THE EUROPEAN PILLAR OF SOCIAL RIGHTS AND THE ROLE OF THE EUROPEAN SOCIAL CHARTER IN THE EUROPEAN UNION LEGAL ORDER

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European Social Charter | Charte sociale européenne

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Summary

This study aims to explore the contribution of the European Pillar of Social Rights (EPSR), endorsed in November 2017, to the protection and promotion of social rights in the European Union, and how synergies could be built in the future with the European Social Charter adopted within the Council of Europe. In order to do so, it first describes the protection of fundamental social rights in the EU (part I). It then addresses the added value of the European Pillar of Social Rights (part II). Finally, it discusses how the Pillar could strengthen its links with the European Social Charter (part III). As the main instrument for the protection of social rights on the European continent, to which all EU Member States are parties, the European Social Charter should guide future efforts, seizing on the opportunity represented by the adoption of the EPSR, to strengthen social rights in European integration.

Although the protection of fundamental social rights in the European Union legal order has been significantly improved since the late 1980s, it still presents major deficits. Part I of this study highlights four deficits in particular. First, the EU Charter of Fundamental Rights has provided the main reference point for the protection of fundamental rights in the EU's legal order since it was proclaimed in 2000. However, while certainly a major improvement in comparison to the earlier situation, the Charter essentially presents the *acquis* of fundamental rights in the European Union. As such, it is selective and it remains provisional. In particular, a number of social rights (guaranteed either by the European Social Charter[1] or by UN human rights treaties) have been omitted from the Charter of Fundamental Rights. The drafters of the Charter were instructed not to include social rights that were considered to be merely "programmatic" -- setting political objectives, rather than guaranteeing claimable entitlements. The result was, however, that some major gaps remain in the catalogue of rights they adopted.

Second, the status of certain social provisions in the Charter of Fundamental Rights remains debated. Certain social guarantees are considered to constitute "principles", rather than "rights". This distinction was reinforced when, in 2007, the horizontal provisions of the Charter were revised in order to allow for the integration of the Charter in the European treaties. The distinction between "rights" and "principles" may have significant impacts in the future developments of the case-law of the Court of Justice of the European Union. It may discourage the Court from imposing on the EU institutions positive duties to promote the guarantees listed in the Charter. It may also provide the Court with a justification for refusing to assess the validity of EU secondary legislation against the requirements of the Charter.

Third, the EU has been highly selective in defining its relationship to international human rights instruments ratified by the EU Member States, and this selectivity has particularly problematic consequences for the status of fundamental social rights. The EU recognizes a "special significance" to the European Convention on Human Rights. The Court of Justice of the European Union also has sought inspiration, in developing the general principles of Union law which it ensures respect for, from the International Covenant on Civil and Political Rights and from the Convention on the Rights of the Child. In contrast, the provisions of the European Social Charter that do not correspond to guarantees listed in the EU Charter of Fundamental Rights are not considered to constitute an authoritative reference point. Moreover, in contrast to the status of the jurisprudence of the European Court of Human Rights (which the Court of Justice of the European Union in general treats as authoritative), the interpretation by the European Committee of Social Rights of the European Social Charter is not considered binding or even persuasive. This imbalanced approach persists despite the fact that a number of provisions of the Charter of Fundamental Rights have been inspired by (and replicate some of the wording of) provisions of the European Social Charter.

1. The original instrument was signed by thirteen member States of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965 (CETS n° 35; 529 UNTS 89). The Revised European Social Charter (CETS No 163) was opened for signature in Strasbourg on 3 May 1996, and entered in force on 1 July 1999. The Revised Charter does not bring changes to the control mechanism of the original Charter but it enriches the list of the rights protected. In this study, the expression "European Social Charter" refers to the 1996 version; where reference is made to the earlier instrument, the expression "1961 European Social Charter" is used.

Fourth and final, the new social and economic governance established in the EU following the public debt crisis of 2009-2012 did not take into account until recently the impacts of fiscal and budgetary measures on social rights. Whether in the European Semester, in the implementation of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), in the "enhanced surveillance" procedure for States threatened by serious economic and budgetary difficulties, or in the workings of the European Stability Mechanism, social rights have been hitherto virtually ignored. This omission had significant effects particularly in EU Member States receiving budgetary support.

Part II of the study then examines the contribution of the European Pillar of Social Rights (EPSR). It first recalls the background of the initiative. It then describes the contribution of the EPSR to the protection of social rights in the economic and social governance of the EU. For the most part, the EPSR develops existing rights, that are already part of the *acquis* of the EU, in order to further clarify their implications (and thus increase their relevance) in the current economic context, or in order to define as a "principle" a guarantee already stipulated in secondary EU legislation. Some principles of the EPSR go beyond providing a restatement, however. And the EPSR includes a number of principles that go significantly beyond the EU Charter of Fundamental Rights, even where the two overlap.

The "constitutional" significance of the EPSR, however -- its impacts on the relationships between the EU and its Member States --, lies elsewhere. On the one hand, the EPSR -- and the "convergence process" in the field of social rights it is meant to encourage -- could lead to identify the need for new legislative initiatives of the European Union. On the other hand, the EPSR could encourage the EU Member States to take action, in their own field of competences, implementing the commitments of the EPSR, thus contributing to a convergence in the fulfilment of fundamental social rights.

The EPSR is therefore a promising initiative. It shall be an important tool to ensure that social objectives counter-balance objectives of an essentially macro-economic nature in the new social and economic governance tools of the EU. Further progress could be made, however, in two areas.

First, the EPSR could be incorporated in a revised version of the Impact Assessments that accompany the legislative proposals and the most important policy initiatives filed by the Commission. Such a revision could provide an opportunity to make it an explicit duty to assess the compatibility of the measures considered with the requirements of the European Social Charter. If, in addition, such IAs were to be systematically prepared also in order to assess the potential impacts of the set of measures adopted within the European Semester and in the other tools of the EU's social and economic governance, this could significantly enhance the visibility of the European Social Charter in the EU's economic and social governance and reduce the risks of conflicts.

Second, the implementation of the EPSR could be more explicitly rights-based, by taking more explicitly into account the European Social Charter. While the proclamation of the European Pillar of Social Rights is a significant event, by which the EU institutions clearly acknowledge the need to balance macro-economic objectives and budgetary and fiscal disciplines imposed on EU Member States against the requirements of social rights, the EPSR should not be confused with a new catalogue of rights, complementing the rights of the EU Charter of Fundamental Rights in the areas insufficiently covered by this instrument: indeed, the principles of the EPSR are not enforceable in the absence of implementing measures. The European Pillar of Social Rights is thus an invitation to go further, through legislative and policy measures at both EU and Member State levels. The European Social Charter should play a major role in the future steps that shall be taken to implement the EPSR, by guiding such efforts and thus facilitating social convergence in the EU.

Part III of the study concludes with a set of proposals to ensure that synergies are established between the EPSR and the European Social Charter. It argues that the EPSR provides a unique opportunity to improve such synergies, and to make progress towards overcoming the deficits identified in part I of the study. Six proposals are made in this regard:

Proposal 1. To the extent that there is an overlap between the EU Charter of Fundamental Rights and the EPSR, strengthening the references to the European Social Charter in the commentary to the EPSR could help compensate, in part at least, for the paucity of references to the European Social Charter in the Explanations appended to the Charter of Fundamental Rights, which serve as an authoritative guide to its interpretation. The commentary to the EPSR is currently presented in the form of a Commission Staff Working Document, accompanying the March 2018 Communication from the Commission on Monitoring the implementation of the European Pillar of Social Rights. This document contains very few references to the European Social Charter, and it is entirely silent about the interpretation of the European Committee of Social Rights. In the future, references to the principles of the EPSR should refer explicitly to the provisions of the European Social

Charter to which these principles correspond. The Table of correspondences provided as an Annex to this study could serve as a departure point to that effect.

Proposal 2. The references in the European Pillar of Social Rights to the corresponding provisions of the European Social Charter should be accompanied by a recommendation to take into account their interpretation by the European Committee of Social Rights. The reference to the authoritative interpretation by the European Committee of Social Rights shall serve what is the primary objective of the European Pillar of Social Rights: to ensure social convergence in the economic and monetary union, and thereby to prevent the risk of imbalances emerging as a result of social dumping and regulatory competition in the internal market. This objective is best served by the European Union institutions and the EU Member States converging on a single interpretation of the provisions of the EPSR. It is this interpretation that the European Committee of Social Rights may provide, at least for the provisions of the Pillar (the overwhelming majority) which correspond to guarantees listed in the European Social Charter.

Proposal 3. The references to the European Social Charter and to its interpretation by the European Committee of Social Rights shall constitute a strong encouragement to the Court of Justice of the European Union to align the status of the European Social Charter with that of other international human rights instruments ratified by all the EU Member States, and to treat as authoritative its interpretation by the European Committee of Social Rights. At present, the provisions of the European Social Charter are only taken into account by the Court of Justice, as a source of inspiration for the development of general principles of Union law, to the extent that such provisions correspond to provisions of the EU Charter of Fundamental Rights. In that sense, the European Social Charter is treated as less authoritative than the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child.

The failure to incorporate the European Social Charter in the case-law of the Court of Justice of the European Union can be explained in part by the uneven levels of commitments of the EU Member States in the framework of the European Social Charter (not all EU Member States have ratified the most recent version of the European Social Charter, and not all States have accepted all the paragraphs of the European Social Charter). It also can be traced back to the traditional uneasiness of the Court of Justice to accept that social rights have immediate effects, without prejudice of the principle of conferral and of the allocation of competences between the EU and the Member States. This lack of recognition of the European Social Charter, however, constitutes a major obstacle to the establishment of a sound division of labour between the Court of Justice of the European Union and the European Committee of Social Rights, based on mutual trust between these two bodies; and it increases the risk that EU Member States shall face conflicting obligations, imposed respectively by EU law and by the European Social Charter.

An alternative scenario may emerge in the future, which would allow such mutual trust to develop and significantly reduce the potential of conflicts. As the European Social Charter shall be better recognized in the EU legal order and as its interpretation by the European Committee of Social Rights shall gradually be considered as authoritative, the risk of the EU Member States being faced with conflicting obligations shall be considerably lessened. In time, such an evolution may lead the Committee to accept a standing (albeit rebuttable) presumption of conformity with the European Social Charter of all measures adopted by the EU Member States by which they seek to comply with an obligation imposed under EU Law. This is not the case at present. Instead, in the 2010 case of *Confédération générale du travail (CGT) v. France*, the European Committee on Social Rights explicitly refused to establish such a presumption as regards compliance with the European Social Charter: it took the view 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".[2] This stands in contrast with the attitude adopted by the European Court of Human Rights vis-à-vis measures adopted by the Contracting Parties to the European Convention on Human Rights which implement Union law: the European Court of Human Rights has agreed since 2005 to establish a presumption of compatibility with the requirements of the ECHR of such measures, taking into account the status of the ECHR in EU law as well as the authority recognized by EU institutions (including the Court of Justice of the European Union) to the jurisprudence of the European Court of Human Rights.

Proposal 4. In the current situation, the budgetary discipline imposed under the "Fiscal Compact" may lead the EU Member States parties to the 2012 Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) to adopt measures that lead to violations of the European Social Charter. Article

2. European Committee of Social Rights, *Confédération générale du travail (CGT) v. France*, Complaint No. 55/2009, decision on the merits of 23 June 2010, para. 35.

3(3)(b) of the TSCG allows for certain deviations from budgetary commitments in the presence of "exceptional circumstances", defined as "an unusual event outside the control of the Contracting Party concerned". In the future, a finding by the European Committee of Social Rights that a particular measure, made in the name of fiscal consolidation, leads to a situation that is not in conformity with the European Social Charter, should be treated as such an "exceptional circumstance". It should thus allow a deviation from the budgetary commitments of that State. This is the only way to ensure that a State party to the TSCG shall not face conflicting obligations, imposed respectively by the TSCG and by the European Social Charter.

Proposal 5. Impact Assessments are currently prepared to accompany the legislative proposals filed by the Commission as well as its major policy initiatives. The fundamental rights component of such IAs has been made more visible since 2005, by reference to the Charter of Fundamental Rights. The adoption of the European Pillar of Social Rights provides an opportunity to further strengthen the social rights component of such IAs. This could be achieved not only by reference to the EPSR, but also by an explicit reference to the European Social Charter.

In addition, such "second-generation" IAs, strengthened to include a more robust social rights component, should be seen as a tool to ensure greater social convergence in the EU, by guiding the macro-economic and budgetary choices in the social and economic governance of the Economic and Monetary Union (EMU). With that objective in mind, IAs should in the future also be prepared in order to assess the Stability or Convergence Programmes presented by the EU Member States as well as the country-specific recommendations (CSR) addressed to Member States in the European Semester cycle. They also should serve to assess prescriptions addressed to countries under the "enhanced surveillance" mechanism for countries of the Eurozone facing or threatened by, serious financial and budgetary difficulties (under Regulation No. 472/2013), so as to ensure that the structural measures these countries adopt (measures which, according to the terms of Regulation No. 472/2013, should be "aimed at addressing the sources or potential sources of difficulties" their economies and public finances encounter (Article 3(1)) do not lead to violations of fundamental social rights. IAs including a social rights component, finally, should allow to assess the Memoranda of Understanding negotiated and signed by the European Commission acting on behalf of the European Stability Mechanism (ESM) with the countries granted financial assistance, as such Memoranda of Understanding define the conditionalities attached to the provision of such assistance.

By thus revisiting the scope of Impact Assessments and their content, the requirements of the European Social Charter, as interpreted by the European Committee of Social Rights, would be effectively taken into account in the design and implementation of structural reforms required under the EU's social and economic governance framework. As the "Greek cases" presented to the European Committee of Social Rights illustrate, this is the only means to ensure that the States concerned shall not be faced with conflicting obligations. The institutions of the EU are already bound to comply with the Charter of Fundamental Rights in the negotiation of such reform programmes. It would be consistent with this duty to identify means to better take into account fundamental social rights in that context. Since the reference to the EU Charter of Fundamental Rights alone is not sufficient to avoid all violations of social rights (due to the gaps of the Charter of Fundamental Rights in the range of social rights covered), the IAs should also consider the impacts on the ability of the State concerned to implement the European Pillar of Social Rights, and to comply with its duties under the European Social Charter.

Proposal 6. Most of the provisions of the European Pillar of Social Rights require to be implemented not by the EU (or not by the EU only), but (also) by the EU Member States. The process of convergence encouraged by the EPSR would be significantly facilitated if all EU Member States ratified the most recent version of the European Social Charter and accepted all its provisions; or, if that cannot be achieved, if they agreed on a number of key paragraphs that they all accept as binding. Indeed, the Commission has already noted that the ratification by the EU Member States of relevant international instruments figures among the tools that could support the implementation of the principles of the European Pillar of Social Rights. While most references in this regard are to ILO conventions, the commentary of Principle 12 of the EPSR (Social Protection) includes a reference to the contribution to the implementation of the EPSR that could result from the ratification of the European Social Charter and from the extension of the list of accepted provisions by Member States. This is a welcome invitation from the Commission, that should receive wide support.

Introduction

This study aims at exploring the relationship between the European Pillar of Social Rights, proclaimed in November 2017 by the institutions of the European Union, and the European Social Charter, with a view to identifying potential synergies. The study first recalls the framework for the protection of fundamental social rights in the European Union's legal order (Part I). It identifies four deficits in this regard. One of these deficits is that the new social and economic governance established in the EU following the public debt crisis of 2009-2012 did not take into account until recently the impacts of fiscal and budgetary measures on social rights. Social rights play a role neither in the European Semester, nor in the implementation of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), nor in the "enhanced surveillance" procedure for States threatened by serious economic and budgetary difficulties, nor in the workings of the European Stability Mechanism: until recently, they were almost entirely ignored in these different mechanisms. This omission had significant effects particularly in EU Member States receiving budgetary support, and the European Committee of Social Rights found in a number of cases that, as a result, measures adopted by EU Member States to comply with the requirements of budgetary discipline within the EU could be incompatible with the European Social Charter.

It is to this deficit that the adoption of the European Pillar of Social Rights (EPSR) sought to respond. Part II of this study examines the contribution of this initiative to the protection of fundamental social rights in the EU. It first recalls the background of the initiative. It then describes the contribution of the EPSR to the protection of social rights in the economic and social governance of the EU.

For the most part, the EPSR develops existing rights, that are already part of the *acquis* of the EU, in order to further clarify their implications (and thus increase their relevance) in the current economic context, or in order to define as a "principle" a guarantee already stipulated in secondary EU legislation. The EPSR goes beyond the existing *acquis*, however. It includes a number of principles that go significantly beyond the EU Charter of Fundamental Rights, even where its principles overlap with guarantees stipulated by the Charter. In the future, the EPSR -- and the "convergence process" in the field of social rights it is meant to encourage -- could lead to identify the need for new legislative initiatives of the European Union. It could also encourage the EU Member States to take action, in their own field of competences, implementing the commitments of the EPSR, thus contributing to a convergence in the fulfilment of fundamental social rights.

Part III of the study concludes with a set of proposals to ensure that synergies are established between the EPSR and the European Social Charter. It argues that the EPSR provides a unique opportunity to improve such synergies, and to make progress towards overcoming the deficits identified in part I of the study. It makes six proposals in this regard.

