any action, the Union must first determine whether it has competence to do so. This implies that, on the one hand, the EU on its own is not able of extending its competences and on the other, that the EU has no general law-making capacity.[76] The competence of the EU to develop instruments to fight poverty and social exclusion is hence determined and limited by the treaties (Article 5 TEU), which also establish the procedures, conditions and objectives for exercising its powers (Article 13(2) TEU).[77]

According to Article 4(2) TFEU, social policy is a shared competence, that is, for the aspects defined in the treaty. In principle, this entails that in those areas attributed to the EU, both the EU and the Member States may legislate. When the Union does not take action, Member States enjoy the freedom to regulate provided that their legislative measure is in line with EU law. For instance, it would not be possible for a Member State to legislate in the social field, if the measure taken breaches the principle of equal treatment, which is regulated under EU law. This is because in cases of concurrence, the principle of supremacy of EU law applies.[78]

In the case of social policy, the EU has both specific and general powers. Specific powers, *stricto sensu*, are to be found under Article 153 TFEU (former Article 137 TEC), concerning, *inter alia* the fight against social exclusion and the integration of persons excluded from the labour market. Moreover, there are other policy areas where a significant corpus of social law has developed, such as free movement, social cohesion, equality and migration. General powers, otherwise, are concerned with issues related to the common internal market. These provisions are to be found in Articles 114, 115 and 352 TFEU.

However, not all these areas are considered a 'shared competence'. In fact, this is not even the case for all areas covered under the social policy title (Title X), which is understood as social policy *stricto sensu*. A number of areas exclude harmonisation either by explicit reference in the provision itself (Article 153(1)(j) and (k) TFEU) or by being catalogued as a competence of support, coordination, or supplement (Article 156 TFEU). Similarly, other areas that are not strictly speaking social policy but where a significant corpus of the social acquis

76 With the exception of the general legal bases discussed below.

77 De Baere and Gutman, *supra* n 5.

78 Klamert, *The Principle of Loyalty in the EU* (Oxford: OUP, 2014) Chapter 6. Barnard, '(Hard) law-making in the fields of social policy' in Barnard (ed.) *EU Employment Law* (Oxford: OUP, 2012), 48–49. Cuyvers,'General principles of EU law' in Ugirashebuja et al. (eds.) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Leiden: Brill, 2017), 217–228.

of the Union has developed—social competences *sensu lato*—also fall under this category of supplementary competences, such as employment policy. These complementary competences exclude the possibility for harmonisation in those areas.

That the EU has competences in social policy, is undisputed. When and how the EU should exercise these powers, is subject to a much heavier debate. These questions are specifically addressed for each of the legislative proposals in Chapter 5.

4.3.2 Subsidiarity

4.3.2.1 The outline of the subsidiarity principle

Where the Union has a non-exclusive competence to legislate, as it is the case of social policy, it must consider the principle of subsidiarity. According to Article 5(3) TEU, the EU will act in these areas where the objective(s) of a proposed action cannot sufficiently be achieved by Member States and, instead, by reason of the scale or effects, it can be better achieved at Union level. In other words, the Union is presumed to act only when it is understood that action by the Union is preferable in order to achieve the objective of a measure. The principle of subsidiarity is often linked to the principle of proportionality that determines the content and the form of new initiatives in a way that it does not exceed what is necessary to achieve its objective. One could say, therefore, that the principle of subsidiarity lies between the principle of conferral and the principle of proportionality.

The rationale behind the principle of subsidiarity is twofold. On the one hand, the principle of subsidiarity responds to the logic of the Union not intruding on national, regional or local identities. This goes beyond legal effectiveness and tackles the issue of Member State's self-governance.[79] On the other hand, there is the federal rationale, meaning that there is a need for a mediating principle between the federal and local government to determine when it is appropriate for the supranational entity to act. This logic is illustrated in the second half of Article 5(3) TEU when questioning whether one central measure can be more effective than 27 national ones.[80]

Beyond the treaty provision, there is an additional protocol on the application of the principles of subsidiarity and proportionality.[81] While this protocol already existed before the entry into force of the Lisbon Treaty, it was then strengthened by the role of national parliaments and the subsidiarity control

79 Chalmers et al., *European Union Law* (Cambridge: CUP, 2014), 393–398.

80 Scharpf, 'Community and autonomy: a multi-level policy making in the European Union' (1994) *JEPP* 1(2), 219–242.

81 Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2007] OJ C 83.

mechanism, also known as the yellow-card procedure. According to this procedure, where national parliaments consider that a new act does not comply with the principle of subsidiarity they may send a reasoned opinion to the Commission within eight weeks.[82] Each national parliament is allocated two votes, one for each chamber (or two votes for a Member State's unicameral parliament) and the effect of a reasoned opinion will ultimately depend on the number of national parliaments reacting to the draft of the act and the number of votes. When the reasoned opinion exceeds one third of the total of votes, the Commission must review the initiative,[83] but it may decide in any case to maintain, change or withdraw the proposal. If it decides to maintain the proposal, however, it will need to present a justification for such a decision before the European Parliament and the Council, also known as the orange-card procedure. Nevertheless, if a simple majority of the European Parliament or the Council decides against such proposal, it will not be given further consideration.[84] Up until now, the yellow-card procedure has been triggered three times. One in 2012 with regard to a proposed regulation on the exercise to collective action, also known as the Monti II Regulation,[85] another in 2013 about a proposal for a regulation establishing the European Public Prosecutor's Office[86] and, most recently, in 2016 about the review of the Posting of Workers Directive.[87] The Commission did not find a breach of the principle of subsidiarity in any of the proposals, however, in the case of the Monti II Regulation (see the discussion that follows) it decided to withdraw the proposal anticipating the lack of support for its adoption. By contrast, in the other two cases the Commission decided to maintain the proposals and provided reasons for its opinion accordingly.[88]

82 For an overview of the recent reasoned opinions see: Jaroszyński, 'National Parliaments' scrutiny of the principle of subsidiarity: reasoned opinions 2014–2019' (2020) *EuConst* 16(1), 91–119.

83 Some areas such as freedom and security and justice require a lower threshold: one quarter.

84 Protocol (No 2), *supra* n 81, Arts. 5–7.

85 COM (2012) 130 final, 'Proposal for a council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services'.

86 COM(2013) 534, 'Proposal for a council regulation on the establishment of the European Public Prosecutor's Office'.

87 COM(2016)126 final, 'Proposal for a directive of the European Parliament and of the council amending directive 96/71/EC of The European Parliament and of the council of 16 December 1996 concerning the posting of workers in the framework of the provision of services'.

88 COM(2013)851 final, 'on the review of the proposal for a council regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2'; COM(2016)505, 'on the proposal for a directive amending the posting of workers directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2'; See for more information on the Yellow Card procedure: Fabbrini and Granat, '"Yellow card, but no foul": the role of the National Parliaments under the subsidiarity protocol and the European Commission proposal for the right to strike' (2013) *CMLRev* 50(1), 115–144; More on the principle of subsidiarity: Lenaerts, 'The principle of subsidiarity and the environment in the European Union: keeping the balance of federalism' (1993) *FILJ* 17(4), 846–895.

Article 8 of the Protocol further establishes that the CJEU shall have jurisdiction in actions of infringement of the principle of subsidiarity. The role of the Court when ruling over the principle of subsidiarity is a complicated one, considering that if the Court finds a breach of the principle it will have to come into a disagreement with the conclusions of the EU institutions.[89] However, this has not precluded the Court from weighing in. For example, the Court has ruled that when the new instrument has the objective of harmonising, it would be difficult to argue that there is a breach of the principle of subsidiarity since it cannot be expected that Member States alone are going to achieve such a goal.[90] Moreover, in *Estonia v. Parliament and Council*, the Court decided that when the purpose of the legislative instrument is twofold and these two objectives are interdependent on one another, even if one of the objectives would be better achieved by Member States, this twofold objective may still be better achieved at the EU level:

> the principle of subsidiarity cannot have the effect of rendering an EU measure invalid because of the particular situation of a Member State, where [...] the legislature has concluded on the basis of detailed evidence and without committing any error of assessment that the general interests of the European Union could be better served by action at that level. [91]

In this line, the Court recently claimed that when dealing with the principle of subsidiarity, the obligations to state reasons must be evaluated both by reference to the wording of the legislative act and by reference to the particular context of the case.[92] Worth noting, in the context of the Better Regulation Agenda,[93] the Commission reports annually better law-making in relation to the principle of subsidiarity and proportionality.[94]

4.3.2.2 Subsidiarity in social Europe and the Monti II Regulation fiasco

The question of subsidiarity in the social dimension of Europe has generated a wide discussion. Some advocate for a proactive role of the Union arguing the

89 Davies, 'Subsidiarity: the wrong idea, in the wrong plate, at the wrong time' (2006) *CMLRev* 43(1), 72–74.

90 C-426/93—*Germany v. Council*, ECLI:EU:C:1995:367, §42; Opinion AG Léger in C-84/94—*UK v. Council*, ECLI:EU:C:1996:93, §126–130.

91 C-508/13—*Estonia v. Parliament and Council*, ECLI:EU:C:2015:403, §46–48 and §54.

92 C-547/14—*Philip Morris*, ECLI:EU:C:2016:325, §225–226.

93 COM(2017) 651 final, 'Completing the better regulation agenda: better solutions for better results'; SWD(2017) 675 final, 'Overview of the Union's efforts to simplify and to reduce regulatory burdens accompanying the document communication completing the better regulation agenda: better solutions for better results'.

94 Reports can be found in the Commission's official Website, available at: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/subsidiarity_reports_en.htm.

duty to care for the social well-being of their citizens to the level of matching the collective economic interest and in the framework of an integrated market. A milder view supports EU action in the social field insofar as it is a necessary action to prevent competition distortions that arise from the divergences between Member States, for example, due to the production costs related to national social standards, such as health and safety at work. Similarly, another view argues that the Union should only act when there is an added value for it, such as those cases where there is a clear transnational element at stake. There is a fourth and more restricted view advocating for no action by the Union in the field of social law. While parts of the three previous views have been somewhat incorporated in actions of the EU in the social field, the fourth view is not supported by the legislation adopted so far, or by the fact that the EU has shared competences in the social field in general.[95]

The previous chapter discussed the cases of *Viking* and *Laval*,[96] where the Court recognised the right to collective action (including the right to strike) as a fundamental right integral to the general principles of EU law for the first time, that the EU also has a social purpose beyond its economic purpose and that the four fundamental freedoms must be balanced against the Union's social objectives. The Court even stressed that the protection of workers is an overriding reason of public interest. And yet, the Court concluded that there was room for limiting collective rights because the burden placed on the freedom of establishment and freedom to provide services was disproportionate. While some commentators welcomed a needed clarification of the internal market rules, for the most part, these and the consequent decisions of the Court were extensively criticised for symbolising the primacy of EU economic rules over fundamental rights.[97] These two cases and the follow-up cases epitomised the most extreme form of the conflict between the economic interests of the EU and the social dimension of the national legal systems.[98] In order to provide a political and more targeted result to the vacuum created by the CJEU on the right to take collective action in the context of the freedom of establishment and freedom to provide services, the Commission presented the Monti II Regulation.[99] However, this proposal was opposed by many, what

95 On the general aspects of subsidiarity see: WATSON, 'The community social charter' (1991) *CMLRev* 28(1), 37–40; CRAIG, 'Subsidiarity: a political and legal analysis' (2012) *JMCS* 50(1), 72–87; BERMANN, 'Taking subsidiarity seriously: federalism in the EC and the USA' (1994) *CLRev,* 94, 331–392; DE BÚRCA, 'Reappraising subsidiarity's significance after Amsterdam' (1999) *Jean Monnet* Working Paper 7/99.

96 C-438/05—*Viking*, ECLI:EU:C:2007:772; C-341/05—*Laval*, ECLI:EU:C:2007:809.

97 COM(2012) 130 final, *supra* n 85, explanatory memorandum.

98 MONTI, 'A new strategy for the single market' (2010) Report to the President of the Commission. C-438/05—*Viking,* ECLI:EU:C:2007:772; §87; C-341/05—*Laval*, ECLI:EU:C:2007:809, §110.

99 COM(2012) 130 final, *supra* n 85.

resulted in the proposal becoming the first victim of the so-called yellow-card procedure.[100]

The main challenge of this proposal was regulating the right to strike without reversing the case-law of the CJEU.[101] Accordingly, the proposal recognised that there was no primacy of the freedom to provide services or of establishment over the right to strike. However, it also recognised that there are instances where fundamental freedoms and rights will have to reconcile following the principle of proportionality. Essentially, what the Commission did was to propose an alert mechanism in order to provide Member States and the Commission with 'timely and transparent' information on those instances affecting the effective exercise of the freedoms of establishment and freedom to provide services. In addition, the Commission also put forward a number of dispute resolution mechanisms that could be used in such situations.[102]

What is interesting about this proposal, beyond the use of the yellow-card procedure, is that the Regulation was intended to be adopted under the general basis on Article 352 TFEU because the right to strike is explicitly excluded from the range of matters that can be regulated in the EU by means of a directive under the Social Policy title (Article 153(5) TFEU). This is an interesting matter for the goal of this research, because 'pay' is also one of the matters that is excluded. So, if one would like to regulate 'pay' in a specific way, it seems that regulating it based on Article 352 TFEU would be possible. At this point, it is of the utmost importance to emphasise that the proposal for the Monti II Regulation did not go through, not because of the subsidiarity principle itself but rather because the Commission considered, bearing in mind the wide opposition to the proposal, that it would not gather the necessary support for its adoption.[103] The claims of a violation of the subsidiarity were puzzling, given that the proposal was a direct response to the problem generated by the Court itself. Since the question of primacy of economic freedoms over fundamental social rights is a matter of primary law, it seems difficult to imagine how Member States could have been better placed to address this issue than the Union as a whole. If the proposal for the Monti II Regulation would have been adopted, this would have allowed to clarify how to apply subsidiarity in

100 See for a deeper analysis: COM(2013) 566 final, 'Annual report 2012 on subsidiarity and proportionality'; Cooper, 'A yellow card for the striker: national parliaments defeat of EU legislation on the right to strike' (2015) *JEPP* 22(10), 1406–1425; Fabbrini and Granat, *supra* n 88; Goldoni, 'The early warning system and the Monti II regulation: the case for political interpretation' (2014) *EuConst* 10(1), 90–108.

101 COM(2012) 130 final, *supra* n 85, explanatory memorandum 10.

102 *Ibid*., Articles 4 & 5. For a deeper study: Rocca, 'The proposal for a (so-called) 'Monti Ii' regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services: changing without reversing, regulating without affecting' (2014) *ELLJ* 3(1), 19–34.

103 The Adoptive Parents, 'The life of death foretold: the proposal for a Monti II regulation' in Freedland and Prassl (eds.) *Viking Laval and Beyond* (Oxford: Hart Publishing, 2014), p. 96.

cases of conflicting cross-border situations which 'by nature, scale and effect' have implications beyond the borders of individual Member States.[104] Some countries, however, used their yellow-card for other concerns than subsidiarity. Sweden, for example, was concerned that adopting such a measure would lower the level of social protection as provided by Swedish law.[105]

More recently, the yellow-card procedure was once again used against the social dimension of the EU with regard to the revision of the Posting of Workers Directive.[106] The Commission's proposal received 14 reasoned opinions by national parliaments from 11 different Member States, representing a total of 22 out of 56 votes. Concerns among national parliaments ranged between existing rules already being sufficient and adequate, the lack of necessity to act at the Union level, the proposal failing to recognise Member State's competence with regard to remuneration and employment conditions and the lack of sufficient justification by the Commission with regard to the principle of subsidiarity.[107] After a careful analysis, it decided to maintain the proposal unchanged.[108] The Commission recalled that the proposal is based on the internal market and that posting, by definition, is of transnational nature, and as such, acting at the EU level would facilitate freedom of establishment and ensure that workers carrying out work at the same location are protected by the same rules, irrespective of whether they are posted or local workers. It further confirmed that the proposal did indeed respect the competence of Member States with respect to remuneration and working conditions as the directive 'only' implements the principle of equal pay for equal work. Ultimately, the directive was adopted in 2018,[109] and was challenged by Poland and Hungary. The Court, however, backed the Commission and confirmed that the legislator may reassess the interests of undertakings exercising their freedom to provide services and the interests of the workers in order to ensure that there is a level playing field among the Member States.[110]

4.3.3 Proportionality

While the principle of subsidiarity responds to the question of when the Union shall intervene, the principle of proportionality answers the query of the extent or scope of such intervention. As such, proportionality is a principle used to

104 *Ibid.*, 99–102.

105 Committee on the Labour Market, 'Statement 2011/12: AU14 subsidiarity check of the proposed Monti II regulation' (2012) Swedish Parliament, available at: www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc537165b8801373a7374c81458.do; Fabbrini and Granat, *supra* n 88.

106 COM(2016) 128 final, *supra* n 87.

107 COM(2017) 600, 'Annual report 2016 on subsidiarity and proportionality'.

108 COM(2016) 505 final, *supra* n 87.

109 Directive 2018/957, *supra* n 87.

110 C-620/18 and C-626/18, *supra* n 55.

measure the extent of the intrusiveness of the EU and requires that the content and form of the Union act does not exceed what is necessary to achieve the objectives of the EU.[111]

The CJEU recognised proportionality as a general principle of EU law as early as 1970, but its current formulation emanates from *Fedesa* where the Court said that the principle of proportionality is one of the general principles of Community law and is used to ensure that measures are appropriate and necessary to achieve the objectives legitimately pursued by the legislation in question. [112]

The principle of proportionality allows the CJEU to evaluate the merits of a case in terms of its suitability or to determine if the measure is excessive.[113] This case has been exhibited in the case of balancing fundamental rights in the previous chapter. This section, differently, focuses on the principle of proportionality as a balancing exercise between means and ends that is key when proposing new legislative instruments. This principle of proportionality is later applied to specific proposals in Chapter 5.

In practice, the principle of proportionality as a 'means to end balancing exercise' for adopting legislation is reduced to an *ex-ante* analysis by the executive and an *ex post* analysis by the judiciary. As for the former, contrary to the principle of subsidiarity, proportionality does not have an early alarm mechanism or an equivalent yellow-card procedure.[114] Protocol No. 2, however, requires EU institutions to ensure constant respect for the principle of proportionality and, as such, every draft of a legislative act must be accompanied by a 'detailed statement'. Moreover, in line with Article 9 Protocol No. 2, every year the Commission presents a report on the application of the principle of proportionality and subsidiarity.[115] In addition, in 2017 the Commission officially established the Task Force on subsidiarity and proportionality that makes recommendations for a better application of both principles.[116] Within the context of the Better Regulation agenda, the proportionality test aims at

111 See for extensively on proportionality: Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: OUP, 1999); de Búrca, 'The principle of proportionality and its application in EC law' (1993) *YEL* 13, 105–126.

112 C-331/88—*FEDESA*, ECLI:EU:C:1990:391, §13.

113 Sauter, 'Proportionality in EU law: a balancing act? (2013) *TILEC* Discussion Paper; Klatt and Meister, *The Constitutional Structure of Proportionality* (Oxford: OUP, 2012); Webber, 'Proportionality, balancing and the cult of constitutional rights scholarship' (2010) *CJLJ,* 179 ff.

114 Article 5 Protocol (No. 2), *supra* n 81: Hettne, 'Reconstructing the EWS' in Cornell and Goldoni (eds.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon* (Oxford: Hart Publishing, 2017), p. 58; Öberg, 'National parliaments and political control of EU competences: a sufficient safeguard of federalism?' (2018) *EPL* 24(4), p. 700.

115 COM(2019)333 final, 'Annual report 2018 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments'.

116 Task Force on Subsidiarity, Proportionality and "Doing Less is More", 'Active subsidiarity: a new way of working' (2018).

delivering ambitious policies in the simplest and least costly manner and avoiding unnecessary bureaucratic steps.[117] Essential to this process are impact assessments, the *ex-ante* evaluation mechanism, which has systematically been applied by the Commission since 2002.[118] In its impact assessments, the Commission focuses on the administrative and financial impact of a given measure, which has to be proportionate with the policy objective that is being pursued. Impact assessments allow the Commission to identify the strengths and limitations of potential policy options and if considered 'necessary' then it puts forward an initiative. In order to comply with a rigorous impact assessment, the DG in charge has to gather information, open a consultation process and apply a cost-benefit, cost-effectiveness and multicriteria analysis.[119] Since 2016, moreover, the Council and the European Parliament must take the impact assessment into full consideration during the legislative decision-making process.[120]

Just as with the principle of subsidiarity, the role of the CJEU in evaluating the principle of proportionality *ex-post*, remains rather controversial. The judicial review of EU legislation in vertical disputes is problematic because it requires the Court to assess quasi-political and empirical issues that the legislator is better suited to deal with.[121] In this vein, it is understood that policy assessments that involve the balancing of complex factors (as it is the case of impact assessments) must be left to the legislature, as a substantive assessment by the Court would raise questions of legitimacy an challenge the horizontal separation of powers. As such, because the legislator enjoys an ample margin of discretion, the role of the CJEU when reviewing the principle of proportionality is limited to a situation where a measure is manifestly inappropriate in relation to the pursued objective.[122] In *Philip Morris*, which concerned the revision of the tobacco advertising directive, the CJEU explicitly acknowledged the broad discretion of the legislature and that the legality of the directive would only be affected if it were 'manifestly inappropriate' *vis-à-vis* the objective it attempts to pursue or where the legislator has exceeded the limits of discretion leading to a misuse of power.[123] Hence, in order to claim that the principle

117 COM(2018) 703 final, 'The principles of subsidiarity and proportionality: strengthening their role in the EU's policymaking'.

118 Alemanno, 'A meeting of minds on impact assessment when ex ante evaluation meets ex post judicial control' (2011) *EPL* 17(3), 485–505.

119 SWD(2017) 350, 'Chapter III guidelines on impact assessment' Better Regulation toolbox'; See extensively: Meuwese, *Impact Assessment in EU Lawmaking* (Aan de Rijn: Kluwe, 2008).

120 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the Commission on Better Law-Making [2016] OJ L 123.

121 Öberg, 'The rise of the procedural paradigm: judicial review of EU legislation in vertical competence disputes' (2017) *EuConst* 13(2), 248–280.

122 Bradley, 'Legislating in the European Union' in Barnard and Peers (eds.) *European Union Law* (Oxford: OUP, 2017), 116.

123 C-547/14—*Philip Morris*, ECLI:EU:C:2016:325, §63 and §166–177; C-84/*94—UK v. Council*, ECLI:EU:C:1996:431, §58.

of proportionality has not been respected, a party will have to demonstrate that either the objective being pursued by the measure at the case is not one that can be pursued by the legislature under the premises of the treaty or that less intrusive means could have been used to achieve the same objective.[124] Differently, in *Spain v. Council* the Court concluded that the legislator had failed to take into consideration the labour costs of cotton production and since, in order to achieve the objectives of the Regulation at stake, all relevant factors needed to be considered, the Council had not complied with the principle of proportionality.[125] Notably, AG Sharpston stressed that the legislator had breached the principle of proportionality because no impact assessment had been carried out.[126]

From the case-law of the CJEU, it appears that the Court limits the judicial review of EU legislation to a procedural review whereby the Court mostly considers the reasoning and evidence put forward by the EU legislator.[127] Accordingly, impact assessments become pivotal, not only for the *ex-ante* but also for the *ex-post* review, as they evidence whether the EU legislator has complied with the necessary procedural steps.[128]

4.4 Social competences

The issue of competences is arguably one of the most disputed items when it comes to social policy, particularly regarding competences to enact legally binding instruments. Because poverty and social exclusion are such broad and all-encompassing phenomena, there are several EU competences that could potentially accommodate (or that already accommodate) legislative instruments that contribute to the policy objective. In what follows, this section discusses a number of possibilities and considers both specific and general legal bases. Firstly, it analyses the most straightforward competences under the social policy title, namely, Article 153 TFEU, particularly focusing on its potential and limitations. Alternatively, it studies the possibility of adopting such an instrument under (or supported by) other legal bases, notably the social, economic and territorial cohesion competences (Article 175 TFEU) and the general

124 C-491/01—*British American Tobacco*, ECLI:EU:C:2002:741.

125 C-310/04—*Spain v. Council,* ECLI:EU:C:2006:521.

126 *Ibid.*, §82–96.

127 C-84/94—*UK v. Council*, ECLI:EU:C:1996:431, §58; C-151/17—*Swedish Match*, ECLI:EU:C:2018:938, §36-57; C-176/09—*Luxembourg v. Parliament and Council,* ECLI:EU:C:2011:290, §62–72;C-58/08—*Vodafone*, ECLI:EU:C:2010:321, §52; Joined Cases C-92 and 93/09 *Volker*, ECLI:EU:C:2010:662, §87–88; C-482/17—*Czech Republic v. Parliament and Council*, ECLI:EU:C:2019:1035, §77–90.

128 Alemanno, *supra* n 118; Lenaerts, 'The European Court of Justice and process-oriented review' (2012) *YEL* 31(1), 3–16; Craig, *EU Administrative Law* (Oxford: OUP, 2012), 592–639; Öberg, *supra* n 121.

competences of the EU regarding approximation of laws (Articles 114–115 TFEU) or the aforementioned flexibility clause (Article 352 TFEU).

Before jumping into this discussion, however, it is important to note that where an instrument is located will have a determinant effect on how the legislative instrument is being interpreted. It follows from the above discussion on the objectives, that a legal measure will have to pursue a social objective. Accordingly, when a legislative act is being interpreted, it will have to be read in conjunction with the objective it aims at pursuing. Hence, it is not only important that the EU has a competence to adopt a legislative instrument to tackle poverty and social exclusion, but that the objective that is being pursued by activating such a competence goes in line with the social character of the measure. Illustrative of the importance of choosing the right legal basis is again the landmark case of *Laval*. In this case, the fact that the Posting of Workers Directive was adopted on the freedom of services provision played a determinant role for interpreting the instrument as a maximum harmonisation of labour standards instead of a social minimum directive.[129] Had the Posting of Workers Directive been based on a different basis with a social objective instead, the subordination of fundamental social rights to the economic interests of the internal market would not have been possible.[130] If an EU instrument has the genuine goal of fighting poverty and achieving an overall harmonious development in the EU, it is crucial that such an instrument is based on competences with a social focus.

4.4.1 Social policy competences: Article 153 TFEU

The Treaty of Maastricht considerably amended former Article 118 TEEC in its Social Policy Agreement by first, extending the areas in which QMV applied and second, introducing a number of new fields of competence. With minor revisions, the Treaty of Amsterdam included the provision under Article 137 TEC, which was once again substantially amended and reorganised under the Treaty of Nice, including *inter alia* the area to combat social exclusion and the modernisation of social protection systems, to later be renumbered in Article 153 TFEU in the Lisbon Treaty without further revisions.[131]

4.4.1.1 General remarks

As it is now, Article 153 TFEU provides for European institutions, generally by joined action of the Council and the European Parliament, to act on a total

129 C-438/05—*Viking*, ECLI:EU:C:2007:772; C-341/05—*Laval*, ECLI:EU:C:2007:809. See also: C-346/06—*Rüffert*, ECLI:EU:C:2008:189.

130 COM(2016) 126 final, *supra* n 87.

131 Barnard, *supra* n 78, p. 53.

of eleven fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Community territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c)'.

In Nice it was agreed that the EU may adopt measures to enhance cooperation between Member States excluding harmonisations of laws (now Article 153(2)(1) and 156 TFEU). This competence refers mainly to the Social OMC analysed in Chapter 2. Beyond these powers, the EU also has the competence to adopt minimum standard directives in the (a) to (i) fields enshrined in the first paragraph of the provision. Noteworthy, after the Treaty of Amsterdam, the order of powers shifted from minimum standards being the first option under paragraph (a) and the OMC methodology under paragraph (b), to the opposite order in the Treaty of Nice. This may suggest that the Social OMC was the preferred path to achieve the objectives set for social policy.[132]

Where possible, minimum standard directives may be adopted by means of the ordinary legislative procedure established in Article 294 TFEU which comprises the QMV once both the Economic and Social Committee and the Committee of Regions have been consulted. In the ordinary legislative process the European Parliament and the Council act together as co-legislators. Given that the European Parliament, contrary to the Council or the Commission is a directly democratically accountable institution, the role of the European Parliament as a co-legislator increases the legitimacy and democratic character of the given directive.

Some fields (Article 153(2) (c), (d), (f) and (g) TFEU), however, require a unanimous vote following the special legislative procedure under Article 289 TFEU, although for some of these the Council, acting unanimously after a proposal of the Commission, may render the decision-making process to the ordinary legislative procedure. This is known as a *passerelle* clause.[133] This is one of a number of 'flexibility mechanisms' introduced by the Lisbon Treaty that aim at rendering the decision-making process at the EU level more efficient

132 Barnard, *supra* n 78, p. 55.

133 *Passerelle clauses* are provisions that allow altering legislative procedures without a formal amendment of the treaties. It is an option enshrined throughout the TFEU to allow moving from the special to the ordinary legislative procedure and it requires unanimity in order to be triggered.

where a special legislative procedure and unanimity are required. In this regard, in April 2019 the Commission launched a communication with the purpose of activating the *passerelle* clause under the social policy title.[134] If the *passerelle* clause were indeed activated, not only could this have an impact on the efficiency of adopting instruments in social policy, but it would also put the European Parliament on an equal footing with the Council. Promoting co-decision and not subordinating the role of the European Parliament to a mere consultant—as it is the case with the special legislative procedure, also addresses the democratic deficit of the social Europe.[135]

As regards the concept of 'minimum standards' these should not be limited to the lowest common denominator or even the lowest level of protection established by the various Member States. This was clarified in the *Working Time* case where the Court held that the EU is free to set its own minimum requirements, as long as these comply with the principles of conferral, subsidiarity and proportionality.[136] In this case the Court also held that Member States are free to adopt more stringent measures.[137] This was recently confirmed in *TSM*[138] and goes in line with the non-regression clause under Article 153(4) TFEU, which impedes measures adopted under Article 153 TFEU from precluding Member States from maintaining or introducing more stringent protective measures, as long as such measures are compatible with EU law.[139] This means that directives setting minimum standards in the field of social policy should in no way restrict Member States from offering additional protection.

If anything, Member States are encouraged or 'geared towards attaining the harmonious development' and 'high degree of convergence' set in Article 3 TEU as well as a high level of employment and social protection.[140] In any case, these measures remain subject to a gradual implementation and transitional periods need to be provided where an increase of the level of protection is required.[141] Moreover, such measures may not set unrealistic objectives for Member States, as specific legal and factual circumstances of Member States need to be taken into account.

Lastly, it follows from Article 153(3) that Member States might transfer the implementation of the directives and other measures under this competence to

134 COM(2019) 186 final, 'More efficient decision-making in social policy: identification of areas for an enhanced move to qualified majority voting'.

135 Aranguiz, 'More majority voting on EU social policy? Assessing the European Commission's proposal' (2019) *EUlawAnalysis,* available at: http://eulawanalysis.blogspot.com/2019/06/more-majority-voting-on-eu-social.html

136 C-84/94—*UK v. Council,* ECLI:EU:C:1996:43, §56;

137 *Ibid.;* C-2/97—*IP*, ECLI:EU:C:1998:613, §36.

138 C-609/17—*TSN*, ECLI:EU:C:2019:981, §47–48.

139 C-194/08—*Gassmayr*, ECLI:EU:C:2010:386, §89–90.

140 Barnard, *supra* n 78, p. 56.

141 Geiger et al., *supra* n 8, p. 645.

the social partners, which may implement the measure by a collective agreement. This transfer will only be permitted when the social partners are able to implement such measures under national law.[142] In any case, Member States remain responsible for a proper implementation that guarantees that the objective therein will be attained.

4.4.1.2 The copious limitations under Article 153 TFEU

The outset of this provision clearly shows how the adoption of legal measures under this basis was not the first choice of the EU, which becomes apparent from the many restrictions set therein. In addition to the fact that a number of fields, such as social exclusion, do not allow harmonising measures and that other fields, like social security, require unanimity, there are a number of additional limitations. Many of these refer to constitutional saving clauses, which are caveats introduced in the treaties to limit the intrusion of the EU into national competences.[143] This section discusses these restrictions to clarify what can be achieved under the social policy title. In what follows, this section studies the restraints regarding small and medium enterprises (SMEs) (153(2)(b) TFEU), what constitutes the 'fundamental principles' of social security and 'significantly altering their financial equilibrium' (153(4) TFEU) and what the limits on the exclusion of 'pay' are (Article 153(5) TFEU). It later discusses whether these limitations apply outside Article 153 TFEU.

4.4.1.3 Small and Medium Enterprises (Article 153(2)(b) TFEU)

First and foremost, according to Article 153(2)(b) TFEU, the EU must not impose administrative, financial and legal constraints when adopting a directive, that may result in holding back SMEs.[144] The meaning of this provision was clarified by the Court in *Kirsammer-Hack* where it stressed that small and medium-sized undertakings may be subject to special economic measures so that they can keep playing a major role in the economic development of the Union and the creation of employment. This decision was taken in spite of the fact that the series of measures ruled in the case, national legislation that excluded part-time workers from accessing social protection, justified indirect discrimination on grounds of sex.[145] Accordingly, differentiations that favour SMEs are permitted, but when this differentiation leads to a lower protective

142 Aranguiz, 'Working paper on the potential and limits for social policy in the current EU framework' (2022) *EUSOCIALCIT* Working Paper Deliverable 2.4.

143 Schültze, 'EU competences: existence and exercise' in Chalmers and Arnull (eds.) *Oxford Handbook of European Union Law* (Oxford: OUP, 2015), p. 81.

144 This limitation is also enshrined in the EPSR. Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights, C(2017) 2600 final [2017] OJ 113 Preamble §19.

145 C-189/91—*Kirsammer-Hack v. Sidal,* ECLI:EU:C:1993:907, §33–34.

threshold for the employees of the SME, this will have to be grounded on an objective reason.[146]

4.4.1.4 On fundamental principles and financial equilibrium (Article 153(4) TFEU)

Secondly, according to Article 153(4) TFEU, legislation adopted under paragraph 2, shall not affect the right of Member States to determine the fundamental principles of their social security systems and/or alter the financial equilibrium thereof. There are two immediate questions that pop out of this provision: First, what are the fundamental principles of the social security systems? And second, how or when is the financial equilibrium significantly altered?

The first part symbolises a constitutional saving clause that aims to respect the variety of welfare designs in the EU. In this regard, Repasi argues that fundamental principles within the context of this provision are limited to the 'ordering rules' that define the fundamental design of the social security system. As such, rules that define distinctive features of different welfare states represent an exclusive competence of Member States where the EU cannot act. 'Ordering rules' include, the manner in which welfare states are financed (contributions or taxes) or the definition of certain eligibility criteria.[147] Rules that relate to the control of the overall expense of the welfare system, differently, might be subject to an EU legal act. A different interpretation would not be coherent as the same provision foresees that a certain degree of financial impact is allowed, as long as this is not 'significant' as to alter the financial equilibrium of the social security system. Eligibility criteria that regulate a matter of principle, (those matters that define the distinctive feature of the different welfare states) such as including the self-employed within the mandatory coverage, would arguably be contrary to the limitation of Article 153(4) TFEU. However, eligibility criteria that regulate entitlement on the basis of a minimum required contribution or timeframe could be regulated under an EU legal act.[148] In this regard, the lines of which eligibility criteria are a matter of fundamental principles remain blurry. While the limits of what constitutes a

146 Geiger et al., *supra* n 8, p. 645.

147 Repasi, 'Legal options and limits for the establishment of a European unemployment benefit scheme' (2017) *Commission,* 13–14.

