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Introductury Report

The European Social Charter in a time of crisis

The European Social Charter was negotiated between 1955 and 1961, in very different circumstances from those prevailing today. It was updated in 1988, with an Additional Protocol to supplement the catalogue of rights, and then again in 1996 with the signature of the Revised European Social Charter. Its role today is more vital than ever. This is due, firstly, to certain contemporary developments in labour law (Part I). It is further due to the economic downturn, which began as an open financial crisis in 2008 but led on to a sovereign debt crisis in Europe in 2010, forcing European Union Member States in particular to focus on reducing debt even if this meant further adding to inequality and undermining the right to social security (Part II). Lastly, it is due to the problems encountered by attempts to deepen integration of the European Union following the successive enlargements of 2004 and 2007-2014 and to the imbalance that is threatening to become entrenched between economic freedoms and social rights (Part III).

This paper obviously makes no claim to cover, even cursorily, all the developments relating to interpretation of the European Social Charter by the European Committee of Social Rights, the committee of independent experts whose role, according to the Turin Protocol, is to 'assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned'.[1] The purpose of this paper is more modest: to highlight how the Committee's reading of the Charter has confirmed and even increased the latter's relevance in the face of developments that have fundamentally changed the landscape of European social law since the Charter was first adopted in 1961. To illustrate this, it takes three major changes that we have witnessed over the past two decades and relates them to the case-law developed by the European Committee of Social Rights.

I. The Charter and changes in labour law

The importance of the European Social Charter's role is apparent first and foremost from the structural changes that have taken place in the world of work. In 1961 the prevailing impression was one of continuous progress in living and working conditions. European treaties attest to this fact, citing it as one of the objectives of post-war European integration, and the European Social Charter itself echoes this.[2] However, for some twenty years now this initially optimistic outlook has given

* The opinion in this paper, which is based on the author's keynote speech at the Turin Forum on Social Rights in Europe, are given in a personal capacity and do not commit the UN Committee on Economic, Social and Cultural Rights.

[1] Article 2 of the Protocol amending the European Social Charter, signed in Turin on 21 October 1991 (ETS No. 142); this article rewords Article 24 of the European Social Charter. Although the Turin Protocol never entered into force, the undertakings that it contained have been implemented to the extent that this has not required formal amendment of the Charter (that is, in compliance with existing provisions). Amongst other things, this Protocol clarifies the division of responsibilities between the European Committee of Social Rights and the Governmental Committee.

[2] Article 2.1 of the Revised European Social Charter requires states having accepted this clause to reduce the working week progressively 'to the extent that the increase of productivity and other relevant factors permit'; under Article 12.3 of this

way to a dull concern that social benefits are being called into question by globalisation and by demographic changes that are threatening the viability of our social security systems.[3]

1. Mounting concern

These fears have been prompted firstly by changes in undertakings themselves. While the 1960s and 1970s saw more and more vertical integration and the emergence of large multinational firms,[4] this was offset from the 1980s by a new development. Businesses increasingly operated as networks, using cascade subcontracting, with highly specialised suppliers of certain goods and services coming into the production process, which was split up among a large number of players.

This compartmentalisation of the production process has clearly identifiable consequences for corporate responsibility. The company coordinating the production process (which may not actually produce anything itself but just look after its brand name and explore markets) will limit demand-related risk as much as it can. It will not enter into any long-term commitments with its suppliers, which bear the lion's share of the risk. As for the company supplying goods or services, it outsources constraints. But its dependence on the contractor paradoxically strengthens its position in relation to the unions, from which it can always demand more because of competition between different suppliers in the same group and the shakiness of markets for its products. We thus have a double lack of responsibility: in both respects, businesses create conditions in which they have no responsibilities towards their workers.

At the same time the liberalisation of trade and investment has altered the balance of power between employers and workers. The removal of barriers to trade and to movement of capital is a global phenomenon that has been picking up speed since the mid-1980s. But it has gone even further, of course, in the European Union. Given the ease with which companies can use freedom of establishment (the conditions imposed by the Court of Justice are quite mild),[5] it is tempting for

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charter they undertake 'to endeavour to raise progressively the system of social security to a higher level'. The wording in both cases is identical to that in the 1961 version of the Charter.

[3] For a fuller assessment, see Olivier De Schutter, 'Welfare State Reform and Social Rights', *Netherlands Quarterly of Human Rights*, Vol. 33 No. 2 (2015), pp. 123-162.

[4] See in particular J.K. Galbraith, *The New Industrial State*, Princeton University Press, 1967.

[5] CJEC, C-212/97 (ECLI:EU:C:1999:126), *Centros*, judgment of 9 March 1999 (in which the Court found that it was contrary to the articles of the Treaty of Rome relating to freedom of establishment 'for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital' whilst pointing out that 'that interpretation does not [...] prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned') and CJEC, C-167/01 (ECLI:EU:C:2003:512), *Inspire Art Ltd*, judgment of 30 September 2003 (it is contrary to the same provisions of the Treaty 'for national legislation [...] to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis'). Although subsequent decisions of the Court of Justice have qualified this position, these two judgments have been widely understood by legal opinion to legitimate establishment of letterbox companies, increasing competitive deregulation within the European Union: see W.F. Ebke, 'Centros - Some Realities and Some Mysteries', *American Journal of Comparative Law*, Vol. 48 (2000), pp. 623-660; A. Looijestijn-Clearie, 'Centros Ltd: A Complete U-Turn in the Right of Establishment for Companies', *International and Comparative Law Quarterly*, Vol. 49 No. 3 (2000), pp. 621-642; W.H. Roth, 'From Centros to Ueberseering: Free Movement of Companies, Private International Law and Community Law',

them to resort to relocation blackmail or even to regulatory optimisation strategies by choosing to set up wherever regulatory constraints, including those relating to labour law, are lightest. In addition, an employer may point to the need to be competitive with regard to an ever-increasing number of rivals, real or imagined, on ever larger markets. The financialisation of the economy is increasing this pressure: shareholders expect immediate returns. Last but not least, paying company executives in stock options, and therefore on the basis of the company's stock market performance, encourages them to opt for management geared to short-term profit maximisation.

Taken together, these developments have exercised downward pressure on workplace rights, weakening unions and lessening their bargaining power. They are reflected in what might be termed a fragmentation of the work force.

Following the adoption of major pieces of social legislation after the Second World War, there was a gradual standardisation of employees' status. This was reflected in the predominance, in the employment contract of aspects relating to employment conditions over aspects that were still purely personal, or *intuitu personae*, negotiated individually between the worker and the employer. In most European countries, contracts of service were left behind for good in the 1950s, and the aspects of the employment contract regulated by law came to prevail over all the others.[6] Standardisation also meant bringing under standard conditions categories of worker traditionally subject to special arrangements. Domestic employees, dockers, seafarers and farm workers would gradually come under the same arrangements as other wage-earners. This standardisation of labour conditions went hand in glove with high levels of unionisation: this was not only a gain for the unions but also increased their influence in collective bargaining on pay and conditions of employment, since a union's claim to represent a specific group of workers was obviously easier to maintain if that group was relatively uniform and therefore had interests that were more or less identical.

Yet nowadays, conversely, we are seeing a fragmentation of employment conditions that is barely disguised by window-dressing in the form of gradual harmonisation of the conditions of non-manual workers ('white-collar' workers or *Angestellte*) and manual workers ('blue-collar' workers or *Arbeiter*). At the top of the salary scale this is reflected in exceptional measures for managers and senior executives with the intention of excluding them from ordinary labour law. The European Committee of Social Rights has from time to time attempted to stem this tide. In 2001, in the case of the *Confédération générale de l'encadrement et Confédération générale des cadres (CGE-CGC)*, it thus found that Article 2.1 of the European Social Charter (promoting progressive reduction in working time) was contravened by the system of annual working days established for managerial staff in the second Aubry Act of 19 January 2000 on negotiated reduction of working time,[7] a revised version of France's famous law on the 35-hour working week originally passed in 1998:[8] because this new version of the law could lead to excessive weekly working hours for managerial staff (up to 78 hours per week), the Committee held that this reform put France in breach of its undertakings.[9]

International and Comparative Law Quarterly, Vol. 52 (2003), pp. 177-208; M. Siems, 'Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century', *European Law Review*, Vol. 27 (2002), pp. 47-59; S. Deakin, 'Two Types of Regulatory Competition: Competitive Federalism Versus Reflexive Harmonisation. A Law and Economics Perspective on *Centros'*, *Cambridge Yearbook of European Legal Studies*, Vol. 2 (1999), pp. 231-260; E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', *Common Market Law Review*, Vol. 40 (2003), pp. 661-695; C. Kersting and C.P. Schindler, 'The ECJ's *Inspire Art* Decision of 30 September 2003 and its Effects on Practice', *German Law Journal*, Vol. 4 No. 12 (2003), p. 1277.