The protection of fundamental social rights in the European Union legal order

The European Court of Justice (now the Court of Justice of the European Union) has incorporated fundamental rights in its case-law since the early 1970s, in response to the concerns expressed by domestic constitutional courts that the supremacy of European law might otherwise undermine the protection of fundamental rights under national constitutions. In the famous *Nold* judgment of 14 May 1974, the Court described its sources of inspiration for defining these rights as follows:

> "In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, *international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law*".[3]

That case-law was later endorsed by the other institutions, and it was gradually incorporated in the European treaties. The gradual constitutionalisation of fundamental rights in the EU legal order culminated in the proclamation of the Charter of Fundamental Rights at the Nice Summit of December 2000. Though initially adopted as a non-binding document -- a political statement, published in the "C" series of the Official Journal dedicated to non-legislative documents[4] --, the Charter was later included, following a few adaptations of its "horizontal clauses"[5], in the European Treaties. The Treaty of Lisbon, which entered into force on 1 December 2009, provides that the Charter shall have the same legal force as the treaties.[6] Importantly, however, the EU Treaty reaffirms that it is the duty of the Court of Justice to develop fundamental rights beyond the Charter, as part of the general principles of Union law which it ensures respect for. Article 6(3) of the EU Treaty states:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Since the Treaty of Lisbon therefore, in all situations where the Member States act in the scope of application of EU law (in particular, when they implement a directive, apply a regulation, execute a decision or restrict an economic freedom stipulated in the Treaties), they are bound to comply with the Charter of Fundamental Rights as well as with fundamental rights recognized as general principles of Union law.[7] In the area of social rights however, four major deficits remain.

3. Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, para. 13 (emphasis added).
4. OJ C 364 of 18.12.2000, p. 1.
5. Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 1.
6. Article 6(1) of the Treaty on the European Union provides that: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".
7. Article 6(1) and (2) TEU, respectively.

1. The EU Charter of Fundamental Rights: an unfinished task

A first deficit concerns the list of social rights, freedoms and principles codified in the EU Charter of Fundamental Rights. Significant gaps appear, in particular, when this list is compared with the 1961 and 1996 versions of the European Social Charter. Although the EU Charter of Fundamental Rights goes beyond the European Social Charter in certain areas,[8] the Table presented in the Appendix illustrates that, for the most part, the European Social Charter provides a far more comprehensive protection of social rights than the EU Charter.

Some of the discrepancies result from the fact that the EU has not been attributed competences in the area concerned. Thus for instance, the EU Charter is almost entirely silent about the right to a fair remuneration, which Article 4 of the European Social Charter aims to guarantee.[9] It says nothing about the right to childcare services, mentioned in Article 17 of the European Social Charter (which guarantees the right of mothers and children to social and economic protection), although the 'legal, economic and social protection' of the family stipulated in Article 33(1) of the EU Charter of Fundamental Rights partly compensates for this. And whereas the right to healthcare, to social assistance as a means to combat social exclusion, or the right to housing, are all mentioned in the EU Charter of Fundamental Rights, the wording chosen shows that the drafters of these provisions were uncomfortable with the idea of guaranteeing certain entitlements in the field of application of EU law (the only field in which the EU Charter of Fundamental Rights applies, in accordance with Article 51) where the subject-matter is to regulated by the Member States.[10] This explains many of the silences, or the hesitant formulations ("the Union recognises and respects the right X, in accordance with the rules laid down by Union law and national laws and practices") adopted by the drafters of the EU Charter of Fundamental Rights in these areas.

This cautious approach towards social rights covering areas in which the EU has not been attributed competences is largely based on a misunderstanding. It is premised on the idea that to guarantee a right is necessarily to have the power to take measures that will implement it. But this is incorrect. A commitment to respect a social right may imply, more modestly but at the same time importantly, that the Union commits not to restrict the ability of the Member States, which are competent in this regard, to adopt such measures aiming at the realization of the right in question. In order to respect a social right, there is no need for the EU to have the power to take measures that fulfil the said right: all that is required that it abstains from taking measures that might affect their implementation.

Other gaps stem from a deliberate choice not to define as a fundamental right a guarantee that is protected under EU law only through secondary legislation. This is the case, in particular, as regards some provisions of the 1996 European Social Charter that were directly inspired by EU legislation. In its revised version from 1996 for instance, Article 8 of the European Social Charter on the right of employed women to the protection of maternity to a large extent summarizes what the 1992 directive on **safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding**[11]**; yet, it is not replicated, as such,**[12] **in the EU Charter of Fundamental Rights.** Similarly, Article 25 of the Revised European Social Charter recognizes the right of workers to the protection of their claims in the event of the insolvency of their employer**:**

8. This is the case, for instance, insofar as the EU Charter refers in Article 36 to services of general economic interest, or insofar it provides for environmental protection and for consumer protection. To some extent, the case-law of the European Committee of Social Rights has developed to include these concerns in the European Social Charter. For instance, taking into account "the growing link that states party [*sic*] to the Charter and other international bodies (...) make between the protection of health and a healthy environment", the European Committee of Social Rights has interpreted Article 11 of the Charter (right to protection of health) as including the right to a healthy environment (European Committee of Social Rights, Complaint No. 30/2005, *Marangopoulos Foundation for Human Rights vs. Greece*, Decision on the merits of 6 December 2006, para. 195).
9. However, the EU Charter of Fundamental Rights does refer to one dimension of this right, which concerns the right to equal remuneration for women and men. Moreover, a remuneration that would be below the poverty rate and thus would not allow the worker to life a decent life, may be considered as contrary to human dignity or to constitute a inhuman or degrading treatment, in violation of Articles 1 and 4 of the EU Charter of Fundamental Rights respectively (see, in support of that interpretation, Eur. Ct. HR (GC), *M.S.S. v. Belgium and Greece*, judgment of 21 Jan. 2011 (Appl. 30696/09), para. 263 (where the Court concludes that the Greek authorities violated Article 3 ECHR, by failing to provide support to an asylum-seeker 'living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs').
10. Although Art. 153(1)(j) TFEU does mention the 'combating of social exclusion' among the fields in which the action of the Union may complement and support that of the Member States, this is an area in which the treaties have not provided for the adoption of EU legislation (see Art. 153(2) TFEU).
11. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1–7.
12. Here again, the 'legal, economic and social protection' of the family stipulated in Article 33(1) of the EU Charter of Fundamental Rights may compensate for this. This illustrates the importance of the Court of Justice interpreting the EU Charter of Fundamental Rights in the light of the European Social Charter and the case law of the European Committee of Social Rights. See also, as regards Case C-116/06, *Sari Kiiski*, judgment of 20 September 2007.

although, again, the EU Charter of Fundamental Rights does not include a similar provision, this is an area in which EU legislation exists since 1980,[13] and it is this legislative framework that directly influenced the revision of the European Social Charter in 1996.

Finally, some omissions of the EU Charter of Fundamental Rights in the area of fundamental social rights stem from a narrow understanding of what constitutes social rights, as opposed to mere 'objectives for action by the Union', to reiterate the distinction used by the Conclusions adopted at the 3-4 June 1999 Cologne European Council which established the body in charge of drafting the Charter of Fundamental Rights.[14] The most notorious example is the right to work. The EU Treaty lists 'full employment' as part of the objectives of the Union, and Article 9 TFEU provides that the Union shall take into account requirements linked to the promotion of a high level of employment' in defining and implementing its policies and activities. Nevertheless, whereas Article 1 para. 1 of the European Social Charter commits States parties to achieve and maintain 'as high and stable a level of employment as possible, with a view to the attainment of full employment', the equivalent provision in the EU Charter of Fundamental Rights only refers in fact to the freedom of everyone to engage in work (replicating Article 1 para. 2 of the European Social Charter), without implying a duty of the State to aim to provide employment to all: although other provisions of the EU Charter refer to the right of access to placement services free of charge (Article 29) or to the right to protection against unjustified dismissal (Article 31), these are only specific dimensions of the broader set of duties that correspond to the fulfilment of the right to work as a human right.[15]

2. Social "rights" and social "principles"

A second deficit has its origins in the debates that led to include certain social provisions in the EU Charter of Fundamental Rights. In part because certain employers' organisations opposed the incorporation of social rights in the Charter, arguing that social rights required positive action from governments,[16] and in part because of the scepticism towards such rights expressed by some members of the Convention in charge of drafting the Charter, the members of the Convention who were in favour of an ambitious approach to social rights sought to convince the other members that social rights could be more than purely "programmatic" provisions, even where the objectives they were setting were too vague to be expressed as self-standing "rights" that courts could guarantee in the absence of any implementation measure. The idea of "normative justiciability" emerged from this debate. According to this doctrine, although a right such as the right to housing or the right to a healthy environment could require implementation measures to be given concrete meaning, such rights are not purely programmatic; instead, they can be invoked in judicial contexts since they can "be opposed to an action that would directly run counter [to such a right]"; they can be relied on by a court "when it must combine different fundamental rights between them"; finally, "when concrete implementation measures have been adopted, the right can be opposed to acts that would challenge the core content of such measures".[17]

The significance of social rights thus understood is that, though the full implications can only be defined by further implementing acts, they allow courts to oppose measures that are clearly inconsistent with the general objective that they set; and that, once certain measures of implementation have been taken, such social rights can be relied upon to oppose retrogressive actions challenging such measures.

The Convention on the Future of Europe that was established to prepare the Treaty establishing a Constitution for Europe (February 2002-July 2003) decided to make this compromise solution explicit. Among the various "adaptations" introduced in the Charter in order to allow for its inclusion in the Treaties, Article 52 of the Charter was completed to include a paragraph 5 to clarify that:

13. See Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer, OJ L 283 of 28.10.1980, p. 23. This directive was subsequently amended by Council Directive 87/164/EEC (OJ L 66 of 11.3.1987, p. 11) and by Directive 2002/74/EC of the European Parliament and of the Council (OJ L 270 of 8.10.2002, p. 10). These successive changes were consolidated in Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36–42.
14. Conclusions of the Cologne European Council, 3-4 June 1999, Annex IV.
15. The right right of access to placement services free of charge reflects Art. 1(3) of the European Social Charter, which commits States parties to 'establish or maintain free employment services for all workers'. Article 24 of the European Social Charter recognizes the right of workers to protection in cases of termination of employment; and the protection against unjustified dismissal is considered by the UN Committee on Economic, Social and Cultural Rights as part of the right to work mentioned in Article 6 of the International Covenant on Economic, Social and Cultural Rights (see General Comment No. 18: The right to work (Art. 6 of the Covenant), UN doc. E/C.12/GC/18 (6 Feb. 2006), paras. 34-35).
16. CBI submission to the Convention on the Charter (12 April 2000), CHARTE 4226/00 CONTRIB 101.
17. See the contributions of Guy Braibant, the representative of the French executive to the Convention, presented in May 2000 (CHARTE 4280/00, CONTRIB 153 (2 May 2000), CHARTE 4322/00, CONTRIB 188 (19 May 2000))

> The provisions of this Charter which contain principles may be 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. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

This provision left it to the courts (under the ultimate supervision of the Court of Justice of the European Union) to determine which provisions of the Charter of Fundamental Rights were "social principles", justiciable only in combination with other instruments implementing these principles (either to assess the legality of such instruments or for their interpretation). Another challenge emerged, however, with Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, appended to the Treaty of Lisbon.[18]. Indeed, Article 1(2) of Protocol No. 30 states that "*for the avoidance of doubt*, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law". This is a deeply problematic provision, since it suggests, wrongly, that there is a perfect overlap between the "principles" and the social rights listed in Title IV ("Solidarity") of the Charter, creating the impression that none of the provisions of this title include justiciable rights. Although this clause presents itself as a mere restatement of what the Charter requires, it is in fact based on an entirely implausible reading of the Charter: the Explanations to the Charter note, for instance, that some provisions of the Charter "may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34", although Articles 33 and 34, which refer to 'Family and professional life' and to 'Social security and social assistance' respectively, are both located in Title IV of the Charter of Fundamental Rights.

The stakes of this discussion concerning the distinction between "social rights" and "social principles" should not be underestimated. First, the Court of Justice appears hesitant to impose "positive duties" on the basis of the Charter, in particular where social "principles" are concerned. Despite some nudges from its advocate generals,[19] the Court of Justice has been initially reluctant to impose positive obligations on the EU institutions on the basis of the Charter of Fundamental Rights.[20] It has more recently come to accept that certain positive obligations could be imposed on the EU legislator, for instance in the preparation of directives (which should be sufficiently detailed to ensure that fundamental rights shall not be violated by the Member States in the adoption of implementation measures[21]). It has also found that the requirement to "promote the application" of the Charter[22] may imply a duty on the Commission to proactively take into account fundamental rights in the design of memoranda of understanding with States being provided with financial assistance.[23] However, its initial reluctance may still be difficult to overcome, particularly as regards social provisions that are considered to embody "principles", taking into account the wording of article 52(3) of the Charter.

This reluctance is in contrast to general human rights law, which recognizes that human rights impose not only duties of abstention (negative duties not to adopt measures that could infringe on human rights, unless certain conditions are complied with), but also duties of action (positive duties to take measures that protect and fulfil human rights). In other terms, a commitment to human rights goes beyond accepting a prohibition:

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18. OJ 2010 C 83, p. 313. This was mistakenly referred to as an "opt-out" protocol, although it is incorrect to interpret the protocol as allowing the United Kingdom or Poland to escape from the requirements of the Charter of Fundamental Rights when acting in the field of application of EU law: see Steve Peers, 'The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights', *Human Rights Law Review*, vol. 12 (2)(2012), pp. 375-389. In the Joined Cases C-411/10 and C-493/10, the Court of Justice confirmed beyond any doubt that "Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland" (Judgment of 21 December 2011, *N.S. and M.E. and Others*, C-411/10 and C-493/10 (EU:C:2011:865), para. 119).
19. See in particular Adovate General P. Cruz Villalón in the case of *Association de médiation sociale*: "The European Union and the Member States are under an obligation to 'promote' the 'principles' set out in the Charter (Article 51(1)), and for that purpose are to adopt those 'implementing' measures which are necessary to ensure that such promotion is effective. In spite of the use of the word 'may', it is clear that this is not an absolute discretionary power, but a possibility subject, as has just been noted, to a clear obligation in Article 51(1) of the Charter, requiring the European Union and the Member States to 'promote' the 'principles'. It is clear that such promotion will be possible only through the 'implementing' acts to which Article 52 subsequently refers." (conclusion of 18 July 2013, in Case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT, et al.*, para. 60).
20. See in particular judgment of 27 June 2006, *European Parliament v. Council of the European Union*, C-540/03, EU:C:2006:429, para. 23.
21. See *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, judgment of 8 April 2014, EU:C:2014:238, para. 65 (where the Court concludes that "Directive 2006/24 [providing for the retention of data in electronic communications] does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary").
22. Art. 51(1) of the Charter of Fundamental Rights.
23. *Ledra Advertising Ltd, et al.*, Joined Cases C-8/15 P to C-10/15 P, judgment of 21 September 2016, EU:C:2016:701, para. 59 and 67.

it also involves a duty to contribute the realization of human rights, by exercising certain powers so as to maximize the enjoyment of human rights by the rights-holders.

Similarly, the Charter of Fundamental Rights is not merely a set of prohibitions. It also should serve as a tool to guide action, ensuring that the institutions of the Union exercise their competences with a view to fulfilling the provisions of the Charter. Article 51(1) of the Charter states that the institutions of the Union shall "respect the rights, observe the principles and *promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties" (emphasis added). Of course, paragraph 2 of Article 51 adds that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". That does not imply, however, that no positive obligations (duties to take action) can follow from the Charter. The Explanations accompanying the Charter clarify that "an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers". But that is not to say no such obligation exists: it is simply to recall that any such obligation as might arise would be limited to the exercise of the powers that the institutions have been attributed. Contrary to a widely held view, this dual function of human rights -- the fact that they impose both "negative" and "positive" duties -- is fully compatible with the principle of conferral, according to which the EU institutions are attributed certain limited powers by the EU Member States, the "masters" of the treaties (Article 5(1) and (2) TEU); and it is fully compatible with the principle of subsidiarity, according to which, in areas of shared competences, the EU should only take action if and in so far as the action envisaged "cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5(3) TEU).

A second problem associated with the distinction between "rights" and "principles" is that the Court of Justice appears in fact unwilling to assess the legality of EU legislation against the requirements of "principles", which it considers to be too vague and imprecise in the absence of measures of implementation. In the judgment of 22 May 2014 the Court of Justice delivered in the case of *Glatzel*, where Mr Galtzel sought to rely on Article 26 of the Charter on 'Integration of persons with disabilities',[24] the Court first recalls that, "as is clear from Article 52(5) and (7) of the Charter and the Explanations relating to the Charter of Fundamental Rights concerning Articles 26 and 52(5) of the Charter, ... reliance on Article 26 thereof before the court is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article, namely the integration of persons with disabilities".[25] In other terms, it treats Article 26 of the Charter as expressing a 'principle', rather than a 'right', so that its invocability is limited to situations in which it is combined with another instrument implementing (or violating) the said principle. The Court then draws the following implication: "although Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, *the principle enshrined by that article does not require the EU legislature to adopt any specific measure*. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such (see, to that effect, as regards Article 27 of the Charter, Case C-176/12 *Association de mediation sociale* EU:C:2014:2, paragraphs 45 and 47)".[26]

In other terms, since the integration of persons with disabilities stipulated in article 26 of the Charter is a mere 'principle', it does not require any specific measure to be adopted by the legislator of the Union; and this in turn would justify a particularly lenient assessment of whatever measure is adopted, recognizing the broad margin of appreciation of the legislature in this regard. The Court thus not only considers that 'principles' cannot be invoked in the absence of implementation measures, but also that such implementation measures can hardly be assessed against the requirements of such principles, since the latter are not self-executing. This comes dangerously close to denying any effective role for principles, beyond their political importance as guides to legislative action.[27]

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24. Article 26 is the last article of title III of the Charter ('Equality'). It provides that: "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".
25. Judgment of 22 May 2014, *Wolfgang Glatzel v. Freistaat Bayern*, C-356/12 (EU:C:2014:350), para. 74.
26. Judgment of 22 May 2014, *Wolfgang Glatzel v. Freistaat Bayern*, para. 78.
27. See also the critiques expressed by A. Bailleux and I. Hachez towards *Glatzel*: A. Bailleux and I. Hachez, 'Another look at *Glatzel*', in E. Brems and E. Desmet (eds), *Integrated Human Rights in Practice. Rewriting Human Rights* (Edward Elgar Publ., Cheltenham, 2017, pp. 351-377; and A. Bailleux, "Droits de l'homme à l'est de Vosges, valeurs à l'ouest? Les récits judiciaires de l'Europe au prisme de l'article 52 de la Charte", *Rev. trim. dr. h.*, n° 115 (2018), pp. 583-592, esp. pp. 591-592.