148 The CJEU and the respective AGs argued that Directive 2003/41 did not interfere with Member States' right to define the fundamental principles of, in this case, the design of national pensions in Poland and the Czech Republic, because the directive does not require Member States to install an occupational pension pillar, but to change the rules that limit the role of occupational pensions. Opinion AG Bot C-343/08—*Commission v. Czech Republic*, ECLI:EU:C:2010:28; §53–68. See also: C-343/08—*Commission v. Czech Republic*, ECLI:EU:C:2010:14; C-271/09—*Commission v. Poland*, ECLI:EU:C:2011:855, §43 ff.

fundamental principle are yet to be clarified by the CJEU, it must be recalled that at all times EU legislation in the field of social security remains bound to an unanimity requirement. Accordingly, if an EU act were to regulate a 'fundamental principle', Member States would still retain their right to veto.[149]

As regards the financial equilibrium of the social security system of Member States, the legislator may adopt instruments with financial consequences insofar as these do not destabilise the social security systems. It could be argued that a measure will significantly affect the financial equilibrium of social security systems when a system cannot finance its legal commitments *vis-à-vis* the eligible people without permanently increasing the level of contributions in more than a modest manner.[150] To some extent, this could be interpreted in the lines of the 'unreasonable burden' on the social security system that is enshrined in the Citizens Directive 2004/38.[151] In any case, modest increases in contributions or taxes seem to be possible under this provision, otherwise, the wording of the provision would have been stricter by not suggesting that a certain financial impact is foreseen.

4.4.1.5 The exclusion of 'pay': Article 153(5) TFEU

The principal limitation of Article 153 TFEU remains in the areas of high sensitivity, which explicitly exclude EU measures based on this provision in areas of pay, the right to association, the right to strike and the right to impose lockouts. Due to its importance for this contribution, this section focuses solely on the exclusion of 'pay'. This constitutional saving clause also poses a number of questions regarding what 'pay' is and what the limits of this exclusion are.

The treaties do not define 'pay' but the Court has explicitly stressed that the limitation on pay refers to 'the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed wage'.[152] This is not all that enlightening, but some clarity can be derived from Article 157 TFEU on equal pay for men and women, which has for long been interpreted by both the legislator and the Court. Article 157 TFEU defines pay as the 'ordinary basic minimum wage or salary' which includes pay received as piece rates or time rates[153] and 'any other consideration, whether in cash or in kind, which the worker receives

149 Repasi, *supra* n 147, 17–18.

150 I*bid*., p. 15.

151 Mantu and Minderhoud, 'EU citizenship and social solidarity' (2017) *MJ* 24(5), 703–720; Thym, 'The elusive limits of solidarity. Residence rights and social benefits for economically inactive union citizens' (2015) *CMLRev* 52(1), 17–50; Heindmaier and Blauberger, 'Enter at your own risk: free movement of EU citizens in practice' (2017) *WEP* 40(6), 1198–1217.

152 C-395/08—*Bruno and Others*, EU:C:2010:329, §37–39; C-268/06—*Impact*, EU:C:2008:223, §125.

153 C-400/93—*Specialarbejderforbundet i Danmark v. Dansk Industri*, ECLI:EU:C:1995:155.

directly or indirectly, in respect of his employment, from his employer'. This same definition is repeated in the Recast Directive 2006/54 (Article 2(1)). Further, the legal nature of the facilities is irrelevant to determine pay, meaning that they can be granted under an employment contract, *ex gratia*,[154] by a collective agreement,[155] or due to legislative provisions[156] as long as they are granted to the worker by reason of the employment. There is no requirement to keep working during that time,[157] which includes, voluntary payments,[158] supplementary pays and one-off payments.[159] Pay also includes, overtime supplements,[160] special bonuses by the employer,[161] travel allowances,[162] training compensations,[163] severance grants in cases of dismissal,[164] family and marriage allowances,[165] maternity benefits,[166] bridging pensions[167] and occupational pensions,[168] even after the termination of employment.[169] The Court has confirmed that the employment relationship is the decisive criterion,[170] even if the payment is only indirectly connected to it insofar as the employee has access to this payment by reason of employment. However, the mere fact that a working condition has a financial impact on the employee does not necessarily mean it constitutes pay.[171]

Because pay requires a connection with employment, where this connection does not exist, this limitation cannot apply. As such, if an instrument targets only people excluded from the labour market who have no connection with employment (based on Article 153(1)(j) TFEU), one cannot claim that there is a breach of the exclusion of 'pay' even if it regulates some kind of

154 C-281/97—*Krüger*, ECLI:EU:C:1999:396. §17.
155 Case 43/75—*Defrenne*, ECLI:EU:C:1976:56, §14; C-262/88—*Barber*, ECLI:EU:C:1990:209.
156 C-262/88—*Barber*, ECLI:EU:C:1990:209, §19; C-12/81—*Garland*, ECLI:EU:C:1982:44.
157 C-19/02—*Hlozek*, ECLI:EU:C:2004:779, §37–39.
158 C-333/97—*Lewen*, ECLI:EU:C:1999:512; C-281/97—*Krüger*, ECLI:EU:C:1999:396.
159 C-360/90—*Arbeiterwohlfahrt der Stadt Berlin v. Bötel*, ECLI:EU:C:1992:246.
160 C-285/02—*Elsner-Lakeberg*, ECLI:EU:C:2004:320.
161 C- 58/81—*Commission v. Luxembourg*, ECLI:EU:C:1982:215.
162 C-12/81—*Garland*, ECLI:EU:C:1982:44.
163 C-360/90—*Arbeiterwohlfahrt der Stadt Berlin v. Bötel*, ECLI:EU:C:1992:246.
164 C-33/89—*Kowalska v. Freie und Hansestadt Hamburg*, ECLI:EU:C:1990:265, §16.
165 C-187/98—*Commission v. Greece*, ECLI:EU:C:1999:535
166 C-342/93—*Gillespie*, ECLI:EU:C:1996:46.
167 C-132/92—*Birds Eye Walls*, ECLI:EU:C:1993:868.
168 C-262/88—*Barber*, ECLI:EU:C:1990:209.
169 C-69/80—*Worringham*, ECLI:EU:C:1981:63, p. 780 C-19/02—*Hlozek*, ECLI:EU:C:2004:779, §35; C-262/88—*Barber,* ECLI:EU:C:1990:209, §12; C-167/97—*Seymour-Smith and Perez;* ECLI:EU:C:1999:60, §23–24.
170 C-366/99—*Griesmar*, ECLI:EU:C:2001:648, §28. More recently C-192/18—*Commission v. Poland,* ECLI:EU:C:2019:924.
171 C-313/02—*Wippel*, ECLI:EU:C:2004:607, §32–33;C-476/99—*Lommers*, ECLI:EU:C:2002:183. However, classification schemes which automatically reclassify workers in a higher salary category based on their seniority may constitute pay C-184/89—*Nimz*, ECLI:EU:C:1991:50, §18; C-17/05—*Cadman*, ECLI:EU:C:2006:633.

payment, such as income, as long as there is no link between this payment and an employment relationship.

A different question refers to instruments on social security and social protection that apply also to those in an employment relationship. In this regard, the CJEU has held that social security payments do not constitute pay under Article 157 TFEU or under the Recast Directive.[172] In order to identify what constitutes a social security payment, the Court has highlighted the importance of determining whether or not there was an element of negotiation within the undertaking or occupational sector. In *Beune*, the Court held that Article 157 TFEU was not applicable because such a payment was directly governed by an obligatorily statute applicable to a general category of employees and that as such, the funding was determined by social policy considerations and not by the employment relationship.[173] Further in *Schönheit*, the Court held that if the pension scheme concerned a particular category of workers and the benefits are directly related to the period of service and calculated on the basis of the public servant's final salary, this will constitute pay under the directive. The inclusion of occupational pension within the scope of Directive 2006/58 was in fact, one of the main 'changes' encompassed by the Directive, whereby it codified *Barber*. In this case, the CJEU determined that all forms of occupational pension do constitute an element of pay within the meaning of Article 157 TFEU, and therefore the Directive.[174]

So, considering the above, both instruments for people excluded from the labour market and instruments that regulate social security may comply with the exclusion of 'pay' and therefore be adopted under Article 153 TFEU. The question remains, whether it could be possible, and if so how, to adopt an instrument on pay, such as a minimum wage instrument under this legal basis.

In this vein, it is important to recall that the Court has explicitly held that the exclusions under Article 153(5) TFEU, including 'pay', cannot hollow out the competence of the EU in other fields of social policy under the same provision. In fact, when interpreting Article 153(5) TFEU, the Court has repeatedly held a narrow interpretation of 'pay' in a way that such limitation does not extend to all areas related to pay given that many areas of social policy, particularly working conditions, would then be deprived of much of their substance.[175] A different interpretation would undermine EU competence and compromise the principle of effectiveness. It is in fact this narrow interpretation that has allowed the legislator to regulate equal pay in various anti-discrimination instruments and the judiciary to apply the principle of non-discrimination to

172 Case 80/70—*Defrenne*, ECLI:EU:C:1971:55.

173 C-7/93—*Beune*, ECLI:EU:C:1994:350; C-351/00—*Niemi*, ECLI:EU:C:2002:480.

174 For more on the origins of the limitation on pay see: Ryan, 'Pay, trade union rights and European community law' (1997) *IJCL* 13, 305–325.

175 C-307/05—*Del Cerro Alonso*, ECLI:EU:C:2007:509, §39–46.

cases that relate to payment or a pay differential, such as the case of gender discrimination discussed above.[176] In this vein, the Court has argued, that while establishing the level of pay is unquestionably a matter of the national competent bodies, these bodies must exercise their competence in line with EU law, which includes, the principle of non-discrimination.[177]

The limitation under Article 153(5) TFEU, hence, does not preclude 'working conditions' from covering certain aspects of 'pay' insofar as it does not directly regulate 'pay'. The case-law suggests, therefore, that 'only' provisions directly interfering with 'pay' are excluded under the social policy title, and as such, the possibility would technically exist to conceive of an instrument that avoids setting wages or the components of pay directly but that instead focuses on procedural matters such as transparency and predictability. This is further discussed in the context of a minimum wage instrument in Chapter 5.

4.4.1.6 Limitations: outside the social policy title?

These limitations are not necessarily applicable outside the social policy title, meaning that a different legal basis could be used to adopt an instrument on the excluded areas. This argument is first and foremost supported by the wording of Article 153(5) TFEU itself which reads that 'the provisions *in this Article* (emphasis added) shall not apply to pay', which suggests that other provisions potentially could. It may be argued,[178] however, that insofar as the Court has held that the level of pay falls unquestionably outside the competence of EU law,[179] the case-law of the CJEU might be strictly interpreted as a general statement of the powers of EU law.[180] Such an interpretation, however, seems to contradict previous interpretations of the Court where the CJEU has held that the limitations of Article 153 TFEU apply only to that provision.[181] A similar reasoning goes for counterarguing the *lex specialis* reasoning, or put differently, that because a more specific provision exists, this prevails. The CJEU does not seem to oppose the use of a more general and indirect legal basis insofar as the conditions of the provision are being fulfilled. Examples where the Court appeared to support this idea include the Tobacco Advertisement case which

176 Opinion AG Maduro, C-307/05—*Del Cerro Alonso,* ECLI:EU:C:2007:3, §23; C-307/05—*Del Cerro Alonso*, ECLI:EU:C:2007:509, §42.

177 C-395/08—*Bruno and Others*, ECLI:EU:C:2010:329, §39–40.

178 Opinion AG Jääskinen C-507/13—*UK v. Parliament and Council,* ECLI:EU:C:2014:2394, §114; C-395/08—*Bruno and Others*, EU:C:2010:329, para. 39; C-268/06—*Impact*, EU:C:2008:223, §129.

179 C-507/13—*UK v. Parliament and Council,* ECLI:EU:C:2014:2394, §114; Similarly also C-62/14 *Gauweiler,* ECLI:EU:C:2015:400, §52; Case C-493/17 *Weiss,* ECLI:EU:C:2018:1000, §61–62.

180 C-395/08—*Bruno and Others*, EU:C:2010:329, §39; C-268/06—*Impact*, EU:C:2008:223, §129.

181 C-343/08—*Commission v. Czech Republic*, ECLI:EU:C:2010:14, §66–67; C-271/09—*Commission v. Poland*, ECLI:EU:C:2011:855, §43. C-620/18 and C-626/18, *supra* n 55.

was adopted under Article 114 TFEU on approximation of laws regardless of the exclusion of harmonisation from the legal basis on public health.[182] This line of argumentation suggests that as long as the conditions for the use of a particular legal basis are fulfilled, it is irrelevant whether other legal bases explicitly exclude the matter. This interpretation should also be applicable, *mutatis mutandis*, to using different legal bases than the social policy. A different interpretation would seriously undermine the principle of effectiveness, contradict a textual reading of the limitation on 'pay' and generalise what ought to be taken as an exceptional exclusion. The most logical interpretation is, therefore, that the exclusion of 'pay' under Article 153(5) TFEU does not prevent the EU legislator from using a different legal basis, provided that there is one.[183] The following sections discuss alterative specific legal bases.

4.4.2 Alternative bases and the interesting case of social cohesion: Article 175 TFEU

Beyond the social competences *stricto sensu* there are a number of competences in the Union that may act (and have already acted) as a driving force for the development of social policy. Arguably, these competences could accommodate an instrument that also aims at tackling poverty and social exclusion.[184] A considerable corpus of the social dimension of the EU has already developed under citizenship (Article 21 TFEU) and social security coordination (Article 48 TFEU),[185] equal opportunities (Article 19 TFEU)[186] and migration (Article 79 TFEU).[187] The main problem with these is that they mostly regulate equal treatment regarding access to welfare, employment or services. Equal treatment can have a meaningful impact in fighting poverty and social exclusion insofar as individuals may not be excluded from a given system. But ultimately

182 C-376/98—*Germany v. Parliament and Council*, ECLI:EU:C:2000:544, §87–88; C-62/14 *Gauweiler* ECLI:EU:C:2015:400, §52; C-493/17 *Weiss* ECLI:EU:C:2018:1000, §61–62.

183 See for this argument also: Aranguiz and Garben, 'Combating income inequality in the EU: a legal assessment of a potential EU minimum wage directive' (2021) *ELRev* 46(2), 156–174.

184 Extensively: Aranguiz, *supra* n 20, Chapters 4 and 5.

185 Schoukens, *supra* n 6, 37–41. Pennings and Seeleib-Kaiser, *EU Citizenship and Social Rights: Entitlements and Impediments to Access Welfare* (Glos: Elgar, 2018); O'Brien, *Unity in Adversity: Union Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford: Hart Publishing, 2017); Verschueren, 'EU migrants and destitution: the ambiguous EU objectives' in Pennings and Vonk (eds.) *Research Handbook on European Social Security Law* (Cheldenham/Northhampton: Elgar, 2015), 414–515.

186 Muir, 'Drawing positive lessons from the presence of 'the social' outside of EU social policy *Stricto Sensu*' (2018) *EuConst* 14(1), 87–88.

187 Verschueren, 'Employment and social security rights of third-country nationals under the EU labour migration directives' (2018) *EJSS* 20(2), 100–115.

it remains neutral.[188] As such, instruments under these bases will not guarantee that the social protection floor is adequate, just that it is equal—though subject to limitations—regardless of nationality, gender, race, age, ethnicity, religion or belief, disability or sexual orientation. Accordingly, while they may ensure that social policy is distributed indiscriminately among different groups of the population, they do not necessarily guarantee that this is sufficient to have a life in dignity. Moreover, equal treatment is already protected in numerous instruments of EU law that cover a variety of areas and groups.[189] There is, however, another legal base other than social policy that could be used for an instrument aiming at combating poverty and social exclusion, namely, social cohesion under Article 175 TFEU.

Under Article 175 TFEU, the EU has the shared competence to adopt measures to strengthen the economic, social and territorial cohesion of the Union. The European Parliament and the Council may, in accordance with the ordinary legislative procedure, adopt 'specific actions outside the funds' to strengthen the economic, social and territorial cohesion of the EU (Article 174 TFEU).[190] As such, it could be argued that an instrument to fight poverty and social exclusion could be adopted under the auspices of this provision. However, such an instrument would have to have the clear objective to reduce the socioeconomic disparities across the EU by promoting upward convergence and a more harmonious development of the EU. *A priori*, a textual reading of Article 175 TFEU does not seem to oppose to the adoption of such an instrument, insofar as it would be designed to genuinely diminish inequalities in the EU and thus to strengthen social cohesion. There are a number of considerations worth noting in this regard.

Since it is pivotal to evidence that such a measure would indeed contribute to social cohesion, in the first place, it must be clarified what 'social cohesion' entails. In words of AG Bot social cohesion 'emerges as a broad and overall concept with imprecise contours' that is difficult to be defined.[191] Because of

188 This is with the exception of social security coordination that also regulates export and aggregation of periods *inter alia,* but this in turn, excludes harmonisation and is limited to coordination. Thus, again, it remains neutral. See complete discussion Special Issue, 'Discussion strategies for social Europe: the potential role of EU law in contributing to the Union's policy objective of fighting poverty and social exclusion' (2020) *EJSS* 22(4), and specifically Verschueren, 'The role and limits of European social security coordination in guaranteeing migrants social benefits' (2020) *EJSS* 22(4), 390–402; Ganty, *supra* n 20.

189 Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166; Directive 2004/38/EC of the European Parliament and of 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 [2004] OJ L 158; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180.

190 C-166/07—*Parliament v. Council,* ECLI:EU:C:2009:499, §45.

191 Opinion AG Bot C-166/07, *Parliament v. Council*, ECLI:EU:C:2009:213, §82.

this, the Court has acknowledged the extensive discretion of the Union to take actions with an economic, social or territorial cohesion objective and has further recognised that economic and social progress corresponds to the objectives pursued by social cohesion policy in the EU.[192] According to Molle, social cohesion could be understood as a way of decreasing inequalities when disparities become 'politically and socially intolerable'. This could substantially be translated into a need to act at the EU level because policy action at the Member States cannot effectively decrease disparities.[193] At this point, the role of subsidiarity becomes apparent. For a secondary law instrument to be adopted under the auspices of social cohesion, the impact assessment of the instrument should clearly identify the social disparities across the EU that are politically and socially 'intolerable'. Such an assessment should provide sufficient data and a reasoned projection that leaves no doubts before the CJEU, should the directive be challenged, that such an instrument does indeed genuinely contribute to social and economic cohesion of the 'overall harmonious development' of the EU.

Others have already explored the possibility of using Article 175 TFEU to circumvent the lack of competence under Article 121 TFEU in the context of economic policy. Flynn argued that Member States and the Union might take another route in order to overcome the limitation under economic policy and argued, referring to *Gauwelier* and *Weiss*,[194] that the fact that a measure has effects on 'economic policy does not mean that the use of that other legal base constitutes a circumvention of the limitations' in the economic policy competence.[195] This argument applies, *mutatis mutandis*, to using Article 175 TFEU instead of the social policy basis for the adoption of an instrument against poverty and social exclusion.[196]

Beyond this, Article 175 TFEU is ambiguous in what 'specific action' really refers to. In *Parliament v. Council,* the CJEU recognised that the provision does not define which specific actions can be adopted under this legal basis. It followed an ill-explanatory text that did not give much guidance for the particular question of whether or not minimum harmonising legislation can be adopted under this provision.[197] However, AG Bot seemed to agree with the Parliament on a wide interpretation of 'specific actions' under Article 175 TFEU, which

192 C-166/07, *Parliament v. Council,* ECLI:EU:C:2009:499, §53; C-420/16*, Izsák*, ECLI:EU:C:2019:177, §68. C-149/96—*Portugal v. Council*, ECLI:EU:C:1999:574, §86.

193 Molle, *European Cohesion Policy* (London/New York: Routledge, 2007), p. 16.

194 C-62/14—*Gauweiler*, ECLI:EU:C:2015:400; C-493/17—*Weiss*, ECLI:EU:C:2018:1000.

195 Flynn, 'Greater convergence, more resilience?—Cohesion policy and the deepening of the economic and Monetary Union' in Fromage and de Witte (eds.) *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection* (Maastricht: Maastricht University, 2019) *Maastricht Law Faculty of Law* Working Paper series 2019/03, p. 49.

196 Aranguiz and Garben, *supra* n 183.

197 C-166/07—*Parliament v. Council*, ECLI:EU:C:2009:499, §46.

would include any action in any legal form.[198] There is, moreover, no sound reason to believe that 'specific action' would exclude harmonising legislation. If this were the case, the legislator could have used a more restrictive language as it is clearly the case for areas of complementary competence such as some fields of social policy (Article 153(2)(1) TFEU), education (Article 165 TFEU), culture (Article 167 TFEU) and tourism (Article 195 TFEU) where the EU has competence to adopt 'complementary actions' but harmonisation is specifically excluded. Moreover, Article 2 and 4 TFEU speak of social cohesion as a shared competence, where the Union may legislate. A narrow interpretation of the concept of 'specific action' would not only seem over restrictive but would also play against the principle of effectiveness.

Furthermore, the argument could be made that because Article 175 TFEU focuses on the role of coordination and funding, any other action beyond these two falls outside the confines of the social cohesion legal basis. Besides being a very narrow understanding of the provisions, such an interpretation, would not even be supported by a textual reading of Article 175 TFEU, which explicitly mentions 'actions outside the Funds' suggesting in fact that other forms of action are encompassed.

Differently, another caveat that could limit the use of Article 175 TFEU refers to the part of the text that reads 'without prejudice to the measures decided upon the framework of the other Union policies'. This could perhaps serve the argument that social cohesion policy is to be subordinated to other legal bases, such as Article 153 TFEU and its exclusion on 'pay'. In view of similar (and much stronger-worded) caveats in the treaties, which have not been given such a restrictive interpretation, this argument seems unlikely.[199]

A different obstacle could be to see Article 175 TFEU as limited to serve region-specific problems. Against this, it shall be noted that two prominent instruments adopted under this basis go well beyond regional integration, namely the ESF and the European Globalisation Adjustment Fund. The latter even introduced an amendment after the financial crisis where the regional limitation was specifically dropped.[200] Moreover, Article 174(1) TFEU refers to strengthening economic, social and territorial cohesion in order to promote the Union's *overall harmonious development*, meaning that the positive effects of a potential instrument under this basis should be measurable at the EU level.

198 Opinion AG Bot C-166/07—*Parliament v. Council*, EU:C:2009:213, §38 and §91–92.

199 Article 18 TFEU on non-discrimination, for example, reads 'without prejudice to any special provision contained therein' and Article 21 TFEU on citizenship is 'subject to the limitations and conditions laid down in the treaties'.

200 Regulation 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 [2013] OJ L 347; Regulation 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014–2020) [2013] OJ L 347.

Consequently, it can hardly be argued that the legislator is limited to region-specific problems.

Article 175 TFEU entails QMV and an ordinary legislative procedure for the adoption of a Directive. Where other specific legal bases too require the same legislative procedure, therefore, there is no argument to be made that Article 175 TFEU is being used to circumvent stricter legislative procedures. This is the case, for example, of the field of working conditions under Article 153 TFEU. However, this might be problematic if the areas covered require unanimity, such as social security.

All things considered, there is no reason to believe that Article 175 TFEU would not serve as a solid and sound legal basis for the adoption of a comprehensive instrument on poverty and social exclusion, as long as the instruments is well documented, justifies how such instrument would attain the objective to decrease disparities and increase social cohesion (Article 174 TFEU), and is not used as a way to circumvent a given legislative procedure.[201] Given the limitations of Article 153 TFEU, this might be a suitable legal basis for the adoption of an instrument on minimum wages or to extend the personal scope for a directive on minimum income.[202]

4.4.3 General legal basis

Originally, the Treaty of Rome did not contain any legal competences for the EU in matters of social policy, because it was seen as a strictly domestic issue. However, the idea of economic policies gracefully reconciling with social policies, as conceived by the founding fathers, was unsustainable at most. Soon after, the heads of State realised that the idea of social policy evolving just as a result of economic progress was not maintainable, which hastened a burst of EU social legislation in matters of gender equality, employee protection and health and safety.[203] Because there was no specific basis to adopt such measures, these were taken by means of a general legal basis in the treaties.[204] These so-called 'residual bases' are deemed to be used only in the absence of specific or

201 Aranguiz and Garben; *supra* n 183.

202 Van Lancker et al., 'Expert study on a binding EU framework on adequate national minimum income schemes' (2020) Commissioned by *EAPN*. See more in Chapter 5.

203 Vandenbroucke, 'Europe: the social challenge. Defining the Union's social objective is a necessity rather than a luxury' (2012) *OSE* Opinion paper.

204 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39.

sufficient legal bases, but never as a way to circumvent an express prohibition of harmonisation laid in the treaties.[205]

Whereas it has been discussed how the Treaty of Lisbon contains social competences, the general clauses still exist. This section takes a look into these powers as an alternative or complement to the legal bases discussed above. This part considers options under the residual powers of the EU and approximation of laws.

4.4.3.1 Residual powers: Article 352 TFEU

The Council, acting unanimously on a proposal of the Commission and after obtaining consent from the European Parliament may rely on Article 352 TFEU, also known as the 'flexibility clause', to take legislative action where no express legislative power has been given or when the legislative power of the EU is insufficient. In order to be able to use this provision, the Commission has to consider it necessary to attain one of the objectives in the treaties.[206] It is for the Council to decide whether a measure is really necessary.[207] This discretion, however, comes with certain limitations: No other provision in the treaties can give sufficient competence to adopt such a measure and this measure should stay within the scope of the Treaties according to the principle of conferral.[208]

Using the flexibility clause to adopt measures in social policy requires the Council to act unanimously on a proposal of the Commission once the European Parliament has agreed. What is more, since the introduction of the 'better competence monitoring' with the Treaty of Lisbon, any measure adopted on the basis of Article 352 TFEU must be brought to the attention of national parliaments.[209] This provision can be combined with other treaty provisions that do not constitute sufficient legal bases, by for example extending the personal scope.[210] It is possible that by also mixing with different procedures, the procedural threshold is lowered by only requiring QMV.[211] Nevertheless, the Treaty of Nice brought significant restrictions to

205 C-376/98—*Germany v. Parliament and Council*, ECLI:EU:C:2000:544, §79.

206 C-8/73—*Massey Ferguson*, ECLI:EU:C:1973:90, §6.

207 C-22/70—*Commission v. Council,* ECLI:EU:C:1971:32, §95.

208 C-51/89—*UK v. Council*, ECLI:EU:C:1991:241, §36.

209 De Baere and Gutman, *supra* n 5, p. 384; Verschueren, 'Union law and the fight against poverty' in Cantillon et al. (eds.), *supra* n 3, 224–226.; Schoukens, *supra* n 6, 37–41.

210 This is how employment law has extended to the self-employed or how Regulation 883/2004 has extended its scope to also include economically inactive citizens. In this regard, there remains the question about how is it possible that the recent proposal for amending said Regulation is based solely in Article 48 TFEU and not in combination with Article 352 TFEU, even though the proposal also targets economically inactive citizens.

211 C-166/07—*Parliament v. Council*, ECLI:EU:C:2009:499, §69. De Baere, 'From 'don't mention the titanium dioxide judgment' to 'I mentioned it once, but I think I got away with it all right':

this provision by introducing a new paragraph under Article 352(3) TFEU according to which harmonisation of laws is not possible in cases where the treaties exclude such harmonisation. This is precisely the case, as seen above, of legal action in the field of social exclusion.

On the necessity to attain one of the objectives set out in the treaties, this refers *inter alia* to the objectives listed in Article 3 TEU such as the objective to have a social market economy, full employment and social progress and combating social exclusion. It is widely accepted that the EU could use the flexibility clause in order to attain the social objectives enshrined in the treaties.[212] However, the limitations on the harmonisation of laws together with the requirement of unanimity put in question its added value for legal measures aiming to fight poverty and social exclusion.

An additional limitation of Article 352 TFEU lies within national constitutions. Some constitutions might impose an additional burden to the potential of the clause by for example requiring additional steps to adopt the measure internally. This is the case of the *Bundesverfassungericht* that requires the ratification by the German *Bundestag* to approve a measure adopted under the flexibility clause.[213]

When considering the idea of adopting any measure under Article 352 TFEU, it is important to recall the failure of the Monti II Regulation,[214] discussed earlier in this chapter, whereby the Commission attempted to fill in the gaps created by the Court after the highly controversial cases of *Viking* and *Laval*. Many argued that the Commission deliberately used the basis of Article 352 TFEU to circumvent the limits of Article 153(5) TFEU. That the Monti II Regulation was the first victim of the yellow-card procedure sent a clear message with regard to adopting measures under the general legal basis.[215]

But rejecting the adoption of legal measures under the flexibility clause has not always been the case. Before the Treaty of Amsterdam, a number of

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reflections on the choice of legal basis' in EU external relations after the legal basis for restrictive measures judgment' (2013) *CYELS* 15, 537–562.

212 De Baere and Gutman, *supra* n 5, 354–355; Garben, *supra* n 1.

213 German Constitutional Court, Judgment of the Second Senate of 30 June 2009—2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, §417: "In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law". This has been codified in Article 8 of the *Integrationsverantwortungsgesetz* of 22 September 2009. For such cases, the German Constitution requires a two third majority in both the Bundestag and the Bundesrat. Van der Schyff, 'EU social competences and member state constitutional controls: a comparative perspective of national approaches' in Vandenbroucke et al. (eds.) *supra* n 5, 385–406.

214 COM (2012) 130 final,' Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services'.

215 Feenstra, 'How can the viking/laval conumdrum be resolved? Balancing the economic and the social: one bed for two dreams' in Vandenbroucke et al. (eds.) *supra* n 5, 309–343.

measures were adopted under the flexibility clause.[216] In other cases, Article 352 TFEU has been used to extend the personal scope of other bases.[217] Recently, this was done for the Recommendation on access to social protection for workers and the self-employed.[218] Thus far, the CJEU has not found that the EU has acted *ultra vires*, probably because the social objectives on which the use of provision 352 TFEU is based are broad enough.

4.4.3.2 Approximation of laws: Article 115 TFEU

Article 114 TFEU and its twin 115 TFEU regulate the procedure of approximation of laws that provide the Union with a general competence to harmonise the internal market. These could serve as the legal basis to overcome obstructions between different laws, regulations or administrative provisions of Member States as long as this is to contribute to a better functioning of the internal market,[219] even as a preventive measure.[220] Whereas Article 114 TFEU excludes, *inter alia*, regulating the rights and interests of employed persons or free movement, its twin Article 115 TFEU applies in these fields. However, measures adopted with this legal base, must undergo a much stricter process, including unanimity by the Council.[221] On top of this, there are a number of reasons why using this legal basis is rather troublesome.

Approximation of laws could in principle be used to develop legal instruments on social policy by using the argument that such a measure would be beneficial for the establishment and functioning of the internal market. Yet, using the internal market as basis to develop the social dimension of Europe is not advisable. For example, a Framework Directive on Minimum Wage could be adopted on the basis of Article 115 TFEU (since 114 TFEU does not allow use of this basis for the rights and interests of employed persons). One can

216 For example, Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L 6; Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149.

217 Regulation No 883/2004; *supra* n 189; Council Recommendation of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems [1992] OJ L 245.

218 Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed [2019] OJ C 387

219 C-547/14—*Philip Morris*, ECLI:EU:C:2016:325, §58; C-477/14—*Pillbox 38*, ECLI:EU:C:2016:324, §123; C-358/14—*Poland v. Parliament and Council*, ECLI:EU:C:2016:323; C-376/98—*Germany v. Parliament and Council*, ECLI:EU:C:2000:544, §80.

220 C-358/14—*Poland v. Parliament and Council*, ECLI:EU:C:2016:323, §33; C-491/01 *British American Tobacco,* ECLI:EU:C:2002:74, §61; C-434/02, *Arnold André*, ECLI:EU:C:2004:800, §31; C-210/03, *Swedish Match*, ECLI:EU:C:2004:802, §30; C-380/03, *Germany* v. *Parliament and Council*, ECLI:EU:C:2006:772, §38; and C-58/08, *Vodafone*, ECLI:EU:C:2010:321, §33.

221 De Baere and Gutman, *supra* n 5, p. 384.

argue that such a measure would help to reduce distortions in competition. For example, it would facilitate the implementation of a number of measures such as the Posting of Workers Directive and reduce significantly 'social dumping' by guaranteeing a minimum pay. But even if this argument were to be accepted for formulating socially oriented legal instruments, there is a strong argument to choose an alternative base. If the final intention of the measure is to improve the conditions of the internal market, when a conflict between the 'social' and the 'market' or the economic freedoms arises, the CJEU is more likely to decide in favour of the latter, as this would be the main objective under this basis.[222] Taking history as precedent, using the internal market legal base would matter-of-factly backlash against the social objective.[223] If an EU instrument on minimum wages has the genuine goal of fighting in-work poverty, reducing inequalities and achieving an overall harmonious development in the EU, it is crucial that such an instrument is based on competences with a social focus. Accordingly, it is not desirable that an initiative on minimum wages, or any other with a social objective, is based on Article 115 TFEU.

Moreover, since Article 115 TFEU requires as much unanimity as Article 352 TFEU, there is no strategic advantage in using it and unnecessarily linking social instruments to the internal market.[224]

4.4 General remarks on EU competences

Given the narrow competences of the EU in the field of social policy, any measure adopted under any of the legal bases would have to be flexible in nature, if not for a restriction in the competence basis (such those under Article 153 TFEU), to seek Member States' support and gain votes, whether for unanimity or QMV. Moreover, flexibility allows Member States to manoeuvre when implementing EU law which leaves room for diversity and respecting Member States' autonomy.[225] However, too much flexibility in the form of soft-law instruments, as argued in Chapter 2, has prolonged market imbalances between 'the social' and 'the economic'. Equally, the previous chapters have shown that social law could benefit from hard-law mechanisms in order to attain the objective to fight poverty and social exclusion, and to tackle

222 Garben, *supra* n 1, p. 32.

223 *Supra* n 87, see also remarks at the beginning of section 4.

224 Kilpatrick et al., 'From austerity back to legitimacy? The European Pillar of Social Rights: a policy brief' (2017) *EULawAnalysis*, available at: http://eulawanalysis.blogspot.be/2017/03/from-austerity-back-to-legitimacy.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+EuLawAnalysis+(EU+Law+Analysis). On Article 114 and 115 TFEU, Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford: OUP; 2014), 325–358.

225 See more on flexibility and social law in Barnard, 'Flexibility and social policy' in De Búrca and Scott (eds.) *Flexible Governance in the EU* (Oxford: Hart Publishing, 2000).

asymmetries both in policy (Chapter 2) and fundamental rights (Chapter 3). This implies that the way forward for the social dimension of the EU should partly be conducted by means of directives that implement the fundamental rights and policy objectives.

Directives may ensure sufficient flexibility in different ways, via framework directives, by directives aiming at partial harmonisation or setting minimum standards.[226] The former refers to directives that set the core standards but the operationalisation of these is left to the Member States.[227] Partial harmonisation is a mechanism that allows coexistence between domestic and Union law by allowing the EU to regulate over particular issues and allowing Member States to fill in the gaps.[228] The latter, a directive setting minimum standards, would provide a minimum floor that Member States are encouraged to improve.