[6] See the remarkable review offered by Alain Supiot in *Critique du droit du travail* (Paris, Presses universitaires de France, 1994, reissued in Quadrige series, 2002).

[7] Law No. 2000-37 of 19 January 2000 on the negotiated reduction of working time, *Official Gazette of the French Republic* No. 16 of 20 January 2000, p. 975.

[8] Law No. 98-461 of 13 June 1998 on reduction of working time, *Official Gazette of the French Republic* No. 136 of 14 June 1998, p. 9029.

[9] ECSR, Complaint No. 9/2000, *Confédération française de l'encadrement et Confédération générale des cadres (CFE-CGC) v.*

But it is mainly at lower levels of the occupational hierarchy that fragmentation of employment conditions has made itself felt, ever since Spain's reform of workers' conditions by the law of 2 August 1984 – a date that may be said, in retrospect, to signal a turning point.[10] Firstly, the idea was to create more flexibility for businesses, particularly by facilitating redundancies and lightening the tax burden on employers. Greater flexibility of this sort is unlikely to create jobs: while some employers may be persuaded to take on workers more readily in the certainty of being able to lay them off in the event of problems, this is more than offset by a propensity on the part of others to use redundancy as a strategy to meet changes in demand, even if temporary, thus counteracting the goal of full employment.[11] Yet, this has been the trend of successive labour market reforms over the past twenty years, in the name of combating labour market 'rigidities' that are supposedly a barrier to higher employment rates. Secondly, given particularly low youth employment rates, governments in Europe have encouraged the creation of new types of employment contracts (more insecure, more flexible, part-time or flexitime) to promote young people's access to the labour market through apprenticeship or training contracts. France offered a typical example of this ten years ago with the 'first job' contract put forward by the Villepin government in 2006 for young people aged under 26.[12]

The most immediate consequence of this fragmentation of employment conditions is to be found in the inroads it has made into the idea of continuous improvement in living and working conditions and also in the idea of widespread introduction of the protection guaranteed by labour legislation. But this fragmentation into a number of different systems – the transition from *one* status for workers to a *variety* of more or less precarious conditions – has also had indirect consequences: it has led to divisions among workers, which hinders collective action, given the growing difficulty of articulating joint demands. The link between better conditions for wage earners and the high rates of unionisation that characterised the thirty-year boom after the Second World War has been broken. In its stead we have individualised paths and competition between workers of different statuses, as well as between 'insiders' within the labour market and 'outsiders' who are excluded from it but hope to enter it, particularly through the introduction of special arrangements departing from ordinary law.[13]

The European Social Charter offers essential guidance in response to these changes in employment conditions. It sets limits to the fragmentation that has been the main feature of recent developments in labour rights in European States (Section 2 below). And it guarantees the role of the social partners and the dialogue between them in order to prevent economic constraints from leading to their gradual marginalisation (Section 3 below).

France, decision on the merits of 16 November 2001.

[10] In 1984, under the first Socialist government of Felipe Gonzalez, Spain decided to promote use of fixed-term employment contracts by passing Law No. 32/1984 of 2 August 1984 on reform of workers' conditions. See, amongst many other studies, M. Casas Baamonde and F. Valdes Dal Re, 'Les nouvelles formes d'emploi dans la législation espagnole', *Travail et emploi*, Vol. 39 (1989), pp. 17-34.

[11] Richard Layard and Stephen Nickell, 'Unemployment in Britain', *Economica*. Vol. 53 No. 210, Supplement: Unemployment (1986), pp. S121-169; Richard Layard and Stephen Nickell, 'The Thatcher Miracle?', *American Economic Review*. Vol. 79 No. 2 (1989), pp. 215-219.

[12] The 'first job' contract was provided for by section 8 of the Equal Opportunities Act (Law No. 2006-396) of 31 March 2006. However, this clause resulted in strong opposition and, following large-scale mobilisation of a section of public opinion, was eventually repealed by Law No. 2006-457 of 21 April 2006 on young people's access to working life, *Official Gazette of the French Republic* No. 95 of 22 April 2006, p. 5993.

[13] On these developments see Robert Castel, *From Manual Workers to Wage Laborers: Transformation of the Social Question* (trans. Richard Boyd, New Brunswick (N.J.), Transaction Publishers, 2003) and, by the same author, *La montée des incertitudes : travail, protections, statut de l'individu* (Paris, Éditions du Seuil, 2009).

2. Maintaining employees' status

The European Committee of Social Rights originally promoted the trend towards standardisation of employment conditions by calling into question special arrangements for certain occupations: it thus found that Article 24 of the Charter (guaranteeing the right to protection in cases of termination of employment) was violated by the Norwegian Seamen's Act, which allowed employers to dismiss seamen aged over 62 without having to justify this decision on the grounds of ability or economic necessity.[14] But mainly the Charter has controlled the gradual introduction of greater flexibility in the labour market encouraged by the spread of competition and fiscal consolidation programmes. In the recent past, the reform adopted by Greece in 2010, allowing termination of employment without notice or severance pay during the probation period in an open-ended contract, is a striking example: in a decision of 23 May 2012, the European Committee of Social Rights found that this reform entailed a violation of Article 4.4 of the European Social Charter, which required 'a reasonable period of notice for termination of employment'.[15] Among the labour market reforms carried out by Greece to satisfy the demands of its creditors following the assistance that it had been granted, there was the introduction of 'special apprenticeship contracts'. These contracts were concluded between employers and young workers (aged 15 to 18) without the latter having a number of safeguards provided for by labour and social security law, while the employers had the option of paying workers aged under 25 less than the minimum wage for their first job. In response to Complaint No. 66/2011, lodged by a number of Greek unions, the Committee came to the conclusion that the introduction of these 'special apprenticeship contracts' was a violation of Article 4.1 of the Charter, which guarantees 'the right of workers to a remuneration such as will give them and their families a decent standard of living'.[16] The Committee considered that:

> it is permissible to pay a lower minimum wage to younger persons in certain circumstances (e.g. when they are taking part in an apprenticeship scheme or otherwise engaged in a form of vocational training). Such a reduction in the minimum wage may enhance the access of younger workers to the labour market and may also be justified on the basis that it reflects a statistical tendency for them to incur lower expenditure on average than other categories of workers when it comes to housing, family support and other living costs. However, any such reduction in the minimum wage should not fall below the poverty level of the country concerned.[17]

No doubt the European Social Charter is not perforce hostile to the coexistence of general conditions applying to the majority of workers and special rules applying to some specific categories of worker. But this multiplication of treatments is considered acceptable only under stringent conditions. On the one hand, some differences of treatment between categories of workers could be considered unjustifiable and therefore discriminatory.[18] On the other, the European Social Charter provides in principle that its labour law safeguards must apply to all workers without exception: special arrangements are therefore theoretically suspect. Admittedly, Article I of the Charter provides that a number of undertakings deriving from the Charter's Article 2 (right to just conditions

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[14] ECSR, Complaint No. 74/2011, *FFFS Union v. Norway*, decision on the merits of 2 July 2013.

[15] ECSR, Complaint No. 65/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece,* decision on the merits of 23 May 2012.

[16] ECSR, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, decision on the merits of 23 May 2012.

[17] Ibid., §60.

[18] The question of the coexistence of different legal arrangements covering identical services provided came up in *CFDT v. France* (Complaint No. 50/2008), for example. However, the circumstances made it difficult to pinpoint discrimination. The issue was the status that should be granted to civilian employees with contracts governed by German law following the dissolution of French forces stationed in Germany. The Committee dismissed the claim of discrimination, based on Article E of the Revised European Social Charter, because of the difference in situation between employees with contracts governed by German law and employees with contracts governed by French law.

of work), Article 7 (right of children and young persons to protection), Article 10 (right to vocational training), Article 21 (right of workers to be informed and consulted within the undertaking) and Article 22 (right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking) shall be regarded as effective 'if the provisions are applied [...] to the great majority of the workers concerned'.[19] However, the European Committee of Social Rights has set clear limits to this tolerance: it 'cannot give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision'.[20] While practical difficulties may prevent full compliance with Charter safeguards (because the labour inspectorate is unable to ensure compliance with certain rules across all sectors of the economy, for example), and it is conceivable that a collective labour agreement putting into effect some of the Charter's safeguards might not apply to all workers, this would not justify a deliberate policy to exempt some categories of worker from universally applicable rules.[21] The rule is therefore that safeguards must apply across the board; exceptions are tolerated only in narrowly defined circumstances.

3. The role of collective bargaining

The Charter can also guide government responses to the economic downturn, for example by guaranteeing the right of workers to be informed and consulted in collective redundancy procedures (Article 29 of the Charter) or encouraging governments to invest in vocational training in order better to equip workers with the skills required by a constantly evolving economy: Article 10 of the Charter guarantees the right to vocational training, which also forms part of the right of persons with disabilities to integration, recognised in Article 15. Above all, the Charter seeks to ensure a certain balance between employers and workers for the purposes of social dialogue – a significant contribution in a context where pressure on workers is growing.