In conclusion, **the distinction between "rights" and "principles" may have significant impacts in the future developments of the case-law of the Court of Justice, both by discouraging the Court from imposing on the EU institutions positive duties to promote the guarantees listed in the Charter, and by providing the Court with a justification for refusing to assess the validity of EU secondary legislation against the requirements of the Charter**. As a result, and contrary both to the mandate the Cologne European Council gave to the body in charge of drafting the Charter and to the intentions guiding the inclusion of social provisions in the Charter, the 'principles' embodied in the Charter might be degraded to purely programmatic objectives, of purely political (rather than legal) significance.

3. The status of the European Social Charter

A third deficit is related to the status of the European Social Charter in the interpretation of the EU Charter of Fundamental Rights, and in the EU legal order more generally.

This status stands in sharp contrast with that of the European Convention on Human Rights, the other major human rights instruments adopted within the framework of the Council of Europe. Indeed, in order to promote consistency between the approaches of, respectively, the European Court of Justice and the European Court of Human Rights, the drafters of the Charter of Fundamental Rights sought to ensure that the rights and freedoms of the Charter that "correspond" to rights and freedoms listed in the European Convention on Human Rights would be interpreted in accordance with the case-law of the European Court of Human Rights,[28] and the Explanations appended to the EU Charter of Fundamental Rights provide the list of such correspondences.[29] No such links are made to the provisions of the European Social Charter, or to the jurisprudence of the European Committee of Social Rights. This is despite the fact that a number of provisions of the EU Charter of Fundamental Rights are inspired by the European Social Charter, and it would have served legal certainty -- as well as acknowledging the role assigned to the European Committee on Social Rights under this instrument -- to read the provisions of the EU Charter in the light of the approach followed by the European Committee of Social Rights.

This is disappointing, since the Court of Justice does occasionally refer to international human rights instruments other than the European Convention on Human Rights: it routinely relies on the International Covenant on Civil and Political Rights in areas where the European Convention on Human Rights was insufficiently comprehensive or the case-law of the European Court of Human Rights unclear[30]; it also refers to the 1989 Convention on the Rights of the Child, explaining in *Parliament v. Council*,[31] when the European Parliament sought to annul the 2003 Family Reunification Directive,[32] that, just like the ICCPR, the Convention on the Rights of the Child "binds each of the Member States".[33]

Moreover, the European Social Charter is otherwise far from being ignored within EU law. It is mentioned in Article 151 TFEU (formerly Article 136 of the EC Treaty), and the Court of Justice occasionally has acknowledged that it therefore could be relied upon in order to guide the interpretation of EU law. In the case of *Kiiski*,[34] the Court relies on the European Social Charter in order to support its interpretation of the requirements of Council Directive 92/85/EEC on the improvement to safety and health at work of pregnant workers and workers

28. Article 52(3) of the Charter provides to that effect: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". As stated by Advocate General Trstenjakin it his opinion of 22 September 2011 delivered in the Case C-411/10, *N.S.*: "under Article 52(3) of the Charter of Fundamental Rights it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR. Because the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice" (para. 148).
29. The Explanations distinguish in this regard between the articles of the Charter "where both the meaning and the scope are the same as the corresponding Articles of the ECHR", and the articles "where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider". For instance, whereas Article 9 of the Charter covers the same field as Article 12 of the ECHR on the right to marry, its scope "may be extended to other forms of marriage if these are established by national legislation", since Article 9 of the Charter does not refer to the right to marry of "men and women" and does not link the right to marry to the right to "found a family", as does Article 12 ECHR, thus leaving open the possibility that same-sex marriage shall be protected.
30. See, e.g., *Case 374/87, Orkem v Commission [1989] ECR 3283, para. 31, and Joined Cases C-297/88 and C-197/89, Dzodzi v Belgian State [1990] ECR I-3763, para. 68.*
31. Case C-540/03, *European Parliament v. Council of the European Union*, judgment of 27 June 2006, para. 37.
32. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).
33. At para. 37.
34. Case C-116/06, *Sari Kiiski*, judgment of 20 September 2007.

who have recently given birth or are breastfeeding.[35] The Court adopts a generous reading of the protection afforded by the directive, noting in this regard that

> Article 136 [of the EC Treaty] refers to the European Social Charter signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, to which in its original or revised version or both, all Member States are parties. Article 8 of the European Social Charter concerning the right of employed women to protection of maternity, aims to provide them with a right to maternity leave of at least 12 weeks (original version) or at least 14 weeks (revised version). ... In those circumstances, the right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law.[36]

Similarly, in the *Impact* case,[37] the Court of Justice was requested to provide an interpretation, in particular, of Clause 4 of the framework agreement on fixed-term work concluded on 18 March 1999 between the social partners at the Union level.[38] This Clause imposes a principle of non-discrimination between fixed-term workers and permanent workers 'in respect of employment conditions': the referring court asked whether this expression included conditions of an employment contract relating to remuneration and pensions. The Court of Justice takes the view that, at the very least, it would be unjustified to exclude entirely financial conditions such as those relating to remuneration and pensions from the notion of 'employment conditions'. Indeed, the Court notes, the European Social Charter includes among the objectives that its Contracting Parties have undertaken to achieve the right for all workers to a "fair remuneration sufficient for a decent standard of living for themselves and their families": the non-discrimination principle contained in Clause 4 of the framework agreement on fixed-term work, the Court noted, "must be interpreted as articulating a principle of Community social law which cannot be interpreted restrictively", in line with the objective of ensuring a fair remuneration stipulated in the European Social Charter.[39]

Cases such as *Kiiski* or *Impact* illustrate how the European Social Charter can operate as a guide for the interpretation of EU law, so as to encourage a reading of EU law that will, to the fullest extent possible, facilitate the attainment of the objectives the Contracting Parties have set for themselves. Indeed, the Court of Justice has occasionally found that the General Court of the European Union is under a duty to interpret EU law in the light of the EU Charter of Fundamental Rights, as well as in the light of the European Social Charter as regards those provisions of the Council of Europe Charter that correspond to rights listed in the EU Charter.[40] However, the European Social Charter still is not recognized a status similar to that of the Convention on the Rights of the Child or the International Covenant on Civil and Political Rights: the use of expressions such as "particularly important principle of European Union social law" to designate social rights listed in the European Social Charter betrays the hesitation of the Court in this regard.[41]

The reason for the reluctance of the Court of Justice to fully acknowledge the European Social Charter is probably that, in the eyes of the European Court of Justice, the undertakings of the EU Member States in the system of the European Social Charter are too varied for this instrument to provide an authoritative source of inspiration for the development of fundamental social rights in the EU legal order. Indeed, whereas all the 28 EU Member States are parties either to the 1961 European Social Charter, or to the 1996 Revised Charter,

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35. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).
36. In paras. 48-49.
37. Case C-268/06, *Impact*, judgment of 15 April 2008.
38. The framework agreement is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).
39. See paras. 113 and 114 of the judgment.
40. See, e.g., Case C-579/12 RX-II, *European Commission v. Strack*, judgment of 19 September 2013. The case raised the question whether a staff member of the European Commission could carry over more than 12 days of annual leave where he could not use his annual leave due to illness. In a judgment of 8 November 2012 in Case T-268/11 P, *Commission* v *Strack*, the General Court initially took the view that such a maximum of 12 days was acceptable, since the illness was not linked to work-related reasons arising from the performance of Mr Strack's duties. The Court of Justice decided however to set aside the judgment of the General Court. It found that the General Court failed to acknowledge "the notion of the right of every worker to paid annual leave as a principle of the social law of the European Union now affirmed by Article 31(2) of the Charter" in its interpretation of the provisions of the Staff Regulations, thus causing "an adverse effect, in particular, on the unity of European Union law" since, in accordance with Article 6(1) of the EU Treaty, the Charter of Fundamental Rights has the same legal value as the provisions of the treaties and bind the Union legislature (para. 58). The Court also notes in its judgment that Article 31(2) of the Charter "is based on Directive 93/104 and on Article 2 of the European Social Charter, ... and on point 8 of the Community Charter of the Fundamental Social Rights of Workers ..." (para. 27).
41. See, e.g., Case C-579/12 RX-II, *European Commission v. Strack*, judgment of 19 September 2013, para. 26. For a more systematic review, see Sophie Robin-Olivier, 'The contribution of the Charter of Fundamental Rights to the protection of social rights in the European Union: a first assessment after Lisbon', *European Journal of Human Rights*, n° 1 (2013), pp. 109-134 (in French).

eight EU Member States still have not joined the more recent instrument.[42] The undertakings remain uneven, moreover, since under the "à la carte" system of the European Social Charter, States acceding to the Charter may, within certain limits, choose which provisions they accept to be bound by. Moreover, the Court of Justice of the European Union has generally expressed a suspicion towards the views adopted by non-judicial bodies tasked with the interpretation of other international human rights instruments.[43]

The consequence of this position of the Court of Justice, however, is that **it is only where rights stipulated in the European Social Charter have been incorporated in the EU Charter of Fundamental Rights that they shall be taken into account as a source of general principles of Union law and thus protected by the Court of Justice**. Even in those instances moreover, the interpretation given to that instrument by the European Committee of Social Rights shall hardly be considered relevant at all.

Finally, **even where certain social rights stipulated in the European Social Charter are recognized in the EU Charter of Fundamental Rights, the Court of Justice of the European Union shall consider them, in cases of conflict, as mere exceptions to economic freedoms constitutionalized in the Treaty on the Functioning of the European Union, in practice therefore giving priority to the latter freedoms**. This may increase the risk of conflicts of interpretation between the Court of Justice and the European Committee of Social Rights, a risk that the "Laval" saga illustrated in the years 2007-2013 (see Box 1).

Box 1. The "Laval" case: labour legislation reform implementing EU law and the European Social Charter

In the well-known *Laval* judgment of 2007, the European Court of Justice took the view that it was in violation of Article 49 of the EC Treaty (guaranteeing the freedom to provide services) and the 1996 Posted Workers Directive (revised since)[44] to allow Swedish unions to pressure a service provider from another Member State to enter into negotiations with local unions with a view to concluding a collective agreement, where the collective action resorted to by unions goes beyond the aim of ensuring an acceptable level of social protection for workers.[45] The case concerned a blockade of the site nearby Stockholm where the service was to be provided by a building contractor from Latvia, which finally led the service provider to bankruptcy. Specifically, the Court of Justice took the view that allowing trade unions of a Member State to resort to collective action in order to force undertakings established in other Member States to sign the collective agreement 'is liable to make it less attractive, or more difficult', for such undertakings to exercise their freedom to provide services by posting workers in another Member State. The exercise of such industrial action therefore constitutes a restriction on this fundamental economic freedom.[46] The Court acknowledged that the right to take collective action is a fundamental right recognized under Community law, and it cited the European Social Charter to that effect.[47] It also acknowledged that respect for the right to collective action may constitute an overriding reason of public interest justifying, in principle, a

42. For the States joining the 1996 Revised Charter who were previously bound by the 1961 Charter, the undertakings accepted under the Revised Charter supersede those accepted under the 1961 Charter, although if a State accedes to the Revised Charter without accepting a provision corresponding to a provision it had accepted under the 1961 Charter, it shall remain bound by the latter undertaking (see Article B, in part III of the Revised European Social Charter).
43. See in particular, the remark made by the Court of Justice in the *Grant* case that the Human Rights Committee established as a body of independent experts under the International Covenant on Civil and Political Rights "is not a judicial institution and [its] findings have no binding force in law" (Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd*. [1998] ECR I-621 (judgment of 17 February 1998), para. 46). In this case, the Court dismisses the view that a difference of treatment on grounds of sexual orientation could constitute a discrimination on grounds of "sex" as prohibited under EU law, despite the fact that the Human Rights Committee had stated that "the reference to 'sex' in Articles 2, paragraph 1, and 26 [which are the non-discrimination provisions in the ICCPR] is to be taken as including sexual orientation". Ms Grant claimed advantages to benefit her female partner, that would have been granted had they formed an opposite-sex couple or a married couple.
44. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.
45. Case C-341/05, *Laval un Partneri Ltd.*, [2007] ECR I-11767. For useful commentaries, see A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', *Industrial Law Journal*, vol. 37 (2008), p. 126; Aravind R. Ganesh, 'Appointing Foxes to Guard Henhouses : The European Posted Workers' Directive', 15 *Columbia J. of Eur. L.*, vol. 15 (2008), pp. 123-142 ; S. Deakin, 'Regulatory competition after *Laval*', *Cambridge Yearbook of European Legal Studies*, vol. 10 (2009), pp. 581-609; J. Malmberg and T. Sigeman, 'Industrial Action and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', *Common Market Law Review*, vol. 45 (2008), p. 1115.
46. *Laval* judgment, para. 99.
47. The Court notes: 'the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union...' (*Laval* judgment, para. 90).

restriction of one of the fundamental freedoms guaranteed by the Treaty.[48] It continued, however, by noting that this right may be subject to certain restrictions, and that it must be exercised in accordance with national and Community law. The Court defines its role as having to balance the right to collective action against the freedom to provide services : "Since the Community has ... not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour".[49]

Although it acknowledged the need to balance the economic objectives of the Treaties against their social purpose, the Court considered that the obstacle to the freedom to provide services which the blockade launched by the Swedish unions could not be justified with regard to the objective of improving social protection, since this objective is already achieved by the Posted Workers Directive: 'with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.[50] In other terms, collective action cannot seek to impose obligations on employers beyond the obligations the host State must in any case impose in accordance with Article 3(1)(a) to (g) of the Posted Workers Directive. The Court thus concluded that the blockade imposed by the Swedish unions on the construction side of the company's subsidiary violates Community law and should not be allowed : Article 49 EC and Directive 96/71 preclude a trade union from resorting to collective action in order to force a service provider established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1)(a) to (g) of the said directive, more favourable conditions than those resulting from the relevant legislative provisions in the State concerned, while other terms relate to matters not referred to in Article 3 of the directive. One important element that led the Court to take this position has to do with the uncertainty resulting from the decentralized nature of the Swedish system of collective bargaining, for the service provider posting workers in that country: indeed, in the absence of 'sufficiently precise and accessible' provisions in Swedish law allowing such a service provider to know which obligations it shall have to comply with, the possibility for unions to resort to industrial action in order to force the conclusion of a collective agreement could make it in practice very difficult or impossible for the service provider to enter the Swedish market.[51]

The *Laval* decision of the European Court of Justice also addressed the Co-Determination Act initially adopted in Sweden in 1976.[52] Section 42 of this Act prohibited taking collective action with the aim of obtaining the repeal of or amendment to a collective agreement between other parties. The Swedish legislature adopted an amendment to this legislation, however, providing that the prohibition to resort to collective action to undo an existing collective agreement shall apply only if an organisation commences collective action by reason of employment relationships falling directly within the scope of the Swedish Law. In practice therefore, this 'Lex Britannia' (called thus since the legislative amendment sought to overturn a judgment concerning a container ship called the Britannia) authorized collective action against foreign service providers only temporarily active in Sweden, *even in circumstances where such service providers had concluded a collective agreement in their home State*. Perhaps predictably, the Court of Justice took the view that the 'Lex Britannia' introduced a discriminatory obstacle to the provision of services.[53] The Court noted that the 'Lex Britannia' intends 'to allow trade unions to take action to ensure that all employers

48. *Laval* judgment, para. 103. The European Court of Justice has routinely considered that compliance with fundamental rights may justify restrictions to the fundamental economic freedoms recognized under the Treaties, provided such restrictions are proportionate and do not lead to discrimination. See, e.g., Joined Cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, para. 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, para. 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and Others* [2001] ECR I-7831 ; Case C-36/02, *Omega* [2004] ECR I-9609, para. 35.
49. *Laval* judgment, para. 105.
50. *Laval* judgment, para. 108. The Posted Workers Directive includes a list of core areas in which, in a transnational posting of workers, the host Member State is bound to ensure at a minimum that service providers established in another Member State comply with the rules stipulated in the legislation of the host State. This concerns the rules pertaining to (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates, but excluding supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and (g) equality of treatment between men and women and other provisions on non-discrimination (Art. 3(1)).
51. *Laval* judgment, para. 110.
52. Lagen (1976:580) om medbestämmande i arbetslivet ou medbestämmandelagen.
53. *Laval* judgment, para. 116.

active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden', and 'to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States'.[54] But this intention – to combat 'social dumping' – did not appear to the Court to correspond to the grounds of public policy, public security or public health which are limitatively enumerated in Article 46 EC, applied in conjunction with Article 55 EC, as justifying derogations from the freedom to provide services guaranteed in Article 49 EC.