In this vein, in its Resolution on certain aspects for EU social policy of 1994, the Council stated that a framework for social legislation should:

> take account of the situation in all Member States when each individual measure is adopted and neither overstretch any one Member State nor force it to dismantle social rights, — avoid going into undue detail but concentrate on basic, binding principles and leave the development and transposition to the Member States individually and, where this is in accordance with national traditions, to the two sides of industry, — be flexible enough and confine themselves to provisions which can be incorporated into the various national systems, — include clauses which allow the two sides of industry room for manoeuvre on collective agreements, — contain review clauses so that they can be corrected in the light of practical experience.[229]

As Barnard argues, a framework directive induces Member States to 'enter into a race to the top when they would otherwise have had the incentive to compete on the basis of the withdrawal of protective standards (the race to the bottom)'.[230] Considering this, Chapter 5 formulates the proposals in the form of framework directived as the ideal instrument to encourage upward social convergence while leaving Member States sufficient discretion on such sensitive topics.

226 Barnard, *supra* n 78, 61–62.

227 See for example: Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave [2010] OJ L 68.

228 Garde, 'Partial harmonisation and European social policy: a case study in the acquired rights directive' (2003) *CYELS* 5, p. 173.

229 Council Resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union [1994] OJ C 368.

230 Barnard, *supra* n 78, 62–63.

A few remarks also need to be made about the legislative process. Ever since the entry into force of the Maastricht Treaty, social legislation under the social policy title can be adopted by means of the 'twin-track' that allows measures to be adopted by collective agreement between the social partners.[231] Whereas in the legislative route, known as the community method, the Commission drafts a proposal for the directives (after a double consultation with the social partners) the later has to be approved by the Council and the European Parliament depending on the legislative procedure, the collective route offers the opportunity for social partners to negotiate Union-level agreements within the timeframe of nine months. However, there is no indication as for what constitutes an agreement or what is a suitable subject-matter.[232] There is also a heated discussion about who represents the social partners at the EU level.[233]

Differently, where there is not a sufficient consensus among Member States, the possibility exists of adopting an instrument through enhanced cooperation or international agreements. The former refers to a route set in the treaties (Articles 326–334 TFEU)[234] that allows Member States to adopt measures using the EU legal framework regardless of the lack of willingness of other Member States. International agreements, instead, would allow a number of Member States to reduce poverty and social exclusion internationally without using the treaty basis.[235] Needless to say, an EU-wide measure is preferred, in particular when aiming for a better balance between Member States, moving towards an overall harmonious development and to prevent a two-speed Europe. Yet, the fact that EU social legislation is a notoriously sensitive topic and Member States are often reluctant to make social law an EU matter cannot be ignored. As such, enhanced cooperation and international agreements could be seen as the back-up plan for the lesser evil.

4.5 Conclusion: Limited, yet existing

This chapter proves that while limited, there are sufficient competences within the current treaties to take substantive steps towards the realisation of the well-embedded EU objective to fight poverty and social exclusion. Not only does the EU have enough competences, but the social dimension of the Union is (or at least should be) fundamental to its identity as seen from the social objectives explored in this chapter. Still, the potential of many of the provisions analysed

231 Shaw, 'Twin-track social Europe-the inside track' in O'keefe and Twomey (eds.) *Legal Issues of the Maastricht Treaty* (Chichester: Wiley Chancery, 1994).

232 COM(93) 600, 'Concerning the application of the agreement on social policy presented by the European Commission to the council and to the European Parliament'.

233 See extensively: Barnard, *supra* n 78, 69–87; Shaw, *supra* n 231.

234 Article 20 TEU and Articles 326–334 TFEU.

235 On enhanced cooperation and international agreements: De Baere and Gutman, *supra* n 5, 369–377.

hereby has remained untapped, in particular with regard to the competences on social policy *stricto sensu* and the horizontal social clause. The 'untapping' of these provisions would potentially have an enormous impact on the improvement of the social dimension of Europe.[236] If fully activated, the horizontal social clause could partly tackle the general displacement of social Europe in areas that negatively impact social standards. For that, however, it is necessary to flesh out the social objectives.[237] This could be partly achieved by building a robust social pillar by exercising the Union's competences. This pillar, in turn, could moreover contribute to put social interests at the same level of other, more economically oriented, interests. In particular, the provisions discussed in this chapter could implement the objective of combating poverty and social exclusion into secondary legislation. Adopting legal measures to fight poverty and social exclusion is not only desirable, but also necessary for the realisation of a genuine and functioning social market economy.[238] In Vandenbroucke's words 'the search for a strong consensus on the content of the European Social Model is no longer a superfluous luxury, but a necessity',[239] which points to the urge to unravel the potential of these provisions, not only to preserve but also to enhance the Union's social *acquis*.

The Union has limited, yet existing, competences to adopt legal measures that would contribute to the fight against poverty and social exclusion. The problem often lies in the fact that Member States are unwilling to reach consensus rather than on the question of whether or not the Union lacks competences to take action. Just as De Baere and Gutman critically state 'the question is not if, but when and how'.[240] As for when and how, the recent developments on the EPSR provide for the perfect scenario to put the treaty provisions in motion for the sake of social integration. To this end, the following chapter operationalises the competences and objectives discussed in this chapter to tackle important gaps in EU law and contribute to the fight against poverty and social exclusion by putting forward a number of potential new secondary law instruments. The content of most of this chapter is therefore applied to specific proposals.

Ultimately, and for the purpose of adopting measures that are redistributive in nature, it is beyond desirable that the treaties are amended giving the EU a stronger social identity and legitimacy.[241] This also seems to be the position

236 European Parliament, *supra* n 2; recital AP refers in particular to Article 9 TEU and Articles 151 and 153 TFEU.

237 Kilpatrick, *supra* n 1.

238 Barnard and de Vries, 'The 'social market economy' in a (heterogeneous) social Europe: does it make a difference?' (2019) *ULRev* 15(2), 47–63.

239 Vandenbroucke, *supra* n 202, 11, 24.

240 De Baere and Gutman, *supra* n 5, p. 384.

241 Lenaerts and Gutíerrez-Fons, 'The European Court of Justice as the guardian of the rule of EU social law' in Vandenbroucke et al. (eds.) *supra* n 5, 369–377; Habermans, 'Democracy, solidarity, and the European crisis' (2013) KU Leuven Euroforum.

of the European Parliament that stressed that 'the completion of a genuine EMU within the Union will require in the medium term a treaty change to be completed'.[242] The Commission too shared the opinion that treaty amendments will be necessary in order to obtain the proper fiscal capacity of the EMU.[243] Such amendments would not only have to free the way to the decision making in social policy *stricto sensu*, but more urgently, effectively mainstream social objectives across other policy areas where important decisions that affect social policy are being taken, notably in the internal market and in the process of macroeconomic governance. Nonetheless, the long-term institutional legislative changes should not be an obstacle for legislative initiatives that can already be achieved under the Lisbon Treaty.

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242 European Parliament, *supra* n 2; recital AJ.

243 COM(2013)690, 'Strengthening the social dimension of the economic and monetary union', p.11.

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Chapter 5

Implementing the objective of combating poverty and social exclusion under EU law

5.1 Introduction

Even though the policy objective to fight poverty is well-embedded in the treaties (Chapter 4) and poverty and social exclusion represent a clear infringement of human dignity and fundamental rights (Chapter 3), this objective has not directly been translated into secondary legislation. Policy efforts, in turn, have so far been insufficient in achieving real progress (Chapter 2). There are, however, limited—yet existing—competences at the EU level to reverse this situation and address the issue of poverty and social exclusion in a collective manner to distribute resources more evenly (Chapter 4). The purpose of this chapter is precisely that, to formulate a series of secondary law instruments that directly aim at implementing the policy objective of combating poverty and social exclusion at the EU bearing in mind the limits of the competences of the Union and with particular emphasis for the respect for the principles of proportionality and subsidiarity.

A coherent and effective legal strategy for social inclusion requires a combined legislative effort of different social branches. This chapter explores a number of limited proposals which are deemed to be most feasible, both politically and legally, as well as effective in tackling the deficiencies of the European social dimension in contributing to the Union's policy objective to fight poverty and social exclusion. It is important to note, however, that the proposals studied in this chapter will only be successful when integrated in a more comprehensive strategy that envelops a wider and more ambitious social project that includes issues such as universal education and healthcare, adequate pensions, work-life balance instruments and long-term care. While not being addressed in this chapter, they remain equally important for the overall success of anti-poverty policies. Similarly, this chapter does not speak to the effectiveness of these proposals in eventually reducing poverty, as this will ultimately depend on other factors such as the enforceability of these instruments or their combination with other policy instruments. Instead, based on the presumption put forward by different actors that securing income is an efficient way of combating poverty, this chapter looks into the legal, and to a lesser extent political,

DOI: 10.4324/9781003222125-5

feasibility of adopting legal instruments that entitle individuals to financial or other sort of claims to secure an adequate income. As such, the proposals in this chapter focus on ensuring a sufficient income to live a life in dignity by guaranteeing either minimum income benefits, wages or income replacement in case of risks. To this end, this chapter explores four proposals that have the potential of tackling poverty by means of guaranteeing income: a Framework Directive on Minimum Income, a Framework Directive on Minimum Wages—different from the proposal presented by the Commission[1]—a Framework Directive on Social Protection for all—as the next step for the current recommendation on access to social protection for workers and the self-employed[2]—and a minimum requirements directive in the context of a European Unemployment Benefit Scheme (EUBS).[3] Before setting forth these proposals, the next section discusses the general rationale and explains why these measures are proposed at the supranational level, why on these particular areas and why the proposals instrumentalise the European Pillar of Social Rights (EPSR) It then provides some general remarks that are important for all the explored alternatives, namely, the notion of adequacy, coverage and take-up. This is followed by an analysis of the four legislative proposals that is structured loosely in the form of how the Commission presents its initiatives. The next section discusses alternatives to the proposals discussed in this chapter. The chapter finalises with some concluding remarks.

5.2 Rationale

5.2.1 Why act at the EU level?

On the particular question of why matters of sufficient resources and redistribution should be defined in a binding instrument at the EU level as opposed to being left to the Member States, many arguments (of a legal, economic, institutional, political and moral nature) have been put forward.[4] From a legal standpoint, the following proposals need to comply with the subsidiarity and proportionality principles, which is discussed in each section specifically, but overall, there are at least four overarching arguments that apply to all four proposals.

1 COM(2020) 682 final, 'Proposal for a directive of the European Parliament and of the council on adequate minimum wages in the European Union'.

2 Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed [2019] OJ C 387.

3 Beblabý and Lenaerts, 'Feasibility and added value of a European unemployment benefit scheme: main findings from a comprehensive research project' (2017) *Commission;* COM(2020) 14 final, 'A strong social Europe for just transitions'.

4 Vandenbroucke et al., 'The nature and rationale for European social rights' (2021), EuSocialCit Working Paper, 23–45.

The first argument relates to the normative argument of substantiating the social fundamental rights enshrined in the CFREU as well as the objectives and values in the treaties. As it has been shown in previous chapters, the fight against poverty and social exclusion is rooted in the objectives and values of the Union, particularly under Article 2 and 3 TEU and Article 9 and 151 TFEU. Chapter 3 has further discussed the right to social security and social assistance that are intrinsically linked to the very foundation of human rights: the respect for human dignity. More recently, this has been encompassed in various passages of the EPSR including, *inter alia*, principles 6, 12, 13 and 14 EPSR (discussed in this chapter). In translating these objectives and rights into secondary law instruments, the EU would take the commitment to flesh out existing rights by empowering individuals to claim them. Moreover, because these provisions go in line with the human rights protection offered in other international instruments, it would encourage a healthy international law order and reduce potential conflicts.

A second argument is that of redressing negative integration. Previous chapters have discussed how there is an inherent asymmetry between different pillars in the EU such as between budgetary surveillance and competitiveness on the one hand and protecting the poor and vulnerable individuals on the other. Under the current framework there remain significant imbalances between the economic interests of the internal market and social rights.[5] The rationale behind this second argument refers to keeping a minimum balance in a multi-tiered EU where both market and social interests are reflected upon by activating the social competences of the EU. While this alone will not fix the overall displacement of social Europe, it will at least address the marginal usage of the social competences.[6]

The third argument responds to a functional economic rationale instead. In the past, the response of the EU to economic distress has focused on purely supply oriented measures, which led to a severe social crisis during the last recession. This one-sided approach ignored to a large extent the importance of boosting the demand in the internal market, which is equally important for a functioning economy. As such, these instruments would serve to ensure that demand is, to a certain extent, maintained by securing a steady income.

Lastly, taking matters of sufficient resources in the hands of the EU is also likely to act as an anchor for political and social stability in the Union. In this

5 See, *inter alia*: Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union' (2017) *EuConst* 13(1), 23–61; Barnard, 'Social dumping or dumping socialism' (2008) *CLJ* 67(2), 62–64; Davies, 'One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ' (2008) *ILRev* 37(2), 126–148; De Vries, 'Balancing fundamental rights with economic freedoms according to the European Court of Justice' (2013) *ULRev* 9(1), 169–192.

6 Kilpatrick (ed.) 'The displacement of social Europe' (2018) *EuConst* 14(1). Specifically see Garben, 'The European Pillar of Social Rights: effectively addressing displacement?' (2018) *EuConst* 14(1), 210–230.

vein, action at the EU would respond to popular grievances and increase the visibility of EU action in areas that are most felt on the ground, and thus, gain proximity to citizens. In turn, this would increase the credibility of the EU and the reliance on the EU project as a whole.

5.2.2 Why these instruments?

Considering the strengths and deficits of the role taken by the EU in the fight against poverty, these four initiatives aim at implementing the policy objective by securing (in combination) a life in dignity for all through some sort of income (whether in the form of wages or benefits). Even though income poverty is only one aspect of the overall multidimensional concept of poverty, income represents a crucial dimension of living standards in consumption societies and, as such, securing adequate incomes remains the most efficient way to combat poverty and social exclusion.[7] Income guarantees, therefore, seem an obvious approach to implement the policy objective of combating poverty and social exclusion. The instruments in this chapter regulate income in different manners and as such, they are seen as essential to cover the gaps, raise the minimums and ensure an adequate standard of living for various aspects of poverty.[8]

Secondly, while the general objective overlaps, each of the proposals attempts to tackle a particular challenge (or group in the society). These range from minimum income benefits tackling people excluded from the labour market to minimum wages covering those at work. The instrument on social protection, differently, tries to address the common issue arising from the lack of (sufficient) social protection of a significant part of the workforce, particularly with regard to non-standard forms of employment. The EUBS, alternatively, aims at addressing the insufficiency of Member States to absorb macroeconomic shocks and discusses setting minimum standards for the unemployed.

Thirdly, to some or other extent, all the proposals of this chapter have been put forward by different stakeholders and institutions. As such, the political feasibility of these instruments is deemed higher (not to say political agreement

7 European Parliament resolution of 24 October 2017 on minimum income policies as a tool for fighting poverty [2017] OJ C 346; European Parliament resolution of 20 October 2010 on the role of minimum income in combating poverty and promoting an inclusive society in Europe [2010] OJ C 70; Vandenbroucke et al., 'The EU and minimum income protection: clarifying the policy conundrum' in Marx and Nelson (eds.) *Minimum Income Protection in Flux* (London: Palgrave Macmillan, 2013); Dassis, 'For a European framework directive on minimum income' (2019) *Opinion EESC*.

8 Note, however, that the focus lies on the legal feasibility, but the effectiveness of these instruments in reducing poverty is not a given. For example, while the Commission proposes a directive on minimum wages as an instrument to tackle in-work poverty, literature has argued that minimum wages are not a good instrument to combat poverty because low wages are often combined at the family level with other (higher) wages. Moreover, it has been argued that in-work poverty is not only and not even primarily linked to low wages, but rather to flexible and part-time work. See in this regard: Marx et al., 'The welfare state and anti-poverty policy in rich countries' (2014) *IZA* DP No. 8154.

is a given) when compared to other alternatives. Lastly, also with regard to the political feasibility of these instruments, all four proposals build on principles of the EPSR. As it has repeatedly been stated in previous chapters, the EPSR represents the most salient political instrument on the social dimension of late, and as such, it offers a great opportunity to be used as a pathway to launch a holistic process of social regulation at the EU level. This also seems to be the position of the von der Leyen Commission, which has developed an Action Plan to deliver on the EPSR.[9]

With the exception of a legislative proposal on minimum wages, which refers to the second chapter on fair working conditions (principle 6), the rest of the proposals relate to the third chapter of the EPSR on social inclusion. This is because, considering the failed focus on market inclusion as an anti-poverty strategy and the effects of the asymmetry between the 'market' and the 'social', this chapter aims at putting the well-being of individuals at the core of the initiatives, as opposed to a more employment activation objective (which is nevertheless also present). For this reason, most of these proposals find their bases on the Social Policy Title of the TFEU, particularly on Article 153, thereby activating the social competences under the treaties.

5.2.3 Why instrumentalise the EPSR?

A reading of the EPSR *stricto sensu* does not see beyond its 20 principles and the political commitment undertaken by the EU institutions. This reading of the EPSR makes it salient from a political standpoint but fails to deliver from a legal point of view. However, this is only the case when seeing the EPSR solely by its two main documents, the recommendation and the interinstitutional proclamation, which lack the binding status necessary to truly address the challenge of substantiating the social field in the EU. A *sensu stricto* reading of these two documents would only support the political argument of using the EPSR as a referent when proposing new legislative proposals. Garben argues, however, that the EPSR 'increases the cost of opposing or down-levelling social initiatives for all institutions that have "solemnly" proclaimed their attachment to these values, which includes the Member States in the Council'.[10] As it has been discussed a number of times in this volume, many of the legislative proposals on the social field have lacked political support, whether by the EU institutions themselves or by the Member States. The interinstitutional proclamation of the EPSR, at the very least, points towards a converging consensus from a political point of view that more needs to be done at the EU level to protect social rights.

9 Commission, 'The European Pillar of Social Rights action plan' (2021).

10 Garben, 'The European Pillar of Social Rights: an assessment of its meaning and significance' (2019) *CYELS* 21, p. 107.

Even if this is a noble commitment, such a narrow interpretation of the EPSR fails to capture the programmatic nature of the instrument.[11] Taking past initiatives as a precedent, such as the 1989 Community Charter (which was accompanied by a Social Action Programme), supports the argument that the EPSR should be seen as more of a movement than a static political development. In fact, the Community Charter boosted the progressive agenda for the adoption of an important part of the current EU social *acquis*. Likewise, the EPSR has already been the engine behind a number of new initiatives and revisions.[12] In this regard, even though the EPSR does not represent an extension of competences, it might very well be acting as a catalyst for activating existing social powers.

Similarly, these recent initiatives on the social field that have (sometimes ambiguously) been linked to the EPSR, reverse at least to a certain extent the detrimental effect that the Better Regulation Agenda has had on the social floor of the EU as a consequence of the deregulatory process. The EPSR itself seems to use the EU Better Regulation Agenda to upgrade the social *acquis* by firstly, clarifying what the social floor in the EU is (when looking at the EPSR *sensu stricto*) and as an exercise to identify the existing gaps and try to address them by means of new initiatives, whether legislative or governance-related. This is perhaps more clearly seen with the example of the revision of the Written Statement Directive (now the Directive on Transparent and Predictable Working Conditions) which is a result of earlier REFIT evaluations.[13]

A different reason to 'instrumentalise' the EPSR relates to the fact that the EPSR offers an opportunity to rekindle the relationship between the EU and other international instruments. As it was discussed in Chapter 3, some international instruments to which Member States are party, such as the ECHR, the ESC, the ICESPR or various ILO Conventions, enshrine a range of rights that are key to the fight against poverty and social exclusion. While many EU law provisions refer to instruments of international law, over the last years, there has been an apparent tension related to the 'social displacement' of EU law,[14] particularly in the context of the internal market and economic governance. This tension throve at least twice over the last decade, first in the aftermath of *Viking* and *Laval* and then in the context of the Greek bailout (discussed

11 *Ibid*., p. 102.

12 For example: Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority [2019] OJ L 186; Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186.

13 SWD (2017) 205 final, 'REFIT evaluation of the "Written Statement Directive"'.

14 Kilpatrick, 'The displacement of social Europe: a productive lens of inquiry' (2018) *EuConst* 14(1), 62–74.

in Chapter 3). The explanatory documents that accompany the EPSR clarify that the principles build on 'the strong body of law which exists at EU and international level' with particular focus on both the ESC and the ILO.[15] As such, while the EPSR does not miraculously fix the tensions related to the displacement of social law, it does represent a renewed commitment to protect social rights as seen also under other international instruments. On this note, both the ECSR and the ILO have welcomed the EPSR and have said that the principles resonate with different provisions envisioned by the ESC[16] and the ILO[17] Conventions respectively.[18]

5.3 General remarks

This section envisages a number of challenges that are common to all the four initiatives presented in this chapter and tries to shed some light on these particularly problematic areas. Particularly, it looks into the concept of adequacy, which discusses how to measure the adequacy of income by means of existing indicators that can, *mutatis mutandis*, be applied to the content of all the instruments in this chapter; coverage and the issue of the notion of workers that are key to define the scope of application; and, lastly, the challenge of non-take up, which remains key in ensuring that individuals do in fact access their social rights.

5.3.1 Adequacy

The epitome of income sufficiency lies in the question of adequacy and how to measure it. This section, depicts income in general terms (as the total revenue received on regular basis for work or through social security or assistance) and attempts to outline some general remarks regarding the adequacy of income that are applicable surely in the case of minimum income, but also to measure the adequacy of wages or income replacement benefits. Accordingly, these general remarks need to be considered in all the proposals put forward below.

15 Garben, *supra* n 10, 121–122.

16 Remarkably the Secretary General of the CoE also emphasised the need to promote legal certainty and coherence between European standard-setting systems and particularly recommended that the provisions of the ESC would be directly incorporated into the EPSR. CoE, 'Opinion of the secretary general of the council of Europe on the European Union initiative to establish a European Pillar of Social Rights', Strasbourg, 2 December 2016, §42.

17 ILO, 'European Pillar of Social Rights central to an equitable future of work', Gothenburg, 17 November 2017, available at: www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_598680/lang--en/index.htm

18 See more specifically on the Pillar as an opportunity to renew the relationship between EU law and international instruments: Garben, 'The problematic interaction between EU and international law in the area of social rights' (2018) *CILJ* 7(1), 77–98.

The 1992 Council Recommendation adopted a general definition of adequacy by stating that income should secure sufficient resources to live a life in dignity that is compatible with human dignity.[19] The recommendation's guidelines advise fixing the amount of resources considered to cover essential needs considering living standards, prize levels and different types of households. This definition, however, is too general to assess and compare national situations.[20] The 2008 Recommendation repeated this concept. Differently, the Social OMC lacks any reference to adequacy in any other areas but pensions. The EPSR also refers to adequacy in all the principles discussed in this chapter (as well as in other provisions) regarding wages, social protection, unemployment benefits and minimum income in the respective principles. But again, there is no clarity on how to measure adequacy. As such, a common approach is needed to establish what an adequate income is.

In order to be adequate, income should ensure a total revenue above the poverty line that is able to prevent severe material deprivation and is capable of lifting households from poverty. Minimum income benchmarks are often calculated on the basis of a fixed proportion of median income, which is often related to current thresholds of poverty. This is the case of the at-risk-of-poverty (AROP) threshold used by the Europe 2020 Strategy and, currently, the Action Plan to implement the EPSR which is set at 60% of the national median equivalised disposable household income.[21] Note that this threshold has been used by the CJEU in a case of insolvency when it held that a reduction of a pension that could leave the beneficiary with an income below the AROP is disproportionate.[22] While this indicator has the advantage of allowing statistical comparability to measure income poverty *vis-à-vis* years and Member States, it fails to give a comprehensive response to the question of income adequacy. There is no proof that the AROP represents life in dignity or the same living standard across time and countries.[23] As a matter of fact, studies have shown that while the AROP approaches an adequate standard of living in wealthier Member States, it is far from doing so in the poorer Member States.[24] Because the AROP is purely income-based, moreover, it fails to include the reality of accessing publicly financed essential goods and services that, in turn,

19 Council Recommendation 92/241/EEC of 31 March 1992 on child care [1992] OJ L 123.

20 EAPN, 'Adequacy of minimum income in the EU' (2010).

21 Penne et al., 'All we need is…Reference budgets as an EU policy indicator to assess the adequacy of minimum income protection' (2020) *SIR*1 47, 991–1013.

22 C-168/18—*Pensions-Sicherungs-Verein,* ECLI:EU:C:2019:1128, §44–46.

23 Goedemé et al., 'What does it mean to live on the poverty threshold?' in Cantillon et al. (eds.) *Decent Incomes for All: Improving Policies in Europe* (Oxford: OUP, 2019), p. 28; Babones et al., 'A poison-based framework for setting poverty thresholds using indicator lists' (2016) *SIR* 126(2), 711–726.

24 Goedemé et al., *supra* n 23, p. 27 ff.

largely impact the sufficiency of income when attaining life in dignity.[25] Mere income-based indicators equally fail to see the individual circumstances of those in need. For this, a more comprehensive methodology that goes beyond cash-income by accounting for both individual circumstances and the social context is needed to assess the adequacy of incomes.

In terms of adequacy, it is essential to note the specific individual circumstances since people with identical or comparable financial resources do not necessarily attain the same standard of living. This is clearly the case of people with bad physical or mental health, low-skilled or lack of social capital who need a higher level of income in order to reach the same level of dignity than someone under more favourable circumstances.[26] Moreover, the household composition also plays an important role in measuring adequacy.

Taking the individual circumstances into account when determining income adequacy is crucial but not sufficient. In order to assess adequacy for a life in dignity, the societal context also needs to be included in the equation. Research has shown that subsidisation of essential goods and services, particularly in the case of healthcare and education, has a positive impact on improving the living standards of those with lower income.[27] Access to essential goods and services, similarly, should encompass several multidimensional concepts, namely, availability, accessibility, affordability, usefulness and comprehensibility.[28] Worth noting, several studies have shown that people who experience poverty often face more personal and societal barriers in order to live a life in dignity as well

25 Aaberge et al., 'The distributional impact of public services in European countries' in Atkinson et al. (eds.) *Monitoring Social Europe* (Luxembourg: Publication Office of the EU, 2017), 159–174; Penne et al., *supra* n 21.

26 Hargittai, 'Digital na(t)ives? Variation in internet skills and uses among members of the "net generation"' (2010) *Sociological Inquiry* 80(1), 92–113; Zaidi and Burchardt, 'Comparative incomes when needs differ: equivalisation for extra costs of disability in the UK' (2005) *Review in Income and Wealth* 51(1), 89–114.

27 Aaberge et al., *supra* n 25, 159–174; Verbist and Matsaganis, 'The redistributive capacities in the European Union' in Cantillon and Vandenbroucke (eds.) *Reconciling Work and Poverty Reduction: How Successful Are European Welfare States?* (New York: OUP, 2014), 185–211.

28 Availability refers to the relation between supply and people's needs and depends, *inter alia,* on waiting lists and eligibility criteria. Accessibility concerns the special reachability of the services and affordability, differently, relates to the costs that individuals face when accessing the service in relation to their capability to pay. Usefulness encompasses the added value these services represent when making use of the service. Comprehensibility comprises the ideas of openness, transparency and informative character of the service. Roose and De Brie, 'From participative research to participative practice—a study in youth care' (2003) *JCASP* 13(6), 475–485, Vandenbroeck and Lazzari, 'Accessibility of early childhood education and care: a state of affairs' (2014) *European Early Childhood Education Research Journal* 22(3), 327–335. Some studies have used the concept of acceptability that embodies both the usefulness and comprehensibility. Quality of the service, has similarly been added in other studies considering access to essential goods and services. Penne et al., *supra* n 21.

as inequalities when accessing essential goods and services. These include, *inter alia*, financial obstacles, lack of availability, poor quality, stigmatisation and digitalisation obstacles when accessing basic services.[29] Moreover, low income is significantly related to health problems[30] and competences.[31]

Many social policy experts have highlighted the importance of adding input indicators (such as standards) to the existing output indicators (referring to social outcomes such as reducing poverty) to the objective to fight poverty and social exclusion.[32] Developing input indicators that allow for a more comprehensive assessment of income on the different Member States would allow linking the broadly defined outcome of lifting poverty to concrete policies. Put differently, indicators that allow for an evaluation of the adequacy of minimum incomes can easily be linked to the outcome of fighting poverty and social exclusion. Moreover, input indicators are more likely to contextualise output indicators like the AROP with personal and societal contexts. The combination of indicators would allow for a more equilibrated balance between policy recommendations and policy goals that, in turn, could be followed in the context of the European Semester.

Reference budgets (also known as budget standards) can help contextualise income adequacy in terms of including individual circumstances in a specific social context. These are illustrative price baskets of goods and services that represent a certain standard of living,[33] and they are mostly used to identify the resources required for a decent standard of living for various purposes, *inter alia*, setting income maintenance levels, determining additional income support, debt rescheduling, financial education or assessing the adequacy of minimum income and wages.[34] Some have argued, moreover, that when developed in a cross-country comparable way, they may serve to contextualise EU social indicators to monitor the adequacy of social protection schemes in a comparative perspective and to facilitate cross-national learning when designing effective

29 Frazer and Marlier, 'Minimum income schemes in Europe: a study of national policies' (2016) *ESPN*.

30 Hernàndez-Quevedo et al., 'Socioeconomic inequalities in health: a comparative longitudinal analysis sing European Community Household Pannel' (2017) *SSM* 63(5), 1246–1261; Eurofound, 'European quality life survey 2–16: quality of life, quality of public services and quality of society' (2017).

31 Hargittai, *supra* n 26; Mullainathan and Shafir, *Scarcity: Why Having Too Little Means so Much* (New York: Henry Holt and Company, 2013).

32 Vandenbroucke et al., *supra* n 7, 271–317; Cantillon and Marchal, 'Decent incomes for the poor which role for Europe (2016) *CSB* Working Paper No. 16, 6–7; Cantillon et al., 'Decent incomes for all: which role for Europe?' (2017) *JCMS* 55(2), 240–256.

33 Bradshaw, *Budget Standards for the United Kingdom* (Alderschot: Avebury, 1993).

34 Storms et al., 'Pilot project for the development of a common methodology on reference budgets in Europe: review of current state of play on reference budget practices at national, regional and local level' (2014) *Commission*.

EU social policies.[35] In order to enhance the relationship between the AROP and the necessary resources to live a life in dignity as well as the arbitrariness of the AROP indicator, reference budgets can prove to be a helpful tool.[36]

Reference budgets may be useful in interpreting what is necessary in order to adequately participate in society, which in turn, is the 'social exclusion' part of the idea of 'poverty and social exclusion' (see Chapter 1). This is achieved by building a theoretical framework of human needs and social participation that is at the same time embedded into the institutional and societal context by incorporating guidelines, conventions and scientific knowledge specific for the national or regional context combined with opinions of focus groups. If reference budgets are transparent, the chosen methodologies are well documented and these are regularly updated with changes in society that involve a variety of stakeholders, they are likely to become a key tool for a common approach to adequacy of income schemes that is sensitive to the specific country contexts. Some have further argued that reference budgets can be used to evaluate social policy both *ex ante* and *ex post*.[37] Particularly interesting is that reference budgets show out-of-pocket costs faced by families, as opposed to other indicators, such as the ones seen on the Social Scoreboard.[38] Moreover, reference budgets offer a way to benchmark minimum incomes *vis-à-vis* Member States in a substantial way by capturing a similar level of living standards that is applicable in different national contexts.[39] As such, while the AROP might be comparable in a procedural way,[40] reference budgets can enhance substantial comparability by providing a benchmark that allows country-specific nuances.[41]

Building on a theory of human need,[42] ImPRoVe[43] has developed a procedure for compiling and pricing comparable reference budgets that translate the elusive concept of a life in dignity into specific needs that allow for social participation. This is in line with the EPSR, as it embodies the ability to participate in community activities in a number of principles. These specific needs identify the two universal needs of 'autonomy' and 'health' as well as a number of 'intermediate needs' that are required in order to adequately participate in society. Similarly, they developed ten baskets of essential goods and services

35 Goedemé et al., 'Pilot project for the development of a common methodology on reference budgets in Europe. The development of a methodology for comparable references budgets in Europe—Final report of the pilot project' (2015) *Commission*.

36 Goedemé et al., *supra* n 23, 22–56.

37 Penne et al., *supra* n 21.

38 Cantillon et al, *supra* n 32, p. 245.

39 Penne et al., *supra* n 21.

40 Goedemé et al., *supra* n 23, 33–34,

41 Penne et al., *supra* n 21.

42 Doyal and Gough, *A Theory of Human Need* (Houndmills: Palgrave Macmillan, 1991).

43 ImPRovE (Poverty Reduction in Europe: Social Policy and Innovation) aims to improve the basis for evidence-based policy making in Europe, both in the short and in the long term. See more on their website, available at: http://improve-research.eu

that comprehend these needs: adequate housing, food, healthcare, personal care, clothing, mobility, leisure, rest, maintaining social relations and safety in childhood.[44] The ImPRovE project showed that the AROP represents very different standards of living across countries, but also within countries between households varying in tenure and family composition. They identified a gap between reference budgets and the AROP that was particularly high in Member States where the absolute level of at risk of poverty was either very low or very high. Penne et al., similarly, apply reference budgets to the specific case of Belgium and minimum income schemes to find similar outcomes: that minimum income schemes are generally insufficient in securing social participation.[45]

Given all the above, the proposals presented in this chapter should aim at guaranteeing, at least, an adequate income by combining input and output indicators in order to effectively monitor policies to fight poverty and social exclusion. Such an input indicator would not only allow evaluating policy packages, but would do so without compromising the subsidiarity and proportionality principles, since it would ensure that the EU framework leaves Member States room to manoeuvre.[46] For example, Member States can argue that while income lies below the AROP line, it is still sufficient to ensure a decent standard of living. In this regard, the EU framework sets a mechanism in place to not go beyond what is necessary at the EU level and thus comply with the principle of proportionality. This is similar to the approach developed by the ECSR, which leaves room for Member States to adapt the AROP to the country-specific circumstances (Chapter 3).[47] When developed in a cross-national comparative way,[48] reference budgets may serve as an opportunity to frame the current EU approach towards the fight against poverty and social exclusion in terms of adequacy of Member States' income protection systems. In other words, reference budgets can prove to be a useful indicator to build a common approach towards what an adequate income to live a life in dignity is, while still leaving room for the specific context of each Member State.

Nevertheless, this does not mean that reference budgets, or other input indicators for that matter, should replace the existing indicators for poverty and social exclusion. Because of the lack of robustness, validity and cross-country comparability, reference budgets are still in development and need to benefit from better data, methodologies and general research before coming up with reference budgets that are more generalisable and comparable for the EU.[49]

44 Goedemé et al., *supra* n 23, 33–34.

45 Penne et al., *supra* n 21.

46 Cantillon et al., *supra* n 32, 240–256.

47 See ECSR, 'Conclusions XIV-2, statement of interpretation on article 4§1' (1998), 50–52; ECSR, *GENOP-DEI and ADEDY v. Greece*, Complaint No. 66/201, §57.

48 Goedemé et al., *supra* n 23, 33–34.

49 *Ibid*., 47–48.

Rather, Member States should be urged to further develop reference budgets and read the results in line with the AROP threshold in order to improve the current understanding of poverty and further foster an evidence-based discussion on income adequacy, both nationally and at the EU level.

In addition to adequacy, two equally important questions for the overall success of any measure are eligibility and non-take-up. As such, the following two sections build on how to tackle these two fronts respectively.