Of course, collective bargaining cannot lead to outcomes that conflict with the requirements of the European Social Charter: the Charter here provides a minimum set of rights that have to be respected by workers and employers in all circumstances, thus setting limits to the social partners' independent action.[22] However, the Committee has endeavoured to balance the relative strengths of workers and employers beyond this. It is a delicate task and one that constantly has to be taken up afresh, since it depends on the context in which social dialogue occurs. The case-law arising out of the Charter contains two main lessons in this respect.

1. Firstly, it seeks to maintain not only the right, and effectiveness, of collective action by the unions but also what is known as negative freedom of association: the right of each individual worker not to join a union, even if this means weakening the union's representation and its ability to influence collective bargaining.[23] In *Confederation of Swedish Enterprise v. Sweden*, for example, an employers' organisation contested pre-entry closed shop clauses, which were not prohibited by Swedish law,

[19] The same rule appeared in Article 33 of the 1961 European Social Charter.
[20] ECSR, Complaint No. 9/2000, *CFE-CGC v. France*, decision on the merits of 16 November 2001, §40.
[21] In the *CFE-CGC* case the Committee dismissed France's argument that the number of managerial staff affected by the contested provisions in the second Aubry Act (concerning the system of annual working days mentioned above) would in any case be limited ('the proportion of persons concerned by agreements on annual working days is less than 5% of the total number of employees' (§26)). If the law has deliberately excluded a section of managerial staff from the requirements of the law on the 35-hour working week, this situation does not comply with the Charter. The dissenting opinion of Mr Stein Evju (joined by Mr Rolf Birk) further confirms this reading of the majority opinion.
[22] ECSR, Complaint No. 8/2000, *CFE-CGC v. France* (on reduction of working time for managerial staff under the second Aubry Act of 2000).
[23] Paradoxically, no doubt, negative freedom of association (the right not to become a member of a union) began to grow in importance in the case-law of the European Court of Human Rights under the influence of the European Social Charter in particular in the 1980s and 1990s, at the very time when unionisation rates and therefore union influence were already in steep decline.

although it did prohibit dismissal of workers who refused union membership. The ECSR found for the complainant organisation in the name of workers' freedom of choice: 'the freedom guaranteed by Article 5 of the Charter implies that the exercise of a worker's right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under the influence of constraints that rule out the exercise of this freedom'.[24]

This does not mean that any encouragement to join an organisation defending its members' interests would, by definition, conflict with the requirements of freedom of association. The ECSR has, for example, refused to consider Finland in breach of Article 5 of the European Social Charter on account of the fact that only employers belonging to national employer organisations could derogate from certain aspects of labour legislation through local collective agreements: according to the Committee, these provisions did not affect the 'substance' of freedom of association, a term it borrowed from the European Court of Human Rights.[25] A clarification of this case-law can probably be expected in future in two respects: firstly, to specify the conditions under which the disproportion between the two alternatives available to a worker or employer – to join a union/association or not – would be such as to rule out genuine freedom of choice on the part of the interested party, leading to a situation in breach of Article 5 of the Charter, and, secondly, to prohibit any possibility of financial reward influencing a worker's choice, which otherwise would allow an employer in reality to pay workers not to join a union.[26]

2. The Charter also seeks to keep intact real collective bargaining, which assumes the ability to use certain forms of pressure. When construing Article 6 of the Charter, which guarantees the right to bargain collectively, the Committee's main challenge is to determine how States Parties should regulate the balance of power between employers and workers, in what may be considered a sort of mutual restraint. Belgium provides a perfect example. Although their practice is not consistent in this respect, the Belgian courts have regularly intervened in respect of the exercise of the right to strike, under urgent procedures (on the basis of Articles 1024-1035 of the Judicial Code), in order to prohibit picketing, that is action taken by unions to block non-strikers' access to the workplace. Here again, the key factor is the individual worker's freedom of choice. According to the Committee, 'The exercise of the right to strike necessitates striking a balance between the rights and freedoms, on one side, and the responsibilities, on the other, of the natural and legal persons involved in the dispute.'[27] The right balance must be determined on the basis of 'the right of other workers to choose whether or not to take part in the strike action',[28] with this freedom of choice being the key criterion: it has to be the foundation for assessing court interference with the exercise of the right to strike.

However, court intervention under urgent procedures regarding the exercise of the right to strike, particularly prohibiting pickets in the name of freedom to conduct business, must comply with conditions 'prescribed by law', that is, sufficiently stable and foreseeable. This follows from Article 31 of the 1961 European Social Charter (Article G of the Revised Charter), which lays down the conditions under which restrictions on the Charter rights are permitted. In *ETUC, CGSLB, CSC and FGTB v. Belgium*, the Committee held that the decisions of the Belgian courts were not sufficiently consistent in this respect to provide adequate legal certainty for the parties concerned;[29]

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[24] ECSR, Complaint No. 12/2002, *Confederation of Swedish Enterprise v. Sweden*, decision on the merits of 15 May 2003, § 29. The Committee upheld this approach in *Bedriftsforbundet v. Norway* (Complaint No. 103/2013, decision on admissibility of 14 May 2014).

[25] ECSR, Complaint No. 35/2006, *Federation of Finnish Enterprises v. Finland*, decision on admissibility of 16 October 2007, §29 (citing European Court of Human Rights, *Gustafsson v. Sweden*, judgment of 25 April 1996).

[26] See European Court of Human Rights, *Wilson, National Union of Journalists and Others v. the United Kingdom*, judgment of 2 July 2002.

[27] ECSR, Complaint No. 59/2009, *ETUC, CGSLB, CSC and FGTB v. Belgium*, decision on the merits of 13 September 2011, §34.

[28] Ibid., §36.

furthermore, this kind of intervention followed a unilateral application by the employer, which in the Committee's opinion failed to respect the requirement for 'procedural fairness' that should surround the imposition of restrictions.[30] The challenge here is to strike the right balance between the need, on the one hand, for a contextualised approach heedful of the actual pressures brought to bear on workers, in order to ensure genuine freedom of choice for the latter, and the need for legal certainty on the other, implying a sufficiently stable and precise regulatory environment in which the rules governing exercise of the right to strike are clear to all.

II. The Charter and growing inequality

1. Rising inequality

While greater labour law flexibility is an underlying primary trend of the past two decades, its main consequence has been growing inequality, for the first time in the post-war period. The work of François Bourguignon and Thomas Piketty in France, Joseph Stiglitz in the United States and Anthony Atkinson in the United Kingdom has alerted governments to the need to do more to tackle this development.[31] In OECD countries the gap between rich and poor has continued to widen since the mid-1980s. For OECD countries overall, while real disposable household incomes rose by 1.7% a year between the late 1980s and the late 2000s, the incomes of the richest 10% grew faster than those of the poorest 10%, so that when the economic downturn began in 2008-2009, the income ratio between the richest decile and the poorest decile was nine to one.[32] This was a general trend across the OECD, although there were a few exceptions: inequality in Belgium, France and Hungary did not increase over this period, and it even declined in Turkey and Greece.

Rising inequality is a problem for a number of reasons.[33] Strong inequalities between households have an impact down the generations: Piketty's work emphasises how far parents' wealth today determines their children's entire lives, placing them in a privileged position in relation to their peers. Marked inequality also leads to political deadlock: the democratic processes that allow a society to change of its own volition are less effective if a small economic elite occupies such a dominant position that it can manipulate their outcome. Such inequality naturally affects enjoyment by the poorest households of social and economic rights such as access to education, health care and adequate housing.[34] Inequality does not just penalise those at the bottom of the social scale: as the work of Kate Pickett and David Wilkinson has shown, it affects the well-being of society as a whole because of the weaker social ties that result.[35] It can be considered a source of social insecurity, and this affects everyone, whatever his or her income.

2. The non-discrimination requirement for implementing the European Social Charter

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[29] Ibid., §43.
[30] Ibid., §44.
[31] Anthony B. Atkinson, *Inequality: What Can Be Done?* (Cambridge (Mass.), Harvard University Press, 2015); François Bourguignon, *The Globalization of Inequality* (trans. Thomas Scott-Railton, Princeton, Princeton University Press, 2015); Thomas Piketty, *Capital in the Twenty-First Century* (trans. Arthur Goldhammer, Cambridge (Mass.), Harvard University Press, 2014); Joseph Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them* (New York, W.W. Norton and Company Inc., 2015).
[32] OECD, *Divided We Stand: Why Inequality Keeps Rising* (Paris, OECD, 2011).
[33] On the links between inequality and enjoyment of human rights, see the Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, to the 29th session of the Human Rights Council (UN document A/HRC/29/31, 29 May 2015).
[34] For example, the Commission on the Measurement of Economic Performance and Social Progress has found that 'people from lower occupational classes who have less education and income tend to die at younger ages and to suffer, within their shorter lifetimes, a higher prevalence of various health problems' (*Report by the Commission on the Measurement of Economic Performance and Social Progress*, J. Stiglitz, A. Sen and J.-P. Fitoussi, September 2009, §81).
[35] Kate Pickett and Richard Wilkinson, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (London, Allen Lane, 2009).