Following the answer of the European Court of Justice, legislative amendments (colloquially known as the "Lex Laval") brought changes to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678).[55] In particular, Section 5a of the latter Act imposed strict limitations on the exercise of collective action by unions. This led the Swedish unions to file a complaint before the European Committee of Social Rights. The complaint alleged in particular that the amendments to its labour legislation were in violation of the undertakings of Sweden under Article 6 paras. 2 and 4 of the Revised European Social Charter, concerning respectively the duty to promote collective bargaining and the right of workers and employers to resort to collective action. Invoking Article 19 para. 4 of the Charter, it also alleged, *inter alia*, a violation of the right of migrant workers to equal treatment as regards remuneration and other employment and working conditions, as well as regards the membership of trade unions and the benefits of collective bargaining.

In its decision of 3 July 2013, the European Committee of Social Rights found that the restrictions to the conclusion of collective agreements are such that the situation in Sweden is not in conformity with Article 6 para. 2 of the European Social Charter.[56] It also considered that, whereas the right to resort to collective action is not absolute and may be limited, for instance, to protect public order or the rights and freedoms of others (such as the right of co-workers to work, or the right of employers to engage in a gainful occupation), "national legislation which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would not be in conformity with Article 6§4 of the Charter, as it would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers".[57] In reference to the balancing exercise performed by the Court of Justice between the freedom to provide services and the right to resort to collective action, the Committee added: "[T]he facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers".[58]

The Committee correctly identifies that, due to the respective positions of the European Court of Justice on the one hand, and of the European Committee of Social Rights itself on the other hand, the balancing exercise proceeds rather differently in the two instances: whereas, for the Court of Justice, the resort by unions to industrial action imposes a restriction to the freedom to provide services (or, at least, to the attractiveness of exercising such freedom), so that collective action is seen as allowable only to the extent it is not disproportionate, the Committee assesses whether the restriction imposed to collective action in the name of complying with EU law can indeed be justified. In theory, "balancing" should erase out such differences in framing. In practice however, the framing does matter: it is telling, for instance, that the Court of Justice would never ask whether the exercise of freedom to provide services has been disproportionately affecting the right of unions to resort to collective action.

Finally, the European Committee of Social Rights considered that posted workers, although they are only temporarily in the host State and although they are not expected to remain present in that State, nevertheless may be considered as "migrant workers" for the purposes of the European Social Charter. The implication was that, in accordance with Article 6 para. 4 of the Charter, these workers have a right to equality of treatment with the workers employed in the host State, in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining. Of course, it follows from the

54. *Laval* judgment, para. 118.
55. For a comprehensive assessment, see N. Bruun & J. Malmberg, '*Lex Laval*: Collective Actions and Posted Workers in Sweden', in R. Blanpain & F. Hendrickx (eds), *Labour Law Between Change and Tradition, Liber Amicorum Antoine Jacobs* (Kluwer, Alphen aan den Rijn, 2011), pp. 21-33.
56. Id., para. 116.
57. Id., para. 120.
58. Id., para. 122.

Posted Workers Directive that workers posted in Sweden by an employer established in another State are protected under the Swedish legislation or through central collective agreements, in all the areas covered by Article 3(1) (a) to (g) of the directive. Beyond that minimum, however, they shall only be protected to the extent that their employer voluntarily concludes a collective agreement with Swedish unions, without it being possible for these unions to force the employer to consider concluding such an agreement. This puts these workers at risk, since in Sweden "collective agreements do not very often provide for rules concerning minimum wages, and ... the minimum wage [as defined in central collective agreements for the protection of workers without qualification, such as young workers] can be considerably lower than the normal rate of pay generally applied throughout the country to Swedish workers (working in the same professional sector)".[59] The Committee concluded that the situation in Sweden is not in conformity with the requirements of Article 6 para. 4 of the Charter: "excluding or limiting the right to collective bargaining or action with respect to foreign undertakings, for the sake of enhancing free cross border movement of services and advantages in terms of competition within a common market zone, constitutes, according to the Charter, discriminatory treatment on the ground of nationality of the workers, on the basis that it determines, in the host State, lower protection and more limited economic and social rights for posted foreign workers, in comparison with the protection and rights guaranteed to all other workers".[60]

The Laval episode, in sum, shows the perils of ignoring the requirements of the European Social Charter in the implementation of EU law by the EU Member States to whom it is addressed: in order to avoid potential situations of conflict, such requirements should be taken into account in the design of EU legislative measures.[61]

4. The impacts on fundamental social rights of the new social and economic governance in the European Union

Fourth and finally, a deficit may result from the failure to take into account social rights in the new architecture of the Economic and Monetary Union ('EMU'). This new architecture was established following the financial and economic crisis of 2009-2010, which was followed by the public debt crisis of 2010-2013.[62] These episodes brought to light the many structural deficiencies of economic governance in the EU, and they led to the introduction of fundamental reforms. Social rights, however, were for the most part ignored in that reform process.

The general diagnosis following the critical months of 2010-2011 during which the single currency was put to the test was that fiscal discipline was too weak, and tools to ensure macroeconomic convergence too few, in the Eurozone, leading to an imbalance between the monetary and the economic integration. What was called for therefore was a profound revision of the Stability and Growth Pact (SGP) and of the mechanism of fiscal and socio-economic surveillance and coordination. This is now mainly ensured by the *Two-Pack* and the establishment of the European Semester (a). In parallel, the internalization by the Member States of the new budgetary discipline of the Union was achieved by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), colloquially known as the "Fiscal Compact" (b). On top of the European Semester, a special, "enhanced surveillance" procedure was also established for States facing, or threatened, by serious economic and budgetary difficulties (c) Finally, the lack of a permanent firewall for the Eurozone, that would be able to provide swift financial assistance to member States in need, was made up for through the setting up of the European Stability Mechanism (d). The paragraphs below describe the main components of the new architecture of socio-economic and fiscal governance of the European Union, systematically examining the extent to which fundamental social rights play a role in their design or implementation.[63]

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59. European Committee on Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, cited above, para. 135.
60. Id., para. 141.
61. On the resulting conflict, see, *inter alia*, Marco Rocca, "A clash of kings - The European Committee of Social Rights on the 'Lex Laval' … and on the EU framework for the posting of workers", *European Journal of Social Law*, vol. 3 (2013), pp. 217-232.
62. For general overviews, see P. Craig, "The Financial Crisis, the EU Institutional Order and Constitutional Responsibility", in F. Fabbrini, E. Hirsch Ballin, H. Somsen (eds), *What Form of Government for the European Union and the Eurozone ?*, Oxford, Hart, 2015, pp. 26-28 ; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford, OUP, 2015, pp. 2-10 ; P. De Grauwe, *Economics of Monetary Union*, Oxford, OUP, 2012, pp. 105-118 ; see also, for a critical description of the basic assumptions of the Maastricht macroeconomic constitution, K. Tuori, K. Tuori, *The Eurozone Crisis – A Constitutional Analysis*, Cambridge, CUP, 2014, pp. 41-57.
63. For extensive analyses of the new governance framework of the EMU, see, among others, N. de Sadeleer, "L'architecture de l'Union économique et monétaire : le génie du baroque", in S. De La Rosa, F. Martucci, E. Dubout (eds), *L'Union européenne et le fédéralisme économique – Discours et Réalités*, Bruxelles, Bruylant, 2015, pp. 143-194 ; F. Allemand, F. Martucci, 'La nouvelle gouvernance économique européenne', *CDE*, vol. 48, n° 1, 2012, pp. 17-99 ; J.-V. Louis, " La nouvelle 'gouvernance' économique de l'espace euro", in *Mélanges en hommage au professeur Joël Molinier*, Paris, LGDJ, 2012, pp. 405-427 ; K. Tuori, K. Tuori, *op. cit.*, pp. 105-116 ; A. Hinarejos, *op. cit.*, pp. 15-50.

4.1. The European Semester

At the core of the new socio-economic governance of the EU now lies the European Semester,[64] designed to enhance macroeconomic and systemic convergence across the Eurozone and the Union.[65] The European Semester is intended to strengthen "the powers and capacities of European institutions to monitor, coordinate and sanction the economic and budgetary policies of Member States",[66] thus fixing the structural deficiencies of the initial European system of economic and monetary governance. It brings under one single regulatory and institutional umbrella various policy coordination mechanisms: the Europe 2020 Strategy,[67] the Stability and Growth Pact,[68] the EuroPlus Pact,[69] the Macroeconomic Imbalance Procedure[70] and the requirement (introduced in May 2013) imposed on the Member States of the Eurozone to submit draft budgetary plans for review by the Commission.[71]

The Semester is in essence a timeline, which provides for both *ex ante* orientation and *ex post* correction and assessment.[72] It starts in November with the publication by the European Commission of the Annual Growth Survey (AGS), a document setting out the socio-economic and fiscal priorities of the EU for the year to come,[73] and of the Alert Mechanism Report (AMR). The AMR relies on a scoreboard of socio-economic indicators to identify the countries that, in the framework of the Macroeconomic Imbalance Procedure, should be subject to further macroeconomic investigation in the framework of an In-Depth Review (IDR). When such a review takes place, its conclusions are communicated by the Commission in March. The conclusions of the Annual Growth Survey and the Alert Mechanism Report are subsequently discussed, and formally adopted by the Council of the European Union, before being endorsed by the European Council. In the spring (April), the Member States present their National Reform Programmes (NRPs), listing the socio-economic reforms envisioned in the framework of Europe 2020 and the Europe Plus Pact, and taking into account the conclusions of the Annual Growth Survey. They also present their Stability (for Eurozone members) or Convergence (for non-Eurozone members) Programmes, in which they describe their budgetary trajectory for the year to come, in the framework of the Stability and Growth Pact. These Programmes are then analysed by the Commission. By the end of May, the Commission provides for each Member State a set of country-specific recommendations (CSR) that are then adopted by the Council of the EU. For the sake of continuity, the Commission also assesses in the CSRs and IDRs the level of implementation of past recommendations. Finally, since 2013, in the framework of the new step added to the Semester by the *Two-Pack*, the Eurozone Member States have to submit in mid-October their draft budgetary plans, thus allowing the Commission to step into the ongoing national budgetary process, and eventually request amendments in case of serious non-compliance with the States' Stability and Growth Pact obligations. The presentation by Italy of its draft national budget in October 2018 led to the first such request by the Commission.

The European Semester thus significantly deepens fiscal, social and macroeconomic coordination within the European Union and the EMU. It strengthens the policy-steering capacity of the European institutions (and mainly that of the European Commission[74]), enabling them to supervise and monitor, with various levels of

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64. The European Semester is established under Article 2a(2) of Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 (*O.J.* L 306, 23 November 2011, p. 12).
65. For an extended overview of the working of the European Semester, see K. Armstrong, "The New Governance of EU Fiscal Discipline", *European Law Review*, vol. 38, 2013, pp. 601 ff.
66. B. Van Hercke and J. Zeitlin, "Socializing the European Semester ? Economic Governance and Social Policy Coordination in Europe 2020", *SIEPS*, Report n° 2014:7, p. 23.
67. A soft law coordination cycle, centered on growth and competitiveness.
68. Both in its preventive (soft law reporting through Stability or Convergence programs) and corrective (the Excessive Deficit Procedure) arms, as amended and strengthened by the *Six-Pack* (in this regard, see K. Tuori, K. Tuori, *op. cit.*, pp. 105-111).
69. A new coordination mechanism launched in 2011 as an international agreement among Member States, mainly focusing on competitiveness, financial stability and fiscal strength. See Conclusions of the European Council of 24-25 March 2011, EUCO 10/1/11, 20 April 2011.
70. A coordination cycle initiated by the Six-Pack in 2011 designed to prevent and correct dangerous macroeconomic evolutions : see Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306 of 23.11.2011, p. 25).
71. This is one of the elements of the "Two Pack": Regulation (EU) No. 473/2013 of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ L 140 of 27.5.2013, p. 11).
72 In this regard, see the official detailed timeline provided by the Commission : https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline_en (last consulted on 18.11.2018).
73. And now also accompanied by a set of recommendations specific to the Eurozone area.
74. In this regard, see M. Bauer, S., Becker, " The unexpected winner of the crisis: the European Commission's strengthened role in economic governance", *Journal of European Integration*, vol. 36, n° 3, 2014, pp. 213–29.

constraint, a very wide set of national policies -- from social security to healthcare and from taxation to education, to name but the most significant --, all in the name of macroeconomic and budgetary convergence.

Neither the primary law of the Union (Articles 121, 126 and 148 TFEU, Protocol No. 12 on the Excessive Deficit Procedure) nor secondary legislation (Regulation No. 1466/97, Regulation No. 1173/2011, Regulation No. 1176/2011, Regulation No. 1174/2011 and Regulation No. 473/2013) organizing the European Semester refer explicitly to a duty to take into account fundamental rights. This is not to say that fundamental rights (and social rights in particular) are irrelevant to the European Semester's workings. First, a number of instruments refer to at least certain requirements linked to fundamental rights. For instance:

1. Regulation (EU) No. 1176/2011 and in Regulation (EU) No. 473/2013, part respectively of the 'Six-Pack' and of the 'Two-Pack' packages, adopted under Article 126 TFEU in order to monitor macroeconomic imbalances or to strengthen the surveillance of budgetary and economic policies in Euro Area Member States, with closer monitoring of Member States that are subject to an excessive deficit procedure, provide that "[i]n accordance with Article 28 of the Charter of Fundamental Rights of the European Union, [they] shall not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice".[75]
2. Many instruments encourage a strong involvement of all relevant stakeholders, with a specific emphasis on the social partners, and the organisations of civil society.[76] This remains however mainly recommendatory, and is left to the Commission's discretion (for an example, see the new Article 2a(4) of Regulation 1466/97, which enjoins the Commission to involve social partners only " when appropriate"). Such involvement is furthermore not provided for in the framework of the Excessive Deficit Procedure (although it is for the Excessive Imbalance Procedure).
3. Some instruments do also explicitly refer to Article 152 TFEU (which recognizes and promotes the role of social partners at EU level) or, as already mentioned, to Article 28 of the Charter of Fundamental Rights of the European Union.
4. Other instruments emphasize the need for the European Semester to respect national practice and institutions for wage formation.[77]
5. Regulation No. 473/2011 specifies, in its Recital n° 8 and Article 2(3), that the budgetary monitoring mechanisms it sets up should be applied without prejudice to Article 9 TFEU, the so-called 'horizontal social clause' which provides that " in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".
6. The intervention of the European Parliament, and exceptionally of national parliaments, is also provided for, notably through the establishment of an Economic Dialogue with the Commission and the Council.[78] Such intervention is however not given much bite: despite the many efforts of the European Parliament to weigh as much as possible on the process, it remains at best consultative, if not merely informative.[79]

Secondly, when acting in the framework of the European Semester, EU institutions remain bound both by the horizontal social clause of article 9 TFEU[80] and by the Charter of Fundamental Rights. Article 51(1) of the Charter states:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

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75. Preamble, Recital n° 7, and Article 1(2) of Regulation No. 473/2013 ; Preamble, Recital n° 20, and Article 1(3) and 6(3) of Regulation No. 1176/2011.
76. Article 2a Regulation No. 1466/97.
77. See, for example, Article 1(2) of Regulation No. 473/2013.
78. See Article 2ab of Regulation No. 1466/97 ; Article 2a of Regulation No. 1467/97 ; Recital n°29 and Article 15 of Regulation No. 473/2013 ; Recital n° 5 and Article 14 of Regulation No. 1176/2011 ; Article 3 of Regulation No. 1173/2011.
79. In this regard, see C. Fasone, "European Economic Governance and Parliamentary Representation : What Place for the European Parliament", *European Law Journal*, vol. 20, n° 2, 2014, p. 174 ; M. Dawson, "The Legal and Political Accountability Structure of Post-Crisis EU Economic Governance", *Journal of Common Market Studies*, vol. 53, n° 5, 2015, pp. 988-990.
80. From a constitutional perspective, this clause has a crucial function to fulfill: it seeks to rebalance the relationship between the 'social' and the 'economic' in the European Union. It has been described as "a potentially strong anchor that can induce and support all EU institutions … in the task of finding an adequate (and more stable) balance between economic and social objectives" (M. Ferrera, "Modest Beginnings, Timid Progresses : What's Next for Social Europe ?", in B. Cantillon, H. Verschueren, P. Ploscar (eds), *Social Inclusion and Social Protection in the EU : Interactions between Law and Policy*, Cambridge, Intersentia, 2012, p. 29).