5.3.2 Coverage

Gaps in coverage are a major problem in the fight against poverty and social exclusion. Problems in coverage arise not only within the particular schemes but also when transitioning between statuses—from employed to unemployed, from employee to self-employed and *vice versa*, or from unemployed to long-term unemployed.[50]

Accordingly, comprehensive coverage will be truly accessible when everyone who is unable to participate in society because of lacking (sufficient) income is protected for as long as it is needed. Adequate coverage should provide clearly defined criteria that are transparent, universal and means-tested. Defining appropriate eligibility criteria is essential to strike a balance between guaranteeing that all those in need are covered and not overburdening the welfare state—for example, by covering those who are not (or no longer) in need. In this regard, unnecessarily problematic and complex regulations and bureaucratic requirements should also be avoided such as, for example, requiring a fixed address which generates a problem for homeless people. Similarly, there should not be room for discrimination on grounds of ethnicity, gender, educational level, nationality, sexual orientation, believes, disability, age or socioeconomic background.

Consequently, the provisions on coverage and accessibility of the following proposals should urge Member States to reduce the existing administrative hurdles, eliminate discrimination and disregard arbitrariness. A straightforward example is to remove minimum age requirements to avoid unnecessary coverage gaps and discriminating against younger beneficiaries. Importantly, punitive conditionality—imposing sanctions to welfare claimants for not fulfilling certain compliance criteria—should be eliminated when examining requests for income support or income replacement.[51] All in all, information should be transparent and available to users and application procedures for benefits should

50 Van Lancker and Farrel, 'Guaranteed minimum income. Nobody deserves less, everybody benefits' (2018) *EMIN*, p. 16; Frazer and Marlier, *supra* n 29, 23–25.

51 See for a study on how these measures are ineffective: Wright et al., 'Punitive benefit sanctions, welfare conditionality, and the social abuse of unemployed in Britain: transforming claimants into offenders?' (2020) *SPA* 54(2), 278–294.

be simplified. These suggestions coincide with the recommendations of the Parliamentary Assembly of the CoE.[52]

Whereas the treaty competences only allow instruments with different material and personal scopes, these instruments should ensure a smooth transition between different statuses and that there remain no gaps in coverage so beneficiaries fall between two stools. Perhaps the most notorious example in this regard refers to the problems that arise when transitioning from unemployment to minimum income, which might also discourage taking up unstable employment.

Differently, because many social rights are linked to having the status of a worker, whether or not a person qualifies as such will make them eligible for the enjoyment of certain social rights. Consequently, the interpretation of the notion of a 'worker' is of utmost importance for the proper enjoyment of the worker's rights. The more recent literature on this topic has focused, to a large extent, on defining the contours of the notion of a worker to accommodate new and flexible forms of employment. While some argue that the dichotomy between a 'worker' and a 'self-employed' could accommodate these new forms of labour, others advocate for the creation of a third category.[53] This chapter does not contribute to this ongoing discussion or to whether or not there should be an autonomous EU interpretation of the notion of a 'worker' (or the self-employed for that matter). Instead, what is important is to adopt a coherent notion in the proposals that are set forth in this chapter. Ideally, a notion that is broad enough to avoid the exclusion of atypical forms of employment. This is key to avoid overlapping or, worse, gaps in the application of these instruments. A different application would undermine the complementary nature of the following instruments. This is because the proposals have a limited personal scope and while the Framework Directive on Minimum Income applies *only* to people excluded from the labour market, the other three apply to those who work. The same is true for the notion of self-employment, employment contract or employment relationship. Because the personal and material scopes are fragmented, it is of paramount importance that these proposals (and preferably also other instruments of EU law) adopt a consistent approach. Divergences in the notion of worker and self-employed not only play to the detriment of individuals' protection and create gaps in access to sufficient resources across

52 PACE, 'The case for a basic citizens income' Resolution 2197 (2018), §6.6.

53 Kountouris, 'The concept of "worker" in European Labour Law: fragmentation, autonomy and scope' (2018) *ILJ* 47, 192–225; Lianos et al., 'Re-thinking the competition law/labour law interaction: promoting a fairer labour market' (2019) *ELLJ* 10(3), 291–333; Giubboni, 'Being a worker in EU law' (2018) *ELLJ* 9(3), 223–235; De Stefano and Aloisi, 'European legal framework for "digital labour platforms"' (2018) *Commission*; Risak and Dullinger, *The Concept of "Worker" in EU Law: Status Quo and Potential for Change* (Brussels: ETUI, 2018); FEANTSA, 'The "working poor" and EU free movement: the notion of "worker" in the context of low-wage and low-hour employment' (2019).

the population but also reduce the overall harmonising effect of the instruments and slow down their potential for social integration. Adopting a common approach would, besides tackling these issues, also favour legal certainty.

In this vein, it is important to recall that all these initiatives are based on the principles of the EPSR which, in turn, refers to workers as 'all persons in employment regardless of their employment status, modality or duration'.[54] On a similar note, a reassuring step has already been taken with the recent directives on work-life balance and on transparent and predictable work that adopt a 'hybrid' notion of a worker in reference to the case-law of the CJEU and accommodate, to some extent, certain non-standard forms of work with unpredictable working patterns.[55]

5.3.3 Take-up

Non-take-up remains one of the major obstacles in access to welfare. It refers to benefits that are not acquired, even when the applicant is entitled to them, for a variety of reasons.[56] A study by Eurofound estimated that non-take-up reached 40% or more.[57] The final report of EMIN, differently, showed that non-take-up varies from at least 20% to even 75% in the case of minimum income benefits.[58] In general terms, the reasons for non-take-up can be divided into two main groups: unknown rights and unclaimed rights. The former is the consequence of insufficient communication and the resulting absence of awareness of individuals to their social entitlements. The latter, differently, refers to when the costs of claiming the right are perceived as higher than the benefit itself. This perception might be induced by the activation conditionality (especially if public works are imposed), extensive controls, which might be seen as humiliating, or general stigma. Another important group refers to benefits that have been claimed, but not acquired.[59] This can be for reasons of discrimination, the complexity of the procedure, additional requirements or the malfunction of the benefits provider.

The reasons for non-take-up are vast and can be classified in a number of ways.[60] However, what cannot be neglected is that considering the high numbers

54 Interinstitutional proclamation on the European Pillar of Social Rights [2017] OJ C 428, preamble §15.

55 See further: Bednarowicz, 'The tale of transparent and predictable working conditions intertwined with work-life balance: assessing the impact of the new social policy directives on decent working conditions and social protection' (2020) *EJSS* 22(4), 421–433.

56 In the case of wages, this problem is not so much of non-take-up as it is a problem of not enforcing their rights to a minimum wage.

57 Dubois and Ludwinek, 'Access to social benefits: reducing non-take-up' (2015), p. 15.

58 Van Lancker and Farrel, *supra* n 50, p. 18.

59 Peña-Casas et al., 'Towards a European minimum income' (2013) *OSE* for the *EESC*.

60 See alternatively, Dubois and Ludwinek, *supra* n 57, 17–26, particularly figure 2 in p. 25.

of non-take-up, this should be a central issue in any given income consideration. In order to incentivise take-up, therefore, it is crucial that information is clearly disseminated and simplified. Member States should ensure that information and guidance are available for those who might be entitled, which would require improving national administrative organisation. In any case, application to social benefits (or enforcement of one's right to minimum wage), should not endanger the legal situation of individuals. This is for example the case of EU economically inactive citizens, whose legal residence may be put into question as a result of applying for social assistance which, in turn, might lead to non-take up of benefits they might be entitled to.[61] Only by tackling non-take-up would these instruments eventually prevent the 'matthews effect'.[62]

Now that these common challenges have been set forth, the next section turns to the first of the four proposed instruments.

5.4 A Framework Directive on Minimum Income (principle 14)

5.4.1 Context of the proposal

5.4.1.1 Reasons and objectives of the proposal

Data show that 16.5% of the population of the EU27 were at risk of income poverty in 2019, meaning that their disposable income was below their national AROP threshold.[63] These numbers evidence that minimum income schemes, while in place in every Member State, are largely incapable of lifting people out of poverty.[64]

Although income poverty is only a part of the overall concept of poverty, it is the most widespread form of poverty in the EU. Income guarantees, therefore, are an obvious approach to implement the policy objective to combat poverty and social exclusion. This is why a number of actors have spoken in favour of minimum income schemes as the means to reducing poverty. The Council, for one, is of the opinion that adequate income support and an integrated life-cycle approach to active inclusion is key for tackling poverty.[65] To

61 Kramer and Heindlmaier, 'Administering the Union citizen in need: between welfare state bureaucracy and migration control' (2021) *JESP*, first published.

62 Bonoli et al., 'Social investment and the Matthew's effect. Limits to a strategy' in Hemerijck (ed.), *The Uses of Social Investment* (Oxford: OUP, 2017), 66–76.

63 Eurostat, 'Living and working conditions in Europe—poverty and social exclusion' (2021) Data extracted October 2020.

64 For an overview on national minimum incomes see: Frazer and Marlier, *supra* n 29. In 2021, the Commission launched a tender to update this report.

65 Council Conclusions 27 June 2016 on combating poverty and social exclusion: an integrated approach; and recently, Council Conclusions 9 October 2020 on Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond.

this, the European Parliament has added that not only do minimum income schemes represent a very small percentage of governmental social expenditure (while providing a huge return on investment that has an enormous impact on the long-term costs for society), but they are also indispensable for achieving more equal societies, which perform better on many social and economic indicators.[66] Beyond mitigating inequalities and partly absorbing the social impact of crises, minimum income schemes are also likely to have a countercyclical impact providing resources to improve demand in the internal market.[67] Moreover, minimum income systems might also generate an upward pressure, not only on minimum rights in social security and social assistance but on the quality of activation schemes for people living under social assistance too.[68]

That minimum income schemes are necessary is something that very few put into question. However, none of the soft-law instruments that have been put in place over the last decades, neither the recommendations (see below) nor the 'socialised European Semester' or the Social OMC (see Chapter 2) seem to have sufficiently delivered. Not only are the results of soft-law instruments scarce for the fight against poverty and the overall social development of the Union, but as poverty rates remain unacceptably high and inequalities between Member States exacerbate, the credibility of the Union shatters. The post-Europe 2020 era needs to reflect on the inability of the strategy to live up to its headline target which should be the base to impulse a stronger base for action in terms of governance, which is capable of delivering the promises that were made over a decade ago.

In this regard, a Framework Directive on Minimum Income would not only represent a stronger base with specific methodologies, but also give meaning to the well-embedded objective to fight poverty and social exclusion clearly outlined in Article 3 TEU, the horizontal clause (Article 9 TFEU) and the social policy title of the Union (Article 151 TFEU). Moreover, it would represent a clear implementation of the right to social assistance under the ESC and the CFREU (Articles 13 and 34 respectively), materialise the right to human dignity by enabling citizens' participation in society and implement the EPSR.

The idea of adopting a Framework Directive on Minimum Income has been often discussed among academics and different civil organisations.[69] Setting

66 European Parliament, 'Minimum income policies in EU member states' (2017), p. 44.

67 *Ibid*.

68 Vandenbroucke et al., *supra* n 9.

69 Van Lancker, 'Working document on a framework directive on minimum income' (2010) *EAPN*; ETUC, 'Action programme for welfare and social protection resolution adopted at the executive committee meeting of 15 December 2016' (2016); Social Platform, 'An EU directive on adequate minimum income' (2014) Position paper; Dassis, *supra* n 7; Benz, 'The design of a European minimum income framework' (2019) Opinion on behalf of the German Trade Union Confederation (DGB) and the German National Poverty Conference (NAK).

two recent examples, in 2019 EESC's rapporteur Dassis delivered a powerful opinion on the need to guarantee the right to a decent minimum income where he urged the adoption of an EU Minimum Income Directive that takes into account each Countries' standard of living through reference budgets.[70] Similarly, the German Trade Union Confederation (DGB) demanded, in a recent report, that an EU regulation legally binds Member States to design a basic social protection system in a way that guarantees a decent life for all citizens.[71] More recently, the UN Rapporteur on extreme poverty and human rights also recognised the need for a minimum income directive at the EU level.[72]

Although a binding instrument on minimum income is not in the plans of the current Commission,[73] as a more employment-based active inclusion policy has—yet again—taken over,[74] the need of a binding instrument on minimum income remains very much alive, recognised even among European institutions. The European Parliament itself has stated in different resolutions its support for an EU target on minimum income set at at least 60% of the national median income,[75] and calling the Commission to evaluate the manner and the means of providing an adequate minimum income in all Member States.[76] The Committee of the Regions and the EESC have similarly shown their support towards an EU-wide directive setting minimum income floors.[77] Even the Council has addressed the importance of a renewed focus on adequacy and coverage of social protection systems, including adequate income support, particularly in the aftermath of COVID-19.[78]

5.4.1.2 Consistency with existing policies

Instruments on minimum income are not alien to the EU. In 1992, the Council Recommendation 92/441/EEC on common criteria concerning

70 Dassis, *supra* n 7.

71 Benz, *supra* n 69.

72 De Schutter, 'Visit to the European Union: report of the special rapporteur on extreme poverty and human rights' (2021).

73 Note, however, that the Action Plan plans a recommendation on minimum income, *supra* n 9.

74 Aranguiz, 'Leave no man behind? The implementation of the EPSR in times of Covid-19' (2021) LLRN5 Conference paper; Chapter 2 of this volume.

75 OJ C 70, *supra* n. 7; European Parliament resolution of 24 November 2015 on reducing inequalities with a special focus on child poverty [2015] OJ C 366*;* European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights [2018] OJ C 242.

76 OJ C 346, *supra* n 7.

77 European Committee of the Regions, 'Opinion on the European platform against poverty and social exclusion [2011] OJ C 166; EESC's Opinion on European minimum income and poverty indicators [2014] OJ C 170.

78 Council, *supra* n 65.

sufficient resources, known as the 'Minimum Income Recommendation',[79] called Member States to recognise the right to social assistance.[80] Similarly, the Council Recommendation 2008/867/EC on the active inclusion encouraged Member States to combine adequate income support with access to quality services and inclusive labour market measures in an integrated inclusion strategy.[81] More recently, the Council Recommendation on the integration of long-term unemployed into the labour market reiterated this call.[82]

In 2017, principle 14 EPSR made a commitment to ensure an adequate minimum income that ensures a life in dignity. In it, minimum income is conceived in a broad manner which includes ensuring a life in dignity at all stages of life, effective access to goods and services and financial incentives to reintegrate to the labour market. As such, it is strictly linked to other rights ensuring access to affordable goods and services of good quality, including *inter alia*: education, training and life-long learning (principle 1), childcare and support to children (principle 11), healthcare (principle 16), housing and assistance for the homeless (principle 19) and access to essential services (principle 20).

The right to minimum income under the EPSR goes beyond the 1992 Minimum Income Recommendation in that it conceptualises the right to minimum income, as such, for the first time. The EPSR affirms the right to an individual form of benefit independent from a more general right to social assistance. The Commission further clarified that minimum income benefits are non-contributory, universal and means-tested.[83] The general wording of the principle/right, is also to be welcomed. The right to minimum income aims to prevent destitution for those who are not eligible for social insurance benefits or whose entitlement has expired and it particularly conceives the right to minimum income as means to fight poverty and social exclusion. Furthermore, the principle emphasises the importance of minimum income benefits being consistent with other financial incentives to take up jobs in order to avoid unemployment traps.[84]

Without specific action, this principle (like the rest of the EPSR) is not directly enforceable and will only be implemented in the context of the European Semester. Whereas this is a suitable scenario for benchmarking, exchanging good practices and monitoring, especially when implementing the

79 SWD(2018) 67 final, 'Monitoring the implementation of the European Pillar of Social Rights', 65–67.

80 Council Recommendation 92/441/EEC of 24 June 1992 [1992] OJ L 245.

81 Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market [2008] OJ L 307.

82 Council recommendation of 15 February 2016 on the integration of the long-term unemployed into the labour market [2016] OJ C 67.

83 SWD(2018) 67 final, *supra* n 79, p. 66.

84 Such an incentive can, for example, take the form of an obligation for recipients of minimum income benefits to use employment services that support labour integration.

Social Scoreboard, much like other soft-law instruments, principle 14 EPSR lacks the necessary 'edge' to trigger actual change. For this, the next section considers adopting a legally binding measure on minimum income.

5.4.2 Legal basis, subsidiarity and proportionality

5.4.2.1 Legal basis

The discussion on the legal basis has extensively been considered in Chapter 4 and, as such, this section is limited to whether or not a Framework Directive on Minimum Income can fit within the established parameters.

As it has been discussed in Chapter 4, the (shared) competences on social policy are enshrined in Title X TFEU. Among the fields of competence, Article 153 (1)(j) TFEU specifically foresees combating poverty and social exclusion, but measures in this field are limited to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences. It excludes, however, any harmonisation of the laws and regulations of the Member States (153(2)(a) TFUE). This field therefore is limited to instruments such as the Social OMC, but cannot be used as the basis to adopt a binding instrument.[85] This basis is thus not viable for a framework directive.

Articles 153(1)(h) and 153 (2)(b) TFEU, however, empower the Union to adopt measures to support and complement the activities of Member States in the field of integration of people excluded from the labour market. While it has not been addressed by means of legislative proposals, the wording of principle 14 EPSR seems to suggest that adopting legislative measures at the EU level is not off the table. The principle could have been worded differently limiting EU competence by referring to minimum income as a means to combating social exclusion instead of envisioning its function to integrate individuals excluded from the labour market. Yet, both explanatory documents (the one presented in April 2017 and the more recent from March 2018) refer to the EU legal competences in the field of integration of people excluded from the labour market with respect to EU powers as regards minimum income.[86] This wording is also visible in the principle itself where specific attention is drawn onto incentives to (re)integrate in the labour market. While a wording linked to Article 153(1)(j) TFEU on combating social exclusion would have limited the possibilities to measures of cooperation regarding minimum income, according to Article 153(2)(b), the field of

85 This was confirmed by the Commission in the context of the Citizen's Initiative on Unconditional Basic Income: C(2012)6288 final, 'Ihr Antrag auf Registrierung einer geplanten Bürgerinitiative mit der Bezeichnung "Unconditional Basic Income"'.

86 SWD(2018) 67 final, *supra* n 79.

integration of people excluded from the labour market also offers the opportunity to adopt directives laying down minimum requirements. By explicitly acknowledging minimum income as part of this field, the EU also ducked the special legislative procedure that is required in many other areas under the social policy title.[87] It follows from Article 153(2) TFEU, that an instrument setting minimum standards ought to be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure after consulting with the EESC and the Committee of Regions. Not only is this important from the point of view that this, being an area of high political sensibility, significantly facilitates sufficient consensus to adopt a given instrument, but also because the Parliament co-legislates. Besides increasing the general democratic value of an instrument adopted in this field, the fact that the Parliament has remained a supporter of an instrument on minimum income also enhances the political feasibility of a Framework Directive on Minimum Income being adopted.

This is not to say, that the competences chosen by the Commission for principle 14 EPSR are unlimited. Notwithstanding its possibilities, the restrains under Article 153 TFEU are manifold. First, because the legal basis only allows to target people excluded from the labour market, read *a contrario*, an instrument under the auspices of Article 153(1)(h) TFEU cannot cover those included in the labour market, therefore limiting the personal scope of the legal instrument. It remains to be clarified who is considered to be 'excluded from the labour market', although a narrow understanding would suggest that it could cover those who are not actively working, regardless of their status. Also regarding the wording, it is important to note that the different Treaty translations seem to suggest that that 'integration' should not be narrowly understood as 'integration in the labour market' but rather integration more broadly in society, thus also covering those who are not fit to work.[88] Potentially, the personal scope could be broadened by combining this legal base with the competences of social cohesion under Article 175 TFEU,[89] which is possible since the provisions are procedurally compatible and pursue an overarching goal of improving the living standards of the EU population.[90]

87 It could be argued that the field of social security and social protection of workers (Article 153(1)(c) TFEU) could materially accommodate such an instrument, but this would have a rather narrow personal scope, be contrary to the letter and spirit of principle 14 EPSR that encompasses minimum income as means to integrate those excluded from the labour market and applicable 'at all stages of life'. Extensively: Van Lancker et al., 'Expert study on an EU framework on adequate national minimum income schemes' (2020) *EAPN*.

88 *Ibid*., p. 24; Benz, *supra* n 69.

89 Van Lancker et al., *supra* n 87, p. 31.

90 C-300/89, *Commission v. Council*, EU:C:1991:244, §20–26.

Regarding the limitations explored in Chapter 4,[91] a Framework Directive on Minimum Income could easily comply with these. For one, given that an instrument on the field of integration of persons only covers persons excluded from the labour market, such an instrument cannot, at least directly, have a negative impact on enterprises, whether they are big or small.[92] Similarly, as for the limitations of Article 153(4) TFEU to not affect the right of Member States to determine the fundamental principles of their social security systems and/or alter the financial equilibrium, it must be noted, that such an instrument would impact the social assistance system and not the social security system *per se*. It could, however, lead to a spill over effect on the social security system[93] and, overall, have a considerable impact on the welfare systems of Member States. Considering the diversity of mixed systems in the EU, however, this limitation deserves some consideration also for an instrument that in theory should impact mostly social assistance.

It has been explained previously (Chapter 4) that the first indent of Article 153(4) TFEU acts as a special constitutional saving clause that limits the power of the Union legislator to regulate the fundamental principles of national social security systems. In this regard, it is important to note, that a Framework Directive on Minimum Income, would not interfere with the fundamental design of welfare systems as it would mostly be limited to establishing a methodology and minimum standards and would not legislate on the matter of fundamental principles. As such, a Framework Directive on Minimum Income would not legislate on how the minimum income schemes are being financed. This is a matter left to the Member States, but the directive may set some requirements of, *inter alia*, adequacy, coverage and transparency. It is important to reiterate that all Member States have some sort of minimum income scheme and that certain requirements already exist in other EU and international instruments. As such, a Framework Directive on Minimum Income would build on existing schemes which could hardly be argued to affect the fundamental principles of their welfare systems.

As regards the second limitation under the same indent, in order to not destabilise the 'equilibrium' of social security systems, a Framework Directive on Minimum Income would have to be implemented gradually considering what is realistic for Member States to ensure that the burden placed on the welfare states is distributed in time. On top of this, a methodology that is country-specific and contextualised with the living standards of a given Member States should not alter, in principle, the equilibrium in such a significant manner.

91 Note that there are also enshrined in the EPSR Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights C(2017) 2600 final [2017] OJ L 113, Preamble §19.

92 C-189/91 – *Kirsammer-Hack v. Sidal,* EU:C:1993:907, §33–34.

93 Arguably, an increase of minimum income benefits could oblige Member States to ensure that the level of social security benefits (such as unemployment benefits or sickness benefits) are sufficiently high to guarantee a minimum income. But this would be limited to an indirect impact.

In this vein, reference budgets might play a key role in contextualising the AROP threshold and maintaining the financial equilibrium of national social security systems. Importantly, the implementation of such instrument should be supported through financial instruments, specifically in this case the ESF+ discussed in Chapter 2. Some structural changes, could also fall under the Resilience and Recovery Facility.

Any provisions adopted pursuant to Article 153 TFEU shall not, in addition, prevent Member States from adopting or maintaining more stringent social protection measures as long as they are in line with the treaties. A Framework Directive on Minimum Income would, in this regard, ensure that Member States comply not only with EU objectives, but with general duties enshrined in international human rights instruments to ensure a certain standard of living (see Chapter 3). As such, it would only aim at raising the standards. In any case, a Framework Directive would incorporate a non-regression clause that prevents a race to the bottom. It follows from the principle of subsidiarity and the idea of 'minimum standards' that Member States are free, and even encouraged, to adopt higher or more stringent standards.

Lastly, as for the areas excluded from EU competence, the previous chapter has already clarified that 'pay' in the context of Article 153(5) TFEU applies only within the confines of an employment relationship.[94] In this sense, this directive would not only be arranged outside this employment relationship, as it is organised by the State, but would moreover be primarily directed to those who lack an employment relationship altogether.[95]

5.4.2.2 Subsidiarity and proportionality

Once it has been established that a Framework Directive on Minimum Income complies with the conferred powers, an instrument on shared competence must also respect the principles of subsidiarity and proportionality. As such, before exercising its powers, it needs to be discussed whether action at the Union level is preferable in order to attain the objective of an instrument on minimum income and, if it is, to what extend should the Union exercise these powers. There are a couple of important remarks worth noting.

In light of this, it is important to reiterate the reasons above for EU intrusion in this domain that include normative, functional and political motives. In this regard, considering the level of unequal distribution of wealth, the disparities between Member States and the impact of the internal market on minimum

94 C-395/08—*Bruno and Others*, EU:C:2010:329, §37; C-268/06—*Impact*, EU:C:2008:223, §125. C-366/99—*Griesmar*, ECLI:EU:C:2001:648, §28. More recently C-192/18—*Commission v. Poland,* ECLI:EU:C:2019:924.

95 This is unless the directive is combined with Article 175 TFEU, but in any case, because this 'pay' would happen regardless of this relationship, the exclusion of 'pay' does not apply.

income schemes,[96] by reason of scale and necessary effect, the EU is better placed to set some core requirements. This is particularly so when we consider that the problem with monetary poverty is widespread across Member States and yet, most Member States fail to guarantee adequate minimum income schemes.[97] Because of globalisation, digitalization and the opening of the internal market, moreover, purely national approaches would not only display a partial picture of the current problems, but also proof counterproductive as many of the current issues are common among Member States. In this vein, strengthening convergence in anti-poverty strategies by engaging in common strategies for resilient minimum income schemes would, beyond translating specific fundamental rights and objectives of the Union into specific action, also foster the social cohesion in the Union. An exploratory assessment of the potential to foster social cohesion in the Union should definitely be included in the impact assessment that precedes any legislative initiative when the proposal would combine both social and cohesion competences.

Member States would retain the competence to structure and give content to their minimum income schemes, where the directive would call on Member States to guarantee the right to minimum income, as enshrined by principle 14 EPSR, and a methodology on its adequacy that is tailored to each Member State thereby being sensitive to national priorities while translating a common Union objective into specific binding actions. In this regard, a couple of considerations need to be noted. In the first place, it is important to highlight the choice of choosing a 'framework' directive, that emphasises the importance of the subsidiarity principle and that a 'one-size-fits-all' approach does not exist.[98] As such, a framework directive leaves the responsibility to implement agreed common core standards and to adapt them to the national context. Secondly, because adequacy is still measured by means of a threshold based on a percentage of national median income, the directive is careful to adjust adequacy to the specific country. Moreover, by virtue of the reference budgets, Member States might contextualise this threshold to a factual national reality and tailor a general methodology to the specificities of each country. The directive would

96 C-434/11—*Corpul Naţional al Poliţiştilor*, ECLI:EU:C:2011:830; C-462/11 *Cozman*, ECLI:EU:C:2011:831; C-128/12—*Sindicato dos Bancários do Norte*; ECLI:EU:C:2013:149. All these cases were, however, declined by the CJEU because, according to the Court, their complaints were not related to EU legal sources. See more extensively on the impact of the austerity measures: Barnard, 'The charter in time of crisis: a case study of dismissal' in Countouris and Freedland (eds.) *Resocialising Europe in a Time of Crisis* (Cambridge: CUP, 2013); Koukiadaki, 'Can the austerity measures be challenged in supranational courts? The cases of Greece and Portugal' (2014) *ETUC*; Kilpatrick, 'On the rule of law and economic emergency: the degradation of basic legal values in Europe's bailouts' (2015) *OJLS* 35(2), 325–353; Busch et al., *Euro-Crisis, Austerity Policy and the European Social Model: How Crisis Policies in Southern Europe Threaten the EU's Social Dimension* (Berlin: Friedrich-Ebert-Stiftung, 2013).

97 Van Lancker and Farrel, *supra* n 50, 3–5.

98 Van Lancker, *supra* n 69.

also include a number of provisions regarding coverage and transparency that aim at lifting existing constraints. A common framework in understanding the right to minimum income is further essential for cross-country comparisons in order to enhance the understanding of poverty at the EU level and identify common gaps in current strategies and move towards reducing disparities between Member States.

Subsidiarity in the social policy title is further intertwined with respecting the (many) constitutional limitations under indents four and five of Article 153 TFEU discussed above. The fact that the constitutional saving clauses of the social policy title are being respected plays in favour of respecting the principle of subsidiarity and ensures that this legislative proposal does not step into the shoes of Member States. Other studies also indicate that a directive on minimum income would have no conflict with the principle of subsidiarity, as long as Member States remain free to adopt more favourable minimum income schemes.[99]

Similar to the principle of subsidiarity, a legislative proposal on minimum income would have to comply with the principle of proportionality to determine the content and form of the initiative in a way that does not go beyond what is necessary to achieve the objective of the new instrument.

Despite the positive results of the Social OMC and the Europe 2020 Strategy as well the socialisation of the European Semester, evidence shows that soft-law mechanisms alone are unlikely to make significant progress in the fight against poverty and social exclusion by means of securing an adequate minimum income. In order to reach current ambitions in the fight against poverty and social exclusion, it is necessary that social policy efforts are supported by a binding instrument that translates existing social rights on social assistance and anti-poverty objectives into specific provisions on minimum income. The directive, however, would only establish the assessment framework and thus not go beyond what is strictly necessary to attain the objectives of the EU. Moreover, because this minimum floor needs to be contextualised in the specific context of a Member State, the directive provides room for Member States to ensure that these minima do not go beyond what is necessary. To put it differently, if in a given Member State adequacy can be achieved even when income remains below the AROP threshold, this Member State may adapt the EU threshold to the national context through the reference budgets. The choice of a framework and 'core standards' emphasizes precisely that, that Member States remain free, and are even encouraged, to adopt higher or more stringent standards. This is explicitly spelt out in Article 153(4) TFEU.

99 Benz, *supra* n 69, 28–29.

5.4.3 Content of the proposal

Considering the above, the content of the directive would be limited to establishing a methodology for Member States to develop a minimum income scheme that can effectively implement the objective to combat poverty and social exclusion. In order to do so, Member States must consider three important pillars when developing their minimum income schemes: (1) adequacy, mostly in terms of securing an adequate income level, (2) coverage, that will aim at including all (excluded from the labour market) who are in need and (3) take-up by putting in place adequate procedural safeguards ensuring that those who are entitled to minimum income do in fact access the benefit.

As far as adequacy is concerned, the most important remarks have been noted in section 5.3. It follows from the above-analysis that a 60% median income should be the standard measure in the Framework Directive on Minimum Income because it is a reliable and robust indicator, that at least in a procedural manner, allows for a comparison *vis-à-vis* Member States. However, because guaranteeing a minimum income above the AROP does not necessarily allow for a life in dignity, Member States should be urged to use national reference budgets to contextualise the AROP to monitor the adequacy of minimum income. This is supported by a number of actors.[100] The EESC and EMIN agreed in this regard. The directive should moreover serve as an incentive to prioritise research on cross-country comparable reference budgets by giving a clear mandate to the indicator sub-group and the SPC to develop this methodology and reach an agreement within a reasonable period.[101]

Accessibility to minimum income schemes as regards the coverage offered by most Member States is still as big of a problem as adequacy or non-take-up. The EESC recognised that while national minimum income schemes are existent in most Member States, most of these do not provide adequate income support for all the people in need.[102] Similar results where reached by the final report of EMIN and earlier by a study of national policies on minimum income schemes in Europe by ESPN.[103] Problematic areas include, *inter alia*, legal residence requirements, particularly among undocumented migrants and people who have recently settled in the Member State. The same problems are encountered by homeless and roma people who often times cannot account for residence and therefore fail to comply with the eligibility criteria.

100 Commission, 'Summary "structured dialogue on minimum income implementation"' Athens, 2–3 July 2019; Dassis, *supra* n 7; Van Lancker and Farrel, *supra* n 50.

101 When developing these methodologies, the work done by the ImPRoVe project as well as by the Herman Deleeck Centre for Social Policy (CBS) of the University of Antwerp should particularly be considered.

102 Peña-Casas et al., *supra* n 59.

103 Van Lancker and Farrel, *supra* n 50, p. 16; Frazer and Marlier, *supra* n 29, 23–25.

To a lesser extent, this is also problem for mobile citizens.[104] Due to minimum age requirements, young people also face problems when claiming minimum income benefits. A different problem concerns the critical transition between unemployment benefits and minimum income (which entails a shift from contributory to non-contributory schemes) faced by the long-term unemployed. Ironically, this directly conflicts with the integration aim of principle 14 EPSR. Considering the risks of this transition, unstable employment is likely to render less attractive and people might be inclined to remain unemployed, instead of risking income.[105]

In the same line, minimum income schemes should go hand in hand with assisting people to overcome poverty by providing personal support such as assistance in gaining access to the labour market for those who are fit to work. Put differently, minimum income schemes should serve to provide a somewhat immediate answer to poverty but also to ensure that beneficiaries move from situations of social exclusion to active life, thereby avoiding long-term dependency.

Moreover, in a coherent minimum income scheme, the importance of covering work-rich households when evaluating minimum income adequacy should be considered, especially given the increasing numbers of in-work poverty across Member States. Because of the limited scope of Article 153(1)(h) TFEU this would only be possible by extending the personal scope with another legal basis such as Article 175 TFEU. This would allow for minimum income to act also as a top-up benefits to ensure an adequate income for those in-work.[106]

To incentivise take-up, clearly disseminated information and simplified procedures should be envisioned in the directive. Member States should ensure that information and guidance are available for those who might be entitled. As such the directive should demand transparency and accessibility at the administrative level. In any case, application to social assistance should not endanger the legal situation of individuals.

Beyond this, other general provisions are also necessary. These include reference to the existing fundamental rights, which might be necessary in order to make the rights of the CFREU justiciable (see Chapter 3), objectives of the Union and existing policy instruments on the topic, a non-discrimination and a non-regression clause, the role of social partners and civil society (who should be consulted both before a legislative proposal and after for its implementation), provisions on the transposition of the directive into the national context and access to EU funding. With regard to the role of social partners, because this initiative would cover people excluded from the labour market, it

104 Kramer and Heindlmaier, *supra* n 61.
105 Van Lancker and Farrel, *supra* n 50, p. 17.
106 Penne et al., *supra* n 21.

is unlikely that Article 154 and 155 TFEU would apply. Nevertheless, together with other stakeholders, Social Partner's engagement in such initiative both *ex ante* and *ex post* is necessary to discuss common principles, definitions, progress and challenges of minimum income schemes. Importantly, the directive should clarify the objective and purpose in its first article and provide a number of necessary definitions in the following provisions, *inter alia*: minimum income, minimum income benefits, minimum income schemes, AROP threshold, equivalized median income, adequacy of minimum income and reference budgets. These provisions would be complemented with the provisions on adequacy, coverage and take-up. Because of the specific legal basis used in this directive and the importance of market (re)integration, moreover, minimum income schemes should also be enabling as to combine minimum income benefits with incentives to join the labour market where possible, thereby avoiding unemployment traps. Hence, additional provisions should include the importance of combining minimum income benefits with incentives to work in order to battle unemployment traps as well as steps to follow in the monitoring of the implementation of the Framework Directive. Other provisions should include general information and transparency requirements, the principle of engagement with stakeholders for the monitoring of the directives and the requirement for independent bodies and procedures to adjudicate in cases of dispute. The latter provision should, in turn, refer to Article 47 CFREU on the right to effective remedy. This content could build on an excellent concrete proposal put forward by Van Lancker in 2010.[107]

5.5 A Framework Directive on Minimum Wages (principle 6)

5.5.1 Context of the proposal

Employment has traditionally been the best route to combat poverty and social exclusion, and yet, even though unemployment rates were in decline pre-pandemic, poverty remained somewhat stable. These unemployment rates hid the harsh truth of in-work poverty and the insufficiency of modern employment to guarantee a life in dignity. According to the most recent numbers, nearly 20.5 million workers were at risk of poverty and social exclusion, which amounts to 9.4% of the employed.[108] This is aggravated by the fact that in-work poverty increases steadily even in times of economic recovery. In-work poverty is accompanied by a growing polarisation as regards the incidence of in-work poverty in certain socioeconomic backgrounds, personal situations and economic status which pay a significant toll on in-work at risk of poverty rates. This is particularly the case for certain categories of the population whose risk

107 Van Lancker, *supra* n 69.
108 Peña-Casas et al., 'In-work poverty in Europe. A study of national policies' (2019) *ESPN*, 2.

of poverty rate has significantly increased over the last years. These categories include, from the individual perspective, people with a lower level of education, young people, migrants (who in some countries double or even triple the average of in-work poverty), single parents (particularly women) and people in non-standard forms of employment, *inter alia*, temporary workers, part-time workers, platform workers or the self-employed.[109] Not only are these categories of the population more likely to be at risk of in-work poverty, but also, the in-work poverty numbers among these categories increased significantly over the last years.[110] The work intensity of a household—the number of months actually worked by working-age adults in households compared to the potential months worked if all working-age adults would have been employed full-time all year long—is an important explanatory point of in-work poverty. While to some extent it is understandable that households with low work intensity are at risk of poverty, studies have found that in-work poverty in households with medium and even high work intensity has also increased since 2012.[111]

The persistence of in-work poverty regardless of the wide array of policies in place suggests that more needs to be done and that in-work poverty should be pivotal to anti-poverty strategies. Against this backdrop, the von der Leyen Commission put forward a proposal for a directive on adequate minimum wages in October 2020 which, at the time of writing, is still stuck in Council negotiations.[112]

Since most of the academic discussions have fixated on the content of minimum wages,[113] this section focuses on the legal aspects of this discussion, also taking into account the proposal already put forward. It first discusses the context of the proposal, including the rationale and consistency with other Union policies. It follows the core of the discussion on different competence options for adopting such the directive. The third and last section, concludes with a few remarks on the content of the proposal.