The Charter's contribution here is both fundamental and frequently underrated. Under Article E of the Revised European Social Charter, 'the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status'. On the basis of this clause, the European Committee of Social Rights can assess whether a State's legislative, regulatory or political environment might result in some marginalised groups being disadvantaged, whether or not intentionally, and even without any express difference in treatment. Following the example of the European Court of Human Rights in its interpretation of Article 14 of the European Convention on Human Rights, the European Committee of Social Rights has held that:

> Article E entails that, in a democratic society, not only should persons who are in the same situation be treated equally and persons whose situations differ be treated differently, but all responses should show sufficient discernment to ensure real and effective equality. On the same basis, the Committee considers that Article E also prohibits all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[36]

The prohibition on infringing the principle of equality places immediate obligations on States Parties (to eliminate any discriminatory provisions) as well as positive obligations to put in place policies to reduce inequality specifically affecting certain groups in society. As part of its supervision, the Committee may here have to compare the legal positions in States Parties across time in order to assess progress made in implementing the rights proclaimed by the Charter.[37] In its decision of 11 September 2013 on the merits of Complaint No. 81/2012, the European Committee of Social Rights pointed out in this respect that:

> when the achievement of one of the rights protected by the Charter is exceptionally complex and particularly expensive to resolve, the measures taken by a State to achieve the Charter's objectives must meet the following three criteria: "(i) a reasonable timeframe, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources" (Autism-Europe v. France, cited above, §53). The Committee reiterated this requirement in decisions on subsequent complaints, particularly those concerning the rights of persons with disabilities (Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, decision on the merits of 3 June 2008, §39; FIDH v. Belgium, Complaint No. 62/2010, decision on the merits of 21 March 2012, §113).[38]

Given these interpretations, the non-discrimination clause in Article E of the Revised European Social Charter goes well beyond merely prohibiting differential treatment of different groups of people that cannot be objectively and reasonably justified or that is disproportionate: in actual fact it

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[36] For successive versions of this idea, see *Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, §52; *European Action of the Disabled v. France*, Complaint No. 81/2012, decision on the merits of 11 September 2013, §133; and *Mental Disability Advocacy Centre v. Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, §50.

[37] In two decisions dated 23 May 2012 on the merits of Complaint No. 65/2011 and Complaint No. 66/2011, the European Committee of Social Rights prefaces its assessment of the various alleged violations with some preliminary observations in which it extends to labour law the conclusions that it had already drawn from the repercussions of the economic crisis on social rights: '[T]he economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need the protection' (§16 and §12 respectively).

[38] *European Action of the Disabled v. France*, Complaint No. 81/2012, decision on the merits of 11 September 2013, §79.

requires States Parties to implement genuine policies to tackle inequality in the fields covered by the Charter.

The European Social Charter can act as a bulwark against the apparently unlimited growth of inequality in at least three other ways: firstly, it encourages States to pursue redistributive wage policies; secondly, it stresses the importance of establishing inclusive education and guaranteeing the right to vocational training, in order to win the race against time to prevent workers' skills becoming obsolescent owing to the rapid changes brought about by both technological progress and economic globalisation; thirdly, by guaranteeing the right to social security, it acts as a bulwark against a reduction in the types of protection associated with establishment of the welfare state. These three processes, complementing prohibition of discrimination as such, enable the European Social Charter to help tackle the rise in inequality.

3. Processes complementing prohibition of discrimination

The European Social Charter encourages States Parties to reduce wage dispersion. Article 4.1 of the Charter guarantees the right to a remuneration such as will provide a decent standard of living. However, the European Committee of Social Rights has not wished to settle for a literal interpretation of this concept, which would have related it to a basket of essential goods, for example, or the satisfaction of vital needs such as food, housing, health and education, and also social protection if based on a contributory scheme. Instead, the Committee recognises the *relative* nature of the idea of the 'decent' standard of living that the remuneration is supposed to provide: individuals' assessments of their own living standards depend on the position they occupy on the social scale. To be deemed fair for the purposes of Article 4.1, the pay must not only be above the country's poverty level but also no less than 60% of national average earnings. This interpretation contrasts in part with the interpretation of the concept of fair pay in Article 7 of the International Covenant on Economic, Social and Cultural Rights.[39] It links the requirement for fair remuneration with prevention of excessive wage dispersion within a State: this might be summed up as the requirement for a redistributive wage policy.

The Charter also emphasises inclusive access to education and vocational training: this again, it might be argued, is a tool to tackle growth in inequality. With the development of information and communication technology we are witnessing a quickening race between technological innovation and advances in training. The OECD has summed this up as follows:

> The rise in the supply of skilled workers considerably offset the increase in wage dispersion associated with technological progress, regulatory reforms and institutional changes. The upskilling of the labour force also had a significant impact on employment growth. The growth in average educational attainment thus appears to have been the single most important factor contributing not only to reduced wage dispersion among workers but also to higher employment rates.[40]

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[39] Cf. General Comment No. 23 (2016) on the right to just and favourable conditions of work, adopted by the Committee on Economic, Social and Cultural Rights on 11 March 2016 (UN document E/C.12/GC/23). The Committee on Economic, Social and Cultural Rights defines the concept of remuneration providing 'a decent living for workers and their families' within the meaning of Article 7.a (ii) of the International Covenant on Economic, Social and Cultural Rights on the basis of the need to guarantee enjoyment of the Covenant's rights (paragraph 18: 'remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs'), although, in a specific allusion to the approach taken for the European Social Charter, it is suggested that the minimum wage could be defined with reference to the average wage in a given State (paragraph 21: 'The minimum wage might represent a percentage of the average wage, so long as this percentage is sufficient to ensure a decent living for workers and their families').

[40] OECD, *Divided We Stand*, op. cit., p. 31.

This makes clearer the implications of cases brought before the European Committee of Social Rights such as, recently, Associazione sindacale "La Voce dei Giusti" v. *Italy*, in which a teachers' union alleged that some categories of teaching staff were being prevented from undertaking or continuing specialised training because of their increased workload, thus contravening Article 10 (right to vocational training).[41]

Lastly, a number of the Charter's provisions are intended to guarantee the right to social security, that is, to protect people from the risks associated with the dismantling of the welfare state's redistributive mechanisms. The OECD believes that the welfare state has had a corrective effect over the past thirty years: in the late 2000s the level of earnings inequality after redistribution (therefore after tax and social transfers) was 25% less, measured by the Gini coefficient, than the level of gross earnings inequality. At the same time, it is worrying that the effectiveness of the redistributive policies associated with the welfare state (their impact on reducing inequality) has diminished since the mid-1990s: until then they had the effect of halving income inequality before redistribution – this means that welfare state mechanisms are today two times less redistributive than they were up until approximately twenty years ago. This goes to show the importance of Article 12 of the European Social Charter, which guarantees the right of workers and their dependants to social security, and also of Article 13 of the Charter, which recognises the right to social and medical assistance for persons without resources.

III. The Charter and European Union integration

The third major development that European States have witnessed over the past two decades, in addition to rising inequality and changes in labour law to allow greater flexibility, is unquestionably the deepening of integration within the European Union. Today this deepening is being questioned by a growing section of public opinion. The voices criticising the fact, rightly or wrongly, that the European Union favours economic freedoms over respect for social rights are becoming louder and louder. The European Social Charter's contribution is here again incontrovertible: by drawing attention to the need to make certain that protection of these rights is not sacrificed to the requirements of economic integration it ensures that advances in European integration will result in better protection of social rights rather than providing a pretext to challenge them. This need is sometimes seen as a constraint, delaying progress of the internal market. In actual fact, it is above all a guarantee of the latter's legitimacy. It constitutes a means of outlining the essential 'social' constitution that is concomitant of the 'economic' constitution laid out in the Treaty of Rome and its successive modifications up to the Treaty of Lisbon.[42]

A decision delivered on 3 July 2013 by the European Committee of Social Rights offers a good illustration. In this decision, the Committee upheld a complaint lodged by the Swedish unions, which considered that the amendments made to Swedish legislation in 2010 to ensure that Sweden was in compliance with the *Laval* judgment of the Court of Justice of the European Union contravened various paragraphs of the Revised European Social Charter: the Committee found that these amendments were not conducive to collective bargaining – in breach of the undertaking accepted by Sweden in Article 6.2 of the Charter to promote collective bargaining as a means of regulating terms and conditions of employment – and placed restrictions on the collective action in which workers ought to be able to engage that were such as to contravene Article 6.4 of the Charter.[43] Alluding to

[41] Complaint No. 105/2014. This complaint was held to be admissible on 17 March 2015.