The phrase "when they are implementing Union law" in that sentence applies to the EU Member States, and to their actions only: the Member States indeed may act either in the field of application of EU law, or in situations that are not covered by EU law. In contrast, EU institutions per definition are bound to comply with the requirements of the Charter, since the same distinction does not apply to them: they owe their very existence to EU law, and the Charter necessarily applies to any conduct they adopt.[81] The Explanations[82] relating to article 51 of the Charter of Fundamental Rights strongly support this reading, as they clearly distinguish EU institutions, bodies, offices and agencies, on the one hand, and the EU Member States on the other hand, referring to the expression 'implementing Union law' *only with regard to the latter*.[83]

If however there indeed exists such a duty to comply with fundamental rights in the new socio-economic governance architecture, and in the framework of the European Semester, on the part of the EU institutions, such a duty appears to be more honoured in the breach than in the observance.[84] First, despite an increased attention being paid in recent years to employment, social fairness and inclusion issues,[85] the European Semester remains primarily focused on fiscal consolidation and budgetary discipline: insofar as social considerations enter into the picture, they appear as side constraints, rather than as ends macroeconomic governance should pursue for their own sake. Second, the involvement of the European Parliament and its national counterparts, the social partners and civil society remains kept to a strict minimum.[86] The only serious 'external' partner the EU institutions rely on when acting in the framework of the Semester seems so far to be the national executives, with which they regularly engage in bilateral dialogues. The European Parliament[87] and the European Trade Union Confederation (ETUC) have voiced concerns in that regard.[88] Thirdly, at the supranational level, the Commission mainly has the upper hand: in practice, the Council of the EU generally defers to the assessments of the Commission, particularly as regards the country-specific recommendations.[89]

Because of the lack of transparency of the Commission's methodology in the framework of the European Semester, particularly in the preparation of the AGS or the CSRs, it is difficult to assess the extent to which such assessments take into account fundamental rights. However, **until the adoption of the European Pillar of Social Rights, nowhere did the methodology used by the Commission to produce the key instruments of the Semester -- such as the Annual Growth Surveys, or the CSRs -- refer to fundamental rights concerns**. And the procedural guarantees included in the instruments organizing the European Semester (such as the

81. In this regard, it is also important to bear in mind that the Charter applies regardless of the legal nature of the acts EU institutions adopt. The Commission or the Council could therefore not hide behind behind the programmatic, recommendatory or non-binding character of many of the instruments they promulgate under the European Semester to evade their Charter obligations in that framework. Both hard law and soft law instruments need to be Charter-compliant.
82. Praesidium of the European Convention, Explanations relating to the European Charter of Fundamental Rights (OJ C 303 of 14.12.2007, p. 17).
83. S. Peers, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review*, vol. 9, n° 1, 2013, pp. 51-52.
84. See for detailed examinations of this point, B. Van Hercke and J. Zeitlin, "Socializing the European Semester ? Economic Governance and Social Policy Coordination in Europe 2020", *op. cit.* ; F. Costamagna, "The European Semester in Action : Strengthening Economic Policy Coordination while Weakening the Social Dimension ?", *Centro Einaudi Working Papers*, 2013/5 ; S. Bekker, " The EU's stricter economic governance : a step towards more binding coordination of social policies ?", *WZB Discussion Papers*, n° 2013-501, January 2013 ; R. Coman, F. Ponjaert, " From One Semester to the Next : Towards the Hybridization of New Modes of Governance in EU Policy", *CEVIPOL Brussels Working Papers*, 5/2016, pp. 32-57 ; S. Bekker, I. Palinkas, "The Impact of the Financial Crisis on EU Economic Governance : A Struggle between Hard and Soft Law and Expansion of the EU Competences ?", *Tilburg Law Review*, vol. 17, n° 2, 2012, pp. 360-366 ; D. Chalmers, "The European Redistributive State and a European Law of Struggle", *European Law Journal*, vol. 18, n° 5, 2012, pp. 667-693 ; M. Dawson, *op. cit.*, pp. 976-993.
85. In that regard, see B. Van Hercke and J. Zeitlin, "Socializing the European Semester ? Economic Governance and Social Policy Coordination in Europe 2020", *op. cit.* More generally, on the political will of the EU institutions to strengthen the social dimension of the EMU, see Conclusions of the European Council from 13-14 December 2012, EUCO 205 :12 ; Conclusions of the European Council from 27-28 June 2013, EUCO 104/2/13 ; European Parliament Report with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the ECB and the Eurogroup, 'Towards a genuine Economic and Monetary Union', 24 October 2012 (2012/2151 INI) ; Communication from the Commission to the European Parliament and the Council, 'Strengthening the Social Dimension of the EMU', COM(2013)690.
86. It has been noted in legal literature that the Eurocrisis has triggered what has been labelled as 'new intergovernmentalism'. See, among others, U. Puetter, "Europe's Deliberative Intergovernmentalism – The Role of the Council and European Council in EU Economic Governance", *Journal of European Public Policy*, vol. 2, No. 19, 2012, pp. 161-178 ; U. Puetter, "New Intergovernmentalism : The European Council and its President", in E. Ballin, F. Fabbrini, H. Somsen (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford, Hart Publishing, 2015, pp. 253 ff ; A. Hinarejos, *op. cit.*, pp. 85-101 ; C. Bickerton, D. Hodson, U. Puetter, *The New Intergovernmentalism*, Oxford, OUP, 2015 ; S. Fabbrini, "From Consensus to Domination : The Intergovernmental Union in a Crisis Situation", *Journal of European Integration*, vol. 38, n° 5, 2016, pp. 587-599.
87. European Parliament, "Country-Specific Recommendations need national owners and social partners", Press Release, 23.06.2015.
88. See, for example, ETUC Statement on the 2014 CSR's concerning wages and collective bargaining systems, 4 June 2014.
89. This is due to the combined effect of the reverse qualified majority voting procedure (which has become common for the Council in the field of economic governance) and the 'comply or explain' rule. As a result, the ability of the Council to exercise its discretion is very much reduced.

duty to involve the social partners or representatives of the civil society in the process, or the promotion of an active role of the European Parliament and of national parliaments) could not be seen as a substitute for ensuring that fundamental rights are taken into account in the design of national reform programmes or of convergence/stability programmes, in part because of their poor implementation, which is highly uneven across EU Member States.

4.2. The Fiscal Compact

Although the initial reaction to the public debt crisis of 2009-2010 led to the revision of the Stability and Growth Pact as well as to the adoption of a set of regulations and directives (the 'Six-Pack') that significantly strengthened the coordination of the national budgetary and macroeconomic policies within the EMU, it was considered desirable to enshrine the new budgetary discipline within the European Treaties themselves. Because this proposal faced the opposition of the British government, soon to be joined by the Czech government, an intergovernmental agreement was concluded formally outside the Treaties.[90] On 2 March 2012, the Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) was thus signed by the representatives of 25 EU Member States (all Member States with the exceptions of the United Kingdom and the Czech Republic[91]) in the margins of the European Council convened in Brussels. The TSCG entered into force on 1 January 2013.

The general purpose of the TSCG is to "strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of [the] economic policies [of the EU Member States] and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion" (Article 1). The TSCG has a number of provisions on the coordination and convergence of economic policies in its Title IV, and on the governance of the Euro Area in its Title V. But its most crucial provisions are certainly to be found in its Title III, entitled 'Fiscal Compact'.[92] The 22 States which are bound by this part of the TSCG (the 19 euro area States plus Bulgaria, Denmark and Romania) commit to seek to maintain balanced public budgets, or even to strive to having a surplus (article 3(1) a)). To this end, they must ensure swift convergence towards their country-specific medium-term objective (article 3(1), b) and c)), from which they may only deviate if faced with exceptional circumstances. Finally, in case of significant deviations from the medium-term objective or the adjustment path towards it, a correction mechanism, managed by a national independent authority, will be automatically triggered (article 3(1), e)). The main innovation of the TSCG certainly lies in the requirement Article 3(2) imposes on the States Parties to internalize the rules of the Fiscal Compact (including the balanced-budget rule and the automatic correction mechanism) in rules of constitutional rank in the domestic legal order.[93] Such internalization was considered by the Treaty makers as locking in budgetary discipline.

Just like the ESM Treaty,[94] the TSCG pays little heed to fundamental rights and their preservation in the framework of the application of the rules set out in the Fiscal Compact -- although here again, the role of the social partners is acknowledged in its Preamble. In particular, although Article 3(3)(b) of the TSCG allows for certain deviations from budgetary commitments in the presence of "exceptional circumstances", "provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term", an "exceptional circumstance" is defined as "an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact"; **the notion of "exceptional circumstance" thus does not encompass a situation in which the requirement to balance public budgets might be incompatible with the fulfilment of economic and social rights**.

90. However, consistency and connection with EU law are guaranteed in the Treaty (Article 2).
91. In the meantime, the Czech Republic has decided to join the Treaty in March 2014. Since its accession to the EU on 1 July 2013, Croatia is eligible to become part to the Treaty but has so far failed to do so.
92. For more comprehensive analyses of the TSCG, see, among others, P. Craig, " The Stability, Coordination and Governance Treaty : Principles, Politics and Pragmatism", *European Law Review*, vol. 37, n° 3, 2012, pp. 231-248 ; F. Martucci, " Traité sur la stabilité, la coordination et la Gouvernance, Traité instituant le mécanisme européen de stabilité. Le droit international au secours de l'UEM", *Revue d'Affaires Européennes*, 2012/4, pp. 716-731.
93. Such internalization is to be carried out, following Article 3(2), " through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".
94. With which a clear connection is established, the granting of financial assistance under the ESM being made conditional upon the ratification of the TSCG (see Recital 5 of the ESM Treaty and the Preamble of the TSCG).

4.3. The enhanced budgetary and economic surveillance framework

Formally located outside the European Semester, the second branch of the Two-Pack, Regulation No. 472/2013[95], sets up an "enhanced surveillance" mechanism for countries of the Eurozone facing or threatened by, serious financial and budgetary difficulties; the mechanism applies automatically for those that requested or received financial assistance (either from one or several other Member States or third countries, the European Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) or another relevant international financial institution such as the IMF).[96] Regulation No. 472/2013 places such countries under closer macroeconomic and budgetary scrutiny than that normally applied to Member States in the framework of the European Semester[97]: this enhanced form of surveillance is established in order to ensure that the macroeconomic structural adjustment programmes, imposed as a condition for the provision of financial assistance, are effectively implemented.[98] The objective, as stated in the Regulation, is to allow for the "swift return to a normal situation" and to "[protect] the other euro area Member States against potential adverse spill-over effects" (Recital n° 5).

The decision to subject a Member State to enhanced surveillance falls to the Commission, which shall reassess its decision every six months (Article 2). The country under scrutiny is imposed a general duty to adopt structural measures "aimed at addressing the sources or potential sources of difficulties" its economy and public finances encounter (Article 3(1)). The procedure includes, *inter alia*, intensive information exchanges with, and review missions by the Commission. The Council (acting with a qualified majority) may also recommend to the Member State concerned the adoption of precautionary corrective measures or the preparation of a draft macroeconomic adjustment programme,[99] should such programme not have been adopted yet (Article 3(7)). Article 18 also specifies that the European Parliament may seek to trigger an informative dialogue with the Council and the Commission on the application of enhanced surveillance.[100]

As in many of the other instruments organizing the European Semester, Regulation No. 472/2013 requires that any measure adopted as part of economic adjustment programmes complies with the right of collective bargaining and action recognized in Article 28 of the EU Charter of Fundamental Rights (Article 1(4), Article 7(1)). Likewise, the Regulation recalls the duty to observe Article 152 TFEU and to involve social partners and civil society (Recital n° 11 of the Preamble, Article 1(4), Article 7(1), Article 8). The Preamble (Recital n°2) also mentions the Horizontal Social Clause of Article 9 TFEU. Article 7(7) moreover specifies that the budgetary consolidation efforts required following the macroeconomic adjustment programme must "take into account the need to ensure sufficient means for fundamental policies, such as education and health care". However, like for the European Semester, nowhere is it explicitly confirmed that fundamental social rights will be duly taken into account in the preparation, and implementation, of such programmes.

An examination of the macroeconomic adjustment programmes adopted under Regulation No. 472/2013 confirms that fundamental social rights are barely considered in the design and implementation of such

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95. Regulation (EU) No. 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L 140 of 27.5.2013, p. 1).

96. For an extensive analysis of Regulation No. 472/2013, see M. Ioannidis, " EU Financial Assistance Conditionality after Two Pack", *ZaöRV*, vol. 74, 2014, pp. 61-104.

97. For countries falling within the scope of application of Regulation No. 472/2013, the application of the European Semester is as such suspended (Articles 10, 11, 12, 13), mainly in order to avoid duplication of efforts.

98. In that regard, Regulation No. 472/2013 contributes to clarifying the relationship between EU law and the ESM/EFSF/EFSM assistance provided following the adoption of Memoranda of Understanding with the borrowing State (A. Hinarejos, *op. cit.*, p. 32, 135 and 162). Indeed, by imposing on the State requesting financial assistance that it prepares a macroeconomic adjustment programme, to be later approved through a Council implementing decision (Article 7), Regulation No. 472/2103 brings the conditionalities linked to such assistance back within the EU legal order, thus lifting the ambiguity that used to exist around the status of such agreements and the attached conditionalities under EU law. It remains however to be seen whether this will make a difference in terms of judicial review. We return to this point below.

99. The macroeconomic adjustment programme " shall address the specific risks emanating from that Member State for the financial stability in the euro area and shall aim at rapidly reestablishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets" (Article 7(1)). The programme is prepared by the Member State at stake, proposed by the Commission and approved by the Council (Article 7(2)). Its implementation is monitored by the Commission, acting in liaison with the ECB and, where appropriate, with the IMF (Article 7(4)). Significant deviations from the programme may lead to more thorough monitoring and supervision (Article 7(7)). A system of post-programme surveillance is also provided for (Article 14).

100. According to Article 18 (Informing the European Parliament) : " The European Parliament may invite representatives of the Council and of the Commission to enter into a dialogue on the application of this Regulation". See also Article 7(10); and for national parliaments, see Article 7(11).

programmes. This is illustrated for instance by the third Greek Rescue Package[101] adopted in the summer of 2015, and the 2013 Cyprus bail-out programme.[102] Some reference is made, of course, to the need to minimize harmful social impacts of adjustment programmes (Article 1(3) of Decision 2013/463, Article 1(3) of Decision 2015/1411), especially as regards impacts on disadvantaged people and vulnerable groups (Article 2(2) of Decision 2013/463, Article 2(2) of Decision 2015/1411); the third rescue package for Greece also emphasizes its ambition to promote growth, employment and social fairness (Recital 7 of Decision 2015/1411) as well as to involve social partners and civil society in all the phases of the adoption and implementation of the adjustment programme (Recital 16 of Decision 2015/1411). However, the analysis of the political background against which these programmes were adopted, especially the resistance they encountered from workers' unions and from public opinion in both Cyprus and Greece, brings to light the limited "inclusiveness" of the processes through which such programmes were designed. More fundamentally, the policy reforms required under those programmes in the sectors of healthcare, education, social security, pension or public administration, have barely taken into account fundamental social rights; on the contrary, measures adopted under the framework of Regulation No. 472/2013 seem to have been mainly driven by financial consolidation and competitiveness concerns. Fundamental social rights have not been relied on as a tool to guide budgetary choices. Instead, on issues such as the reform of public administrations, healthcare or the energy sector, policy choices reflected through the conditionalities almost exclusively rest on considerations of cost-effectiveness and long-term financial sustainability, at the expense of other 'non-efficiency' factors, such as the guarantee of a certain level of quality, accessibility and equity in the provision of public services. Moreover, either on the expenditure or on the revenue side, most of the burden falls on the middle class (which are the main beneficiaries of the social programmes affected), an unfair sharing of the burden which is particularly blatant in the case of Cyprus.[103]

4.4. The European Stability Mechanism

As the sovereign debt crisis initially unfolded, threatening the stability of the Eurozone, two emergency mechanisms were set up to provide financial assistance to Member States facing serious difficulties to finance themselves on the capital markets: the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). Those were conceived as temporary tools, and their lending capacities remained limited. They were later replaced by the more ambitious European Stability Mechanism (ESM), a permanent financial assistance mechanism, tasked with preserving financial stability within the EU, and endowed with a maximum lending capacity of 500 billion euros. The ESM is sometimes described as the "IMF of the EU": the design of the ESM extensively relies on IMF practice; and it is designed to cooperate closely with the IMF.[104] The ESM was not established not as an EU institution, but as a distinct international organization, with its own legal personality, headquartered in Luxemburg. As a consequence, its founding act was not adopted within the framework of the EU Treaties, but has the status of an international treaty.[105] As the creation of this more stable and effective arrangement raised doubts concerning its compatibility with the Treaties, and more specifically with the so-called "no bail-out" clause (Article 125 TFEU) which prohibits the debts of the EU Member States from being assumed either by the Union itself or by any other Member State,[106] it was deemed wise and necessary to explicitly affirm in the EU Treaties the Member States' power to establish a permanent crisis management mechanism that would safeguard the stability of the euro area. The European Council thus revised Article 136 TFEU, adding a new paragraph 3 that created such an explicit basis,[107] following the simplified

101. See Council Implementing Decision (EU) No. 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece (OJ L 219, 20 August 2015, p. 12).
102. See See Council Implementing Decision (EU) No. 2013/463 of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU (OJ L 250, 20 September 2013, p. 40).
103. See Decision No. 2013/463, Article 2(8) to 2(14).
104. See Recital 8, 12, 13 of the ESM Treaty, Article 13 and 38.
105. The ESM Treaty was signed on the 2 March 2012, and entered into force on the 1 May 2013.
106. Article 125(1) TFEU reads: "The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project". For a comment, see J.-V. Louis, "The No-Bailout Clause and Rescue Packages", *Common Market Law Review*, vol. 47, n° 4, 2010, pp. 971-986.
107. Article 136(3) is worded as follows : "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

amendment procedure provided for in Article 48(6) TEU.[108] The validity of this much contested amendment was later confirmed by the Court of Justice in the *Pringle* case.[109]

The general purpose of the ESM is "to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States".[110] The granting of stability support follows a four-steps procedure (Article 13): a request from the ESM Member; a principled decision of the ESM on the granting of stability support; the negotiation and signature by the European Commission, on behalf of the ESM, of a Memorandum of Understanding detailing the conditionalities attached to the financial assistance facility; and compliance monitoring by the Commission.[111] ESM financial assistance can be granted through various stability support instruments: loans (Article 16), purchase of bonds on the primary market (Article 17), interventions on the secondary market (Article 18), precautionary financial assistance (Article 14) or bank recapitalisation programmes (Article 15).