5.5.1.1 Reasons and objectives of the proposal

Despite a moderate wage and employment growth over the last years, the share of low wages (two-thirds of the average national wage) has increased. This is

109 Particularly on new forms of work; OECD, 'The emergence of new forms of work and their implications for labour relations' (2018).

110 Peña-Casas et al., *supra* n 108.

111 *Ibid.*, 10–11.

112 COM(2020) 682 final, *supra* n 1.

113 Schulten, 'European minimum wage policy: a concept for a wage-led growth and fair wages in Europe' (2012) *IJLLR* 4(1), 85–104; Menegatti, 'Challenging the EU downward pressure on national wage policy' (2016) *IJCL* 32(2), 195–219; Fernández-Macías and Vacas-Soriano, 'A coordinated European Union minimum wage policy? (2015) *EJIR* 22(2), 97–11; Schulten and Müller, 'Back on the agenda: a European minimum wage standard' (2014) *ETUI* Policy Brief.

corelated to in-work poverty which has likewise seen an upward trend in the last decade with an increase from 8.5% to 9.4%.[114]

In the EU, all Member States have some sort of minimum wage protection, however, its level, adjustment mechanism and coverage vary greatly. Most Member States regulate minimum wages through statutory regulation while others regulate them through collective agreements. Moreover, whereas most Member States have a single national minimum wage (whether by statutory regulation or collective agreement) others set a sectorial or occupational minima.[115] The number of workers earning a minimum wage, however, differs significantly among Member States. A significant number of workers are not protected by an adequate minimum wage, either because the minimum wage in some Member States cannot be considered adequate or because many are not covered due to major coverage gaps in national minimum wages.[116] Some Member States have a very high share of protected workers (such as Austria with 98%) while others such as the Nordic countries and Italy show considerable gaps in coverage, where the share of protected workers is estimated to be around 80–90%.[117] In Cyprus, by contrast, only 45% of the workers is covered by minimum wages. Also in statutory national minimum wages there are gaps in coverage as often the law defines exceptions or deductions. This is especially the case of workers in the public sector, young workers in education and training, relatives of family-owned SMEs or participants of active market policies. Some of these categories are covered by alternative regulations that explain the rationale behind the exception.[118] Differently, in some Member States, workers that should in practice be covered by the statutory minimum wages appear to be earning below the minimum.[119]

In the years that followed the economic crisis, minimum wages followed the rationale of safeguarding employment and macroeconomic imbalances through internal devaluation, which meant that minimum wages developed along productivity. This resulted in minimum wages freezing or increasing rather moderately. Recently, there seems to have been a shift towards workers protection.[120] An EU instrument on minimum wages should take advantage of this momentum and incentivise this shift in wages to boost a revision of

114 Note that while the percentage at the EU level might not seem radical in some Member States, in-work poverty has grown significantly in nine Member States, remains stable in sixteen and has only decrease in three countries. Peña-Casas et al., *supra* n 108, p.10.

115 See specifically Table 1 Fernández-Macías and Vacas-Soriano, *supra* n 113, p. 99.

116 C(2020) 83 final, 'First phase consultation of social partners under article 154 TFEU on a possible action addressing the challenges related to minimum wages', 3–4.

117 ILO, 'Minimum wages for public sector workers' (2016), 30–31.

118 *Ibid*., 3–5.

119 Aumayr-Pintar et al., 'Minimum wages in 2019—annual review' (2019) *Eurofound*.

120 Aumayr-Pintar, 'Fears and hopes around future minimum wages' (2020) *Eurofound;* Eurofound, 'Statutory minimum wages' (2020), available at: www.eurofound.europa.eu/data/statutory-minimum-wages.

minimum wages in every Member State and put adequate safeguards to maintain adequacy also in times of economic hardship.

Against these challenges, the Commission proposes to secure 'adequate' minimum wages through a legislative instrument on minimum wages as a way to tackle in-work poverty. The role of minimum wages in combating in-work poverty, however, is quite debated.

On the positive side, minimum wages protect workers with low wages and low bargaining power. In a similar vein, they can prevent exploitative labour practices and limit wage inequalities to some extent. By lifting the bottom end of low earners, minimum wages may play a role in promoting wage equality. In this sense, they go hand in hand with gender equality given that more women are low-wage earners than men. The same is true for the effects of minimum wage in closing the pension gap.[121] Similarly, minimum wages are important because they may act as a 'glass ceiling' to minimum benefits in social protection.[122] Moreover, by ensuring that work pays, minimum wages ensure that individuals are incentivised to work. This is particularly important in the context of the previous proposal. If minimum income ought to be enabling for those fit to work, minimum wages should, at the very least, be higher than minimum income benefits.

One of the strongest arguments to adopt an instrument at the EU level lies in the need to ensure a level playing field across Member States. Some countries may have refrained from adopting policies to improve their minimum wage protection against the fear that this would lead to a negative influence of the external costs of competitiveness and put national enterprises in a disadvantaged position. This same argument supports the idea of downward competition in minimum wages, or more generally in working conditions. An EU-wide minimum wage instrument would, instead, aim at boosting upward convergence by supporting adequate minimum wages for all workers in the EU which, in turn, might also reduce disparities among low-wage earners. As a consequence, this would contribute to a healthier competition based on innovation and productivity rather than on a cost-cutting capacity.[123] Similarly, minimum wages increase the purchasing power of workers, particularly low-wage earners leading

121 By increasing contributions for social protection systems, minimum wages ensure the decrease of the pension gender gap. C(2020) 83 final, *supra* n 116, 2–3. For more on the pension gender gap see: Dessimirova and Bustamante, 'The gender gap in pensions in the EU' (2019) *European Parliament Policy Department for Economic, Scientific and Quality of Life Policies*.

122 Cantillon et al., 'A glass ceiling on poverty reduction? An empirical investigation into the structural constraints on minimum income protections' (2020) *JESP* 30(2), 129–147.

123 The importance of this is enshrined in the revision of the Posting of Workers Directive. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173, recital 16 of the preamble.

to stimulating demand in the market and simultaneously preserving and even improving employment conditions and competitiveness.[124]

A different argument for the need of minimum wages at the EU level is the negative impact of EU interventions in maintaining the adequacy of minimum wages. European institutions, primarily the Commission and the Central Bank have extensively intervened in wage formation mechanisms of the bail-out Member States through the MoUs that contained cutbacks of minimum wage levels, public pay and decentralisation of the collective bargaining systems.[125] Similarly, the negative interference of the EU on wages has become self-evident in the process of the European Semester, where several CSRs have put a downward pressure on national minimum wages to accommodate competition interests. Examples of this include the CSR to France where the Council supported 'breaks' on the growth of minimum wages in order to support competitiveness and job creation[126] or the case of Slovenia where the Council found that a continuous increase in the minimum wage, even if it laid below the poverty threshold, would 'reduce competitiveness and exacerbate structural unemployment'.[127] On top of this, the Euro Plus Pact and the Six Pack also incentivise wage austerity and bargaining decentralisation.[128] In this regard, while both 'ordinary' and 'extraordinary' EU economic governance processes have played a role in putting a downward pressure on national minimum wages, no EU instrument exists to guarantee an adequate standard of wages.[129] This calls for the need to balance out the impact of the EU on minimum wages, particularly by means of binding measures.

Minimum wages may also have an important positive role in economic growth. By setting an adequate minimum wage, there is a spill-over effect to overall general wages that increases just above minimum wages. Moreover, they reduce the turnover of workers among low-wage workers and impact productivity of workers which might lead employers to invest more in their human capital. Likewise, lifting minimum wages to an adequate amount, is likely to support domestic demand and boost the resilience of the economy

124 C(2020) 83 final, *supra* n 116, pp. 5-6.

125 Busch et al., *supra* n 96.

126 See, for example, Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of France and delivering a Council opinion on the updated Stability Programme of France, 2011–2014 [2011] OJ C 213; Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of France and delivering a Council opinion on the 2015 Stability Programme of France [2015] OJ C 272.

127 Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Slovenia and delivering a Council opinion on the Stability Programme of Slovenia, 2012–15 [2012] OJ C 219, preamble 16.

128 Busch et al., *supra* n 96; Fernández-Macías and Vacas-Soriano, *supra* n 113, 98–99; Schulten, *supra* n 113.

129 For the impact of ordinary process of economic governance in wages see: Menegatti, *supra* n 113, 195–219.

as a consequence.[130] From the perspective of enterprises too, minimum wages might play a pivotal role in ensuring a level playing field among companies. This level playing field could, therefore, reduce to a great extent the risk of social dumping.

Conversely, minimum wages may also be accompanied by a number of negative implications. For one, literature has argued that minimum wages might not be the most effective way to tackle poverty because in-work poverty is not only, and not even primarily, linked to low wages, but rather to flexible and part-time work and the family composition.[131] Moreover, minimum wages may lead to reduce the cost of labour by, for example, outsourcing work or delocalising low productivity activities. In this regard, however, studies have found that while minimum wages do not harm employment (at least considerably),[132] they do tend to have a positive impact on fighting in-work poverty. The latter, however, ultimately depends on the household composition, available national welfare benefits, taxation and social security contributions.[133] On this note, one has to bear in mind that even though minimum wages might play a role in combating in-work poverty, by themselves, they do not suffice to support more than one person, and as a consequence, minimum wages are not that effective in low work-intensity households, particularly among single parents, who are at the same time more likely to be at risk of in-work poverty. To this end, it is particularly useful to combine decent wages with other measures that directly affect in-work poverty such as in-work benefits, tax allowances and family benefits. Other policies might also have an indirect but important role in combating in-work poverty such as childcare, healthcare and long-term care, housing and energy costs, assistance with transport costs or the promotion of lifelong learning.[134]

All in all, minimum wages can be key to protect workers with low wages and low bargaining power and reduce the risk of unfair competition and social dumping. Adequate wages are, moreover, essential to have adequate social assistance benefits, as the former act as a glass ceiling for the level of benefits. Moreover, although the impact of minimum wages on combating in-work poverty by themselves might be limited, as they might not suffice to support households consisting of more than one person,[135] when combined with other social policies they could be quite effective. Even though the advantages of

130 Arpaia et al., 'Statutory minimum wages in the EU: institutional settings and macroeconomic implications' (2017) *IZA* Policy Paper; Herzog-Stein et al., 'The positive economic impact of Germany's statutory minimum wage—an econometric analysis' (2018) *IMK* Report.

131 Marx et al., *supra* n 8.

132 Arpaia et al., *supra* n 130.

133 Matsaganis et al., 'The interaction between minimum wages, income support, and poverty' (2015) *Commission* Research note.

134 Peña-Casas et al., *supra* n 108, 11–12.

135 Peña-Casas et al., *supra* n 108, p. 11.

such a holistic approach should be noted, the focus of this section lies solely on the feasibility of adopting an instrument on minimum wages at the EU level, which is what the Commission has planned for.

5.5.1.2 Consistency with existing policies

It follows from Article 3 TEU that the EU is committed to the sustainable development of Europe, with a particular focus on the objective to have a highly competitive social market economy that aims at full employment and social progress. A Framework Directive on Minimum Wages would further the objective to promote gender equality as enshrined in Article 8 TFEU, include the promotion of adequate social protection and fight social exclusion in EU policies as seen in the horizontal social clause under Article 9 TFEU and to combat discrimination under Article 10 TFEU. Moreover Article 31 CFREU recognises the right to fair and just working conditions. Article 151 TFEU further enshrines the objective to promote employment, improved living and working conditions as well as dialogue between the social partners.

The EU is no stranger to minimum wages. In fact, several initiatives on the prohibition of discrimination on employment and working conditions specifically ban discrimination on wages. The principle of equal pay dates back to the Treaty of Rome (Article 119 EEC) which was later implemented in the Directive on Equal Pay for Work of an Equal Value which tackled pay discrimination on the basis of gender.[136] Ever since, the EU has adopted a number of legislative initiatives that regulate pay—technically equal pay—in the context of discrimination.[137] Other EU initiatives have also related to wages. These include, *inter alia*, the Recommendation on Active inclusion of 2008[138] that puts promotion of quality jobs at the centre of the inclusion strategy and the Employment Guidelines 5, which urges Member States and the social partners to ensure adequate minimum wage levels considering the 'impact on competitiveness, job creation and in-work poverty'.[139] Importantly, the revised Posting of Workers Directive 2018/1215 also conveys the principle of 'equal pay for equal work'.

136 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 045.

137 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180; Directive 2006/54/EC of the European Parliament and of the council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204.

138 OJ L 307, *supra* n 81.

139 Council Decision (EU) 2018/1215 of 16 July 2018 on guidelines for employment policies of the member states [2018] OJ L 224, recital 6 and 12 of the preamble.

As regards the EPSR, principle 6 enshrines the right to fair wages that provide a decent standard of living. According to the EPSR, 'adequate wages shall ensure satisfaction of the needs of the worker and her/his family in the light of national economic and social conditions whilst safeguarding access to employment and incentives to seek work'. In this regard, principle 6 EPSR features the importance of preventing in-work poverty through wages. It moreover calls for all wages to be set in a transparent and predictable way according to national practices. While the right to minimum wages in itself reads rather ambitiously, it is worth noting that the Commission originally envisioned wages as an area of very limited competence for the EU and as such, to be monitored only in the context of the European Semester without further implementation at the EU level. In fact, as regards the legislative powers of the EU for principle 6 EPSR, the Commission mentioned Article 153 TFEU only insofar as it enshrines a limitation on 'pay' to later refer to the coordinated strategy for employment under Article 145 TFEU. This suggests that originally the Commission, by omission, limited the EU efforts on wages to a coordination approach and excluded the possibility of any legislative measure in this domain.[140] The new Commission does not seem to share this opinion at all, as the proposal builds precisely on Article 153 TFEU.

The right to wages under the EPSR reads quite similar to the right of fair remuneration under the ESC (Article 4 ESC) explored in Chapter 3 which requires an amount that at least reaches a certain percentage of the national average equivalised wage, mostly 50% or 60%.[141] Remarkably, the ECSR has noted that the statutory minimum wage of several Member States, *inter alia*, the Netherlands, Romania, Spain and the UK or the lowest wage in Germany are too low.[142]

In the context of the ILO most Member States are party to either Convention No. 131 on Minimum Wage Fixing, requiring Member State to set a system of minimum wage fixing that has the force of law or to the older Convention No. 26 on Minimum Wage Fixing Machinery with a narrower scope.[143] Moreover, in 2019 the ILO declared that all workers should enjoy an adequate minimum wage whether it is statutory or negotiated.[144]

In this vein, an EU instrument on minimum wages that complies with these standards of international protection would live up to the non-regression

140 COM(2018) 130 final, 'Monitoring the implementation of the European Pillar of Social Rights', p. 32; COM(2017) 250 final, 'Establishing a European Pillar of Social Rights', see point 4.

141 See ECSR, *supra* n 47.

142 CoE, 'The European Committee of social right's conclusions 2018/protection of worker's rights in Europe: shortcomings found, but also positive development in certain areas' (2019).

143 ILO C131—Minimum Wage Fixing Convention [1970] (No. 131); ILO, C026—Minimum Wage-Fixing Machinery Convention [1928] No. 26.

144 ILO Centenary Declaration for the Future of Work adopted by the Conference at its 108th session, 21 June 2019.

clauses (Article 153(4) TFEU and Articles 53 CFREU) and avoid potential conflicts in the international legal order.

5.5.2 Legal basis, subsidiarity and proportionality

5.5.2.1 Legal basis

Formulating an EU instrument on minimum wages has many challenges, including, that the role of social partners ranges from almost exclusive control to a marginal role in wages or that the divergences on coverage, structure and level are huge across Member States. And yet, perhaps the greatest challenge is to find an adequate legal basis for the formulation of a minimum wage instrument at the EU. This is precisely what this section deals with.

The Commission bases its proposal on Article 153 TFEU, however, because of the exclusion of 'pay' under this provision, this section argues in favour of a more legally creative formulation under Article 175 TFEU. This section builds on Chapter 4, and it starts by highlighting the limitations under the competence chosen by the Commission to suggest a more legally feasible pathway that needs no trims in ambitions.

Under Article 153 TFEU the EU has the specific legal basis to adopt minimum requirements following the ordinary legislative procedure in the field of working conditions. Granted, were it not for the limitations on 'pay', Article 153 TFEU would be the desirable choice as it puts the social objective at the core of the initiative which is necessary given the pressures that EU macroeconomic decisions have put on national wages. This is the path taken by the Commission. However, because of the exclusion of 'pay', an instrument on this basis would not only make a minimum wage instrument vulnerable to be challenged, but is—exemplified by the existing proposal—significantly limited in terms of adequacy as it could only regulate pay indirectly.

As it has previously been discussed in Chapter 4, Article 153(5) TFEU bans any action taken under this basis to regulate pay.[145] To reiterate, the Court has explicitly stressed that the limitation on pay refers to 'the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed wage'.[146] In this regard, the Court has repeatedly held a narrow interpretation of 'pay' in a way that such a limitation does not extend to all areas related to pay arguing that many areas of social policy, particularly working conditions, would otherwise be deprived of much of their substance.[147] Accordingly, Article 153(5) TFEU does not

145 For more on the exclusion of pay: Ryan, 'Pay, trade union rights and European community law' (1997) *IJCL* 13, 305–325.

146 C-395/08—*Bruno and Others*, EU:C:2010:329, §37–39; C-268/06—*Impact*, EU:C:2008:223, §125. The limits of constitutes pay are further analysed in Chapter 4.

147 C-307/05—*Del Cerro Alonso*, ECLI:EU:C:2007:509, §39-46.

preclude 'working conditions' from covering certain aspects of 'pay' insofar as it does not directly regulate 'pay'. Hence, given that the Court has unambiguously ruled that fixing the level of pay falls within the contractual freedom of the social partners and national authorities (who retain the sole competence to establish the level of wages and salaries), 'only' measures that do not preclude Member States from establishing the level of the various constituent parts of pay can be regulated under the social policy title.[148] It follows that the EU may adopt measures laying down minimum procedural requirements for national employment law that results in the worker's right to be paid or their right to transparent and predictable pay information. This is the interpretative vacuum with which the Commission has manoeuvred in its proposal. Because under Article 153 TFEU the EU has no competence to legislate 'pay' in a way that exercises influence on wage levels at the national level by fixing minimum wages,[149] quite clearly, this would significantly limit regulating the adequacy of wages. Instead, the proposal regulates 'adequacy' (applicable only to statutory minimum wages) by proposing a number of indicators that Member States ought to use when fixing wages. A more ambitious provision on adequacy would undoubtedly amount to interfering with fixing of wage levels, even in the narrowest interpretation of the exclusion of 'pay'.

Even though the proposal fits the limits of Article 153 TFEU, it is still a risky move vulnerable to future interpretations, which makes the measure a prime candidate for annulment actions. Considering that there is a strong opposition by a number of Member States, and that better alternatives exist, this constitutes an unnecessary gamble.[150]

Instead, a more creative but less risky path exists under Article 175 TFEU on economic, social and territorial cohesion. In this vein, it must be repeated, as noted above, that a notorious part of the rationale of introducing a Framework Directive on Minimum Wages is to reduce the socioeconomic disparities across the EU by promoting upward convergence and a more harmonious development of the EU. *A priori*, a textual reading of Article 175 TFEU does not seem to object to the adoption of such an instrument, insofar as the directive is designed to genuinely diminish inequalities in the EU and thus to strengthen social cohesion. Several objections could be raised against using

148 *Ibid*.; C-395/08—*Bruno and Others,* ECLI:EU:C:2010:329, §36

149 AG Kokkot further argued in *Impact* that the limitation on pay also prevents the EU from legislating, for example, annual inflationary compensation, introduce an upper limit for annual pay increases or regulate the amount of pay for overtime or for shiftwork, public holiday overtime or night work. AG Kokkot, C-268/06—*Impact*, ECLI:EU:C:2008:2, §174–175.

150 A similar argument was used by Hungary and Poland with regard to the posting of workers directive that, even though is based on different competences than Article 153 TFEU, was challenged for circumventing the exclusion of 'pay'. The Court dismissed these actions. C-626/18—*Poland v Parliament and Council*, ECLI:EU:C:2020:1000; C-620/18—*Hungary v Parliament and Council*, ECLI:EU:C:2020:1001.

Article 175 TFEU as the legal basis for such an instrument, which have already been dispelled previously (Chapter 4). To recap, in spite of its many caveats, this competence should not be understood as limited to coordination acts, funding, or regional cohesion.

Because 'social cohesion' is such a broad notion,[151] the CJEU has acknowledged the extensive discretion of the Union to take actions with an economic, social or territorial cohesion objective and has further recognised that economic and social progress corresponds to the objectives pursued by social cohesion policy in the EU.[152] For a Framework Directive on Minimum Wages to be adopted under the auspices of social cohesion, the impact assessment should provide robust evidence that such a measure would indeed contribute to social cohesion. To this end, the impact assessment should clearly identify the social disparities across the EU that are politically and socially 'intolerable'.[153] Such an assessment should provide sufficient data and a reasoned projection as to create no doubts before the CJEU, should the directive be challenged, that an instrument on minimum wages genuinely contributes to the social and economic cohesion of the 'overall harmonious development' of the EU. The assessment should moreover include how wage competition has distorted the internal market, as it became clear after the *Viking* and *Laval* saga that endorsed social dumping through the freedom of establishment and to provide services.

Just as Article 153 TFEU on the field of working conditions, Article 175 TFEU also entails QMV and an ordinary legislative procedure for the adoption of a directive which, automatically rules out using the social cohesion policy basis as a way of avoiding stricter adoption processes.

The Court has recently recalled that a directive based on other competences than the social policy ones can still pursue a social objective, as it would be the case of using Article 175 TFEU. In addition, it confirmed that the exclusion of 'pay' is limited to Article 153 TFEU.[154]

All things considered, there is no reason to believe that Article 175 TFEU would not serve as a solid and sound legal basis for the adoption of a comprehensive instrument on minimum wages that could interfere with wages in a way that adequacy levels can be ensured, which is essential for the social cohesion of the EU.[155]

Other alternative bases, such as Article 115 TFEU on approximation of laws or the flexibility clause in Article 352 TFEU could potentially also host

151 Opinion Bot C-166/07, *Parliament v Council*, ECLI:EU:C:2009:213, §82.

152 C-166/07, *Parliament v Council,* ECLI:EU:C:2009:499, §53; C-420/16, *Izsák and Dabis v. Commission*, ECLI:EU:C:2019:177, §68. C-149/96—*Portugal v Council*, ECLI:EU:C:1999:574, §86. Molle, *European Cohesion Policy* (London/New York: Routledge, 2007), p. 16.

153 Molle, *ibid.*, p. 16.

154 *Supra* n 150.

155 Aranguiz and Garben, 'Combating income inequality in the EU: a legal assessment of a potential EU minimum wage directive' (2021) *ELR* 46(2), 156–174.

an instrument on minimum wages. However, there are a number of reasons to opt out of these alternatives (Chapter 4). Briefly, Article 115 TFEU would make this instrument subject to the interests of the internal market, which has proven to backfire in the past.[156] Article 352 TFEU, in turn, might require to pass national procedures for adoption of an instrument under these general base[157] and, moreover, explicitly excludes the possibility of using this base where the Treaties exclude harmonisation. Moreover, both these alternatives require unanimity, which offers no strategic advantage to using these alternatives and would, considering the opposition of some Member States, make it virtually impossible to adopt such an instrument.

5.5.2.2 Subsidiarity and proportionality

The context for this proposal has argued that due to its widespread character, the supranational constraints and the objective to move towards upward convergence in wages, which would simultaneously secure a level playing field for companies in the internal market, a common approach to tackle wage insufficiency is necessary. Given the downward pressure exercised in the context of the European Semester, moreover, a binding instrument seems a better choice to ensure that work pays. The political and social 'intolerable'-ness of inequalities among Member States that is reflected in low-wages also argues in favour of a major effort at the supranational level, particularly since national efforts have thus far been insufficient. These are also the subsidiarity points highlighted by the Commission in the impact assessment that accompanies the current proposal.[158] To use cohesion powers, however, a thorough impact assessment would require evidence that raising up the levels of wages, converge and promoting the role of social partners is reasonable and justified to achieve the overall objective of upward convergence and social cohesion in the EU.[159]

As far as the principle of proportionality is concerned, it would be fully respected as long as the proposal is limited to guaranteeing adaptable core standards. With regard to proportionality it shall also be noted that the most

156 C-341/05—*Laval un Partneri*, ECLI:EU:C:2007:809. See also: C-346/06—*Rüffert*, ECLI:EU:C:2008:189.

157 German Constitutional Court (BVerfG), Judgment of the Second Senate of 30 June 2009—2 BvE 2/08 -ECLI:DE:BVerfG:2009:es20090630.2bve000208, §417: 'In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law'. This has been codified in Article 8 of the *Integrationsverantwortungsgesetz* of 22 September 2009. For such cases, the German Constitution requires a two-third majority in both the *Bundestag* and the *Bundesrat*. See Commission, The role of the Flexibility clause. Article 352, available at: https://ec.europa.eu/European Commission/sites/beta-political/files/role-flexibility-clause_en.pdf (last accessed 1 April 2020).

158 SWD(2020) 245, 'Impact assessment accompanying the document proposal for a directive of the European Parliament and of the council on adequate minimum wages in the European Union'.

159 Aranguiz and Garben, *supra* n 155.

recent wave of minimum wages reckons what is essentially being proposed in this Framework Directive on Minimum Wages. Some Member States, such as Spain, Slovakia or Poland have implicitly linked their proposals to a percentage of wages, specifically to 60% of average wages.[160] Other Member States, such as Romania or Slovenia, have based the calculation of minimum wages on an estimate minimum cost of living which, in turn, resembles the methodology of reference budgets suggested in these pages. While it cannot be ruled out that these increases in minimum wages have originated in the shadow of the discussion on an EU initiative on minimum wages, the fact that a considerable number of Member States are adopting similar measures to the ones suggested below, which simultaneously go in line with the case-law of the ECSR, indicates that the EU would not go beyond what is necessary and that consequently, the principle of proportionality will be met. Just like the increases at the national level, the EU Framework Directive on Minimum Wages should also be based on reliable indicators, have a gradual implementation, aiming at reaching the given target within a reasonable period. This is as far as adequacy goes, which is a problem in statutory minimum wage systems but less so in systems based on collective agreement. This is why, northern Member States are reluctant to action at the EU level. In this vein, it is important to underscore that the directive would only set some core standards but should encourage Member States to aim at higher levels.

Similar to the previous instrument, moreover, an instrument on minimum wages would not create an EU-wide statutory minimum wage. Instead, it would install an obligation on Member States to extend their coverage and provide some wage-setting indicators to be used at the national level that are adaptable to the country specific circumstances, such as median wages and reference budgets. Member States would remain free, however, to set their minimum wages in whichever manner they consider best, and would instead build in existing foundations.

5.5.2.3 Choice of instrument

The fact that a directive on minimum wages is legally feasible under the current Treaty framework does not necessarily mean that a directive should be the preferred choice of instrument. While the Commission proposes a directive, the lack of political will and substantial divergences among Member States ought to be considered.

Even though a directive represents a much sturdier commitment to lift wages and to strengthen social cohesion in the EU, the obstacles and possible negative outcomes of adopting a minimum wage directive should not be underestimated. These include, but are not limited to: the respective roles of

160 Aumayr-Pintar, *supra* n 120.

the State and social partners, the combination of legislation (if at all) and collective agreements, the level of wages and even the definition of wages as well as the level of unionism (that goes from as little at 5% in some Member States to 65% in others).[161] Whether coverage is universal or sectorial, or if some specific categories of workers are excluded, differs significantly across the EU too. It is true that much of this can be solved by providing Member States a sufficient margin of appreciation to apply the directive into national jurisdictions, this is how the Commission has presented its proposal. Nevertheless, a recent study of the OECD on collective bargaining found that even minor changes on the labour market can lead to major (and often unintended) shifts of the bargaining dynamics by, for example, totally blocking collective bargaining, even if the initial intention was only to change a specific element of the system.[162]

In order to be effective, however, the provisions of a minimum wage directive would have to be specific, *inter alia*, on what is meant by wages. A different approach is likely to lead to lack of implementation or gaps which is partly what a minimum wage instrument is trying to tackle. This level of specificity, however, would narrow a much-needed margin of appreciation. In this regard, the institutional burden that a minimum wage directive would place on certain Member States, particularly those based on sectorial or occupational collective agreements (the Nordic countries, Austria and Italy) might be far too heavy, particularly considering that some of these countries, notably the Nordic countries, score the highest wage performance in the EU.[163] Conversely, it is also true that due to the slow-down of collective activism and the decrease of unionisms at the national level, the EU might need to take the issue on their own hands.[164]

Due to the vast difference and the many obstacles for a minimum harmonisation of wages, perhaps a recommendation, instead of a directive, should be considered by the Commission.[165] Compared to a directive, which would impose binding outcomes, a recommendation would increase the cooperation between the EU and the Member States and install a monitoring process in order to address the different dimensions of wages to trigger action at

161 OECD, 'Negotiating our way up: collective bargaining in a changing world of work' (2019), part 1.

162 Denk et al., 'Negotiating our way up: collective bargaining in a changing world of work' (2019) *OECD*, point 3.

163 Bender and Kjellberg, 'A minimum-wage directive could undermine the Nordic model' (2021) *Social Europe*, available at: https://socialeurope.eu/a-minimum-wage-directive-could-undermine-the-nordic-model

164 Sciarra, 'How social will social Europe be in the 2020s?' (2020) *GLJ* 21(1), 95–89, p. 96.

165 See also supporting this argument: Crespy, 'Why EU action on minimum wages is so controversial- yet so necessary' (2020) *Social Europe*, available at: www.socialeurope.eu/why-eu-action-on-minimum-wages-is-so-controversial-yet-so-necessary

national level. Thus, it would ensure progress and reach a certain degree of evenness across Member States. A recommendation would moreover take into account the already existing lack of consensus among Member States on the discretion of the national reforms particularly given the degree of divergence among Member States. The added value of a recommendation, as opposed to a directive, is that it creates a momentum to direct national reforms into a common objective while leaving Member States sufficient leeway to achieve goals accommodating specific national traditions and practices. In parallel, it avoids alienating further the frugal Member States. Having this in mind, it is perhaps a good idea to use the political momentum and interest on EU minimum wages to agree on a Council Recommendation and work gradually in its implementation to gather data, create a conversation floor in the EU and start a process of upward convergence in a very near future. In this regard, a potential recommendation on minimum wages would introduce a reporting and control mechanisms that resembles the one of the recommendation on access to social protection (see later discussion), in order to monitor progress effectively. This monitoring system is already included in the current proposal of the Commission.

Given the impact of the downward pressure exercised by the EU on wages, however, a soft-law instruments would probably not suffice in the long run. A next step in the years to come could take the form of a directive, once a recommendation has paved the way for a common understanding of what is needed and sufficient data has been gathered.

5.5.3 Content of the proposal

Whatever form a minimum wage instrument takes, there are a number of significant provisions that cannot be excluded from the legal text, most of these were correctly addressed as the main challenges in the consultation process of the Commission. These include provisions on adequacy, coverage, the role of social partners, transparency, enabling services and implementation. First and foremost, against the arguments of certain Member States with high minimum wage systems that fear that the adoption of a minimum wage instrument would play to the detriment of their current systems, a general non-regression clause should guarantee that not only will their higher threshold be maintained, but that Member States will remain free to adopt more stringent provisions as long as they are in line with EU law.

The Commission did include all of these concerns in the existing proposal. And it did so with a very clear design that accommodates the concerns of collective systems by creating a chapter that applies to statutory wages alone. Whereas the proposal is quite salient from a coverage point of view, the provisions on adequacy are rather weak. This is unsurprising considering that the legal basis chosen by the Commission (Article 153 TFEU) forbids regulating

the level of wages, and a more ambitious provision on adequacy would have been contrary to the social powers of the Union. Had the Commission chosen the cohesion basis as it is argued above, the provisions on adequacy could have been stronger and thus live up to be called a directive on *adequate* minimum wages. In this vein, Article 5 of the proposal imposes an obligation on Member States to establish national criteria in a stable and clear way that includes (at least) the purchasing power of minimum wages, the general level of gross wages and their distribution, their growth rate and labour productivity developments. Member States are further obliged to use indicative reference values commonly used at the international level. While the preamble refers to the at-risk-of-poverty threshold in this regard as a possible aid to assess adequacy, the provision does not include a specific reference value that (even remotely) sets a threshold.

Securing adequacy in wages would require that wages are fair *vis-à-vis* the general wage distribution of the country while at the same time guaranteeing a decent standard of living in a given country context. In this regard, minimum wages would resemble the Anglo-Saxon idea of living wages that goes beyond ensuring subsistence to enable individuals to participate in society.[166] It is important to reiterate that wages have a history of being contextualised with country specific circumstances in the context of the CoE and at the national level. An instrument on minimum wages would therefore translate standards used by international organisations into the specific EU framework. At the very least, this would require to implement the case-law of the ECSR, which requires at least 50% of the national average wage, provided that the Member States can prove that this threshold is sufficient to live a life in dignity in a particular Member State.[167] Just as is the case for minimum income, adequacy can be contextualised with national reference budgets. In any case, the target threshold should, in principle, be above the at risk of poverty threshold and could be calculated on the basis a percentage (arguably 60%) of the median or average equivalised wage.[168] The implementation of the minimum wage standard should in any case be gradual.[169]

Note, however, that minimum wages are individual while poverty thresholds refer to household incomes. As such, securing adequate wages will not necessarily have a significant impact on one-earner households. Minimum wages for non-standard forms of employment should apply a *pro rata temporis*

166 Schulten and Müller, 'What's in a name? From minimum wages to living wages in Europe' (2019) EJSS 25(3), 267–284.

167 Extensively: Marchal, 'An EU minimum wage target for adequate in-work incomes?' (2020) *EJSS* 22(4), 452–466.

168 See supporting this argument: Müller and Schulten, 'The European minimum wage on the doorstep' (2020) *ETUI* Policy Brief.