[42] On this subject see O. De Schutter (ed.), *The European Social Charter: A social constitution for Europe*, Brussels, Bruylant, 2010.

[43] European Committee of Social Rights, Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, decision on admissibility and the merits of 3 July 2013, §§116 and 120 in particular. In its *Viking* and *Laval un Partneri Ltd* judgments, delivered a few days apart in December 2007, the

this decision, the Secretary General of the Council of Europe noted in his report on the *State of democracy, human rights and the rule of law in Europe*, prepared for the Council of Europe Summit in Vienna on 5 and 6 May 2014: 'In 2013 the European Committee of Social Rights found a breach, inter alia, of the right to bargain collectively and the right to strike, important corollaries of the right to organise. The measures in question had been adopted as a result of a judgment of the Court of Justice of the European Union. The decisions of the States Parties (resulting directly or indirectly from EU law) must conform to the rights enshrined in the Charter. Therefore we see an urgent need to find pragmatic solutions to settle conflicts between the two sets of standards.'[44]

Although it is the best known, this decision is not an isolated example: it was one of a number that paved the way for it. A brief outline will be given below of the position taken by the European Committee of Social Rights on the obligations of EU law that conflict with commitments under the European Social Charter (Section 1 below). This position is explained by the status accorded this charter by the Court of Justice of the European Union (Section 2 below), whence there is a real risk that the two sets of norms will come into conflict (Section 3 below).

1. The European Committee of Social Rights and EU law

The two, previously described, decisions on Greece delivered on 23 May 2012 by the European Committee of Social Rights were an initial warning. Note should be taken of the conclusion to which these decisions came: the Committee considered that the 1961 European Social Charter had been contravened by a number of measures to make Greek labour law more flexible – in particular, those authorising dismissal without notice or severance pay of persons hired with open-ended employment contracts and promoting recruitment of young workers through creation of special arrangements resulting in exemption from existing arrangements. In fact, these measures were intended as a response to the economic crisis and particularly the extremely high youth unemployment rate in Greece, and it seems they were adopted under pressure from the 'troika' (the European Central Bank, the European Commission and the International Monetary Fund) set up to ensure that the country would take structural measures to reduce its national debt.[45]

Court of Justice of the European Union concluded that there was a need to balance the right to collective action recognised in Article 28 of the Charter of Fundamental Rights (*OJ,* C 83, 30.3.2010, p. 389) against freedom of establishment and freedom to provide services when the exercise of these fundamental economic freedoms was hindered by union action (Court of Justice (Grand Chamber), 11 December 2007, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP*, C-438/05, and 18 December 2007, *Laval un Partneri Ltd*, C-341/05; see also Court of Justice, 3 April 2008, *Rüffert*, C-346/06). These judgments drew criticism, particularly from the unions but also from academia (see Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', *European Law Journal*, Vol. 15, No. 1 (2009), pp. 1-19; Olivier De Schutter, 'Transborder provision of services and "social dumping": rights-based mutual trust in the establishment of the Internal Market', in I. Lianos and O. Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration*, Cambridge University Press, 2011, pp. 346-380; A. Bücker and W. Warneck, *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Baden Baden, Nomos, 2011); A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', *Industrial Law Journal*, Vol. 37 No. 2 (2008), p. 126). The European Parliament and the European Economic and Social Committee also expressed concern (see European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)) and the Opinion of the European Economic and Social Committee on 'The Social Dimension of the Internal Market' (rapporteur: Mr Janson), adopted on 14 July 2010 by 143 votes in favour, 15 against and 19 abstentions (SOC/360 - CESE 970/2010, *OJ*, C 44, p. 90)).

[44] *State of democracy, human rights and the rule of law in Europe*, Report by the Secretary General of the Council of Europe, SG(2014)1 final, p. 41.

[45] European Committee of Social Rights, Complaint No. 65/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, decision on the merits of 23 May 2012; European Committee of Social Rights, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, decision on the merits of 23 May 2012. The first decision relates to measures to increase Greece's labour market flexibility, introduced by a law of 17 December 2010 and making it possible to dismiss a worker without notice or

Some months later, the European Committee of Social Rights gave its opinion on the merits of a complaint lodged by the Federation of Employee Pensioners of Greece (IKA-ETAM) alleging that the changes made to the Greek pension scheme in 2010 were incompatible with Greece's commitments under the European Social Charter and especially Article 12, which required the social security system to be raised progressively to a higher level.[46] In reply, the Greek Government argued that the impugned measures were 'approved by the national parliament, are necessary for the protection of public interests, having resulted from Greece's grave financial situation, and, in addition, result from the Government's other international obligations, namely those deriving from a financial support mechanism agreed upon by the Government together with the European Commission, the European Central Bank and the International Monetary Fund ("the Troika") in 2010'.[47]

The Committee rejected this argument. It noted that the limitations clause in Article 31.1 of the European Social Charter did not include 'economic or financial aims' among admissible grounds for restricting the rights guaranteed by the Charter.[48] It added that 'the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter'. In support of the latter position, the Committee cited the case-law of the European Court of Human Rights, which did not rule out the possibility, in the1996 *Cantoni* case, that France might be guilty of infringing the principle of legality in criminal proceedings as a result of incorporating an EEC directive word for word into its criminal law.[49] In short, in its own words, the Committee held that:

> when states parties agree on binding measures, which relate to matters within the remit of the Charter, they should – both when preparing the text in question and when implementing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter.[50]

This position of the European Committee of Social Rights is consistent with the position that it has adopted in other cases in which the question of interpreting the requirements of the European Social Charter in the light of obligations inferred from EU law has come up in similar terms. The

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severance pay during the probation period of an open-ended contract: the Committee considered that this measure undermined the safeguard contained in Article 4.4 of the 1961 European Social Charter, which guarantees 'the right of all workers to a reasonable period of notice for termination of employment'. The second decision establishes that provisions introduced into Greek labour law in 2010 concerning 'special apprenticeship contracts' for hiring of young people aged 15 to 18 and concerning employment of new entrants to the labour market aged under 25 contravene a number of safeguards in the European Social Charter. The 'special apprenticeship contracts' make no provision for young people to have at least three weeks' annual paid leave, in breach of Article 7.7 of the Charter; they do not promote training for the young workers, in violation of Article 10.2 of the Charter; and in practice they exclude these young workers from the protection offered by the social security system, in contravention of Article 12.3 of the Charter. Regarding the measures to promote employment of new entrants to the labour market aged under 25, the Committee considered that the authorisation to hire young people for a wage that was 68% of the statutory minimum wage did not comply with Article 4.1 of the Charter, which guaranteed the right to fair remuneration and did not allow payment of a wage below the poverty level; the Committee further noted that it resulted in age discrimination.

[46] European Committee of Social Rights, Complaint No. 76/2012, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, decision on the merits of 7 December 2012.

[47] Ibid., §10.

[48] Ibid., §12. Article 31.1 of the 1961 European Social Charter states, 'The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.'

[49] European Court of Human Rights, *Cantoni v. France*, judgment of 15 November 1996, §30.

[50] European Committee of Social Rights, Complaint No. 76/2012, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, decision on the merits, §51.

Committee has always held that a State Party could not use the pretext of European Union obligations to restrict the scope of its obligations under the European Social Charter:

> The Committee attaches the utmost importance to the need for the Contracting Parties to take the Charter into account when adopting directives in the areas covered by the Charter within the European Union. The Committee asks that when incorporating European Union directives into domestic legislation, Contracting Parties carry out this incorporation in compliance with their obligations under the Charter. This applies especially to directives which have not yet been included in the domestic legislation of a number of Contracting Parties.[51]

However obvious this position may appear, the Committee felt the need to issue this reminder, given the tendency of EU Member States to consider that, in fields covered by directives, the latter constitute a satisfactory minimum standard – with the result that the more generous provisions of the European Social Charter are sidelined.[52] In the case of *Federation of Employee Pensioners of Greece (IKA-ETAM) v. Greece*, the European Committee of Social Rights was able reassert its previous position all the more easily, as the Court of Justice of the European Union had not been able to verify whether the measures recommended by the 'Troika' were consistent with fundamental rights.[53] But the problem revealed here goes beyond the specific circumstances of this case: potential conflicts between EU law and the requirements of the European Social Charter will continue to exist as long as the status of the European Social Charter in EU law remains unchanged.[54] In a 2010 decision,[55] the European Committee of Social Rights categorically stated that it did not intend to

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[51] *European Social Charter: Conclusions XIV-1* Vol. 1 (1998), General introduction, p. 28.