Organically, the ESM is structured around a Board of Governors (Article 5), which brings together all the finance ministers of the ESM members, and takes all the strategic decisions (including all of those related to the granting of financial assistance) ; a Board of Directors (Article 6), which ensures the day-to-day management of the ESM; and a Managing Director (Article 7). Depending on their substance, decisions within the Board are taken by consensus, qualified or simple majority (Article 4). The Treaty also provides for an emergency voting procedure (Article 4(4)). The voting rights of each ESM member are proportional to the number of shares it holds, and ultimately, to the extent to which it contributed to the capital stock of the ESM (Article 4(7), Annex I and II to the Treaty). With roughly 27%, 20% and 17% of the shares respectively, Germany, France and Italy are the most influential players within the structure of the ESM.

As any other financial institution, the ESM has its own pricing policy, which includes achieving an appropriate profit margin (Article 20). For the performance of its purpose, it borrows on capital markets (Article 21), and in order to guarantee its creditworthiness, it designs its own investment policy (Article 22). When the capital stock exceeds its maximum lending capacity, the ESM distributes dividends to its members (Article 23).

Central to the ESM's financial assistance policy is the principle of conditionality. Conditionality is negotiated by the European Commission (in liaison with the ECB and the IMF), and detailed in the MoUs signed with the ESM member requesting assistance. It ranges from compliance with the pre-established eligibility conditions to the adoption of a macroeconomic adjustment programme. Although this conditionality is defined as strict (Recital 6, Article 3, Article 12(1)), there is room for flexibility, as conditionality should remain appropriate to the financial assistance instrument chosen (Article 12(1)).

The ESM Treaty does not make any reference to fundamental social rights. However, although the Court of Justice of the European Union took the view in its *Pringle* ruling of 27 November 2012 that EU Member States were not implementing EU law, within the meaning of Article 51(1) of the Charter, when they *established* the ESM as a separate international organisation,[112] the Court later confirmed that the institutions of the EU acting within the framework of the ESM remained bound to comply with EU law, including with the Charter of Fundamental Rights. In a judgment of 20 September 2016 delivered in Joined Cases C-8/15 P to C-10/15 P, which concerned the impacts of measures adopted following the conclusion of the Memorandum of Understanding between Cyprus and the ESM and the possibility for the persons affected to file claims for compensation of alleged violations of the right to property, the Court considered that "the tasks allocated to the Commission by

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108. European Council Decision 2011/199/EU of 25 March 2011amending Article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro (*O.J.* L 91, 6 April 2011, p. 1).
109. Judgment of 27 November 2012, *Thomas Pringle v Government of Ireland*, C-370/12, EU:C:2012:756. On this decision, see, among others, P. Craig, " Pringle : Legal Reasoning, Text, Purpose and Teleology", *Maastricht Journal of European and Comparative Law*, vol. 20, n° 1, 2013, pp. 3-11.
110. Article 3 of the ESM Treaty.
111. The ESM being an international organisation as such, the MoU's negotiated and concluded by the European Commission on behalf of the ESM lie outside the scope of EU law. A clear connection is however established with the existing EU law framework, and more specifically, with Regulation No. 472/2013, in Article 13(3) : the Commission must guarantee the consistence of the MoU's it negotiates and concludes within the framework of the ESM Treaty, with the macroeconomic adjustment programme adopted under Regulation n°472/2013. While not an act of EU law, the MoU's content is to be reflected in the macroeconomic adjustment programme adopted under Regulation n° 472/2013, and subsequently endorsed in a decision of the Council (see *supra*).
112. *Thomas Pringle v Government of Ireland*, cited above fn. 109, para. 180. The Court, answering the argument that the establishment of the ESM is not accompanied by effective judicial protection, and thus potentially in violation of Article 47 of the Charter, states that: "...the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where ... the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism".

the ESM Treaty oblige it, as provided in Article 13(3) and (4) thereof, to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law",[113] and that the Commission "retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts".[114] The EU institutions, the Court noted, remain at all times under a duty to comply with the Charter of Fundamental Rights. The Charter, the Court noted,

> is addressed to the EU institutions, including [...] when they act outside the EU legal framework. Moreover, in the context of the adoption of a memorandum of understanding such as that of 26 April 2013 [signed by the Minister for Finance of the Republic of Cyprus, the Governor of the Central Bank of Cyprus and the Commission, before being approved on 8 May 2013 by the ESM Board of Directors], the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 163 and 164), to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter.[115]

Thus, should such a Memorandum deprive a State from its ability to uphold the right to education (Article 14 of the Charter) or the right to social security (Article 34), or to maintain high levels of provision of healthcare (Article 35) or access to services of general interest (Article 36), the non-contractual liability of the Commission could in principle be engaged.[116]

4.5. Conclusion

These various components of the new economic and social governance of the EU have entirely ignored the requirements of the European Social Charter. This explains why, in the case of Greece, the first wave of fiscal consolidation measures, adopted following the conclusion of the 2010 Memorandum of Understanding between Greece and its creditors, [117] led to a total of seven decisions of the European Committee of Social Rights identifying various instances of non-conformity with the European Social Charter. To summarize briefly:

1. In Complaint No. 65/2011, the Committee found that, by amending its labour legislation in December 2010 in order to provide that during the probation period, a permanent contract may be terminated without notice and with no severance pay, Greece had created a situation that was not in conformity with the right of workers to a reasonable period of notice for termination of termination, which forms part of the right to a fair remuneration under Article 4 para. 4 of the European Social Charter.[118]
2. Complaint No. 66/2011, introduced by the same public sector unions, led the European Committee of Social Rights to again find that the situation in Greece was not in conformity with the Charter.[119] The concerns here were a set of measures introduced in July 2010. First, "special apprenticeship contracts" between employers and individuals aged 15 to 18, without regard for the main safeguards provided for by labour and social security law, except as regards health and safety. This, the Committee concluded, was in violation of Article 7 para. 7 of the European Social Charter, which commits States parties having accepted that provision to ensure that employed persons under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay.[120] It also was in violation of Article 10 para. 2 of the European Social Charter, which requires States parties, as part of their duty to recognize the

113. Judgment in *Ledra Advertising Ltd, et al.*, C-8/15 P to C-10/15 P, EU:C:2016:701, para. 58. On this decision, see P. Dermine, " ESM and Protection of Fundamental Rights : Towards the End of Impunity ?", *Verfassungsblog*, 21 September 2016 ; A. Hinarejos, " Bail-outs, Borrowed Institutions and Judicial Review : Ledra Advertising", *EULawAnalysis*, 25 September 2016.
114. *Id.*, para. 59.
115. *Id.*, para. 67.
116. Actions for annulment of the actions taken by the Commission in the framework of the ESM, however, remain excluded, since these actions fall outside the EU legal order: see *Ledra Advertising*, judgment of 20 September 2016, para. 54.
117. For an excellent summary of the background, see Lina Papadopoulou, 'Can Constitutional Rules, even if 'Golden', Tame Greek Public Debt?', in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budget Constraints* (Hart Publ., 2014), pp. 223-247.
118. European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011, decision on the merits of 23 May 2012. Specifically at stake was Section 17 § 2 (a) of Act No. 3899 of 17 December 2010, which stipulated that "The first twelve months of employment on a permanent contract from the date it becomes operative shall be deemed to be a trial period and the employment may be terminated without notice and with no severance pay unless both parties agree otherwise".
119. European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, decision on the merits of 23 May 2012.
120. The 'special apprenticeship contracts' were introducted by Art. 74 § 9 of Act No. 3863 of 15 July 2010.

right to vocational training, "to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments': the apprenticeship contracts as regulated under the new legislation, the Committee noted, 'aim exclusively at acquiring work experience through employment and irrespective of whether or not the persons concerned attend some educational programme".[121] Finally, the Committee concluded that the apprentices under the scheme introduced in 2010 were defined as "a distinct category of workers who are effectively excluded from the general range of protection offered by the social security system at large", in violation of Article 12 para. 3 of the Charter, which commits States parties to "endeavour to raise progressively the system of social security to a higher level".

Another provision of the July 2010 reform allowed employers to pay new entrants in the labour market aged under 25 a rate of 84 % of the minimum wage or daily wage: the Committee took the view that, insofar as this allowed the employer to pay a minimum wage to all workers below the age of 25 which is below the poverty level, this resulted in a violation of Article 4 para. 1 of the Charter, which recognises "the right of workers to a remuneration such as will give them and their families a decent standard of living".[122] In addition, because "the extent of the reduction in the minimum wage, and the manner in which it is applied to all workers under the age of 25, is disproportionate even when taking into account the [serious economic crisis facing Greece]", the Committee considered that this measure, though it was introduced with the aim of encouraging the entry of young workers in the employment market, led to a discrimination on grounds of age, in violation of the reference to non-discrimination made in the preamble of the 1961 Charter.[123]

3. Finally, the European Committee on Social Rights adopted five decisions on 7 December 2012, following complaints filed by public sector pensioners' unions, which denounced significant reductions to the pensioners' social protection.[124]

Taken together, these decisions illustrate the problems associated with the failure to take into account the requirements of the European Social Charter in the design and implementation of adjustment programmes adopted within the framework of the "enhanced surveillance" mechanism provided for under Regulation No. 472/2013, which places countries receiving financial support under closer macroeconomic and budgetary scrutiny. Indeed, even the reference to the EU Charter of Fundamental Rights would not be sufficient to ensure that the countries concerned do not face conflicting expectations, resulting respectively from their participation in the euro zone and from their obligations under the European Social Charter, since not all the requirements of the latter instrument are reflected in the Charter of Fundamental Rights.

A preventive approach, in which any impacts on social rights are assessed before the adoption of fiscal consolidation measures, would be the only effective means to avoid potential conflicts between the disciplines imposed on the Eurozone Member States and the requirements of the European Social Charter. The Political Guidelines for the next European Commission presented in July 2014 by President Juncker included a commitment to ensure that future support and reform programmes would be subjected to social impact assessments to feed into the public discussion.[125] As a follow-up to this commitment, the European Commission announced in October 2015 its intention to pay greater attention to "the social fairness of new macroeconomic adjustment programmes to ensure that the adjustment is spread equitably and to protect the most vulnerable in society".[126] This is the source of inspiration for the development of a European Pillar of Social Rights. The next part of this study turns to this initiative.

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121. Id., para. 37.
122. Id., para. 65.
123. Id., paras. 69-70.
124. European Committee of Social Rights, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners v. Greece*, Complaint No. 77/2012; *Pensioners' Union of the Athen-Piraeus Electric Railways (I.S.A.P.) v. Greece*, Complaint No. 78/2012; *Panhellenic Federation of pensioners of the public electricity corporation (PAS-DEI) v. Greece*, Complaint No. 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint No. 80/2012. The decisions on the merits of all five complaints were adopted on 7 December 2012. Though these complaints were filed by different organisations, they all raise the same issues of substance, and may thus be considered together.
125. *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, Political Guidelines for the next European Commission, 15 July 2014.
126. European Commisssion, *Communication from the Commission to the European Parliament, the Council and the European Central Bank: On Steps Towards Completing Economic and Monetary Union*, COM(2015) 600 final of 21.10.2015, p. 5.

The European Pillar of Social Rights

1. The background

The European Pillar of Social Rights was initially announced on 9 September 2015 by the President of the Commission in his State of the Union address.[127] It was then formally presented by the Commission in a communication of March 2016.[128] The professed ambition of the Commission in presenting this proposal was to encourage a move towards a "deeper and fairer EMU",[129] and to complement macroeconomic convergence with greater convergence in three broad areas -- equal opportunities and labour market participation, fair working conditions, adequate and sustainable social protection and access to high quality essential services --, covering in total 20 policy domains. The initiative is initially addressed to the Euro Area Member States, although it is anticipated that the other EU Member States could join at a later stage.

The communication published by the Commission on 8 March 2016 saw social policy as entirely consistent with the objectives of the internal market and with the effort to improve the competitiveness of the European economy and thus to stimulate growth and jobs creation: "social policy is conceived as a productive factor, which reduces inequality, maximises job creation and allows Europe's human capital to thrive".[130] The European Pillar of Social Rights presents the need to make progress in the different social areas concerned as essential to achieve sustainable growth, to avoid macroeconomic imbalances within the Eurozone, and to build human capital on which businesses' competitiveness, and ultimately the prosperity of societies, depend. It has been asked however whether such a definition of social objectives as a component of a broader macroeconomic project -- as an instrument in the service of higher aims, rather than as having to be pursued in their own right -- may lead to devalue their significance.[131]

Following a consultation period until 31 December 2016, the European Pillar of Social Rights (EPSR) was endorsed by the European Parliament, the Council and the Commission on 17 November 2017, at the Social Summit for Fair Jobs and Growth held in Gothenburg. The European Council of 14 December 2017 endorsed the conclusions of the Gothenburg Social Summit, and identified as the next steps "implementing the European Pillar of Social Rights at Union and Member State level, with due regard to their respective competences"; and the proposal by the Commission of "appropriate monitoring" of the Pillar.

127. See also European Commission, *Commission Work Programme 2016*, COM(2015) 610 final of 27.10.2015 (in which, under the heading 'A deeper and fairer Economic and Monetary Union', the Commission announces its intention to contribute to the development of a 'European pillar of social rights', both by 'modernising and addressing gaps in existing social policy legislation' and by 'identifying social benchmarks, notably as concerns the flexicurity concept, built on best practices in the Member States with a view to upwards convergence, in particular in the euro area, as regards the functioning of the labour market, skills and social protection' (p. 9)).
128. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Launching a consultation on a European Pillar of Social Rights*, COM(2016) 127final, 8 March 2016.
129. Id., para. 2.1.
130. Id.
131. The European Anti-Poverty Network expressed its concerns in that regard, regretting "[t]he priority given to macroeconomic objectives, with a tendency to *instrumentalise* social policies as a means to growth rather than a priority in its own right to which economic policies must contribute" (EAPN, *Last Chance for Social Europe? EAPN Position Paper on the European Pillar of Social Rights*, September 2016, p. 4).

The EPSR is now entering the implementation phase. On 13 March 2018, responding to the request of the European Council, a communication from the Commission described how implementation of the EPSR would be monitored.[132] This monitoring includes a regular assessment of the employment and social performances of the EU Member Staes on the basis of a Social Scoreboard, comprised of 35 social, educational and employment indicators, broken down by age, gender and education, grouped into three dimensions corresponding to the broad areas covered by the EPSR (equal opportunities and access to the labour market; dynamic labour markets and fair working conditions; and public support, social protection and inclusion). The Social Scoreboard should gradually influence the orientation of the macroeconomic policies in EU Member States: it is aimed at "supporting the broader process of upward convergence".[133] The Scoreboard should, in particular, influence the annual Joint Employment Report and the Country Reports presented as part of the European Semester, which seeks to promote macro-economic convergence in the EU.[134]

2. An assessment

2.1. The contribution of the European Pillar of Social Rights

The European Pillar of Social Rights responds to a clear need: to ensure that, in addition to being monitored for budgetary discipline, the performances of the Euro Area member States in the employment and social domains are assessed, with a view to ensuring a greater degree of convergence within the EMU. Indeed, as explained by the International Labour Office in an early contribution to the contribution on the future EPSR, the EU-28 are either diverging, or converging towards lower standards of protection in a number of areas (or sliding towards higher poverty levels) since the economic and financial crisis of 2009-2010: the implication is that unless affirmative action is taken to improve convergence towards improved standards, the macro-economic disciplines imposed on the EU Member States may threatened part of the social *acquis* within the EU.[135] Referring to the "soft" mechanisms put in place in the EU since the European Employment Strategy was launched in 1997 to favour convergence in social policies (now streamlined under the Europe 2020 strategy), the ILO noted that the "disappointing results (at least in terms of convergence in social and employment outcomes) seem to indicate that divergence cannot be addressed by assuming individual policies will converge towards common goals. Soft convergence might not be effective unless it is built upon a social floor applicable in all Member States".[136]

The Pillar, the Commission explained early on, should provide a safeguard against these risks of divergence in social standards or of a race to the bottom across the EU. The Pillar thus "should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area".[137]

The European Pillar of Social Rights could contribute to a rebalancing between the economic and the social in the constitution of the European Union. In particular, in the European Semester of policy coordination, described above, the EPSR should lead the Commission to put greater focus on social priorities and put them on a par with economic objectives at the core of the annual cycle of economic governance.[138] Thus, in its March 2018 Communication assessing progress on structural reforms, prevention and correction of macroeconomic

132. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018.
133. Id., p. 3.
134. See Proposal for a Council Decision on guidelines for the employment policies of the Member States, COM(2017) 677 final of 22.11.2017.
135. See ILO, *Building a Social Pillar for European Convergence*, Geneva, 2016, p. 23 (noting that "an examination of the trends over time indicates that there has been either considerable divergence between countries (e.g. unemployment) or, worse, convergence towards undesirable outcomes (e.g. higher income inequality). [...] [While] these developments are very much a function of national policies and country-specific circumstances [...], the distributional consequences of policy inaction at national and EU-wide levels could be large").
136. ILO, *Building a Social Pillar for European Convergence*, op. cit., p. 31. On this issue, see already O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces. Is the open method of coordination of social and employment policies the future of social Europe? (*Bruxelles, Bruylant, 2005).
137. First preliminary outline for a European Pillar of Social Rights, Annex to the Communication from the Commission, *Launching a consultation on a European Pillar of Social Rights*, cited above.
138. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018, p. 3.

imbalances, and results of in-depth reviews,[139] the Commission notes, referring to the adoption of the European Pillar of Social Rights, that: "A key message of the 2018 Annual Growth Survey is the need to implement the Pillar for a renewed convergence towards better working and living conditions across the EU. This requires fair and well-functioning labour markets, as well as modern education and training systems that equip people with skills that match labour market needs. This should be supported by sustainable and adequate social protection systems. The country reports published [in March 2018] look at how Member States deliver on the three dimensions of the Pillar: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. The provision of adequate skills and persistent gender employment gap, high labour market segmentation and the risk of in-work poverty, the low impact of social transfers on poverty reduction, sluggish wage growth, and ineffective social dialogue are areas of particular concern in some Member States. In order to analyse Member States' performances in a comparative perspective, the country reports also build on the benchmarking exercises conducted on unemployment benefits and active labour market policies and on minimum income".[140]

An examination of both the 2018 AGS and the assessment provided by the Commission of the country reports demonstrates the strong influence of the EPSR on the analysis proposed. The Commission thus seeks to ensure that "convergence towards better socio-economic outcomes, social resilience and fairness, as promoted by the European Pillar of Social Rights, [shall become] an essential part of the efforts to strengthen and complete the Economic and Monetary Union".[141] If this effort is pursued further, the Pillar could gradually lead the EU to set binding targets for the reduction of poverty and inequality, to be enforced through mechanisms similar to those already agreed to enforce macro-economic prescriptions concerning annual deficits and the size of the public debt.