169 Fernández-Macías and Vacas-Soriano, *supra* n 113, 105–111.

principle that, mirroring other instruments,[170] implies that their wages would be equivalent to the hours worked. This means that for those who do not work full time a *pro rata* minimum wage might also not be enough to escape poverty.

Moreover, adequacy shall be considered together with the impact of taxes on the one hand and social contributions on the other. This is particularly important in the case of the different vulnerable groups that were addressed at the beginning of this section such as households with low work intensity, women, workers with a migrant background or non-standard forms of employment for whom tax exemptions and top-ups might mark the difference between a life in dignity or poverty. An instrument that truly aims at having adequate wages should thus encourage Member States to take these into consideration.

Other aspects of the current proposal are already outstanding and should be maintained or simply strengthened. Important definitions, which are essential for a proper application of any instrument, reflect on current developments and international standards. In this sense, the current proposal offers a rather broad definition of worker, in consideration to the case-law of the Court and, moreover, explicitly includes a number of vulnerable groups that have often been excluded from the application of minimum wages such as platform workers. Moreover, the proposal defines minimum wages as 'the minimum remuneration that an employer is required to pay to workers for the work performed during a given period, calculated on the basis of time or output'. It also explicitly distinguishes between collective bargaining and statutory systems. However, the ILO specifically forbids reductions of this minimum through collective agreements of individual contracts,[171] which gives minimum wages a more mandatory role and could have been included in the proposal.

An instrument on minimum wages should include provisions that urge Member States to close gaps and provide both formal and effective minimum wage coverage for all workers, whether this is done by means of statutory regulation or collective agreements. The current proposal is quite successful in this regard as, on the one hand, it requires Member States to adopt measures where collective agreements' coverage is below 70% (Article 3) and, on the other, limits the use of deductions and variations for statutory minimum wages (Article 6).[172]

The role of social partners should be not only safeguarded but also encouraged,[173] which in the current proposal is also evident both in Articles 5 and 7 that aim at boosting the promotion of collective bargaining and the involvement of social partners in statutory wage-setting respectively.

170 This would resemble *pro rata temporis principle* in the Part-Time Directive. Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work [1998] OJ L 14.

171 ILO, 'Minimum wage systems' (2014); ILO, 'Minimum wage policy guide' (2016), p. 3.

172 COM(2020) 682, *supra* n.

173 Müller and Schulten, *supra* n 168.

A different point of interest refers to the wage adjustment mechanisms and particularly to their transparency and regularity. Article 5 of the proposal provides for a weakly formulated provision, which should be strengthened. Studies have found that in some Member States, minimum wage setting, particularly in the case of statutory regulation, is not always based on clear and stable criteria and as such, updates and changes in minimum wages are not always reasonably frequent or regular. Moreover, a provision on transparency should be included to detach readjustment methods from political cycles and prevent negative effects on the labour markets, particularly for low-wage earners. Transparency, in more general terms, should also guarantee that regardless of the sector, minimum wages are clearly defined both for statutory regulation and in collective agreements.

Lastly, an important component for an active labour market is to guarantee that working is not costlier for the worker than to remain inactive. Especially in the case of low-wage earners, working might come with additional costs (such as childcare) that low wages do not compensate for, while remaining inactive, due to social transfers, might be more economically advantageous. As such, a minimum wage instrument should enshrine a provision on enabling services that guarantees that remaining active is always more beneficial. Not only does this provision affect individuals, but overall the general sustainability of the welfare system and the healthy development of an active labour market.[174] Including an enabling provision would, moreover, be a way of incorporating part of the objective of the 2008 Active inclusion Recommendation.

Other than the above, an instrument should always be accompanied by provisions on its implementation, monitoring and transposition which, importantly, should ensure a gradual implementation of the measure. Importantly, the directive should include direct references to Articles 1 and 31 CFREU in order to read the directive in light of the right to fair working conditions and human dignity, and ensure the justiciability of these rights. The current proposal already includes these important clauses.

5.6 A Framework Directive on Access to Social Protection (principle 12)

As opposed to the other initiatives put forward in this chapter, this section evaluates the recent Council Recommendation on access to social protection for workers and the self-employed.[175] Overall, this section argues that the recommendation is a good first step as it acknowledges the need to act at the EU level to confront the challenges posted by the rise of non-standard employment and the lack of adequate social protection. However, this recommendation falls

174 Peña-Casas et al., *supra* n 108, p. 16.
175 OJ C 387; *supra* n 2.

short in various ways, and as such, this section argues that a binding instrument tackling the current gaps should be adopted at a later stage. This section therefore evaluates the current recommendation with its strengths and weaknesses and advocates for a sturdier approach that addresses the weaknesses and gaps of the current recommendation. Because this is rather an evaluation than a proposal in itself, this section follows a different format. It will first address the context in which the recommendation was put forward, with a particular focus on principle 12 EPSR. It analyses the recommendation in light of the objective that the instrument attempts to accomplish (to provide adequate coverage for all and, particularly, non-standard forms of labour), and it shortly discusses issues arising from the legal basis and its limitations. It concludes by formulating a number of suggestions for a future (binding) amendment.

5.6.1 Context of the proposal

Access to social protection is essential not only to guarantee the well-being of the workforce but also to maintain the well-functioning of labour markets that are capable of generating jobs and sustainable growth. Social protection may be provided either through in-kind or in-cash benefits and is often provided through social assistance and social security schemes.[176] However, although social protection entails a much wider notion, the proposal focuses solely on employment risks given that the previous proposals have dealt with minimum income schemes and wages. This is also the key point addressed by the recommendation itself, that applies to the branches of social security that are more closely related to the labour market or type of employment.

Even though social security systems differ extensively across Member States, thereby reflecting on different political preferences, traditions and budgets, many Member States, if not all, are facing similar transformative changes. As national social protection systems were envisaged at a time where full-time indefinite contracts were the rule rather than the exception, they were designed to protect those with a standard contract. In the rise of new forms of labour, this outdated model has generated a vacuum where many people are not covered adequately, if even protected at all.[177] Currently about 40% of the labour market is composed of (not so) atypical forms of employment.[178] The upsurge of new forms of labour has extensively segmented the labour market, leaving

176 COM(2018) 132 final, 'Proposal for a council recommendation on access to social protection for workers and the self-employed'.

177 A recent study shows that social protection measures against the pandemic are unequally distributed throughout the population and that the young, low-earners and casual workers are hit the hardest, which evidences the poor coverage of contributory systems. Adams-Prassl et al., 'Inequality in the impact of the coronavirus shock: new survey evidence for the US' (2020) *Cambridge-INET* Working Paper Series No: 2020/09 and 2020/10.

178 COM(2018) 132 final, *supra* n 176, p. 3.

an increasing number of atypical workers without access to a vast number of social transfers such as unemployment, sickness, healthcare, maternity, paternity, parental benefits, pensions, occupational sickness or accidents.[179] As current social protection systems are geared by traditional forms of employment, new (and not so new) forms of labour fall between the rigid dichotomous approach of social protection schemes that do not seem to see beyond traditional workers, and fail to provide sufficient protection for those who are not in a 'standard employment relation'. As a consequence, an increasing part of the population is left outside the welfare system based on their economic status raising, in turn, the risk of poverty and social exclusion among this part of the workforce.[180] Maintaining social protection systems that no longer accommodate a big part of the workforce has dreadful consequences for individuals but also for the well-being of the labour market and the welfare systems. For individuals, on the one hand, differential coverage (if any) often translates into economic uncertainty and hardship. On the other hand, segmentation in the labour market increases, which is connected to high levels of unemployment and lower quality of skills. Because a smaller part of the workforce pays contributions, fewer people contribute to the financing of the contributory system and fewer people benefit from it. In the absence of insurance-based safety nets, more people need to recourse to last resort social assistance nets which threatens the sustainability of welfare systems.[181]

In recognition of the gaps in social protection faced nowadays by a non-standard form of employment, principle 12 EPSR enshrines the right to adequate social protection regardless of the type and duration of their employment situation for workers, and under comparable situations, the self-employed. This goes in line with Article 34 CFREU that enshrines the right to social security in cases of maternity, illness, occupational accidents, dependency, old-age and loss of employment. The principle further builds on the entitlement to social security and social assistance for everyone residing and moving legally within the EU as well as the right to social assistance and social housing that ensure a decent standard of living for those who lack sufficient resources and combat social exclusion and poverty. Moreover, it also builds on Article 35 CFREU that guarantees the right to access preventive healthcare and the right to medical treatment.

The EPSR goes beyond previous policies on social protection in various ways. First, it specifically transforms the call for an income replacement into a

179 SWD(2017) 201 final, 'Establishing a European Pillar of Social Rights', 3–6; ILO, 'Strengthening social protection for the future of work' (2017), p. 7.

180 COM(2018) 132 final, *supra* n 176, 1–4.

181 SWD(2017) 381, 'Analytical document accompanying on second phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights', 51–55.

right. Importantly, principle 12 EPSR recognises the right to social protection regardless of the type and duration of employment while particularly targeting the increasingly prevalent non-standard forms of employment. Moreover, the personal scope of the Pillar is considerably wider and gives the self-employed a wider coverage by specifically putting them at the same level of protection as workers, that is, under comparable circumstances. This provision therefore expands from previous notions of 'appropriate protection', but raises the question of what comparable circumstances between workers and the self-employed entail. In any case, by ensuring the self-employed access to social protection in all branches of social security—though only under comparable circumstances—it surely goes beyond Directive 2010/41 which only covers maternity leave.[182] Whilst the principle is ambitious in its personal and material scope, this did not translate quite as clearly into the proposal of the Commission and was even further watered-down in the final text of the recommendation.[183]

5.6.2 The recommendation

5.6.2.1 Overview

There seems to be an agreement among Member States and the EU institutions on the need to modernise social protection systems.[184] In this context, the Commission presented a proposal for a recommendation on access to social protection for workers and the self-employed as a part of the Social Fairness package put forward in March 2018.[185] The proposal was the result of a two-step consultation process involving the social partners following Article 154 TFEU and other key stakeholders and representatives.[186] Due to strong disagreements between management and labour, the social partners did not enter into negotiations. In the absence of an agreement between the social partners, the Commission moved on to make its own proposal for a Council Recommendation. Only in November 2019 did the Council finally adopt a watered-down version of the proposal.[187]

The general aim of the recommendation is to increase income security, reduce precariousness and unfair competition, fight poverty and foster more

182 Directive 2010/41/EU of the European Parliament and of the council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity [2010] OJ L 180.

183 Aranguiz and Bednarowicz, 'Access to social protection, for some' (2019) *Social Europe*, available at: www.socialeurope.eu/access-to-social-protection-for-some

184 COM(97) 102, 'Modernising and improving social protection in the European Union'.

185 Together with: COM (2018) 131 final, 'Proposal for a regulation of the European Parliament and the council establishing a European Labour Authority'. Which has by now been adopted OJ L 186, *supra* n 12; COM(2018) 130 final, *supra* n 140.

186 COM(2017) 127 final, 'Launching a consultation on a European Pillar of Social Rights'.

187 OJ C 387, *supra* n 2.

resilient economic structures. It is clear from its preamble, that the main goal of the recommendation is to support those engaged in non-standard forms of employment and the self-employed given that these groups are often not sufficiently covered by social security schemes. To the end of improving their situation, the recommendation urges Member States to secure an adequate social protection for all, which is accordingly seen as sufficient to uphold a decent standard of living. This requires to replace income loss in a reasonable manner while preventing individuals from falling into poverty and contribute, when appropriate, to activation.[188]

The recommendation covers on the one hand access to social protection and, on the other, the right to build-up and take-up entitlements. Particularly, the recommendation calls for Member States to ensure formal and effective coverage, adequacy and transparency of social protection systems. Formal coverage stems from existing legislation and collective agreements, which establish the right to social protection in different branches. Effective coverage, differently, refers to the ability of individuals to access a level of benefits with regard to a specific branch when a risk materialises. As for the personal scope, the recommendation applies to both workers and the self-employed as well as to people transitioning from one status to the other or holding both statuses and it specifically includes people whose work has been interrupted due to one of the risks covered by social protection systems. Nevertheless, the recommendation also recognises inherent differences between workers and the self-employed. Most notably in Article 8 of the Recommendation Member States are recommended to ensure adequate access to social protection for workers on a mandatory basis and for the self-employed 'at least on a voluntary basis and *where appropriate* on a mandatory basis'.

Further, the recommendation urges Member States to provide comprehensive, accessible and user-friendly information that is clearly understandable and available to individuals to secure transparency. Importantly, in order to ensure data collection, which is key to address the problem of social protection, both the Member States and the Commission should collect and publish reliable national statistics on access to social protection. Lastly, the recommendation is deemed to be monitored through the European Semester and the Social OMC as well as being supported through actions funded by the relevant Union programmes.

5.6.2.2 Analysis

This recommendation is a crucial part of the new wave of social Europe geared by the EPSR, and as such, it comes with an important set of provisions that are likely to put some pressure on Member States to accommodate current

188 *Ibid.*, recital 17.

welfare systems to social realities. The recommendation has, at the very least, started an important discussion on the adequacy, suitability and accessibility of our social protection systems and the inability of the current social protection nets to respond adequately to increasingly segmented, dynamic and mobile trends in the labour market. Importantly, the recommendation addresses this challenge from the perspective of securing a life of dignity as opposed to the issue of financing social protection systems. While the latter is present in the text, more importance is given to the quality of life of those people who, for one reason or another, lack adequate access to social protection. The fact that individual interests and human rights are the centrepieces of the debate steers the discussion onto a prioritisation of the social interests over the economic ones. Although both interests remain an important part of the conversation, the balance seems to favour individuals which is accentuated in the importance given to adequacy and coverage (both formal and effective).

It also puts at the very core of the discussion the insufficient protection for the self-employed. While the self-employed nowadays amount to an important part of the workforce, not all Member States offer social protection nets for them.[189] This recommendation acknowledges their vulnerable position, and while addressing the 'entrepreneurial risks' adhered to self-employment, it urges Member States to provide a bare minimum of social protection on a voluntary basis. As such, the recommendation might be key in promoting coverage among the self-employed, which remains unacceptably low.[190]

The recommendation also includes a monitoring system to discuss and develop agreed quantitative and qualitative indicators and enable a review of the recommendation. Given the lack of sufficient data in the domain of the recommendation, this monitoring is essential to allow the recommendation to develop along with new data and research. Eventually this could even lead to the adoption of a binding instrument (see the discussion that follows).[191]

Other positive aspects relate to, *inter alia*, the definitions under Article 7, the importance of accumulation, transferability and transparency that, if used adequately in the context of monitoring in the European Semester, could be key in developing a common European strategy that targets the current flaws in social protection.

For all its ambition, however, the recommendation also falls short in several aspects. First, the recommendation is a soft-law instrument and accordingly, it is not legally binding. The Commission opted for a recommendation in

189 Spasova et al., 'Self-employment and social protection: understanding variations between welfare regimes' (2019) *JPSJ* 27(2), 157–175.

190 Where voluntary schemes exist only 1–20% of the self-employed enroll. COM (2018) 132 final, 'Proposal for a recommendation on access to social protection for workers and the self-employed', p. 11.

191 Commission, 'Monitoring of the council recommendation on access to social protection for workers and the self-employed' (2020).

anticipation of the lack of consensus among Member States for the adoption of a directive. The original intention for choosing a directive instead, is still traceable from references to minimum standards, most notably under Article 3. The next section on legal basis develops this weakness further and discusses the competences for the adoption of a directive instead.

Another drawback relates to the regrettable choice of considerably watering down the original proposal put forward by the Commission. This is evident in several ways. For one, the general language of the recommendation is far softer, moving away from what Member States *should* do to what they are *recommended* to do. As for the room of deviation Member States enjoy with regard to difference in coverage for workers and the self-employed, the proposal referred to coverage on a voluntary basis only in the case of unemployment benefits, which is usually linked to the entrepreneurial risks that the self-employed take.[192] The final text, however, generalises this caveat to an ambiguous *where appropriate*.

Other parts of the original proposal have completely disappeared from the final text. This is perhaps most remarkably the case for the definition of worker, that even though it might have still not served to include some new forms of labour,[193] it was crucial for the sake of a coherent approach in the implementation of European labour and social rules. This is particularly unfortunate given that the discussion took place in parallel to the Work-life Balance Directive, and the Directive on Transparent and Predictable Working conditions which, in a different way, did incorporate some kind of link with the case-law of the CJEU. Eliminating the definition of worker from the final text leaves the door open for Member States to embrace more restrictive notions of 'worker' (or 'employment relationship' for that matter), and therefore exclude a number of individuals from accessing social protection, which goes against the proclaimed objective of the recommendation.

Similarly, while the proposal originally referred to the social security branches with an explicit mention to Regulation 883/2004, the final text avoids such a connection which, in turn, limits the possibility of interpreting the social security branches in line with the regulation. The recommendation also explicitly excludes social assistance from its scope, particularly, minimum income benefits. This is problematic for those workers whose salary is insufficient to escape poverty, as it has been discussed above.

In addition, the provisions relating to transferability and adequacy were furthermore diluted in the final text. In a similar vein, the final text of the recommendation introduces a new caveat where Member States' social protection

192 With regard to the so-called 'entrepreneurial risks' undertaken by the self-employed, it is important to note that an increasing number of the self-employed (around 20% of the self-employed) does not take these risks voluntarily, but is rather forced to self-employment in the absence of a standard employment contract. COM (2018) 132 final, *supra* n 190, p. 3.

193 Aranguiz and Bednarowicz, 'Adapt or perish: recent developments on social protection in the EU under a gig deal of pressure' (2018) *ELLJ* 9(4), 329–345.

system needs to be considered *as a whole*. Lastly, the final text also downgraded the provisions on transparency by eliminating a set of examples of information about social security and extending the periods that Member States have to report on the collection of data and implementation of the recommendation.[194]

Several other aspects of the recommendation are conspicuous by their absence. This is most notably the case of non-take-up. The preamble of the recommendation, as well as the original text of the Commission, refer to the challenge of non-take-up in setting up the scene but failed to incorporate provisions to tackle this particularly problematic area of social protection, where individuals, for a number of reasons explained above, fail to claim their entitlements.

All in all, the recommendation should be given a cautious welcome. Given the lack of data collection and the difficulty to adopt an instrument in this sensitive area of law, particularly considering the unanimity requirement to adopt a directive on social protection, this should be taken as a modest beginning with the potential to lead to a stronger and more ambitious project in a near future, where more consensus can be gathered due to a process of common learning through the current monitoring processes and when more data has been collected.

5.6.3 The next step: a framework directive

5.6.3.1 Moving towards a binding instrument

Given the urgency of future-proving social protection systems, the relatively weak enforceability of the recommendation is arguably one of the greatest pitfalls of the instrument. In the EPSR, the right to social protection is seen in connection to the legal basis of Article 153 TFEU, particularly, in the field of social security and social protection. The Commission was careful to address the limitations already in the formulation of the staff working document accompanying the EPSR with respect to not affecting the right of Member States to define the fundamental principles of their social security system and not significantly altering the financial equilibrium thereof.[195] Likewise, the Commission did not fail to observe the importance of avoiding to impose any administrative, financial and legal constraints in a way that could hold back the creation and development of SMEs under Article 153(2) TFEU. Noteworthy, the initial explanatory document on the EPSR envisioned the adoption of a directive, and not a recommendation. In the proposal for the recommendation, the Commission did however address the reasons behind the choice of instrument by stating that a recommendation was the most 'proportionate' approach

194 Aranguiz and Bednarowicz, *supra* n 183.

195 SWD(2017)201 final, 'Establishing a European Pillar of Social Rights'.

'at this point in time'. The Commission deemed a recommendation the best course of action given the lack of consensus on the direction of the reforms among Member States and the social partners, and the general absence of political support for a hard-law instrument. The Commission stressed that a recommendation, unlike a directive, provides the possibility for the EU institutions and the Member States to cooperate together in addressing the diverse aspects that emanate from the problem and anticipate its evolution. Without establishing binding outcomes, a recommendation stimulates and guides national reforms while ensuring a comprehensive progress across the EU. Given the lack of available data on the protection of non-standard workers, and the general absence of national statistics, it is probably for the best that the Commission opted for a recommendation that ignites the conversation and leads to a gradual common progress in the EU. With the monitoring of the recommendation through the existing mechanisms of the European Semester and the Social OMC, together with the duty of Member States and the Commission to collect data on the topic, this recommendation, in spite of its soft-language, might still symbolise a turning point on the EU social agenda and the modernisation of social protection systems in the EU. This way, the recommendation would represent the first step towards the adoption of a stronger instrument in a not-so-distant-future. Such an instrument could take the form of a framework directive on social protection for all.

Just like the recommendation, a Framework Directive on Social Protection would first and foremost support the Union's objectives under Article 3 TEU, Article 9 and 151 TFEU. It would likewise be based on Article 153(1)(c) and 153(2) TFEU in combination with Article 352 TFEU for extending the personal scope beyond workers to also include the self-employed. Both these bases require unanimity, which might be seen as a major obstacle. To gather consensus, it is essential that Member States and institutions get first the chance to discuss such issues in the more informal monitoring framework of the recommendation.

As far as the principle of subsidiarity and proportionality is concerned, the framework directive would have to be careful not to go beyond what is necessary and address the limitations under Article 153(4) TFEU to not define the fundamental principles of their social security systems and not significantly affect the financial equilibrium thereof. The key to respecting these limitations, as well as the principle of subsidiarity, therefore lies on the content of the initiative. This content shall acknowledge that employment and social protection policy are primarily a responsibility of the Member State, meaning that the initiative will be limited to the problem of insufficient access to social protection for a growing number of the workforce and the negative consequences for social cohesion that are wide-spread among Member States. An asymmetric approach, where each Member State acts individually, not only would this risk an irregular development and a 'several-speed Europe', but might also put certain countries at a competitive disadvantage relative to other enterprises

in different Member States. In this vein, a common strategy is necessary to prevent a 'race to the bottom' in the internal market and, instead, promote upward convergence both within and among Member States. The content of the framework directive should therefore aim at reducing or eradicating common obstacles that impair individuals from accessing adequate social protection schemes regardless of their type of employment relationship or labour status. Such an initiative would have to leave ample room for Member States to implement this directive into the national terrain. At the same time, more fundamental issues would be left to each Member State, such as the financing of the social protection system, whether to extend the coverage range of the current schemes or create new schemes, or the exact level of protection provided (given that is adequate).

In order to ensure compliance with the principles of subsidiarity and proportionality, a Framework Directive on Social Protection would be limited to ensuring core standards in access to social protection. It would, however, leave it to the discretion of the Member States to adopt more favourable standards in the particular national context. Moreover, a rigorous an updated impact assessment must accompany the initiative, which is likely to show (considering the impact assessment that accompanied the current recommendation) the divergent approach taken by a number of Member States particularly regarding new forms of labour and the necessity to support progress at the EU level. A recommendation was considered the most proportionate approach 'at this point in time' particularly given the lack of exchange of good practices, and the gaps in data collection.[196] If the recommendation does indeed fulfil its objectives of collecting data and starting an important conversation among Member States, in a few year's time, sufficient available quantifications should serve to indicate the costs-benefit of adopting a more ambitious instrument.[197] These data would therefore directly feed into the impact assessment necessary to prove the proportionality of a directive.

5.6.3.2 Strengthening its content

The starting point of re-launching this instrument would therefore be to transform it into a Directive, once sufficient national data has been collected and common expertise has been gathered in order to draft accurately the principles, definitions and other provisions of a binding instrument. Beyond the transformation into a binding instrument, however, a new instrument should be more

196 COM(2018) 132 final, *supra* n 176, p. 8.

197 It is important to not in this regard that the ITUC has already concluded that social protection for all is affordable. See: ITUC-CSI., 'ITUC meeting of experts confirms that docial protection for all is affordable' (2018), available at: https://www.ituc-csi.org/ituc-meeting-of-experts-confirms?lang=en

substantial and provide specific methods to guarantee that all the principles enshrined in the directive can be effectively implemented.

On a general note, the directive should recognise the universal character of the right to social protection and acknowledge, in this regard, the crucial role of public and collectively financed statutory schemes in securing the universality and adequacy of social protection. In the same line, and in spite of the important role that these might play, the role of occupational and private systems should only fulfil a complementary role. As such, while leaving room for Member States to decide on the precise financing of their social security systems, a Framework Directive on Social Protection should reformulate Article 1.2 of the current Recommendation to stress the primary obligation of Member States to guarantee universally accessible social protection and the secondary role of occupational schemes. Similarly, a directive should also include a specific reference to a fair balance of contributory obligations between the worker/self-employed and the employer/customer.[198]

As far as the personal scope is concerned, it is most regrettable that the final text of the recommendation omitted the definition of a worker. The original proposal of the Commission did include a definition of worker. However, it required a person to be 'under the direction' of another, which is often a difficult point to prove for several forms of non-standard employment, particularly platform work and the gig economy. The CJEU has nevertheless developed a somewhat comprehensive approach with regard to the concept of worker as interpreted by Article 45 TFEU.[199] Given that the objective of the instrument is to secure minimum standards in the field of social protection and that it specifically allows for a different treatment between workers and the self-employed, it is crucial that the instrument provides a definition that both goes in line with EU law and is sufficiently flexible as to accommodate those in greyer areas that do not clearly belong to this dichotomic approach. In the past, the Court has shown a dynamic attitude towards the concept of worker, which has benefited the protection of individuals. A definition that codifies the case-law of the CJEU and narrows down the possibility for Member States to exclude certain categories of workers from social protection while being sufficiently broad as to accommodate new realities through judicial dynamisms should be enshrined in the legislative instrument. Equally, such a definition would avoid gaps in EU legislation and ensure coherence with other instruments.[200]

198 ETUC, 'ETUC position: proposal for a council recommendation on access to social protection for workers and the self-employed' (2018).

199 See extensively: *supra* n 53.

200 The recently adopted Work-life Balance Directive and the revision of the Written Statement Directive both refer to the case-law of the CJEU on the concept of worker: Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188, Article 2; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on

With regard to the material scope, the directive should explicitly include references to existing instruments, particularly to the ILO Convention 102,[201] the ILO Recommendation 202[202] and the social security Regulation 883/2004.[203] This should ensure coherence and facilitate the interpretation of the provisions enshrined in the directive to guarantee a coherent implementation across the EU. Another change that the directive should feature is the need to prevent that people who do not yet fulfil the criteria to access to social security benefits but remain active fall between two stools as they cannot access neither contributory nor non-contributory schemes. This connection between benefits is crucial to guarantee a smooth transition to active inclusion so individuals are not discouraged from taking up employment.[204] Instead, the current recommendation expressly excludes social assistance and particularly minimum income. While these might fall out of the material scope *stricto sensu*,[205] the Framework Directive should certainly include a provision that urges Member States to consider transitioning periods, both from unemployment to employment and transitions between different employment statuses. In this regard the Framework Directive should be more inclusive than the current recommendation.

In terms of coverage, the recommendation suggests Member States to extend the mandatory basis for the self-employed only 'where appropriate'. It is unclear when the self-employed are deemed to be covered on a mandatory or voluntary basis which creates legal uncertainty and is likely to result in a lesser protection for the self-employed. Even though the priority in formal coverage lies in guaranteeing that both workers and the self-employed have indeed access to all branches of social security, whether on mandatory or voluntary basis, the voluntary option should be as limited as possible if the aim is indeed to ensure a universal coverage that is based on solidarity, risk-sharing and fairness.[206] On the one hand, mandatory coverage would ensure that the

transparent and predictable working conditions in the European Union [2019] OJ L 186, Article 1 and more explicitly in recital 8 of the preamble.

201 ILO C102—Social Security (Minimum Standards) Convention, 1952 (No. 102).

202 ILO R202—Recommendation concerning National Floors of Social Protection, 2012 (No. 202). See on the application of this ILO Recommendation to the EU context: Dijkhoff, 'The ILO social protection floors recommendation and its relevance in the European context' (2019) *EJSS* 21(4), 351–369.

203 These cover sickness benefits, maternity and paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, occupational sickness/accident related benefits, death grants, unemployment benefits, pre-retirement benefits and family benefits. These references might also assist in shedding some interpretative light when in conflict.

204 ETUC, *supra* n 198, p. 3.

205 Note that social assistance-type benefits are covered by Regulation 883/2004, specifically, the so-called special non-contributory benefits. As such, this kind of benefits could arguably fit within the material scope of the Framework Directive as well.

206 As it stands currently, social protection covers mainly the salaried employees and as far as self-employment goes, they are often completely excluded from the statutory access or may only *opt-in* on a voluntary basis to key insurance risks. Spasova et al., 'Access to social protection for people

self-employed are protected against all risks and on the other, it would play for the sustainability of the welfare state, as the financing of the statutory systems would be levied more evenly. It is undeniable that the self-employed often undertake so-called 'entrepreneurial risks', and that as a consequence, different rules might apply to the self-employed. In order to ensure effective protection, derogation from the mandatory principles should be conditional upon an assessment to prevent a race to the bottom among the self-employed by allowing unlimited reductions of their labour costs. One effective way to limit this would be to instigate Member States to implement voluntary coverage through *opt-out* clauses instead of *opt-in* clauses. While the former requires the self-employed to actively choose coverage, the latter option has coverage as the default option. Several studies have found that working on the basis of *opt-out* clauses has considerable benefits for the protection of the self-employed and increases the likelihood of individuals choosing to be covered against labour-related risks.[207]

Similarly, effective coverage allows for differences in the rules governing schemes between labour market statuses or types of employment relationship. Differentiation in treatment, however, shall be 'proportionate' and reflect on the particular situation of beneficiaries. Given that different rules are already applicable to workers and the self-employed across Member States creating an uneven protection, vague references to proportionality and specific circumstances will not prevent or sufficiently attenuate long-term uneven treatment. In this regard, transparency is key in ensuring that such leeway is not used to circumvent effective coverage. Equally important, the implementation and monitoring actions should be directed at identifying criteria for differential treatment to reduce uncertainty and tackle unjustified unequal treatment.

Importantly, effective coverage must include a provision on transferability that will ensure that both workers and the self-employed preserve their rights when they switch employment contract or statuses.[208] Arguably, transferability, particularly the aggregation of periods during transitions, could be subject to a short period of time in order to reduce the costs for enterprises, particularly of the SME (which would incorporate the limitation of Article 153(2) TFEU with respect to SMEs). This way, the concerns voiced by the employers

working on non-standard contracts and as self-employed in Europe: a study of national policies' (2017) *Commission*.

207 Opt-in designs result on a much lower participatory rates (20%) as opposed to the opt-out designs (75%). SWD(2017) 381 final, *supra* n 181; Beshears et al., 'The importance of the default options for retirement saving outcomes' in Brown et al. (eds.) *Social Security Policy in a Changing Environment* (National Bureau of Economic Research, 2009).

208 Not ensuring transferability of 'earned' rights could even amount to a breach of the right to property of individuals under Article 1 ECHR. See Chapter 3 on this, particularly: ECtHR, *Béláné Nagy v. Hungary*, App. No. 53080/13, ECLI:CE:ECHR:2015:0210JUD005308013.

during the consultation rounds of the Recommendation would also be taken on board.[209]

In all likelihood, together with the general aim of the recommendation, adequacy is the most remarkable provision of the current initiative, particularly with regard to the references to preventing poverty, maintaining a decent standard of living and ensuring protection in a 'timely manner'. Nonetheless, a Framework Directive on Social Protection should strive for a more complete and clear principle of adequacy that calls for full participation in society by setting a clear threshold. It might be recalled, that the ESC considers that a replacement income must at least amount to 40% of the previous income, as long as this percentage reaches 50% of the average national median income. Any income replacement that falls below this 50% is considered contrary to the ESC.[210] A future directive could include a similar threshold that is moreover underpinned by reference budgets. Therefore, adequacy in the different branches covered by the social protection initiative should ensure not only that individuals who require protection from those risks remain above the poverty threshold, but also that this threshold is sufficient to enable full participation in society. The adequacy provision in the Framework Directive should frame income replacement measures for working people in a way that it corresponds to their level of contributions. The difference should be marked, thus, between benefits to solely prevent poverty (minimum income schemes) and measures aimed at income replacement, which should be proportionate to the contributions made. As far as adequacy of contributions goes, it is crucial to recognise the importance of exemptions or reductions in social contributions for vulnerable groups, particularly for low-income earners. Equally, tailoring contributions of the self-employed to their income fluctuations in a way that reflects the actual earnings of the self-employed is crucial to prevent them from falling into poverty as a consequence of paying a disproportionate amount of contributions in times of economic hardship.

A heated ongoing debate, which was purposefully left out of the recommendation, refers to the organisation and bargaining rights of the workforce, which are crucial for the negotiating part of the 'weaker' link of the employment balance, and is becoming increasingly relevant for non-standard workers.[211] Ideally, the discussions that are currently on the table, particularly with regard to the right (or lack thereof) of collective bargaining of the self-employed, will in the upcoming years culminate in an agreement among the Social Partners

209 SWD(2017) 381 final, *supra* n 181, 45–48.

210 ECSR, *IKA-ETAM v. Greece,* Collective Complaint No. 76/2012, §74; ECSR, 'Conclusions 2009, Ireland', 'Conclusions 2009, France' and 'Conclusions 2009, Finland'.

211 Despite the steady increase in self-employment, the self-employed are denied the right to be represented by trade unions and bargaining power. FULTON, 'Trade unions protecting self-employed workers' (2018) *ETUC*; See importantly: ECSR, *ICTU v Ireland*, Complaint No. 123/2016.

where all types of employment have an adequate representation.[212] This, in turn, should be included in the framework directive. If such agreement is not reached, at the very least, a directive should recognise the collective rights of all workers and the solo self-employed, and promote best practices among Member States to encourage a better representation of the self-employed.[213] As a fundamental regulatory tool, collective bargaining is essential for addressing potential deficits in the social protection systems with the advantage of being tailored to a particular sector. Strengthening collective bargaining is a powerful tool to ensure the inclusive protection of workers and identify potential gaps in the social protection schemes.

Lastly, the issue of non-take-up of benefits, as seen in the beginning of this chapter, should equally be incorporated among the effective coverage provisions and reference to Articles 1 and 34 CFREU should be clear, in order to make these rights justiciable, and interprete the provisions of the directive in their light.

5.7 A European Unemployment Benefit Scheme (principle 13)

Unsurprisingly, the working status of individuals is one of the main socio-economic characteristics that has an impact on the risk of poverty and social exclusion, with a poverty rate of 43% among the unemployed as opposed to 11.4% for employed persons.[214] Against this backdrop, the idea of an EU-wide unemployment scheme has been on the table of EU institutions for decades. The Commission promised to present a proposal for a reinsurance scheme by 2020,[215] however, probably due to COVID-19 this never took place and, what is more surprising, this is absent from the future plans of the Commission.[216]

5.7.1 Context of the proposal

The idea of a EUBS dates back to the 1970's Marjolien Report, where the authors suggested considering 'means of redressing imbalances between Community countries including the introduction of a community system of unemployment benefit'.[217] In a more modern approach, Dullien published

212 Commission, 'inception impact assessment collective bargaining agreements for self-employed' (2021).

213 In relation to false self-employment, the Court decided that competition law does not apply to arrangements to improve the working conditions among the self-employed when they can be qualified as 'workers'. C-413/13—*FNV*, ECLI:EU:C:2014:241.