[52] According to a particularly well-informed observer, the European Committee of Social Rights 'has had, for certain pieces of legislation submitted to it, some trouble in imposing its views in fields where the EU has passed legislation reflecting what it considers lower standards. Where EU directives cover a set of rules and principles in a particular field, this is considered by EU Member States […] as a satisfactory minimum standard and the States concerned are reluctant to accept broader interpretations of the relevant provisions, often worded in more general terms, of the European Social Charter' (J. Vandamme, 'Les droits sociaux fondamentaux en Europe', *Journal des tribunaux-Droit européen*, 1999, p. 55). This observation has lost none of its relevance. Thus, for example, in the case of *Confédération générale du travail (CGT) v. France*, lodged with the European Committee of Social Rights as Complaint No. 55/2009, the Government of Finland submitted observations referring to Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, in order to conclude that 'the national situation is in compliance with the aforementioned Directive and, as a result, […] is in conformity with the Charter' (European Committee of Social Rights, *Confédération française de l'Encadrement CFE-CGC v. France*, Complaint No. 56/2009, decision on the merits of 23 June 2010, §29).

[53] The formalisation of the financial assistance mechanisms introduced to protect the stability of the euro area may change this situation. With the establishment of the European Stability Mechanism (ESM), which succeeded the European Financial Stability Facility (EFSF) on 1 January 2013, the European Commission – 'in liaison with the ECB and, wherever possible, together with the IMF' – was entrusted with the task of 'negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility' (Article 13.3 of the Treaty Establishing the European Stability Mechanism, concluded in Brussels on 2 February 2012 under the simplified procedure provided for by the first subparagraph of Article 48.6 of the Treaty on European Union, by Decision 2011/199/EU of 25 March 2011). In response to a reference for a preliminary ruling on the validity of the amendment thus made to Article 136 TFEU to establish the ESM, the Court of Justice held in 2012 that adoption of Decision 2011/199/EU did not contravene the right to effective judicial protection recognised by Article 47 of the Charter of Fundamental Rights of the European Union because, when they established the ESM, Member States were not implementing EU law within the meaning of Article 51.1 of the Charter of Fundamental Rights defining its scope: the ground was, according to the Court, that 'the EU and FEU Treaties do not confer any specific competence on the Union' to establish the ESM, so that by amending Article 136 TFEU, Member States were acting in a field in which the Charter could not be raised (CJEU (Grand Chamber), 27 November 2012, *Pringle*, C-370/12, §180). However, it has since held that the European Commission and European Central Bank cannot disregard their obligations under the Charter of Fundamental Rights of the European Union, including when adopting measures taken in connection with the ESM: see CJEU (Grand Chamber), *Ledra Advertising Ltd and Others v. European Commission and European Central Bank (ECB)*, Joined Cases C-8/15 P to C-10/15 P (ECLI:EU:C:2016:701), judgment of 20 September 2016.

[54] See O. De Schutter, 'Le statut de la Charte sociale européenne dans le droit de l'Union européenne', in *Mélanges en hommage à Jean-Paul Jacqué*, Dalloz, Paris, 2010, pp. 217-261.

[55] European Committee of Social Rights, Complaint No. 55/2009, *Confédération générale du travail (CGT) v. France*,

recognise a presumption – 'even rebuttable' – of conformity of European Union legal texts with the European Social Charter.[56] It was strengthened in this belief by 'the lack of political will of the European Union and its Member States to consider at this stage acceding to the European Social Charter'.[57] In an allusion to the *Bosphorus Hava* judgment of the European Court of Human Rights,[58] the Committee noted 'that neither the situation of social rights in the European Union legal order nor the process of elaboration of secondary legislation would justify a similar presumption – even rebuttable – of conformity of legal texts of the European Union with the European Social Charter', although it admitted that it would 'review its assessment' if there was evidence similar to that which had guided the European Court of Human Rights in its *Bosphorus* decision.[59] The Committee's attitude raises questions regarding the status accorded the European Social Charter by the Court of Justice of the European Union and the Committee's interpretation of it.

2. The European Social Charter in EU law

The fact that the Court of Justice has so far rejected the view that the European Social Charter should guide interpretation of the European Union's basic provisions in the social field – and, more broadly, the general principles of EU law – creates a genuine risk of conflicts of interpretation between the Court of Justice and the European Committee of Social Rights. The Court of Justice admittedly accepts that Member States can raise certain fundamental social rights – and their concern to protect them at the national level – as overriding reasons relating to the public interest and capable of justifying restrictions on free movement of goods,[60] on the freedom to provide services[61] or on the requirements of competition law.[62] But its case-law has obvious limitations.[63]

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decision on the merits of 23 June 2010, see §§32-42 in particular (conformity of France's Law No. 2008-789 of 20 August 2008 on the reform of social democracy and working time with France's commitments under the Revised European Social Charter).

[56] Ibid., §35.

[57] Ibid., §36.

[58] European Court of Human Rights (Grand Chamber), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005 (App. No. 45036/98), in which the Court agreed to a 'presumption of compliance' with the Convention of State action implementing EU law as long as the Court of Justice had been able to verify whether this action was consistent with the requirements of fundamental rights; at the same time the European Court of Human Rights reserved the possibility of intervening if protection was 'manifestly deficient' (§§155-156). See Johan Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony', *European Human Rights Law Review*, No. 6 (2009), pp. 768-783, here pp. 771-774, as well as Florence Benoît-Rohmer, 'Bienvenue aux enfants de Bosphorus : la Cour européenne des droits de l'homme et les organisations internationales', *Revue trimestrielle des droits de l'homme*, 2010, p. 18, and O. De Schutter, 'The Two Lives of *Bosphorus*: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention", *European Journal of Human Rights*, No. 4 (2013), pp. 584-624.

[59] European Committee of Social Rights, Complaint No. 55/2009, *Confédération générale du travail (CGT) v. France*, decision on the merits of 23 June 2010, §37.

[60] CJEC, 28 April 1998, *Decker*, C-120/95, ECR, p. I-1831, §§39 and 40. For a systematic study, see O. De Schutter, 'L'affirmation des droits sociaux fondamentaux dans la Charte des droits fondamentaux de l'Union européenne', in A. Lyon-Caen and P. Lokiec (eds), *Droits fondamentaux et droit social*, Paris, Dalloz, 2004, pp. 145-184.

[61] CJEC, 17 December 1981, *Criminal proceedings against A.J. Webb*, 279/80, ECR, p. 3305; CJEC, 27 March 1990, *Rush Portuguesa*, C-113/89, ECR, p. I-1417, §17; CJEC, 28 March 1996, *Guiot*, C-272/94, ECR, p. I-1905, §16; CJEC, 28 April 1998, *Kohll*, C-158/96, ECR, p. I-1931, §41; CJEC, 23 November 1999, *Arblade*, Joined Cases C-369/96 and C-376/96, ECR, p. I-8453, §36; CJEC, 15 March 2001, *Mazzoleni and ISA*, C-165/98, ECR, p. I-2189, §27; CJEC, 24 January 2002, *Infringement proceedings against Portugaia Construções Lda*, C-164/99, ECR, p. I-787, §§20 and 21.

[62] CJEC, 21 September 1999, *Albany*, C-67/96, ECR, p. I-5751.

[63] On the question of the relationship between the European Social Charter and EU law generally, see O. De Schutter, 'Le statut de la Charte sociale européenne dans le droit de l'Union européenne', op. cit. For earlier studies, see J.-F. Akandji-Kombé, 'Charte sociale et droit communautaire', in J.-F. Akandji-Kombé and S. Leclerc (eds), *La Charte sociale européenne*, Brussels, Bruylant, 2001, and J.-F. Flauss, 'Les interactions normatives entre les instruments de droit européen relatives à la protection des droits sociaux', in J.-F. Flauss (ed.), *Droits sociaux et droit européen. Bilan et prospective de la protection normative*, Brussels, Bruylant-Némésis, 2002, p. 87.

The failure by the Court of Justice of the European Union to take account of the European Social Charter, as such, in its decisions is of particular concern. Despite the fact that the European Social Charter has been continuously gaining in importance in recent years and the European Committee of Social Rights has built up a genuine body of case-law, this consolidation has not led the Court of Justice of the European Union to the view that it should also protect the rights enshrined in the European Social Charter. Admittedly, in the 2007 *Viking* and *Laval un Partneri Ltd* judgments,[64] the Court of Justice consented to mention the European Social Charter signed within the Council of Europe as one of its sources of inspiration in identifying the fundamental rights recognised in the EU legal system.[65] But these decisions referred only to the 1961 European Social Charter, signed by all the Member States, rather than the 1996 Revised Charter. Moreover, this allusion to the earlier version was prompted by the express reference made to it in Article 136 TEC and the fact that the right at issue – the right to take collective action, including the right to strike – is recognised in Article 28 of the EU Charter of Fundamental Rights.