In addition, the European Pillar of Social Rights -- and the "convergence process" in the fied of social rights it is meant to encourage -- could lead to identify the need for new legislative initiatives of the European Union. The European Anti-Poverty Network for instance has proposed a framework directive on minimum income, building on Council Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in the social protection systems,[142] obliging all EU member States to introduce a statutory adequate minimum income according to certain agreed criteria linked to the cost of living.[143] This would appear necessary to bring about convergence in an area that appears to present considerable variations : the ILO noted that, while an adequate level of minimum income guarantee should at least protect beneficiaries from being at risk of poverty, in some Member States such as Bulgaria, Latvia, Poland and Romania, "the minimum income guarantee for a single person amounts to less than 30 percent of the national median income, far below the at-risk-of-poverty threshold [defined in the EU as 60 percent of the national median income]".[144]

Finally, the EPSR could encourage the EU Member States to take action, in their own field of competences, implementing the commitments made, thus contributing to a convergence in the fulfilment of fundamental social rights. Indeed, most of the principles listed in the EPSR relate to areas in which the European Union has not been attributed legislative powers, or in which the EU shares powers with the Member States. The definition of the conditions under which the level of the statutory minimum wage should be set provides an example: implicitly acknowledging that the failure of certain member States (particularly Germany) to raise wages in line with productivity increases has been a major cause of macroeconomic imbalances within the EU -- and the risks implicated in divergences across the EU Member States[145] --, the Commission proposed that one of the principles of the Pillar should be that:

> All employment shall be fairly remunerated, enabling a decent standard of living. Minimum wages shall be set through a transparent and predictable mechanism in a way that safeguards access to employment and the motivation to seek work. Wages shall evolve in line with productivity developments, in consultation with the social partners and in accordance with national practices.[146]

This is now ensured in Principle 6 (Wages), which states:

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139. Communication on the assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews (COM(2018) 120 of 7.3.2018).
140. Id., p. 3.
141. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018, p. 5.
142. OJ L 245, 26 August 1992, p. 46 (recommending that the EU member States "recognize the basic right of a person to sufficient resources and social assistance to live in a manner compatible with human dignity as part of a comprehensive and consistent drive to combat social exclusion", and that with that objective in mind, they adapt their social protection systems in accordance with the principles and guidelines included in the recommendation).
143. EAPN, *Last Chance for Social Europe? EAPN Position Paper on the European Pillar of Social Rights*, op. cit.
144. ILO, *Building a Social Pillar for European Convergence*, op. cit., p. 41.
145. ILO, *Building a Social Pillar for European Convergence*, op. cit., pp. 35-39.
146. *Id.*

> Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented.

The European Pillar of Social Rights therefore could lead the European Union to penetrate into fields that have hitherto been left to the member States, in order to dampen the impacts of regulatory competition[147] encouraged by social dumping.[148]

These are important benefits associated with the adoption of the European Pillar of Social Rights. However, further progress could be made in two areas. First, the EPSR could be incorporated in a revised version of the IAs that are currently being prepared by the European Commission -- and ensuring that such strengthened IAs also are prepared to assess the impacts of structural reform measures prescribed to EU Member States receiving financial support. Second, the implementation of the EPSR could be more explicitly rights-based, and take into account the European Social Charter. These two areas are explored in turn.

2.2. The role of fundamental social rights in impact assessments

In the future, the EPSR could provide a framework to assess the impacts of Stability or Convergence Programmes presented by the EU Member States and of the country-specific recommendations addressed to States (both adopted under the European Semester framework), as well as the impacts of adjustment programmes negotiated with countries provided financial support. The political consensus on a set of objectives identified as desirable in a European Pillar of Social Rights could allow such impact assessments to be prepared, in order to ensure that these various measures support the attainment of such objectives. While impact assessments are not an end in themselves, they can favour accountability and ensure that a greater attention shall be paid to social rights in the adoption of such measures.

The role of impact assessments in the EU law- and policy-making process has been regularly strengthened since they became systematic in 2002 for legislative measures[149] and they were generalized for other initiatives with the "Better Regulation" agenda. Since 2015, the quality of Impact Assessments is rigorously examined by an independent body, the Regulatory Scrutiny Board, which includes members external to the EU institutions, and whose role it is to "check major evaluations and "fitness checks" of existing legislation" by delivering an "impartial opinion on the basis of comprehensive know-how of the relevant analytical methods".[150]

Fundamental rights have gradually played a greater role in such IAs. The guidelines for the preparation of impact assessments presented in 2005 already referred to the potential effects of different policy options on the guarantees listed in the Charter.[151] In 2009 and 2011, successive Staff Working Papers of the Commission have made the role of fundamental rights in impact assessments increasingly more explicit.[152] The guidance provided to the Commission services by these documents applies only to the legislative proposals submitted by the Commission. In contrast, the tools developed as part of the "Better Regulation" agenda apply to all initiatives, whether legislative or regulatory or whether they consist in the introduction of new policies or in

147. Article 156 of the Treaty on the Functioning of the European Union, which lists the areas in which the Commission "shall encourage cooperation between the Member States and facilitate the coordination of their action", does not explicity refer to wages (though it does refer to labour law more generally); indeed, Article 153(5) TFEU purposefully excludes "pay" from the areas in which, with a view to achieving the social policy objectives listed in Article 151 TFEU (a list which includes "improved living and working conditions"), the Union "shall support and complement the activities of the Member States".
148. Social dumping is understood here as the choice of employers to work under a set of rules aimed at the protection of workers which allows them to be more cost-effective than potential competitors operating on the same market. The expression has sometimes been used with other meanings, ranging from situations in which an employer deliberately violates existing legislation in order to achieve a competitive advantage to situations where practices as regards working conditions and wages comply with the applicable labour legislation and simply reflect different levels of productivity between workers, without entailing any distortion of competition. For a discussion of these various definitions, see D. Vaughan-Whitehead, *EU Enlargement versus Social Europe ? The Uncertain Future of the European Social Model*, Cheltenham, Edward Elgar, Cheltenham, 2003, pp. 325-327. For a powerful argument in favour of an EU minimum wage policy, see D. Vaughan-Whitehead, "Towards an EU minimum wage policy?", in D. Vaughan-Whitehead (ed), *The Minimum Wage Revisited in an Enlarged EU*, International Labour Office, Geneva, 2010.
149. European Commission, Communication on Impact Assessment, 5 June 2002, COM(2002)276final.
150. Replies of the European Union to the list of issues raised in regard to the initial report submitted in accordance with article 35 of the Convention on the Rights of Persons with Disabilities (CRPD/C/EU/Q/1/Add.1, 8 July 2015), para. 26.
151. See SEC(2005)791, 15.6.2005.
152. See, respectively, SEC(2009) 92 of 15.1.2009 and SEC(2011) 567 final of 6.5.2011. The latter document is a Commission Staff Working Paper providing Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments.

amendments to existing policies. Fundamental rights and (for the external dimension of EU action) human rights are now better integrated in these tools.[153]

Despite this significant progress, a number of deficiencies remain, and there remains a gap between the shift towards "social fairness" considerations being included in reform programmes, and a *social rights-based* assessment of their impact:

(i) **The inclusion of fundamental rights in impact assessments did not lead to modify the basic structure of such assessments, which still rely on a division between economic, social and environmental impacts.** Despite requests expressed in this regard by the Parliament,[154] the Commission has repeatedly stated that it was unwilling to perform *separate* human rights impact assessments, distinct from the assessment of economic, social and environmental impacts. This so-called "integrated" approach allows fundamental rights impacts to be factored into a broader set of considerations, making it possible to compensate certain negative impacts (such as, for instance, a narrowing down of civil liberties or of the provision of certain public services) by positive impacts at other levels (including, e.g., on economic growth and social cohesion), in the overall assessment presented to decision-makers.[155]

(ii) **The IAs as they are currently performed still insufficiently ensure that fundamental rights concerned shall be mainstreamed in the EU's decision-making process**: an empirical study assessing how IAs serve the various horizontal "mainstreaming agendas" concluded that IAs were not giving equal attention to the six mainstreaming objectives referred to by the TFEU[156]: "While social and environmental concerns are primary objectives of assessment of the IIA system", this study notes, "fundamental rights constitute a more ad hoc horizontal category".[157] Of the 35 IAs examined (covering the period 2011-2014), fundamental rights were taken into account in 19 cases, and in none of the cases where they were ignored was any justification provided for this. The relatively marginal role of fundamental rights in Impact Assessments (certainly compared to economic considerations about regulatory burdens on businesses, but also compared to the other "mainstreaming objectives" listed in the TFEU, with the exception of gender and non-discrimination) is further illustrated by the findings of the Impact Assessment Board (IAB), which since 2007 tracks which issues are addressed in IAs and adopts recommendations to improve the process: it would appear that, whereas 80% of the IAB reports included comments on the consideration of economic impacts in an average year, recommendations related to fundamental rights were found in only 10% of the reports.[158]

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153. They are explicitly taken into account in the Better Regulation "Toolbox", in which they constitute tool # 24. Moreover, since not all services of the Commission can be expected to be fully knowledgeable about fundamental rights issues and thus to be equipped to answer these questions in the more complex cases, the guidelines explicitly suggest to seek advice from the Legal Service of the Commission (SJ) or from DG Justice and Consumers (JUST) (or DG Employment, Social Affairs and Inclusion (EMPL) as regards the rights of persons with disabilities).
154. European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring (2005/2169(INI)), OP 11 (where the Parliament 'Calls on the Commission to think over its decision to divide its considerations on fundamental rights into the current three categories in its impact assessment - economic, social and environmental effects - and to create a specific category entitled 'Effects on fundamental rights', to ensure that all aspects of fundamental rights are considered').
155. This is a defensible position; however it also is a strong argument for not allowing impact assessments, thus understood, to become a substitute for rigorous compatibility checks based on legal analysis. The Commission notes in this regard, correctly in the view of this author that "Impact Assessment does not, and cannot, operate as the fundamental rights check. It cannot be a substitute for legal control. In the end result, fundamental rights proofing can only be performed via a legal assessment based on a crystallised draft legislative text. However, while not being, in itself, the legal control for fundamental rights compliance, the Commission recognises that the Impact Assessment can do some of the groundwork to prepare for the fundamental rights proofing of legislative proposals" (Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, cited above, p. 6).
156. In addition to fundamental rights, these objectives are : gender equality (Article 8 TFEU); the promotion of a high level of employment, adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health (as stipulated in the so-called "horizontal social clause" of Article 9 TFEU); non-discrimination on the basis of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10 TFEU); environmental policy integration for sustainable development (Article 11 TFEU); and consumer protection (Article 12 TFEU).
157. S. Smismans, R. Minto, "Are integrated impact assessments the way forward for mainstreaming in the European Union?", *Regulation & Governance* (2016), p. 2. The study also notes that "while the six mainstreaming objectives receive attention in the IIA [integrated impact assessments] institutional set-up, other objectives receive at least as much attention. Indeed, both the assessment of economic impacts and of regulatory burdens are predominant in the set-up of the IIA system, although neither of these are set out in the treaties as constitutional horizontal objectives" (*id.*).
158. *Id.*, p. 15. The authors of this study attribute this state of affairs to the fact that "the EU's fundamental rights regime is mainly conceived as a negative guarantee, intended to ensure that the EU should not negatively impact on fundamental rights, rather than as a positive regime promoting these values in a proactive way at policy level. The operational guidelines on fundamental rights in the IA are, thus, steered to set off a warning light whenever policy intervention would negatively impact on fundamental rights, while failing to use IAs actively to define the objectives of new policy initiatives that positively promote fundamental rights": *id.*, p. 13 (citing O. De Schutter, "Mainstreaming Human Rights in the European Union", in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart, 2005, pp. 37-72).

(iii) **The Guidance provided to the Commission services concerning the preparation of the fundamental rights component of impact assessments[159] refer almost exclusively to the Charter of Fundamental Rights**, as if the rights, freedoms and principles codified in the Charter were the only fundamental rights recognized in the EU legal order. In the future, IAs should move beyond references to the EU Charter of Fundamental Rights alone, to integrate the full range of social rights guaranteed in international human rights law, including in particular the Council of Europe Social Charter. The preparation of such social rights impact assessments taking into account the European Social Charter would also appear to be in line with the position of the European Commission, according to which (as stated by Commissioner M. Thijssen on its behalf in response to a parliamentary question) it is "important that Member States comply with the European Social Charter also when implementing reform measures".[160]

(iv) **No procedures are established to ensure for meaningful participation of unions and other components of civil society in the design and implementation of such programmes, and for re-examination of the draft programmes if negative impacts on social rights are found to occur.** Regulation (EU) No. 472/2013 already establishes certain procedural requirements linked to the assessment of the impacts of the measures to be adopted: Article 6 provides that the European Commission must evaluate the sustainability of the sovereign debt, and Article 8 imposes on the country placed under enhanced surveillance that it "seek the views of social partners as well as relevant civil society organisations when preparing its draft macroeconomic adjustment programmes, with a view to contributing to building consensus over its content". These requirements have been generally ignored until now.

(v) **There has been no systematic assessment of the impacts on social rights of the various measures adopted in reaction to the sovereign debt crisis.** In fact, the guidance published by the European Commission concerning IAs still suggests that in the field of economic governance, including "recommendations, opinions and adjustment programmes", impact assessments are not *a priori* necessary, since (it is said) such "specific processes are supported by country specific analyses".[161] This appears difficult to reconcile with President Juncker's July 2014 Political Guidelines for the next European Commission, in which he committed to ensure that future support and reform programmes would be subjected to social impact assessments to feed into the public discussion.[162] Indeed, following that pledge, the European Commission has announced its intention to pay greater attention to "the social fairness of new macroeconomic adjustment programmes to ensure that the adjustment is spread equitably and to protect the most vulnerable in society", and it has proposed a number of improvements in this regard.[163] This, after Greece was granted a new package of financial assistance in August 2015 -- the third 'bail-out' in a row --, this was accompanied by a social impact assessment showing "how the design of the stability support programme has taken social factors into account".[164] This remains short, however, of an IA that would be truly rights-based, taking into account the full range of fundamental social rights.

2.3. The European Pillar of Social Rights and social "rights"

For the most part, the EPSR develops existing rights, that are already part of the *acquis* of the EU, in order to further clarify their implications (and thus increase their relevance) in the current economic context, or in order to define as a "principle" a guarantee already stipulated in secondary EU legislation. For instance:

- Principle 7(a) ("Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period") goes further than current protections under EU law: although being provided with a written information about the status of the employment would seem a rather elementary safeguard against abuse, the

159. Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final of 6.5.2011.
160. Statement made by Commissioner M. Thijssen on behalf of the European Commission on 30 April 2015, in response to a parliamentary question on the social rights impacts of reform programmes (more specifically, on wage decline in Spain) (question from P. Iglesias (GUE/NGL) of 6 March 2015, P-003762-15).
161. See the Better Regulation Toolbox, Tool #5: When is an IA necessary?, http://ec.europa.eu/smart-regulation/guidelines/tool_5_en.htm
162. J.-C. Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, *Political Guidelines for the next European Commission*, Strasbourg, 15 July 2014.
163. European Commisssion, *Communication from the Commission to the European Parliament, the Council and the European Central Bank: On Steps Towards Completing Economic and Monetary Union*, COM(2015)600 final, 21 October 2015, p. 5. See also European Commission, *Commission Work Programme 2016*, COM(2015)610 final, 27 October 2015 (in which, under the heading 'A deeper and fairer Economic and Monetary Union', the Commission makes a first reference to its intention to contribute to the development of the 'European pillar of social rights', inter alia by "identifying social benchmarks, notably as concerns the flexicurity concept, built on best practices in the Member States with a view to upwards convergence, in particular in the euro area, as regards the functioning of the labour market, skills and social protection" (p. 9)).
164. Commission Staff Working Document, Assessment of the Social Impact of the New Stability Support Programme for Greece, SWD(2015) 162 final, 19 August 2015.

existing EU legislation on this does not refer explicitly to probationary periods of work, and it requires such information to be provided within two months of the employment relationship rather than at the start of the relationship.[165]

- Principle 10 of the EPSR, which concerns a healthy, safe and well-adapted work environment, is also conceived as going "beyond existing EU law by aiming at a high level of protection for workers from risks to health and safety at work. It therefore urges Member States and employers to go beyond the minimum requirements laid down in existing EU legislation and to get as close as possible to an accident-free and casualty-free working environment."[166] Indeed, this Principle seems (on its face at least) to extend the requirement to provide reasonable accommodation not only as a means to protect people with disabilities from discrimination (as in the Employment Equality Directive[167]), but also as a means to accommodate the workplace more generally to each individual worker's occupational needs.