214 Eurostat, 'Living conditions in Europe—poverty and social exclusion' (2019).

215 COM(2020) 14 final, *supra* n 3.

216 Commission, *supra* n 9.

217 Commission, 'Report of the study group "economic and monetary union 1980"' (1975).

a series of papers on a potential European unemployment insurance which caught the Commission's attention.[218] It was not until later, once the dreadful outcomes of the crisis became apparent, that the discussion took impetus in the European institutions. In 2012, the European Parliament adopted a position urging the Commission to explore the feasibility and added value of introducing an EUBS[219] and in 2014 published a study on the potential impact that an EUBS would have had in reducing the impact of the economic crisis in the euro area.[220] It followed a resolution on the budgetary capacity of the euro area according to which an EMU-wide unemployment benefits would have directly stabilised household income.[221]

In parallel, the Commission presented a report commissioned by DG Employment and carried out in consortium with CEPS on the feasibility and added value of the EUBS, following the 2012 request of the Parliament.[222] While in general terms the report (and the work that followed) found that the impact of the EUBS to provide stability to the EMU might be limited, it may, however, lead to a number of advantages such as convergence of the labour market policies or the enhancement of unemployment protection in those Member States where unemployed individuals experience high risks of poverty. In this regard, the EUBS is a desirable course of action to strengthen the social dimension of the EMU or the EU, but its impact would ultimately depend on the choice of mechanism. The Commission later acknowledged the 'breathing space' capacity that the EUBS may provide for national public finances and for a quicker and stronger recovery after the crisis.[223]

In the absence of such an instrument amidst the COVID-19 crisis, the Commission launched SURE, a temporary loan system with the objective of supporting unemployment schemes for Member States.[224] Links between

218 Dullien, 'Improving economic stability in Europe: what the Euro area can learn from the United States' Unemployment Insurance' (2007) *FG1 German Institute for International and Security Affairs* Working paper.

219 European Parliament, 'Towards a genuine EMU' (2012).

220 According to this study, the GDP loss in the eurozone would have been reduced by 71 billion of euros., del Monte and Zandstra, 'Cost of non-Europe report: common unemployment insurance scheme for the euro area' (2014) *European Parliament*.

221 This report further emphasised the link that this insurance would create between citizens and European institutions, its positive outcome for the macroeconomic convergence of the euro area that, in turn, would accelerate market integration, labour and wage mobility as well as the high degree of harmonisation. Böge and Berés, 'On budgetary capacity of the eurozone' (2017) *European Parliament*.

222 Beblavý et al., 'A European unemployment benefit scheme: the rationale and the challenges ahead' (2015) *Commission*.

223 Commission, 'New budgetary instruments for a stable euro area within the Union framework' (2017).

224 COM(2020) 139 final, 'Proposal for a council regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the Covid-19 outbreak'.

SURE and the EUBS can easily be drawn.[225] Even though SURE is a temporary instrument and is based on loans, the need for a supranational unemployment stabilisation mechanism has been made obvious. This should have served as a catalyst to move forward with a legislative proposal for an EUBS, however, it is currently absent from the Commission plans.

Bearing this political context in mind,[226] the following section analyses the proposals that have been put forward, particularly that of the Commission in consortium with CEPS, in light to its potential to contribute to the policy objective to combat poverty and social exclusion.

5.7.1.1 Reasons for and objectives of the proposal

The need for a European stabilisation mechanism became particularly apparent after the global economic crisis of 2008–2009, where the financial markets saw a substantial decline and monetary policy of the eurozone was unable to react to country-specific developments. With the formation of the EMU, eurozone Member States lost control over their monetary policy, which is now centralised, while national fiscal policy (essential for absorbing economic shocks), remained under the competence of the Member States. Consequently, during the crisis the EMU could not consider country-specific fluctuations and the ECB could not stimulate the economy by adjusting the interest rates in accordance with national needs.[227] Inflexible exchange rates, accordingly, are likely to destabilise labour markets when fiscal policy cannot adjust to economic fluctuations by, *inter alia*, increasing the unemployment rate. With a monetary policy that is unable to react to shocks, a strong fiscal cooperation between Member States becomes crucial. It is on this note that fiscal transfer mechanisms can play an important role in supporting national fiscal policy when their economies need to be stabilised.

The EUBS is only one among many other stabilisation mechanisms that could be put forward by the EU policymakers. Ultimately, the decision of opting for a EUBS and not a different stabiliser would depend on its added value as opposed to other alternatives. Part of its added value is that by feeding into unemployment benefits, its link to poverty and social exclusion is arguably more direct than other stabilisers.

225 Alcidi and Corti, 'The time is ripe to make SURE a permanent instrument' (2021) *CEPS*; Vandenbroucke et al., 'The Commission's SURE initiative and euro area unemployment re-insurance' (2020) *Vox EU*, available at: https://voxeu.org/article/european-commission-s-sure-initiative-and-euro-area-unemployment-re-insurance.

226 See more extensively on the debate of an EUBS: Schmid, 'European unemployment insurance? A more modest approach in the short term, more ambition in the long term' (2019) *OSE* Paper Series.

227 Fichtner, 'Euro area-wide unemployment insurance: useless, desirable, or indispensable?' in Natali (ed.) *Social Developments in the European Union 2013* (Brussels: OSE/ETUI, 2014).

In this regard, the primary objective of the EUBS would be to provide an automatic response to the cyclical development of the market in order to absorb substantial economic shocks. A similar automatic stabilisation mechanism is currently missing in the EU and it would be crucial in complementing existing market mechanisms. In line with the five-president report, an EUBS should: (1) not lead to permanent transfers, (2) not undermine the incentives for sound fiscal policy-making at the EU level, (3) be developed within the EU framework and (4) not become an instrument for crisis management.[228] Beyond the role as an automatic stabilisation mechanism, the EUBS should also have a clear objective of assisting individuals, and not only Member States, that are in a situation of unemployment, therefore ensuring not only the well-being of the welfare states but particularly that citizens have the right to an adequate income replacement in case of employment loss. Whatever form an EUBS takes, it should thus convey some minimum criteria that would eventually lead to upward convergence. Later this section, discusses the possibility of implementing such criteria through a Directive.

5.7.1.2 Consistency with Union policies

As far as unemployment benefits go, and EUBS would implement the right to social security entitlements under Article 34 CFREU, in this case of unemployment, as well as the social objective of the EU to promote living and working conditions and proper social protection that are enshrined in Article 3 TEU and 151 TFEU. With regard to secondary legislation, Regulation 883/2004 coordinates, *inter alia,* unemployment benefits among Member States. While the adoption of an EUBS would in principle not conflict with the Regulation, adding an EUBS to national unemployment benefits is likely to become a complicating factor for the coordination of systems and, as such, the principles of coordination should always be considered in the formulation of an EUBS, whatever its final form. Other than that, making an EUBS portable may tackle gaps in the coordination of social security and, as such, an EUBS could be complementary to the social security regulations. In any case, were the EUBS be adopted, the Regulation should be adapted to be applicable also to the EUBS.[229]

Principle 13 EPSR enshrines the

> right to adequate activation support from public employment services to (re)integrate in the labour market and adequate unemployment benefits of reasonable duration, in line with their contributions and national eligibility

228 Juncker, 'Completing Europe's Economic and Monetary Union' (2015) *Commission*, p. 14.

229 See on the impact of EUBS on intruments of social security: Coucher et al., 'Legal & operational feasibility of a European unemployment benefits scheme at national level' (2016) *CEPS*, p. 63 ff.

rules. Such benefits shall not constitute a disincentive for a quick return to employment.

An EUBS would have the potential to enhance the financial capacity of Member States to guarantee adequate benefits and ensure that economic fluctuations do not aggressively reduce benefits, particularly in times of crisis. Similarly, because a certain degree of harmonisation between Member States is desirable for the implementation of the EUBS, this is likely to lead to upward convergence in unemployment benefits. As such, an EUBS would contribute to the implementation of principle 13 EPSR, at least partially.

As a stabilisation mechanism, on the other hand, the EUBS should be consistent with existing economic mechanisms. According to the CEPS study, an EUBS would not only be beneficial as a stability mechanism, but it would also act where other mechanisms do not, therefore complementing rather than substituting other market mechanisms. This is the case of the Macroeconomic Imbalance Procedure, whose corrective arm has seldom been used even though it is a powerful mechanism to contribute to stabilisation. In the case of the Outright Monetary Transactions and the ESM, while they both are major stability mechanisms they are not suited for crisis prevention.[230] Regional policies and public investment, on the other hand are crucial in times of crisis, but they are limited to *ex-post* relieve.[231]

5.7.2 Potential EUBS design(s)

This section briefly summarises the current literature review on the topic to later discuss its added value and legal bases, particularly in the context of adopting a minimum requirements directive.

5.7.2.1 The different variables

Although the Commission has referred to a reinsurance scheme, this is not the only possibility. In fact, the CEPS project studies the feasibility and added value of 18 different variants of EUBS, among which only four relate to equivalent (or reinsurance) EUBS and the remaining 14 are genuine EUBS.[232] Equivalent schemes, on the one hand, act as a reinsurance unemployment benefit scheme for the national schemes, which requires transfers between a supranational fund—in charge of managing the EUBS—and the Member States. These transfers are only activated when a 'trigger' is pulled. This happens when a

230 See on the Outright Monetary Transactions: ECB, 'Technical features of outright monetary transactions' (2012), available at: www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html

231 Beblavý and Lenaerts, *supra* n 3, 9–11.

232 See on the different variants: *Ibid.*, 21–23.

Member State's short-term unemployment rate in a given quarter exceeds a certain percentage (starting from 0.1% to 2% in the different EUBS studies by the CEPS report) over the average of the last ten years. A trigger is only one of the four dimensions that shape the equivalent EUBS, experience rating, claw-back and debt-issuing possibility being the remaining three. [233]

On the other hand, genuine schemes encompass a direct transfer to individuals. Because the benefit activates for eligible individuals when they become unemployed, there is no need for a trigger and, therefore, they are continuous schemes in this regard. The different variables of genuine schemes respond to eight dimensions, some of which are typical in unemployment benefit schemes such as qualifying periods, replacement rate, duration of payment and capping and four others which are designed specifically for supranational schemes, namely, cyclical variability, experience rating, claw-back and debt-issuing capability.[234] Genuine schemes are designed to be either complemented by or complementary to national unemployment schemes. As such, genuine EUBS may take two forms: basic genuine schemes or top-up schemes. The idea of a basic genuine scheme entails that the supranational fund would pay the unemployment benefits to individuals when they fulfil certain pre-defined eligibility criteria for a pre-defined period. National unemployment schemes might complementarily increase the paid amount or duration freely. In a genuine top-up scheme, otherwise, EUBS benefits will be used to guarantee a given replacement rate and duration for those eligible when the national unemployment scheme is not sufficiently generous, being therefore complementary to the national insurance scheme.[235]

Both designs, equivalent and genuine, would entail some degree of harmonisation of unemployment benefits and the labour markets in general. Whereas this is prone to lead to upward convergence, because of the complexity and diversity of national unemployment schemes, and EUBSs—specially a genuine kind—would pose numerous challenges that would require substantial legal reforms at the national level, a rather high degree of administrative effort and, moreover, some Member States would inevitably bear a higher burden.[236] This would certainly be the case for national unemployment schemes that greatly differ from the EUBS in terms of generosity, design and philosophy. In any case, the degree of harmonisation required by genuine schemes, begs the question of whether such EUBS would not surpass the limits of EU competence by overstepping into defining the fundamental principles of the social security systems of Member States.[237] Equivalent EUBS, alternatively, would

233 See definitions: *Ibid*., 81–84.

234 See definitions: Coucher et al., *supra* n 229, 74–76.

235 *Ibid*., 29–31.

236 For an overview of unemployment benefits in EU Member States see: Esser et al., 'Unemployment benefits in EU member states' (2013) *Commission*.

237 For an extensive analysis on the implications of a genuine EUBS see: *Ibid*., 41–47.

leave national unemployment schemes unaffected and would require minimal amendments.[238] In this regard, equivalent EUBS seem to be far more feasible than genuine schemes in terms of national implementation. Politically as well, the Commission has referred to a reinsurance scheme.[239]

5.7.2.2 Stabilisation capacity of the EUBS

The general findings of the project suggest that as far as its stabilisation ability goes, the impact of the EUBS would be relatively limited.[240] This relates to the small scale of the scheme, which is typically designed to be less than 1% of the EU GDP. Both the equivalent and the genuine schemes would be able to partially absorb economic shocks, although the extent to which they might do so varies greatly depending on the generosity and on the possibility of the EUBS being in deficit. In terms of stabilisation, however, equivalent schemes seem to perform better when compared to the genuine schemes. This is because equivalent schemes are only triggered in case of economic emergencies, mostly in times of crisis, as opposed to the genuine schemes that operate on a continuous basis. Yet, for both schemes, the stabilisation capacity would be considerably higher at the start of an economic crisis.[241] To put this 'relative impact' in context, other studies have found that an EUBS would have mitigated on average 20% of the income losses that followed the labour market shocks in 2000–2016.[242] For equivalent EUBS variants, the stabilisation capacity of the scheme highly depends on the threshold of the trigger. Whilst high trigger thresholds are relatively cheap, they might not even respond to very severe economic difficulties, therefore reducing the stabilisation impact of the mechanism. A lower trigger threshold is likely, at the expense of increased expenditure, to have a greater impact on absorbing economic shocks. This is because in variants with a higher threshold for trigger, fewer Member States would benefit from the EUBS. This would boost polarisation between Member States that benefit from the EUBS and those that do not. As regards genuine EUBS variants, their stabilisation capacity is mostly determined by the features of coverage and generosity. The more generous schemes with the longest duration and highest replacement rates perform better as stabilisation mechanisms, while the less generous schemes have a lower stabilisation income but also at a much lower cost.[243] Hence, in either EUBS, the policymaker would therefore have to find

238 *Ibid.*, 34–40.

239 COM(2020) 14 final, *supra* n 3.

240 Beblavý and Lenaerts, 'Stabilising the European Economic and Monetary Union: what to expect from a common unemployment benefits scheme?' (2017) *CEPS,* 5–10.

241 Beblavý and Lenaerts, *supra* n 3, p. 32.

242 Dolls, 'An unemployment re-insurance scheme for the Eurozone? Stabilizing and redistributive effects' (2018) *Bertelsmann Stiftung*.

243 Beblavý and Lenaerts, *supra* n 3, 31–47.

a middle ground between high expenditure and stabilisation impact. For both schemes, claw-back and experience-rating prove to be efficient mechanisms to reduce moral hazard and avoid permanent transfers, and as such these mechanisms should certainly be included in the EUBS.[244]

5.7.2.3 The importance of minimum requirements

In addition to its stabilisation function, there are several positive outcomes of an EUBS, such as, boosting labour mobility by making EUBS portable, contributing to upward convergence, enhancing the protection of the unemployed, contributing to social cohesion and tackling unemployment and poverty rates while being considerate of the risks of moral hazard.[245]

Setting common minimum requirements could be essential in enhancing not only the stabilisation capacity of the EUBS, but also coverage and generosity of the existing national unemployment schemes and, thus, increase the capacity of such instrument in fighting poverty and social exclusion. In all likelihood, an EUBS will give rise to a certain level of convergence. In this regard, an EUBS may incite Member States to align their national schemes with the EUBS thereby making their systems more comprehensive and smoothing transitions between national and European schemes. This is particularly true in the case of genuine EUBS that replace, at least to some extent, the national unemployment schemes. To a lesser extent, however, equivalent schemes would also require at least some minimum requirements.[246] Such requirements are likely to be specified in the guidelines linking the EUBS transfers to the national unemployment scheme. This 'link' is necessary in terms of stabilisation and legitimacy.[247]

In addition, against the risk of free-riding by those Member States with high unemployment rates, also known as moral hazard, pre-defined conditionality criteria or thresholds for the activation and disbursement of Member States could be key. This is partially accounted for by triggers (in the case of equivalent EUBS) as well as by the use of experience rating and claw-back mechanisms that link contributions to its use. These serve the purpose of guaranteeing that those Member States that use more funds are also contributing more. Another important way of addressing the moral hazard is by adopting minimum standards, particularly regarding the quality of unemployment benefits (coverage and generosity), and activation policies, which are a natural corollary of an EUBS.

244 *Ibid.*, 27–29 and 76–77.

245 Alcidi et al., 'Will a European unemployment benefits scheme affect labour mobility?' (2016) *CEPS*.

246 This has already been the case in the US and Switzerland. Beblavý and Lenaerts, *supra* n 3, p. 50.

247 *Ibid.*, 25–27.

It follows that setting minimum requirements follow a twofold purpose. On the one hand, they would enhance the design of national unemployment schemes thereby contributing to the stabilisation capacity of the EUBS. On the other, minimum requirements would prevent risky behaviours from Member States such as, reducing their efforts with regard to activation policies.[248]

The exact content of these minimum requirements would ultimately depend on whether there is a choice for a genuine or an equivalent EUBS, the threshold for a genuine EUBS being higher than for the latter. Either way, a directive on minimum requirements based on Article 153 TFEU would be more than desirable, given the convergence potential of the EUBS in both forms. This would be an essential step forward and would create stronger and formal obligations for Member States. This directive would moreover require the coordination of activation policies across Member States in a way that it incorporates existing internal mechanisms.

An EUBS that is accompanied by a strong set of minimum requirements would further foster social cohesion by enhancing income protection of the unemployed, particularly, in times of macroeconomic shocks. As far as the impact of an EUBS on poverty goes, this would eventually depend on the EUBS variant of choice. According to the CEPS study, the higher generosity and coverage of the EUBS, the greater the impact on poverty and social exclusion. For example, in a study of the more generous (genuine) EUBS the scheme would reduce poverty by 0.35% on average.[249] Therefore, the introduction of minimum requirements would not only be beneficial for the stabilisation capacity of the EUBS and reduce the moral hazard of the mechanisms, but also to implement the policy objective to combat poverty and social exclusion by reducing (or at least containing) poverty and inequality, especially, in times of economic shocks.[250]

5.7.3 Legal bases: a directive on minimum requirements on unemployment benefits

The legal bases for an EUBS have been heavily contested in the past, with some authors arguing that under the current EU framework the adoption of an EUBS is not possible without a Treaty change,[251] whereas others claimed that

248 In the comparative study of the CEPS report, minimum requirements have proved to be key in reducing moral hazard of the unemployment scheme. See more: Vandenbroucke and Luigjes, 'Institutional moral hazard in the multi-tiered regulation of unemployment and social assistance' (2016) *CEPS*.

249 See in detail table 5. Beblavý and Lenaerts, *supra* n 3, p. 51.

250 *Ibid*.

251 Fuchs, 'Assessing the impact of an EMU UBS on diverse national benefits systems: (to what extent) do we need common eligibility rules?' (2013) Paper at the workshop 'Let's think out of the box' organized by Bertelsmann-Stiftung, 11 October 2013.

some forms of EUBS are possible under the existing framework.[252] Because an EUBS raises different legal questions, an EUBS might be composed by several legal acts tackling three different fronts: the payment of the EUBS, the financing of the EUBS and the minimum requirements for the national schemes. Given the importance of setting minimum requirements as regards the impact of an EUBS on implementing the policy objective to fight poverty and social exclusion, this section discusses solely the legal basis for such an instrument. An extensive discussion on the overall legal feasibility of different variant of the EUBS can be found elsewhere.[253]

Just as for the previous instrument on social protection, a directive on minimum requirements for unemployment benefits could find its legal basis under Article 153(1)(c) TFEU, which, in conjunction with Article 153(2)(b), empowers the EU to adopt measures in the field of social security and social protection of workers. While this legal basis requires unanimity, accessing the EUBS is prone to be perceived as an 'incentive' to gather consensus. Arguably, a directive on minimum requirements to access the EUBS could also be based on Article 153(1)(h) TFEU for the reintegration of people excluded from the labour market. While unemployment is also covered by the recommendation on access to social protection, which is based on 153(1)(c) TFEU, there is no reason to believe (nor case-law) that the unemployed are not to be considered 'excluded from the labour market'. In fact, the Staff Working document on the EPSR confirms this position, as principle 13 EPSR refers to the power of the EU to adopt measures in the field of integration of people excluded from the labour market.[254] The benefit of this legal basis is that it requires QMV and the ordinary legislative procedure instead of unanimity and the special legislative procedure.

Either way, it is worth recalling, that a directive setting minimum requirements based on Article 153(2) shall comply with the constitutional limitations under Article 153(4) TFEU to respect the right of Member States to define the fundamental principles of the social security systems. It follows from this limitation that a directive on minimum requirements could include provisions on the adequacy of the benefit and eligibility criteria (as long as they do not implement fundamental principles), transferability and transparency.[255]

A different point of interest that should be included in the directive refers to minimum requirements for activation policies. While in principle, provisions on activation would technically fall under the scope of title IX on employment policies, this does not exclude the possibility of using Article 153(2)(b) TFEU as

252 De Baere and Gutman, 'The basis in EU constitutional law for further social integration' in Vandenbroucke et al. (eds.) *A European Social Union after the Crisis* (Cambridge: CUP, 2017); Repasi, 'Legal options for an additional EMU fiscal capacity' (2013) *European Parliament*, p. 26.

253 Repasi, *supra* n 252.

254 SWD(2018) 67 final, *supra* n 79, p. 62.

255 Repasi, *supra* n 252, 17–18.

a legal basis given that the relation between activation and the objective to offer social protection for workers or reintegration are made evident. The Court has previously argued that provisions in a legal act that fall within the scope of another policy field do not prevent the legislator from adopting a legal act under a different legal basis provided that the conditions for recourse of the provision are fulfilled.[256]

As far as the principle of subsidiarity is concerned, it has already been remarked before that such a stabilisation mechanism is necessary to adjust fiscal policies to country-specific situations. Given that many of the Member States share a common currency, such stabilisation mechanism would not be effective at the Member State level. The same is true due to the fiscal constraints imposed by the internal market, which leave much less room for Member States to manoeuvre with their fiscal policies in times of economic distress. As such, the stabilisation effect and unemployment protection intended by the EUBS needs to be taken at the supranational level in order to sufficiently achieve its goals. As regards the principle of proportionality, the minimum requirements would have to be limited to what is necessary to ensure a coherent upward convergence and to reduce the risk of moral hazard. In any case, the minimum requirements would have to be realistic and be implemented gradually.

In terms of content, the directive would mirror the suggestions made about the social protection recommendation, as this too includes unemployment benefits. In this case, challenges that are particularly relevant for unemployment, such as transitional periods between statuses or the coverage of the self-employed, would have to be addressed specifically.

5.7.4 Concluding remarks

An EUBS that is capable of minimising income losses during crisis with 20% is, on its own, a mechanism that should be given a warm welcome from the point of view of fighting poverty and social exclusion, as those individuals at risk of poverty will be more protected in times of crises. Stabilisation impact aside, which is essential in times of crisis, the key part of an EUBS in terms of implementing the policy objective to combat poverty and social exclusion lies on its potential for upward convergence. As such, it is crucial that an EUBS is accompanied by a set of minimum requirements in the form of a directive under Article 153(1)(c) or (h) TFEU.

Arguably, one of the most relevant consequences of strengthening the social dimension of the EU by implementing an EUBS would be to increase the legitimacy of the European project and increase citizens' trust in the EU. Because

256 C-217/04—*UK v Parliament and Council*; ECLI:EU:C:2006:279, §44; C-270/12—*UK v Parliament and Council*, ECLI:EU:C:2014:18, §104 ff; C-376/98—*Germany v Parliament and Council*, ECLI:EU:C:2000:544, §85.

protection during unemployment is seen as highly important for citizens, a visible role of the EU in tackling unemployment would rekindle citizen's trust at a time of increased Euroscepticism.[257] In this vein, a recent study on the public support of an EUBS has shown that only a very limited amount of the population (13%) would be fundamentally opposed to cross-border sharing of unemployment risks, therefore tackling the argument that citizens in richer Member States are opposed to this kind of mechanism.[258] Simultaneously, by implementing principle 13 EPSR, this would make the EPSR tangible for citizens and tackle the perception of 'empty promises' made by the EU.

A different question is whether an EUBS should apply only to the eurozone or to the whole EU. Most of the literature on an EUBS focuses on the eurozone-wide EUBS. This makes sense in view of the fact that the main rationale for the EUBS emanates from the lack of capacity of the EMU to respond to country-specific needs. From a point of view of attaining a social goal, however, an EU-wide EUBS is more desirable since a eurozone-only scheme, probably based on enhanced cooperation (Part 6, Title III TFEU), would foster a two-speed Europe and fuel growing inequalities between Member States within and outside the EMU.

Ultimately, much of what is discussed above will depend on the choice of variables. Whilst the most comprehensive study to date suggests that both genuine and equivalent EUBS are possible, the equivalent scheme poses *a priori* fewer challenges which, in turn, increases its feasibility at least in the short run. Even though equivalent EUBS would probably have a lesser impact on poverty and social exclusion, such a scheme is likely to be a catalyst of upward convergence in the quality of unemployment schemes across Member States, therefore being a key step in a gradual improvement of income replacement and activation measures in the EU. Equivalent schemes have also been the preferred option at the political level where references to date have focused on reinsurance unemployment schemes.[259]

All in all, whatever its final form, an EUBS would contribute to the macroeconomic stability of the EU and could considerably improve the personal or familiar income situation of many individuals, thereby responding to popular grievances and increasing the visibility of EU action in areas that are most felt on the ground and, thus, gain proximity to citizens and increase reliance on the EU project as a whole.

257 Andor, 'Shared unemployment insurance—helping refocus the Eurozone on convergence and cohesion' (2015) *Prime Economics*; Ceccanti, 'An EU unemployment benefit scheme to relaunch the European project' (2019) *Istituto Affari Internationali*.

258 Vandenbroucke et al., 'Risk sharing when unemployment hits: how policy design influences citizen support for European unemployment risk sharing (EURS)' (2018) *AISSR* Policy Report.

259 COM(2020) 14 final, *supra* n 3.

5.8 Other alternatives

The previous sections in this chapter envisaged four legislative instruments that could potentially convey the policy objective to fight poverty and social exclusion at the EU. These have mostly been chosen due to the legal and political feasibility contrasted with the urge of addressing a number of particularly problematic areas. Moreover, each instrument targets a different material and personal scope and, as such, a combination of these instruments provides quite a comprehensive response to the lack of legal implementation of the policy objective. The possibilities of implementing the policy objective of combating poverty and social exclusion, however, cannot be limited to the instruments presented in this chapter. Some alternatives include variations of the above instruments by for example narrowing the personal or material scope to specific groups or gaps, others take a more targeted approach to poverty by either focusing on vulnerable groups or a reduced number of Member States. Some of these alternatives are briefly contemplated in this section.

As regards minimum income, for example, Seeleib-Kaiser, takes a one-step-at-the-time approach in his formulation of an EU-wide social solidarity instrument with the purpose of ensuring the right to free movement of EU citizens. In his view, given the political feasibility of such an instrument, minimum income should take a more modest take at first, covering 'only' mobile job seekers in the eurozone to subsequently extend the personal scope to pensioners. This should serve as a catalyst to eventually provide a basic income guarantee for all EU citizens. This proposal has the primary objective of overcoming current deficiencies of social security coordination and guaranteeing that every citizen is entitled to the genuine enjoyment of their citizenship. According to this proposal, minimum income would only cover a rather limited part of the EU who is at risk of poverty and social exclusion, namely EU citizens (or technically eurozone citizens) who are mobile.[260] Even though this initiative is politically more feasible than the one proposed in this chapter and might indeed overcome deficiencies of social security coordination by tackling specific gaps therein, its potential to implement the policy objective is rather weak, considering its rather narrow personal scope. Clearly, such an instrument would have a certain impact on those covered, but it would simultaneously create categories of citizens depending on their economic status, membership to the eurozone and background, not to mention that it effectively excludes non-EU citizens from its scope. In this regard, it would feed inequalities by neglecting the same (or at least similar) rights to individuals living in the EU. As such, it would further contribute to the existing hierarchy of migrants under EU

260 Seeleib-Kaiser, 'Limited social rights and the case for a European minimum income scheme' (2017) *European Policy Brief*.

law.[261] This initiative, while it could very well serve the purpose of facilitating labour mobility, seems rather weak from the standpoint of fighting poverty and social exclusion.

In a more ambitious and yet far less feasible take, Denuit advocates for the adoption of a European Universal Basic Income as an instrument to provide substance to the EU social citizenship.[262] While this proposal does put the well-being of citizens at the centre of the discussion and takes a very inclusive approach, instead of labour mobility, for example, its political and legal feasibility within the given EU framework is far less viable. It does, however, contour the need for a more ambitious social project that is needed in other to truly address the issue of poverty.

Instead of an EUBS, Schmid alternatively proposes the idea of a 'European employment and Social Fund' which would gather characteristics of both genuine and equivalent EUBS and would be more feasible in the short-term with greater ambitions in the long run.[263] In order to be used, the fund would require to set up some minimum standards for national insurance systems to access such a fund which loosely resembles the idea of setting minimum standards contemplated in the EUBS section but with the purpose of accessing a more all-encompassing fund instead of solely an unemployment scheme.

In 2017, the European Parliament requested the Commission to initiate a preparatory action on a potential child guarantee scheme.[264] Accordingly, the Commission commissioned a feasibility study on a child guarantee for vulnerable children with the objective to contribute to combating poverty and social exclusion amongst the most vulnerable children and ensuring access to: free healthcare, free education, free early childhood education and care, decent housing and adequate nutrition.[265] The Commission recently presented its proposal for a Council Recommendation, based on Article 11 EPSR on childcare and support to children that specifically encompasses the right of children to protection from poverty.[266] This fits perfectly with the specific Action Plan headline target to lift five million children out of poverty. It is an interesting instrument from the standpoint of breaking the intergenerational cycle of disadvantage, at this stage, however, it remains a soft-law instrument.

261 Aranguiz, 'The role of EU law in contributing to the policy objective of combating poverty and social exclusion' (2020) Doctoral thesis, University of Antwerp, Chapter 5.

262 Denuit, 'Fighting poverty in the European Union. An assessment of the prospects for a European universal basic income' (2019) Doctoral thesis, Université Libre de Bruxelles and University of Warwick.

263 Schmid, *supra* n 226.

264 Levi et al., 'Swapping policies: alternative tax-benefits to support children in Austria, Spain and the UK' (2007) *JSP* 36, 625–647.

265 Frazer et al. (cos.), 'Feasibility study for a child guarantee. Intermediate report' (2020) *Commission*, in consortium by Applica, LISER and close collaboration with Eurochild and Save the Children.

266 COM(2021) 137 final, 'Establishing a basic child guarantee'.

Continuing with the idea of setting up some minimum requirements, an alternative proposal would tackle the extremely precarious situation of the homeless, including the lack of sufficient infrastructure and often considerable administrative hurdles imposed by Member States. Homelessness represents the most extreme form of poverty and deprivation. It is estimated that over three million people in the EU experience homelessness, over 10.5 million suffer from severe material deprivation and 22.3 million households spend a disproportionate amount on housing.[267] The importance of accessing publicly funded essential services has also been repeatedly stated. In this regard, an instrument securing some minimum standards would be beyond desirable. Such an instrument would target the main obstacles for homeless people to access social benefits/housing, which include, *inter alia*, lack of information, the cost and complexities of access to benefits, social barriers such as stigmatisation, criminalisation of homelessness, administrative hurdles (such as the need for documentation), conditionality requirements and the availability of services (particularly in remote and rural areas).[268] In turn, such an instrument would implement Articles 19 and 20 EPSR.

Given the problems and high legal uncertainty of EU inactive mobile citizen's when in need to access the welfare system of the host Member State, another initiative to consider would be a cost-sharing mechanism for the co-financing of social assistance of these people. Such an initiative would bring transparency to the situation of EU citizens, tackle non-take up for reasons regarding the loss of their right to residence and set a mechanism in place for shared responsibility between Member States. Verschueren refers in this regard to the US federal integration process which has a comparable system thereby preventing states from excluding people coming from a different state.[269]

Other proposals that have been put forward include the possibility of introducing an EU-wide universal basic pension[270] or a residual pension guarantee.[271] This possibility would be in line with principle 15 EPSR.

267 Eurostat, 'Housing statistics' (2019), available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics

268 See extensively on these obstacles: Crepaldi, 'Peer review on "access to social assistance and rights for homeless people"' (2019) *Commission*.

269 Verschueren, 'EU migrants and destitution: the ambiguous EU objectives' in Pennings and Vonk (eds.) *Research Handbook on European Social Security Law* (Cheltenham/Northhampton: Elgar, 2015), 441–442.

270 Atkinson et al., 'Microsimulation of social policy in the European Union: case study of a European minimum pension' (2002) *Economica* 69(274), 229–243; Goedemé and Van Lancker, 'A universal basic pension for Europe's elderly: options and pitfalls' (2009) *Basic Income Studies* 4(1), Article 5, p. 26.

271 Vandeninden, 'A simulation of social pensions in Europe' (2012) *MGSoG* Working Paper 2012/8; Atkinson et al., 'Income distribution and financial poverty. EU-SILC in national and international context' (2010), p. 22.

Most of these have a narrower personal scope than the instruments proposed in this chapter. In this vein, whereas a narrow personal scope that targets specific gaps or vulnerable groups is perhaps a good first step towards implementing the Union's policy objective to fight poverty and social exclusion by means of legal instruments, such a segmented approach is likely to increase inequalities among citizens' social rights. Targeted approaches towards the eradication of poverty might act as a catalyst in the adoption of an instrument for all, but as it is, employment and social protection instruments at the European level are already far too fragmented. More comprehensive and unifying approaches should be encouraged.

A similar argument runs for adopting an instrument by means of enhanced cooperation, which allow multilateral agreements to be adopted within the framework of the EU but without necessarily involving all Member States. One could argue that instruments, such as the ones mentioned previously, are more feasible to be negotiated among the less divergent Member States, such as, for example, those within the eurozone. However, the adoption of an instrument on the basis of enhanced cooperation will—without a doubt—stimulate a two-speed Europe. A fragmented approach that tackles only one part of the problem and fulfils only partially the objectives of the Union, moreover, does not seem to fit well with the Better Regulation Agenda. In addition, fragmenting the approach in the fight against poverty and social exclusion even further, would inevitably translate into complexity, uncertainty and overburdening both EU and national authorities.

Differently, even the more moderate instruments require a significant effort from Member States, whether it is budgetary, administrative or institutional. The burden is particularly heavy in Member States that do not already conceive a similar instrument at the national level, or whose instrument, while existing, varies considerably from a given proposal. For instance, the burden of guaranteeing adequate benefits, whatever their form, is heavier on those Member States who are less generous as they will have to raise their level of benefit considerably more than more generous Member States. As such, the gradual implementation of any of these proposals and support of EU funds for their implementation is crucial to their success.

5.9 Conclusions

While considering the challenges posed by the fight against poverty and social exclusion (Chapter 1) and shortages to tackle this problem both by means of social policy (Chapter 2) and fundamental social rights (Chapter 3), this chapter has studied four proposals of secondary legislation to bring to life the objectives of the EU (Chapter 4) and translate existing fundamental rights (Chapter 3) into specific legislative actions. As such, this chapter is formulated as a solution to tackle the discrepancy between the proclaimed policy objective and its

marginal implementation into legally enforceable instruments. Similarly, the initiatives discussed in this chapter should be seen as a way of adjudicating social rights at the EU level by transforming ambiguous objectives and rights into legitimate claims. In this vein, not only do these instruments substantiate the 'social' in the social market economy but also play an important role in the overall credibility of the EU and have the power to rekindle individuals with the EU institutions.

These four proposals are based on the EPSR, as this represents a clear and present political commitment to social rights as well as the embodiment of the existing social *acquis* at the EU. The EPSR, moreover, seems to be serving a programmatic function. As such it represents an ideal starting point for the formulation of new proposals and increases their political feasibility.