Recent case-law certainly shows an encouraging contrast to the Court's unwillingness, in earlier cases,[66] to take the European Social Charter as an instrument of reference for developing fundamental rights in European Union law. However, the European Social Charter is still taken into consideration by the Court of Justice only to the extent that it can be used to clarify rights referred to in the Charter of Fundamental Rights of the European Union, which partly draws upon it for its Chapter IV on 'Solidarity'.[67] The tribute paid, if tribute it is, is circumspect to say the least, and the reference is indirect.[68] Furthermore, so far at least, the obligation, arising out of a combined reading of the third subparagraph of Article 6.1 TEU and Article 52.7 of the Charter of Fundamental Rights, to take account of the 'sources' from which the wording of the Charter of Fundamental Rights is derived (found in the relevant 'explanations') when interpreting this Charter, has not been reflected in Court of Justice decisions in the form of consideration of the interpretation given by the European Committee of Social Rights. The Court has contented itself with referring to the articles of the European Social Charter as proof of the fundamental nature of the principles that it is highlighting.

The tendency of the Court of Justice of the European Union is thus to accept, among the fundamental social rights raised to justify such restrictions, only those rights appearing in the EU Charter of Fundamental Rights. Yet the latter is selective, excluding, for example, the right to work, the right to a fair remuneration, the right to protection against poverty and social exclusion and the

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[64] CJEC (Grand Chamber), 11 December 2007, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP*, C-438/05, and CJEC (Grand Chamber), 18 December 2007, *Laval un Partneri Ltd*, C-341/05.

[65] CJEC (Grand Chamber), 11 December 2007, *Viking*, op. cit., §43; CJEC (Grand Chamber), 18 December 2007, *Laval*, op. cit., §90.

[66] See CJEC, 27 June 2006, *European Parliament v. Council of the European Union*, C-540/03, §107. In this judgment, the Court refers to the European Convention on Human Rights among the sources of inspiration on which it draws to identify the fundamental rights recognised in the EU legal system and one which has long had 'special significance' (CJEC, 21 September 1989, *Hoechst AG*, Joined Cases 46/87 and 227/88, ECR, p. 2859 (§13); CJEC, 18 June 1991, *Elliniki Radiophonia Tilleorassi (ERT),* 260/89, ECR, p. 2925 (§41)) as well as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which have both been accepted by all Member States of the European Union (§37). The European Social Charter is not granted the same status. It is not so very long ago that a member of the Court actually maintained that the 'structure' of the European Social Charter was such that 'the rights set out represent policy goals rather than enforceable rights, and the States parties to it are required only to select which of the rights specified they undertake to protect' (opinion of the Advocate-General F. Jacobs, CJEC, 21 September 1999, *Albany International BV*, C-67/96, op. cit., ECR, p. I-5751).

[67] CJEU, C-579/12 RX-II, *Commission v. Guido Strack*, 19 September 2013, §26.

[68] Furthermore, the obligation, arising out of a combined reading of the third subparagraph of Article 6.1 TEU and Article 52.7 of the Charter of Fundamental Rights, to take account of the 'sources' from which the wording of the Charter of Fundamental Rights is derived (found in the relevant 'explanations') when interpreting this Charter, has not been reflected in Court of Justice decisions in the form of consideration of the interpretation given by the European Committee of Social Rights. The Court has contented itself with referring to the articles of the European Social Charter as proof of the fundamental nature of the principles that it is highlighting.

right to housing, which are nevertheless expressly recognised in the Revised European Social Charter.[69] This selectiveness is explained by a concern on the part of the drafters of the Charter of Fundamental Rights to respect the instructions given by the Cologne European Council of 3-4 June 1999 to the effect that 'account should […] be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), *insofar as they do not merely establish objectives for action by the Union*' (author's emphasis).[70] However, combined with an out-of-date interpretation of the distinction between civil and political rights on the one hand and economic and social rights on the other (although the understanding of the latter had progressed considerably over the past twenty years, and their justiciability was widely recognised),[71] the upshot of this approach was the adoption of a charter with serious omissions in the field of social rights that fell well short of Council of Europe standards.

This is compounded by a very timorous interpretation by the Court of Justice of the European Union of the circumstances in which safeguards in the Charter of Fundamental Rights that it deems to be 'principles' can be invoked. Unlike 'rights', 'principles' can be brought before the court only if reflected in 'norms': that is, according to the Charter of Fundamental Rights, they are judicially cognisable only if implemented 'by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers' and in this case solely 'in the interpretation of such acts and in the ruling on their legality'.[72] In fact, the Court of Justice of the European Union has shown in recent judgments that there are strict conditions governing the circumstances in which 'principles' can be invoked,[73] in practice preventing these 'principles' from having any effect other than promoting a consistent interpretation of the acts implementing them.[74] The very terminology of

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[69] See Articles 1, 4, 30 and 31 respectively of the Revised European Social Charter. The 'right to engage in work and to pursue a freely chosen or accepted occupation' recognised by Article 15.1 of the Charter of Fundamental Rights of the European Union does not mean that EU institutions or Member States acting within the ambit of EU law have to 'accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment', as required by the first subparagraph of Article 1 of the Revised European Social Charter. While the other safeguards contained in this article are taken into account in the EU Charter of Fundamental Rights (see Article 29 of the latter for access to the free employment services referred to in the third subparagraph of Article 1 of the Revised European Social Charter, and Article 14.1 of the Charter of Fundamental Rights for the right to vocational guidance and training), this fundamental guarantee that steps will be taken to ensure the right to work is thus missing. As regards the right to housing, the EU Charter of Fundamental Rights states in Article 34.3 that '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'. This offers less than the wording of Articles 30 and 31 of the Revised European Social Charter.

[70] Cologne European Council, 3-4 June 1999, Conclusions of the Presidency, Annex IV: European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union.

[71] To mention just three major contributions to a literature that has become extremely extensive, see Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge, Cambridge University Press, 2009; Fons Coomans (ed.), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*, Antwerp-Oxford, Intersentia, 2006; Bertrand G. Ramcharan (ed.) *Judicial Protection of Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Leiden-Boston, 2005.

[72] Article 52.5 of the Charter of Fundamental Rights of the European Union in the revised version adopted on 12 December 2007 for inclusion in the Treaty on European Union, *OJ*, C 83 of 30.3.2010.

[73] CJEU (Grand Chamber), 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, §§45 and 47 (concerning Article 27 of the Charter, 'Workers' right to information and consultation within the undertaking', which provides that workers must, at different levels, be guaranteed information and consultation in the cases and under the conditions provided for by EU law as well as by national laws and practices); CJEU (Fifth Chamber), 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350 (concerning Article 26 of the Charter, covering the right of persons with disabilities to benefit from measures designed to ensure their integration).

[74] CJEU (Grand Chamber), 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233 (interpretation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents in the light of the importance attached to housing assistance by Article 34 of the Charter of Fundamental Rights of the European Union).

Court of Justice decisions on protection of fundamental social rights bears the mark of the Court's reluctance to enshrine them fully: observers get confused by the distinctions between 'rights', 'principles' and 'particularly important principles of Union social law'[75] (the latter term indicating differences of opinion within the Court of Justice when it comes to granting social rights full status as fundamental rights).[76]

3. Conflicts between EU law and the requirements of the European Social Charter: a real risk

The reluctance of the Court of Justice of the European Union to take social rights seriously creates a specific weakness in the European Union legal system, since it is perfectly conceivable that a Member State might be required, under obligations arising out of its membership of the European Union, to cease safeguarding some fundamental social rights, or at least to cease doing so to a certain standard, although by providing this safeguard it could claim to be fulfilling its obligations under the European Social Charter.

Of course, the risk of conflict must not be overestimated. There is no question of conflict in fields where EU law obliges Member States merely to comply with minimum requirements. This is the case for the guidelines based on Article 153 TFEU for achieving the objectives laid down in Article 151 TFEU for social policy that are issued by the European Union and Member States 'having in mind', when they determine these objectives, 'fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers'.[77]

Nor can we, strictly speaking, point to a risk of conflict just because, for some fifteen years now, policy processes within the European Union have been encouraging modernisation of social protection and changes in labour law for more 'activation' of social security benefits by making them conditional on taking certain training courses or providing proof of job-seeking.[78] This development, conveniently encapsulated by the term 'active social state', may increase the risk of tensions, since

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[75] S. Robin-Olivier, 'La contribution de la Charte des droits fondamentaux à la protection des droits sociaux dans l'Union européenne : un premier bilan après Lisbonne', *Journal européen des droits de l'Homme*, 2013, No. 1, pp. 109-134. We should note the slight change in terminology in a judgment of 19 September 2013 in which the Court of Justice states: 'the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law, *affirmed* by Article 31(2) of the Charter, which the first subparagraph of Article 6(1) TEU recognises as having the same legal value as the Treaties' (author's emphasis). The order of precedence of 'principles of Union law' and the Charter of Fundamental Rights here seems – at last – to have been reversed. CJEU, C-579/12 RX-II, *Commission v. Guido Strack*, 19 September 2013, §26.

[76] S. Robin-Olivier, op. cit.

[77] In order to achieve the objectives for European Union social policy set out in Article 151 TFEU (formerly Article 136 TEC), the European Parliament and the Council 'may adopt […] by means of directives, minimum requirements for gradual implementation' (Article 153.2(b) TFEU). The second indent of Article 153.4 TFEU further specifies that provisions adopted pursuant to this article 'shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties'.

[78] An extensive literature has started to grow up around this transformation. Among the best studies, see Anton Hemerijck, *Changing Welfare States* (Oxford, Oxford University Press, 2013), pp. 51-85; J.T. Weishaupt, *From the Manpower Revolution to the Activation Paradigm: Explaining Institutional Continuity and Change in an Integrating Europe* (Amsterdam, Amsterdam University Press, 2011); Anton Hemerijck, 'Two or three waves of welfare state transformation?', in N. Morel, B. Palier and J. Palme (eds), *Towards a Social Investment Welfare State? Ideas, Policies and Challenges* (Bristol, Policy Press, 2012), pp. 33-60; Pascale Vielle, Philippe Pochet and Isabelle Cassiers (eds), *L'Etat social actif. Vers un changement de paradigme ?* (Brussels, PIE-Peter Lang, 2005); Sylvie Morel, Les logiques de la réciprocité. Les transformations de la relation d'assistance aux États-Unis et en France (Paris, Presses universitaires de France, Le Lien social, 2000). Other comparisons also bring to light the diversity of activation models that have been pursued in different jurisdictions: see, for example, A. Serrano Pascual and Lars Magnusson (eds), *Reshaping Welfare States and Activation Regimes in Europe* (Brussels, PIE-Peter Lang, 2007); W. Eichhorst, O. Kaufmann, R. Konle-Seidl and H.-J. Reinhard (eds), *Bringing the Jobless into Work? Experiences with Activation Schemes in Europe and the U.S.* (Berlin, Springer, 2008). For Belgium, see Daniel Dumont, *La responsabilisation des personnes sans emploi en question* (Brussels, La Charte, 2012).

the European Committee of Social Rights has expressed some doubt as to the compatibility of activation of social security benefits with an individual's freedom to enter freely upon an occupation.[79] However, this takes the form of guidelines for Member States under the Europe 2020 strategy. These guidelines are recommendations that are supposed to be taken into account in their employment policies and more specifically through adoption of peer-reviewed national reform programmes: they are policy incentives rather than legal constraints.[80] This is therefore not, strictly speaking, a conflict of norms, even if the formal distinction between legal norms and policy recommendations here shows its limitations.

The risk of conflict is more obvious when Member States' concern to comply with the interpretation given by the Court of Justice of the European Union of the economic freedoms recognised by the EU treaties leads them to limit the protection of social rights, as illustrated by the above-mentioned repercussions of the *Laval* decision in cases before the European Committee of Social Rights. It may happen that, in given situations, the balance between economic freedoms and social rights is determined differently by the European Social Charter on the one hand and EU law on the other, and the Committee of Social Rights and the Court of Justice of the European Union therefore adopt different attitudes to the balance to be struck between these conflicting values. It must also be remembered that the case-law of the European Committee of Human Rights is continually changing: for States Parties to the Charter it may have the effect of highlighting obligations whose scope and effect was not necessarily foreseeable at the outset from the text itself.

In other fields covered by the Revised European Social Charter, it is harmonisation measures adopted in the European Union that create a risk of conflict. This is particularly true of measures taken to establish the internal market on the basis of Articles 114 and 115 TFEU.[81] This means that if such European legislation protects fundamental social rights to a lower standard than that provided for in the 1961 European Social Charter – or its revised version – Member States will no longer be able to comply with their obligations under the Charter without contravening their obligations under EU law.[82]

In fact the safeguards of the Revised European Social Charter go well beyond the fields covered by Article 153 TFEU – fields in which the European Union can support and complement the action of Member States, for example by adopting directives containing minimum requirements and by ruling

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[79] According to the European Committee of Social Rights, a worker's right to earn his or her living in an occupation freely entered on (Article 1.2 of the European Social Charter (wording unchanged in the revised version)) may be an obstacle to sanctioning persons whose unemployment results from refusal to take up proposed employment when this employment does not correspond to the person's occupational qualifications: see *Conclusions XVI-1* (2002), p. 11 (United Kingdom) and p. 98 (Belgium).

[80] The employment policy guidelines are adopted on the basis of Article 145 of the Treaty on the Functioning of the European Union, which requires Member States and the European Union to work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union. The most recent guidelines include a Guideline 7 for increasing labour market participation of women and men, reducing structural unemployment and promoting job quality. It states, amongst other things, that: '[a]ctivation is key to increasing labour market participation. Member States should integrate the flexicurity principles [...] into their labour market policies and apply them [...] with a view to increasing labour market participation and combating segmentation, inactivity and gender inequality, whilst reducing structural unemployment. Measures to enhance flexibility and security should be both balanced and mutually reinforcing. Member States should therefore introduce a combination of flexible and reliable contractual arrangements, active labour market policies, effective lifelong learning, policies to promote labour mobility, and adequate social security systems to secure labour market transitions accompanied by clear rights and responsibilities for the unemployed to actively seek work.' See Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States (2010/707/EU), *OJ*, L 308 of 24.11.2010, p. 46.

[81] For an example concerning the right to protection of health (Article 11 of the European Social Charter), see below.

[82] See, for example, C. Sachs-Durand, 'Comparaison de la Charte sociale européenne et des règles sociales de l'Union européenne', in *Les droits sociaux dans les instruments européens et internationaux. Défis à l'échelle mondiale*, Nikitas Aliprantis (ed.), Brussels, Bruylant, 2009, pp. 253-265.

out any harmonisation measures. Thus, for example, Article 11 of the Revised European Social Charter guarantees the right to protection of health. The European Committee of Social Rights decided, 'in view of the threat to health represented by diseases related to food and the recent outbreaks of such diseases, in particular the new variation Creutzfeldt-Jakob disease, as well as the emergence of new food products derived from biotechnology, [...] to look at food safety measures in all states parties to the Charter. It recalls that under Article 11 states have a responsibility to ensure a high degree of safety in this area for their populations.'[83] The undertaking made by EU Member States to respect this right could have a bearing on, for example, the rules adopted within the European Union concerning use of genetically modified micro-organisms[84] or product safety,[85] in the form of harmonisation measures not confined to laying down minimum requirements.

The risk that conflicts between EU law and the European Social Charter will increase in future should not therefore be played down: solutions must be found that allow both sets of norms to coexist in harmony.[86]

IV. Conclusion

The landscape of European social law has undergone far-reaching changes since the European Social Charter entered into force fifty years ago. Given the imperatives of, nowadays global, competition and the need to maintain the viability of social security systems in an ageing Europe, labour law has become more flexible: broadly standardised by the late 1970s, employment conditions have now been split up into a range of varying arrangements, including special arrangements for young workers to promote their entry into the labour market. The economic and financial crisis has led to a significant rise in inequality, from which few European states have been exempt. Lastly, economic integration within the European Union has sometimes been perceived as an additional threat to fundamental social rights, since businesses' freedom of establishment and freedom to provide services could not only weaken the bargaining position of workers' representatives, but also put pressure on the regulatory capacities of EU Member States in fields covered by the Charter: the risks of conflict are multiplying.

These are the challenges to which interpretation of the European Social Charter has had to rise; this is the transformation to which it has had to react. The way in which the European Committee of Social Rights has responded today enables it to support changes in European States' labour law and social law by managing them on the basis of the principles laid down in the Charter. This is an urgent task. More even than international competition, and more even than the economic and financial crisis, it is a crisis of legitimacy that is threatening European societies: a lack of trust in governments and the emergence of doubts as to their ability to resist pressure from entrenched economic interests. It is this political crisis that should be of concern to us now, much more so than the economic or the legal crisis: rooting our response in scrupulous respect for the Charter, as a set of objectives that we have undertaken to pursue collectively, is the best way of overcoming this crisis.

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[83] European Committee of Social Rights, *Conclusions XVI-2*.

[84] Council Directive 90/219/EEC of 23 April 1900 on the contained use of genetically modified micro-organisms. See also Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, *OJEC,* L 106 of 17.4.2001.

[85] Council Directive 92/59/EEC of 29 June 1992 on general product safety, amended by Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001.

[86] For a set of proposals on how to do this, see Olivier De Schutter, *The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights*, Study for the Committee on Constitutional Affairs (AFCO) of the European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2016.