The proposals in this chapter tackle different, yet equally important, fronts in the fight against poverty and social exclusion. The first proposal on minimum income targets people excluded from the labour market while the instrument on minimum wages targets low pay and the risk of 'racing to the bottom' in labour standards. The remaining two refer to risks insurance through social security benefits. The EUBS, with dual functionality, acts predominantly as an automatic stabiliser mechanism, and as such, it reduces the social impact of economic shocks. This legislative fragmentation, however, should be kept to a minimum for reasons of efficiency and clarity. In this regard, it ought to be said that a certain degree of fragmentation is inevitable, partly because poverty is a multifaceted phenomenon, and partly because the legal competences of the EU exclude a more encompassing instrument. In the first place, such a fragmentation calls for the need to consider gaps in between. A clear example of gaps, in this regard, relates to the transitional periods. This is, for instance, the case of transitions between contributory to non-contributory benefits which has proven challenging in the past. This transition has left the long-term unemployed unprotected once their contributory benefits are over, which may discourage market participation, particularly, for unstable job opportunities. Another example is the relationship between minimum wages and social transfers, as the former might act as a glass ceiling. Moreover, if minimum wages are not higher than the benefits received, this might also dishearten people from taking up employment. For this too, the costs of taking up work, such as childcare or contributions, also ought to be considered. Such gaps might be critical and need to be reflected upon in such legislative processes.[272]

In the same vein, while the legislative proposals that this chapter advocates for should cover some of the most important areas in the fight against poverty and social exclusion, the overall inclusion strategy should be combined with an arsenal of multitiered efforts that, beyond securing a dignifying income, also tackle access to services, employment support, training, healthcare and

272 Van Lancker and Farrel, *supra* n 50, p. 16; Cantillon, *supra* n 122.

childcare among others. Similarly, while EU legislative efforts are necessary to truly address the complexities of poverty, these efforts should be understood as complementary to, and not substituting, existing social policy instruments both at national and supranational levels. As a multifaceted problem, poverty and social exclusion require a multilevel approach and only a combined multilevel effort has the potential to be effective in delivering the Union's objectives.

The excessive limitations on the social competences of the EU exposed in this and previous chapters and the legal fragmentation, as a result, beg the question of whether the EU is currently sufficiently equipped to live up to its objectives or whether, on the contrary, the social competences of the EU are significantly ill-fitted not only to implement the EU objectives, but to preclude economic and budgetary interests of the Union from negatively interfering in the national social protection systems. Put differently, the sharp contrast between, on the one hand, the social deficiency of the EU, particularly in view of its social objectives, and on the other, the limited (yet existing) social competences to adopt secondary instruments to implement these objectives, exposes a plea for revisiting the social competences of the EU and free the social policy title from the innumerable obstacles. A future revision of the treaties should acknowledge this constitutional asymmetry and its negative effects on the wellbeing of individuals and bring some balance to the social competences of the Union.

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Chapter 6

General conclusions

6.1 Introduction

By the end of 2020, it became painfully clear that the poverty target agreed upon at the beginning of a ten-year-long European strategy was nowhere near to being achieved. In fact, with still 113 million people at risk of poverty and social exclusion, the ten-year strategy did not live up to a fifth of its expectations, which is simply unacceptable.[1] A global pandemic and a brand-new economic crisis down the line, the latest social strategy renews, though less ambitiously, this promise by pledging to lift 15 million people out of poverty by the end of 2030. The road to success requires taking stock of the anti-poverty efforts thus far and equipping this goal with the necessary tools, including, as it is the goal of this book, legal instruments of EU law.

In order to understand why EU efforts to combat poverty and social exclusion have so far failed, the approach of the EU to poverty and social exclusion needs to be put in the context of poverty trends. A comparative analysis within the EU shows that the high rates of people at risk of poverty and social exclusion are primarily a consequence of the way in which societies are structured and how resources are produced and allocated.[2] There are a number of factors that are deemed to be key in the understanding of poverty trends and poverty responses within the EU. For one, there has been a gradual structural change in the allocation of resources, primarily to workers, leading to an increased risk of poverty as a consequence of unemployment. This is accompanied by a transition towards non-traditional employment such as part-time or temporary contracts and the booming of new forms of labour, including zero-hour contracts, platform work or the gig economy, which offer less favourable conditions of social protection for workers.[3] This has caused increased divergences between

1 These were the words used at the Lisbon Council 20 Years Ago. Lisbon European Council 23–24 March 2000 Presidency Conclusions.

2 Eurostat, 'People at risk of poverty and social exclusion' (2019).

3 Eurofound, 'Non-standard forms of employment: recent trends and future prospects' (2017) *Background Paper for Estonian Presidency Conference* 'Future of work: making it e-easy', 13–14 September 2017.

DOI: 10.4324/9781003222125-6

productivity and wage levels which result in a downward pressure towards reduced wages. Put simply, work is no longer a guarantee for staying out of poverty just as renewed economic growth does not suffice to reduce poverty in a significant manner, let alone reach the goal of lifting 20 million people out of poverty. The substantive shift towards activation for more inclusive labour markets that can be traced in the EU anti-poverty strategy over the last decades is, therefore, inherently flawed.

In addition, an increasing number of people who have resorted to social protection nets have fallen between the cracks of welfare systems. This has happened for at least two intertwined reasons. On the one hand, consecutive national welfare reforms, often geared by supranationally imposed austerity measures, have lowered the benefit levels, adopted stricter eligibility criteria or decided to abandon the universalistic nature of social protection, which has left a significant part of the population under-protected, or completely unprotected.[4] On the other hand, the traditional design of social protection systems that focuses on standard employment contracts is, amidst the upsurge of atypical forms of employment, no longer fit for purpose. The cracks in the welfare system result in the limited protection of a share of the population, leaving those who are not eligible for protection exposed and, thus, more likely to be at risk of poverty and social exclusion. Moreover, differential coverage (if any at all) often translates into economic uncertainty and hardship. An illustrative recent example is brought by the dreadful consequences of the COVID-19 pandemic that has pushed non-standard workers to the edge.[5] In contrast to traditional workers, non-standard workers are not officially laid off, their contracts are simply not renewed or their hours are carved to zero. On top of this, their right to access to unemployment benefits is far more uncertain, if existing at all, just as their entitlement to equally important protections, such as sick leave. The precariousness of new forms of labour is not only problematic for the negative impact inflicted upon these groups, but also regarding the overall sustainability of the welfare system, in particular, regarding the financing of contributory systems. As those who are not covered by the social protection system do not pay contributions, welfare systems are not being financed by an important part of the workforce. This becomes particularly important when a work-related risk appears and, in the absence of insurance-based safety nets, more people need

4 *Ibid.*, p. 11.

5 Adams-Prassl et al., 'Inequality in the impact of the coronavirus shock: new survey evidence for the US' (2020) *Cambridge-INET* Working Paper Series No: 2020/09 and 2020/10; Berg, 'Precarious workers pushed to the edge by COVID-19' (2020) *ILO Work in Progress,* available at: https://iloblog.org/2020/03/20/precarious-workers-pushed-to-the-edge-by-covid-19/; Spasova et al., 'Non-standard workers and the self-employed in the EU: social protection during the Covid-19 pandemic' (2021) *ETUI.*

to recourse to last resort social assistance, which constitutes a great burden on the welfare system of Member States.[6]

Considering the above, efforts towards reducing poverty should concentrate on improving the allocation of resources. This requires stepping away from inclusion as a market activation only approach by ensuring a dignified income and access to resources for all as well as adapting both labour markets and social protection nets to be fit for purpose and future-proof.

The goal of this book has been to look into what the input of EU law could be in implementing these efforts in order to contribute to the policy objective to fight poverty and social exclusion. To this end, the previous chapters have responded to four interlaced questions: 1) What have EU policy instruments achieved so far in the fight against poverty and social exclusion? 2) How do fundamental social rights contribute to the policy objective to combat poverty and social exclusion? 3) What is the role that the provisions in the EU treaties could play in the fight against poverty and social exclusion? 4) What kind of secondary law instruments could be adopted to contribute to the policy objective of combating poverty and social exclusion?

Each of these questions corresponds to one of the chapters presented in this manuscript. What follows brings together the key findings of each chapter and finalizes them with some concluding remarks.

6.2 The EU social policy context

Although anti-poverty policies have been on the agenda of the EU since the 1970s, the commitment to fight poverty and social exclusion became more prominent with the adoption of the Social OMC and the Europe 2020 Strategy. Both these instruments were warmly welcomed as a significant step forward in facilitating the integration between the social, economic and financial aspects of the EU and terminating with the asymmetry between those policy areas protecting market efficiency and those seeking social protection and equality.[7] They have, however, failed to achieve or significantly advance towards their initial objectives. This is most clearly seen in the headline target of the Europe 2020 Strategy. Although the poverty levels decreased by 3.1 million people since its reference year in 2008, it remained far from its headline target to lift 20 million people out of poverty.[8] Chapter 2 shows that there are some inherent flaws to these processes that could be tackled, at least partially, by lifting the

6 SWD (2017) 381, 'Analytical document accompanying on second phase consultation of social partners under article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European pillar of social rights', 51–55.

7 Scharf, 'The European social model: coping with the challenge of diversity' (2002) *JCMS* 40(4), 645–670.

8 Eurostat, 'Europe 2020 indicators – poverty and social exclusion' (2019).

discrepancy between the proclaimed policy objective and its implementation into legally enforceable instruments.

Chapter 2 identified three general trends since the adoption of the Europe 2020 Strategy that go from largely ignoring the social objectives until 2013, passing through a gradual socialisation of the European Semester from 2013 until 2017 to an obvious dilution of the specific poverty target into the overarching initiative of the EPSR.[9] In this regard, this process followed a *matryoshka*-like trend where new instruments have overtaken past strategies without actually ever truly replacing them or providing so much as a clear roadmap in their collective implementation.

Even with a gradual socialisation of the European Semester, the entire governance process remains overridden by macroeconomic interests, most notably by the Stability Growth Pact, and the implementation of social objectives of the Europe 2020 Strategy was limited in comparison. Although exitent in the various documents composing the European Semester, national implementation tends to prioritise economic interests in the face of possible sanctions, which are not conceivable in the case of social objectives. Further, a rather narrow interpretation of economic recovery and fiscal stability puts pressure on the cost-effectiveness of publicly available services, social protection systems and wages. The Social OMC, in turn, has shown little progress on its own towards the realisation of the overall goal of making a decisive impact on the eradication of poverty and social exclusion. While it is too soon to celebrate, the more recent Action Plan promises the delivery of many ambitious instruments. However, the more socially inclusive ones, those farther from the market activation ethos, are also exclusively soft in nature.

On a positive note, the current governance structure of the EU has opened a 'Europeanised' public space for debate, with increased visibility of the social arena in the EU policy making. But this governance structure is still far from effectively envisaging a genuine commitment to fight poverty and social exclusion. The importance of this process should not be underestimated, particularly given the transformative nature of such trend. However, the outcomes of the Social OMC and the Europe 2020 Strategy, when measured in numbers, are underwhelming to say the least.

Against the backdrop of increasing inequality and relative steadiness in poverty and social exclusion, the overall structure of the policy context remains considerably weak, economically swing-dependant and constantly overshadowed by other interests. The current approach to poverty and social exclusion, which is open and flexible, lacks the necessary bite to truly address the innate imbalance of the EU and give the poverty objective a genuine chance.

9 Sabato et al., 'Europe 2020 and the fight against poverty' in Jessoula and Madama (eds.), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020* (London/New York: Routledge, 2018), 14–35.

6.3 The EU fundamental social rights landscape

Chapter 3 has studied both procedural and substantive aspects of different instruments of fundamental rights in order to flesh out a number of relevant provisions that contribute to the fight against poverty and social exclusion. While there is no substantive right not to be poor *per se*, there are a number of provisions that protect individuals from falling into poverty by establishing a number of safeguards. At a substantive level, even if it is to a minimum extent, the right to human dignity, social security, social assistance and fair working conditions as enshrined in different sources, (*inter alia,* general principles of EU law, the CFREU, the ECHR, the ESC, the EPSR and the different ILO Conventions) provide a fundamental floor of social protection that entitles individuals to claims that aim at precluding them from falling into (absolute) poverty. This chapter identified an inviolable minimum, to be protected at all costs, which appears to correspond with what is necessary to not deprive people from their dignity.

However, this semi-positive picture at the substantive level is outshined by, on the one hand, a tempestuous implementation of the general principles of EU law and the CFREU and, on the other, a poor interaction between these and other instruments of fundamental rights. This trumps the justiciability of social rights in the EU. On top of this, the CJEU has been known to balance conflicting rights between 'the social' and 'the market' in favour of the latter. This choice has led in the past to conflicts with other instruments of fundamental rights,[10] which puts into question the presumption of synergy between EU and human rights law. Conflicts between these norms not only create a fundamental problem of international rule of law, but because of the principle of primacy, also hamper the legal protection of individuals at risk of poverty and social exclusion in the EU.[11]

Although this draws quite an obscure landscape of the protection of fundamental social rights in the European legal order, at least with regard to poverty and social exclusion, this does not need to be the case in the future. An enhanced version of this landscape would require that existing EU instruments and new initiatives include a reference to the CFREU or the rights therein,

10 ECSR, *LO and TCO v. Sweden*, Complaint No. 85/2012. CoE, 'State of democracy, human right and the rule of law in Europe (2014), p. 41; ILO, '2010 report of the committee of experts on the application of conventions and recommendations' (2010), p. 209; ILO, 'Observation (CEACR) -adopted 2010, published 100th ILC session' (2011); ILO, 'Observation (CEACR)- adopted 2012, published 102nd ILC session' (2013); ECSR, *GSEE v. Greece,* Complaint No. 111/2014; ILO, 'Individual case (CAS) – discussion: 2018, publication 107th ILC session' (2018); ECtHR; *LO and NTF v. Norway*, App. No. 45487/17, ECLI:CE:ECHR:2021:0610JUD004548717.

11 See more on this in: Rocca, 'Enemy at the (flood) gates: EU "exceptionalism" in recent tensions with the international protection of social rights' (2016) *ELLJ* 7(1), 52–80; Garben, 'The problematic interaction between EU and international law in the area of social rights' (2018) *CILJ* 7(1), 77–98.

particularly regarding instruments where the social displacement takes place. In this regard, every chapter –in its respective context– discusses how decisions with significant social repercussions are taken in other policy areas, most notably in the context of the internal market and macroeconomic governance. And yet, little or insufficient attention is drawn onto respecting social rights in these areas. Instruments such as the Fiscal Compact or the ESM are silent on the need to ensure or even consider social rights,[12] which obstructs the application of the CFREU. Including explicit references in these or similar instruments to respect fundamental social rights would duck part of the procedural limitations of the application of CFREU and untap the potential of the horizontal social clause under Article 9 TFEU (this provision is discussed in Chapter 4 instead).

Better synergies with other fundamental rights instruments, in turn, could similarly be accomplished by taking advantage of the powerful arsenal of social rights protection both at national and international level through an effective judicial dialogue. Additionally, there is a question of *lege ferenda*, which is key in unblocking the procedural restraints of the CFREU and the overall justiciability of fundamental social rights. In the process of new legislation, fundamental social rights should play a guiding role.

Against the backdrop of the limited justiciability of social rights that could make the difference for those at risk of poverty and social exclusion by granting them legal claims for financial or other forms of support, Chapter 3 argues that the recent reinvigoration of the social *acquis* through the EPSR could contain the key to tackle at least part of these deficiencies. Although not a fundamental rights instrument in itself, and not legally binding, the EPSR offers a number of tools that may serve to awaken the social dimension of Europe from its long overdue slumber. This is, *inter alia,* because the EPSR represents a renewal of the existing social *acquis* which, beyond representing a political commitment towards the provisions therein, also collects a great deal of social sources, therefore creating important bridges between different instruments. It also detaches specific rights from traditionally more general rights, thereby contributing to the concreteness of social rights. In addition, the EPSR is accompanied by the Social Scoreboard, which can be used to identify gaps and steer in the direction towards further action. Consequently, the EPSR might serve on the one hand to rekindle the relationship between EU law and other instruments of international law and, on the other, as a compass to identify and tackle problematic areas for fundamental social rights, where necessary, also by means of legal instruments. This is why Chapter 5 operationalises the EPSR for the formulation of legally binding instruments.

12 De Schutter and Dermine, 'The two constitutions of Europe: integrating social rights in the new economic architecture of the union' (2016) *CRIDHO* Working Paper.

6.4 The EU constitutional framework

Outside the confines of policy instruments and fundamental rights, the objective to fight poverty and social exclusion is also explicitly confirmed in several provisions of the treaties. Since the enactment of the Lisbon Treaty, the EU recognises that social inclusion, social justice and social protection are part of the general objectives of the EU and that the respect for human dignity, solidarity and equality is part of its founding values. Chapter 4 has first discussed several provisions enshrining the objective to combat poverty and social exclusion at the EU level, including, Articles 2 and 3 TEU and Article 151 TFEU. In addition, it has also studied the innovative inclusion of the so-called horizontal social clause (Article 9 TFEU), which should act as a procedural safeguard to ensure that this objective is mainstreamed across the different policy areas of the EU. However pivotal it is to install safeguards of social protection in other policy areas, particularly in those where decisions with important ramifications for social policy are taken (predominantly macroeconomic governance and internal market), its potential remains 'untapped' and has, in practice, been reduced to the implementation of impact assessments.[13]

The analysis of this chapter has continued with a discussion of a different kind of procedural safeguards in the form of general principles that must be applied before activating the Union's competences: The principles of conferral, subsidiarity and proportionality. It follows a discussion on something that lies at the very core of the discussion of the European social dimension and the future of Europe, namely, the matter of EU social competences. This chapter argued that, even though the treaties do not equip the EU to adopt binding measures directly in the field of combating social exclusion, there are a number of shared competences, most notably in the social policy title, that could enable the Union to develop secondary legislation to contribute to the policy objective of combating poverty and social exclusion. However, up until now, they have remained largely ignored which has contributed to the asymmetries between 'the market' and 'the social'.[14] The discussion on competences has mostly focused on the activation of the social policy title and, as such, it has discussed a number of limitations and possibilities under Article 153 TFEU. On top of this, a number of alternatives have also been put forward, including social cohesion (Article 175 TFEU) and the general competences, namely, approximation of laws (Articles 114 and 115 TFEU) and the so-called flexibility clause (Article 352 TFEU).

13 Aranguiz, 'Social mainstreaming through the European pillar of social rights: shielding 'the social' from 'the economic' (2018) *EJSS* 20(4), 341–363.

14 Special Issue Kilpatrick (ed.), 'The displacement of social Europe' (2018) *EuConst* 14(1), 62–230; Garben, 'The constitutional (im)balance between 'the market' and 'the social' (2017) *EuConst* 13(1), 23–61.

All in all, this chapter has shown how the treaties, in their current form, although with numerous obstacles, offer sufficient competences to take substantive steps towards the realisation of the well-embedded objective of fighting poverty and social exclusion. According to the general objectives of the Union, not only does the EU have a social dimension but in fact 'the social' should be fundamental to its identity. And yet, the potential of many of the provisions discussed in this chapter remains inactive, most notably, in the case of the social competences *stricto sensu* and the horizontal social clause. The 'untapping' of these provisions is not only desirable, but also necessary as a first step towards attaining the realisation of a genuine and well-functioning social market economy.[15] Adopting legal measures to implement the objective to fight poverty and social exclusion is not a question of 'if', but of 'when' and 'how'.[16] The recent developments on the EPSR provide for the perfect scenario to put the treaty provisions in motion for the sake of social integration. As such, the constitutional landscape explored in Chapter 4 is applied to specific legislative proposals in the following chapter.

6.5 Implementing the objective to fight poverty and social exclusion under EU law

Chapter 5 takes due account of the challenges posed by the fight against poverty and social exclusion (Chapter 1) and the shortages to tackle this problem both by means of social policy (Chapter 2) and fundamental rights (Chapter 3), to put forward four proposals of secondary legislation that bring to life the objectives of the EU by using the existing competences (Chapter 4) and translate social fundamental rights (Chapter 3) into specific legislative actions. As such, this chapter responds to the queries of the insufficient interaction between law and the Union's policy objective to fight poverty and social exclusion. It, therefore, offers a final answer to the main research question posed by this manuscript. The initiatives discussed in this chapter should be seen as a way of adjudicating social rights at the EU level by translating objectives and rights into justiciable claims for financial or other kinds of support. In this vein, not only do these instruments aim at substantiating the 'social' in the social market economy but also play an important role in the overall credibility of the EU and have the power to reconnect individuals with the EU institutions. The analysis of these proposals is centred on the legal and, to a lesser extent, political feasibility of proposals that have been put forward by a variety of actors as the

15 Barnard and de Vries, 'The 'social market economy' in a (heterogeneous) social Europe: does it make a difference?' (2019) *ULRev* 15(2), 47–63.

16 De Baere and Gutman, 'The basis in EU constitutional law for further social integration' in Vandenbroucke et al. (eds.), *A European Social Union after the Crisis* (Cambridge: CUP, 2017), p. 384.

means to tackle poverty. The effectiveness of these instruments in ultimately reducing poverty and social exclusion in a significant manner, however, falls outside the scope of this research. Future research should focus on this.

The four proposals presented in this chapter are based on the EPSR, as the embodiment of a clear and current political commitment to social rights as well as the compilation of the existing social *acquis* at the EU. The EPSR, moreover, seems to be serving a programmatic function as it has been the compass followed in many recent initiatives. The chapter begins by explaining why action needs to be taken at the EU level and why the EPSR represents a golden opportunity to formulate new initiatives. It continues with some general remarks relevant for all four proposals regarding what an 'adequate' level of protection is and a number of considerations regarding coverage and take-up. It then discusses the four proposals which aim to tackle different, yet equally important fronts in the fight against poverty and social exclusion. The first proposal, on minimum income, targets people excluded from the labour market. The instrument on minimum wages aims at tackling those at work and the remaining two, namely, the Directive on Access to Social Protection and the European Unemployment Benefit Scheme (EUBS), cover risks insurance through social security benefits. The EUBS, with a dual function, also acts as an automatic stabiliser mechanism, and as such, it aims at reducing the social impact of economic shocks.

As regards the first proposal, it discusses whether an EU legal instrument on minimum income, as deemed necessary by many,[17] is possible (and if so how) under the current treaty framework. The chapter first discusses the context and rationale of the proposal. It then explores how by virtue of Article 153(1)(h) TFEU (and possibly 175 TFEU), the EU could adopt measures to support and complement the activities of Member States in the field of integration of people excluded from the labour market by establishing a framework to guarantee a sufficient income for a decent standard of living. Such an instrument would have to comply with a number of limitations under the social policy title as well as with the principles of subsidiarity and proportionality. The Framework Directive on Minimum Income would target three important fronts: Adequacy, coverage and take-up. As regards the first front on adequacy, the primary standard would be to install an income above 60% of the median equivalized income (the AROP threshold). However, because this threshold does not always ensure a life in dignity, the AROP threshold would need to be put in context with national reference budgets to ensure that the threshold imposed corresponds to an adequate level of income.[18] As regards accessibility, including coverage and take-up, the

17 In the context of the COVID-19 crisis, increasing attention is being drawn to an EU-wide instrument on minimum income, leading to the Commission Planning a recommendation in its Action Plan. Commission, 'European pillar of social rights action plan' (2021).

18 When developing the methodologies to elaborate cross-country comparable reference budgets, the work done by the ImPRoVe project as well as by the Herman Deleeck Centre for Social Policy of the University of Antwerp should particularly be considered.

Directive would require, *inter alia,* the removal of unnecessary bureaucratic burdens, clearly disseminated information and simplified procedures.

The second proposal discusses the possibility of adopting a Framework Directive on Minimum Wages. This proposal relates to the recent commitment undertaken by the Commission and its proposal on 'adequate' wages which, according to the Commission, would address the increasingly prominent issue of in-work poverty.[19] A big part of the discussion focuses on the challenges to formulate such an instrument within the existing treaties given the considerable limitations, particularly with regard to the exclusion of 'pay' under Article 153 TFEU in the social policy title, which is the legal base of the Commission's proposal. This section argues that, while such a proposal would technically be possible under Article 153 TFEU, its content, especially regarding provisions on adequacy, is limited to mostly procedural considerations. Alternatively, this section suggests using Article 175 TFEU on social cohesion as the legal basis.[20] Regarding its content, the Directive could aim at guaranteeing minimum wages of at least 60% of the average equivalised wage.[21] In this context, it shall be noted that the implementation of the minimum wage standard would be gradual, and that this threshold would have to be contextualised with national circumstances underpinned by reference budgets. As such, if in a given Member State a different threshold suffices to live a life in dignity, Member States should have some room to manoeuvre insofar as it suffices to secure a decent standard of living.[22] In this regard, minimum wages would resemble the idea of living wages.[23] Minimum wages for non-standard forms of employment should apply a *pro rata temporis* principle,[24] meaning that their wages would be equivalent to the hours worked. Important concepts such as wages, worker and employment relationship should be clearly defined in the Framework Directive. In order to tackle massive coverage gaps, the directive could urge Member States to provide formal and effective coverage. Whether this is done by means of statutory regulation or collective agreements would be left to the discretion of Member States. Moreover, the directive should include provisions on the significant role of the social partners in transposing

19 Peña-Casas et al., 'In-work poverty in Europe. A study of national policies' (2019) *ESPN,* 2.

20 Aranguiz and Garben, 'Combating income inequality in the EU: a legal assessment of a potential EU minimum wage directive' (2021) *ELR* 46(2), 156–174.

21 See supporting this argument: Mülle and Schulten, 'The European minimum wage on the doorstep' (2020) *ETUI* Policy Brief.

22 Fernández-Macías and Vacas-Soriano, 'A coordinated European Union minimum wage policy?' (2015) *EJIR* 22(2), 97–113, 105–111.

23 See in this regard: Schulten and Müller, 'What's in a name? From minimum wages to living wages in Europe' (2019) EJSS 25(3), 267–284.

24 This would resemble *pro rata temporis principle* in the Part-Time Directive.Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work [1998] OJ L 14.

the directive and the process of its implementation. In addition, a provision on transparency should be included to detach wage readjustment methods from political cycles and prevent negative effects on the labour markets, particularly for low-wage earners. Transparency, in more general terms, should also guarantee that, regardless of the sector, minimum wages are clearly defined both for statutory regulation and in collective agreements. While adopting such a framework directive is possible, given the great divergences between Member States, this section argues that perhaps a laxer approach, in the form of a recommendation, would be desirable. In any case, while such an instrument would probably reduce the risk of social dumping and improve the situation of low wage earners with a low bargaining power, it needs to be noted, that minimum wages might not be enough to support households consisting of more than one person.[25] As such, minimum wages ought to be combined with other instruments to access benefits and services.

The next proposal evaluates the recent recommendation on access to social protection and the self-employed. While it finds these recent efforts a step in the right direction, there remain important flaws that should be addressed in the future, potentially this time by means of a legally binding instrument. In this regard, the current recommendation lacks not only binding force, but also a stronger language in its final formulation (which was different from the original proposal). It moreover eliminated important definitions such as worker or employment relationship, which are key in ensuring access to social protection. Other aspects, such as the challenge of non-take-up, are conspicuous by their absence. Once more data regarding access to social protection has been gathered through the monitoring system set by the current recommendation, a future amendment, potentially in the form of a Directive based on Article 153(1)(c) TFEU, could address these limitations. This could be done by, *inter alia,* including the (strengthened) definitions that were removed from the final text, reinforcing the formal and effective coverage provisions (especially for the self-employed whose situation is more uncertain) and by establishing a clear obligation of transferability that will ensure that both workers and the self-employed preserve rights when they switch employment contract or statuses. Regarding adequacy, a Framework Directive on Social Protection should strive for a more complete and clear principle of adequacy that calls for full participation in society. In this vein, adequacy in the different branches covered by the social protection initiative should ensure that: individuals who require protection from those risks remain above the poverty threshold, that

25 Note, however, that minimum wages are individual while poverty thresholds refer to household incomes. As such, securing adequate wages will not necessarily have a significant impact on one-earner households. It has been argued, moreover, that low-wages are not the primary cause of in-work poverty but rather, the challenge lies in the increasing predominance of atypical employment and low work intensity. Peña-Casas et al., *supra* n 19.

this threshold suffices to enable individuals' full participation in the given society and that this level of protection is proportionate to their contributions. As such, just as with the previous proposals, adequacy could be contextualised with reference budgets.

The last proposal analyses the possibility to adopt an EUBS, which is (or, rather, was) also in the plans of the current Commission. Different from the above, an EUBS has the main objective to act as a supranational automatic stabilisation mechanism. This proposal analyses the rationale and objective of the EUBS and its potential impact considering the possible variables. It concludes the analysis by stating that an EUBS that is capable of minimising income losses during a crisis with 20%, on its own, should be given a warm welcome from the point of view of implementing the objective to fight against poverty and social exclusion. Stabilisation impact aside, which is unquestionably an essential instrument in times of crisis, what would be key to an EUBS in terms of poverty and social exclusion, lies in its potential for upward convergence. In this vein, a coherent formulation of an EUBS, for the sake of a smooth transition towards upward convergence, could lead to the adoption of a Directive on minimum standards for unemployment systems which could be adopted under Article 153(2) TFEU. Such requirements are likely to be specified in the guidelines linking the EUBS transfers to the national unemployment scheme. This 'link' is necessary in terms of stabilisation and legitimacy and could be tied to the experience rating mechanism, which, in turn, would avoid moral hazard and permanent transfers.[26] All in all, whatever its final form, an EUBS would contribute to the macroeconomic stability of the EU and potentially improve the personal or family income situation of many individuals, thereby responding to popular grievances and increasing the visibility of EU action in areas that are most felt on the ground, and thus, gain proximity to citizens and increase reliance on the EU project as a whole.

Together, the four proposals target different needs in the fight against poverty and social exclusion. These proposals, however, offer a fragmented front in implementing the policy objective. This fragmentation is inevitable, partly because poverty is a multifaceted phenomenon and partly because the legal competences of the EU exclude a more encompassing instrument, such as universal minimum income. This fragmentation calls for the need to consider gaps in between these different fronts of protection that should be targeted, in the absence of a broader competence, either at the national level or by means of policy instruments, such as coordination or funding. In this regard, although EU legislative efforts might be necessary to truly address the complexities of poverty, these efforts should be understood as complementary to, and not substituting, existing social policy instruments both at national and supranational

26 Beblabý and Lenaerts, 'Feasibility and added value of a European unemployment benefit scheme: main findings from a comprehensive research project' (2017) *CEPS,* 25–27.

levels. As a multidimensional problem, poverty and social exclusion require a multilevel approach, and as such, only a combined multilevel effort will be effective in delivering the Union's objectives. In a similar vein, while the legislative proposals that Chapter 5 has advocated for aim at covering what are arguably some of the most important areas in the fight against poverty and social exclusion, the overall inclusion strategy will only be successful if combined with an arsenal of multitiered efforts that, beyond securing a dignifying income, also tackle other equally important areas such as access to services, employment support, training, healthcare and childcare.

6.6 Concluding remarks

The underwhelming results attained by the flexible and open approach to fight poverty and social exclusion reveal what was already suspected by many, namely, that policy efforts alone were insufficient to achieve the objectives set in the Europe 2020 Strategy. The social dimension of the EU, as it stands, is far too marginal to make meaningful advances in the fight against poverty and social exclusion. Without a harder edge, efforts towards attaining the new objective set in the Action Plan of the EPSR are doomed to fulfil a similar destiny. This book has discussed what the role of EU law could be in partially reversing this fate.

Regarding the main question of how EU law can contribute to the policy objective of combating poverty and social exclusion, this manuscript shows that the failure to contribute to the Union's policy objective is not necessarily a consequence of the EU being unequipped, but rather a problem of an insufficient interaction between these policy objectives and the lack of activation of existing competences to implement treaty-rooted objectives and fundamental social rights. A more suitable framework, hopefully under the auspices of the EPSR, would ensure that both Member States and EU institutions are guided systematically towards respecting the values enshrined in the existing tools of EU law. To this end, this book puts forward a number of recommendations, including four legislative proposals. This would not only provide a stronger basis to find incompliance accountable, but also foster the legitimacy, the coherence and the effectiveness of employment and social policies in the fight against poverty and social exclusion. While the discussion focuses on the objective to fight poverty and social exclusion, it could easily be extrapolated to other social objectives of the Union.

Along the process of answering this main research question, moreover, this manuscript has also pointed to a number of inherent flaws of the European project, particularly with regard to the constitutional asymmetry in the EU. In this vein, if the Union sincerely aims at becoming a social market economy, the constitutional asymmetries between the economic interests and their social counterparts need to be balanced out. This manuscript has looked into how these asymmetries can be partly tackled within the existing treaty framework.

Part of this task consists of fleshing out the social powers of the Union. However, even if it is possible to formulate a number of legislative instruments under the existing social policy title, these social competences remain impeded by abundant obstacles and limitations, which is not the case for most competences outside the social policy context. As a result, the legislator is often 'handcuffed' even when the will exists to regulate areas where the EU exercises a notorious influence. A prime example of these limitations is seen in the case of wages. Even though macroeconomic governance, particularly in the context of the economic crisis, has led to downward pressure on wages, the legislator is precluded from adopting instruments regulating 'pay' under the social policy title. True, Chapter 5 has shown that it is still possible to regulate wages within the limits of the treaties, but this would require either a creative reading of a provision outside social policy *stricto sensu* (Article 175 TFEU) or an instrument mostly limited to procedural safeguards which excludes, to a large extent, matters of adequacy, under Article 153 TFEU. The latter is the approach adopted by the Commission. Another clear example of these limitations is brought by the infamous cases of *Viking* and *Laval* and the Monti II Regulation fiasco. Even though the Commission aimed at answering a gap generated by the CJEU, the proposal was criticized for regulating an area (the right to strike) explicitly excluded from the social policy title. The recent proposal of the Commission to activate the *passerelle* clause to free the social competences suggests that the Commission too finds the amount of limitations excessive.[27] For a true social economy, the activation of the existing social gear is necessary, but this alone will not be sufficient. The significant difficulties faced to formulate the instruments due to the suffocating limitations of the social competences of the EU beg the question of whether the EU is appropriately furnished to live up to its objectives, or whether, on the contrary, the social competences of the EU are considerably ill-fitted to fully attain the EU social objectives.

Be that as it may, addressing the structural flaws of the treaties with regard to the overall displacement and imbalance between the different policy areas of the EU cannot be achieved solely by freeing the social policy title from excessive limitations.[28] For that, a much more ambitious project is necessary, which would require not only to amend the treaties but to rethink the whole structure of the EU where social objectives, budgetary concerns and internal market interests find an equilibrium. Future research should aim to address this issue. The sharp contrast between, on the one hand, the social deficiencies of the EU to truly live up to its social objectives and, on the other, the impasse of the

27 COM (2019) 186 final, 'More efficient decision-making in social policy: identification of areas for an enhanced move to qualified majority voting' on. Aranguiz, 'More majority voting on EU social policy? Assessing the European Commission's proposal' (2019) *EUlawAnalysis,* available at: http://eulawanalysis.blogspot.com/2019/06/more-majority-voting-on-eu-social.html

28 Garben, 'The European pillar of social rights: effectively addressing displacement?' (2018) *EuConst* 14(1), 210–230.

social dimension of the EU in the face of macroeconomic governance and the internal market, discloses a plea for revisiting the current structure of the EU. A future revision of the treaties should seek to address this constitutional asymmetry and open a process of self-reflection that leads the way towards a Union with a genuine balance between 'the social', 'the market' and 'the economy'.

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