This attempt to update existing rights, or to define new principles for the changing economy, is generally progressive. For instance:

- On the right to social security, Principle 12 (Social Protection) provides that "regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection": this should be read as an attempt to cover also non-standard contracts for the provision of work (which is broader than classic "employment contracts" for waged workers alone) which, as the Commission notes, are "increasingly prevalent in today's labour market".[168] Indeed, while it remains to the Member States to establish systems of social security at domestic level (though Article 153(2) of the Treaty on the Functioning of the European Union (TFEU) enables the EU to adopt measures, including directives setting minimum requirements, in the field of social security and social protection of workers), Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies[169] recommends that EU Member States "provide employed workers who cease work at the end of their working lives or are forced to interrupt their careers owing to sickness, accident, maternity, invalidity or unemployment, with a replacement income, fixed wither in the form of flat-rate benefits, or benefits calculated in relation to their earnings in their previous occupation, which will maintain their standard of living in a reasonable manner in accordance with their participation in appropriate social security schemes", and that they "*examine the possibility of* introducing and/or developing appropriate social protection for self-employed persons": thus, Principle 12 of the EPSR extends the "right" to social protection beyond the existing consensus on the scope of this right, and the Commission is proposing a new recommendation for adoption by the Council on this topic as part of the "Social Fairness Package" which aims, in part, to implement the EPSR. Similarly, whereas Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity[170] grants access to maternity leave and benefits for at least 14 weeks, it does not cover access to any other social insurance risks: in contrast, Principle 12 of the EPSR aims to extend the "right to social protection", *in all its components*, to self-employed workers.
- On access to essential services, Principle 20 (Access to essential services) arguably goes beyond article 36 of the Charter of Fundamental Rights (which provides that the EU recognises and respects access to services of general economic interest as provided for in national law and practices, in accordance with the Treaty on the Functioning of the European Union), by recognizing the right of everyone "to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications", and by specifying that "Support for access to such services shall be available for those in need".

One contribution of the EPSR in this regard shall be to provide improved guidance to the EU Member States against the background of the "activation" of welfare benefits (unemployment benefits and social aid) that the European Employment Strategy has encouraged since the late 1990s (Box 2). Principle 13 (Unemployment Benefits) clarifies the duties of public employment services and it complements, in that respect, the 2008

165. Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, p. 32.
166. SWD(2018) 67 final of 13.3.2018, p. 49.
167. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
168. SWD(2018) 67 final of 13.3.2018, p. 60.
169. OJ L 245 of 26.8.1992, p. 49.
170. Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the Principle of equal treatment between men and women engaged in an activity in a self-employed capacity, OJ L 180, 15.7.2010, p. 1.

Commission Recommendation on the active inclusion of people excluded from the labour market.[171] Similarly, Principle 14 (Minimum income), while stipulating the principle of a right of everyone lacking sufficient resources to adequate minimum income benefits ensuring a life in dignity at all stages of life, provides that "for those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market". It complements Council Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems, colloquially referred to as the "minimum income recommendation".[172] Of course, activation presents its own challenges from the point of view of the protection of fundamental social rights, as illustrated by the debates concerning what is a "suitable" job offer which the beneficiary of unemployment benefits or of social aid should have a duty to accept, or concerning the appropriate level of social benefits. The commentary to Principle 13 states, for instance, that: "An important element of ensuring incentives to work is that the design of the benefit should be consistent with other benefits and preserve financial incentives to take up a job. This avoids situations where minimum income beneficiaries are trapped in inactivity. Such incentives can take the form of requiring the person receiving the benefit to use employment services, which together with other enabling services can support labour market reintegration".[173]

Box 2. The "activation" of welfare in the EU Member States

The "activation" of social allowances, including unemployment benefits, has been the response of European welfare States to three forms of pressure. The globalisation of competition questions the ability for States to maintain earlier levels of welfare. Technological change results in accelerating skills depletion, so that workers have to be retrained regularly during their career in order to maintain (and further improve) productivity: skills must permanently be rebuilt in order for workers to cope with the introduction of new technologies. Finally, over the past 50 years, life expectancy has increased significantly. This puts a particular stress on old-age pension schemes, as the ratio between the active population and the total population is declining. In the EU, for instance, life expectancy at birth averaged 79.7 years in 2009 (for EU-27 countries), with a slight advantage to women (82.6 years) over men (76.7 years), though this gap is narrowing down. Over the period 2002-2009 alone, life expectancy increased by 1.7 years for women and 2.1 years for men. At the same time, the fertility rate has strongly declined throughout the past decades, and even taking into account the slight increase in recent years, the current fertility rate of 1.59 live births per woman in 2009 for the EU-27 remains significantly below the replacement level of 2.1.[174] In other terms, without migration, the population in the EU would be in slight decline, even taking into account increased life expectancy; the population is ageing and the ratio between people in working age and people over the age of 65 is rapidly falling.[175]

It is against this background that recent developments in how welfare is organized in Europe should be assessed. In the late 1990s and early 2000s, a number of EU Member States launched reforms that seek to 'activate' social policies: instead of being treated as passive recipients of support, individuals granted unemployment benefits or social assistance have certain conditions imposed upon them, allowing them, in time, to build skills and to become, or re-become, active economic agents. The combination of flexibility and security (referred to as 'flexicurity') is typical of the European versions of activation policies. In this model, a strong protection of workers is combined with a strong requirement of being 'adaptable' in order to meet the demands of the employment market by permanent improvement of skills and active efforts to increase workers'' 'employability'.[176]

Three closely interrelated developments therefore characterize welfare reforms launched since the past decade and a half on the European continent. First, social assistance and unemployment assistance have been gradually merged, as the former was made increasingly conditional upon the beneficiary actively seeking work and as the levels and (especially) the duration of unemployment benefits were drastically lowered. Second, the support provided to job-seekers, in the form of individual counselling by public

171. Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market, OJ L 307, 18.11.2008, p. 11.
172. OJ L 245, 26.8.1992, p. 46.
173. SWD(2018) 67 final of 13.3.2018, p. 66.
174. Figures from Eurostat Fertility statistics: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Fertility_statistics>.
175. The European Commission has noted that 'from 2013 onwards, for the first time, the size of the population of working age in Europe will shrink, whilst the proportion of older people will expand rapidly. There are now four people to support one person over the age of 65, and this ratio is set to halve by 2040' See European Commission, Communication from the Commission, *Towards Social Investment for Growth and Cohesion -- Including Implementing the European Social Fund 2014-2020*, COM(2013) 83 final of 20.2.2013 at 4.
176. See Paul Teague, *Economic Citizenship in the European Union: Employment Relations inthe New Europe* (Routledge 1999) and Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (OUP 2005).

employment agencies (a role sometimes outsourced to private employment agencies chosen on a competitive basis, as in the "Hartz III" legislation[177] in Germany[178]), as well as the duties of the job-seeker to actively search employment, as a condition for the continued receipt of benefits, are increasingly contractualized. Third, a duty to accept 'suitable' employment is imposed on those without employment, with a generally broadened definition of what is suitable employment, based on the idea that the job-seeker should be 'flexible' and encouraged to adapt to the exigencies of the employment market. This approach is echoed in the European Union's employment guidelines, which reflect the need for active employment policies.[179]

Though they do increase the pressure on the beneficiary of social protection to seek employment or to go through training to improve his or her 'employability', these various modalities of 'activation' of social policies do not appear in violation of human rights. Indeed, various provisions of ILO Convention (No. 168) Concerning Employment Promotion and Protection against Unemployment, adopted in 1988,[180] illustrate the fact that the activation of unemployment benefits is seen as a legitimate tool to promote full employment and improve access to employment, in particular, to those who are least favoured on the employment market. In particular, Article 20 acknowledges that "The benefit to which a protected person would have been entitled in the cases of full or partial unemployment or suspension of earnings due to a temporary suspension of work without any break in the employment relationship may be refused, withdrawn, suspended or reduced to the extent prescribed", in particular, "(f) when the person concerned has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work; [...]". Article 21(1) provides that "The benefit to which a protected person would have been entitled in the case of full unemployment may be refused, withdrawn, suspended or reduced, to the extent prescribed, when the person concerned refuses to accept suitable employment"; and Article 21(2) clarifies how the suitability of employment should be assessed.

Though ILO Convention (No. 168), which entered into force on 17 October 1991, attracted only a small number of ratifications, it does express a certain consensus across governments and social partners that the purely 'passive' allocation of unemployment benefits may not be an appropriate solution, if the end goal is to ensure that the beneficiaries have access to gainful employment. Nor is this position a new one within the ILO. In fact, the first significant instrument adopted within the ILO on the protection against unemployment, ILO Unemployment Provision Convention (No. 44) of 1934,[181] already made it clear that the right to receive unemployment benefits could be made subject to compliance by the claimant with the condition, *inter alia*, that 'he is capable of and available for work',[182] or that he attend 'a course of vocational or other instruction'[183]; and Article 10 par. 1 clarifies the conditions under which a claimant "may be disqualified for the receipt of benefit or of an allowance for an appropriate period if he refuses an offer of suitable employment". The Unemployment Provision Convention also acknowledges that a claimant may be disqualified from receiving an unemployment benefit, *inter alia*, 'if he fails to comply with the instructions of a public employment exchange or other competent authority with regard to applying for employment', or if 'it is proved by the competent authority that he has failed or neglected to avail himself of a reasonable opportunity of suitable employment'.[184]

The ILO standards that have been recalled therefore confirm the view that certain conditions may be imposed on the receipt of unemployment benefits. At the same time, these instruments set clear limits to the type of work that may be imposed as part of an 'active' employment policy, as indicated by the reference to employment that is 'suitable' in Article 21 ILO Convention (No. 168) Concerning Employment

177. This was part of a number of reforms implemented in 2002-2003 under then Chancellor G. Schröder through four Acts on the Provision of Modern Services on the Labour Market (*Gesetze für moderne Dienstleistungen am Arbeitsmarkt*). The reforms came to be known, colloquially, as the 'Hartz reforms', after Peter Hartz, the director of personnel of Volkswagen at the time, who chaired the 'Commission for Modern Labour Market Services', an independent group of experts set up in 2002 in order to make proposals to improve the effectiveness of employment policies.
178. The European Court of Justice found that public employment agencies could abuse their dominant position when conferred a monopoly in the provision of placement services. See Case C-41/90, *Höfner and Elser v. Macrotron* [1991] ECR I-1979; and Case C-55/96, *Job Centre Coop ARL* [1997] ECR I-7119. The Court arrived at this conclusion where the public employment agency was unable to meet the actual demand for placement services.
179. These guidelines are now integrated to European semester as part of a single set of integrated guidelines, and are currently being revised in order to reflect the European Pillar of Social Rights: see Proposal for a Council Decision on guidelines for the employment policies of the Member States, COM(2017) 677 final of 22.11.2017.
180. 1654 UNTS 67.
181. ILO Convention (No 44) Ensuring Benefit or Allowances to the Involuntarily Unemployed, adopted on 23 June 1934 at the 18th International Labour Conference, entered into force on 10 June 1938.
182. Art.4(a).
183. Art 8.
184. Art.10, para 2.

Promotion and Protection against Unemployment. In general international human rights law, the same conclusion would appear to follow from the definition of the right to work itself, which human rights bodies have developed by providing a definition of what counts as 'work' for the purpose of assessing whether that right was being realised.[185]

The right to work is therefore not satisfied simply by providing employment to each individual, regardless of the nature of the employment in question, of the level of remuneration provided and of adequacy of the fit between the individual's abilities and the employment offered. In other terms, it is not only "forced" or "compulsory" labour that is prohibited, it is also making the allocation of social benefits conditional upon acceptance of certain types of work, that are not suited to the individual abilities of the person concerned or are devoid of any useful purpose, including in ensuring social integration by improving the "employability" of the person. The ultimate objective of work-for-welfare programmes should be to ensure "full, productive and freely chosen employment', to borrow a phrase from the 1988 ILO Convention (No. 168) Concerning Employment Promotion and Protection against Unemployment.[186] Yet, provided they remain within this objective -- provided they do not oblige the job-seeker to accept employment that is not 'suitable' --, the activation of unemployment benefits or of social protection is not, as such, contrary to the right to social security.

The EPSR includes a number of principles that go significantly beyond the EU Charter of Fundamental Rights. In some cases, the EPSR principles are inspired by the European Social Charter and bridge the gap between the EU Charter of Fundamental Rights and the Council of Europe Charter. For instance:

- Whereas the EU Charter is silent about the right to a fair remuneration, Principle 6 of the EPSR (which was inspired both by the 1989 Community Charter of the Fundamental Social Rights of Workers (one of the sources of Title X on Social Policy of the TFEU) and by the (revised) European Social Charter[187]) states that "Workers have the right to fair wages that provide for a decent standard of living" (a) and that "Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented" (b).
- Principle 9 of the EPSR, which concerns the work-life balance, provides another example. In contrast with article 27 of the Revised European Social Charter, which refers to "workers with family responsibilities" whose needs should be accommodated, the EU Charter of Fundamental Rights refers to the reconciliation between family and professional life in article 33(2) primarily by focusing on parents' relationships to their children -- as indeed does the EU legislation on that issue.[188] In contrast, Principle 9 of the EPSR stipulates rights "for *all people in employment with caring responsibilities*. It will hence also apply to people in employment who are not parents, but who may, for example, care for elderly or disabled family members".[189]
- Principle 11 (Childcare and support to children) stipulates that "Children have the right to affordable early childhood education and care of good quality" (a) and that "Children have the right to protection from poverty. Children from disadvantaged backgrounds have the right to specific measures to enhance equal opportunities" (b). Except for a general reference to the rights of the child in article 24, the EU Charter of Fundamental Rights is silent about these guarantees; in contrast, article 17 of the European Social Charter refers to the "Right of mothers and children to social and economic protection, requiring that Contracting Parties take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services", under article 27(1)(c) of the European Social Charter, States parties commit "to develop or promote services, public or private, in particular child daycare services and other childcare arrangements".

185. For instance, the Committee on Economic, Social and Cultural Rights emphasized that: "Work as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment" (Committee on Economic, Social and Cultural Rights, 'General Comment No. 18: The right to work' (6 February 2006) UN Doc E/C.12/GC/18 , para. 7).
186. ILO Convention (No. 168) Concerning Employment Promotion and Protection against Unemployment, art 2.
187. See SWD(2018) 67 final of 13.3.2018, p. 33.
188. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the Principle of equal treatment between men and women engaged in an activity in a self-employed capacity, OJ L 180, 15.7.2010, p. 1.
189. SWD(2018) 67 final of 13.3.2018, p. 45.

The ratification by the EU Member States of relevant international instruments figures proeminently among the tools that the Commission considers for the implementation of the principles of the European Pillar of Social Rights. As regards Principle 6 for instance, it refers to ILO Convention (No. 131) on minimum-wage fixing and to ILO Convention (No. 154) on the promotion of collective bargaining.[190] Similarly, while Principle 7 refers to the protection of workers in case of dismissal (including the right to be informed of the reasons and be granted a reasonable period of notice), reference is made to the fact that EU Member States are encouraged to ratify relevant ILO conventions, such as Convention (No. 122) on Employment Policy, Convention (No. 144) on Tripartite Consultations, Convention (No. 135) on Workers' Representatives, or Convention (No. 154) on Promotion of Collective Bargaining. While most references in this regard are to ILO conventions, the commentary of Principle 12 of the EPSR (Social Protection) includes a reference to the contribution to the implementation of the EPSR that could result from the ratification of the European Social Charter and from the extension of the list of accepted provisions by Member States.[191]

Nevertheless, a number of limitations should be noted:

(i) **The proclamation of the European Pillar of Social Rights should be seen as a means to support, and not as a substitute for, the recognition of social rights.** The March 2016 communication formally announcing the initiative referred to "common values and principles" that "feature prominently in reference documents" such as the Charter of Fundamental Rights or international instruments such as the European Social Charter adopted within the Council of Europe and recommendations from the ILO.[192] The Pillar, the communication suggested, should support the further implementation of social rights that are part of the *acquis* of the European Union: the principles that shall be attached to the 20 policy domains concerned by the initiative, it is said, "take as a starting point a number of rights already inscribed in EU and other relevant sources of law, and set out in greater detail possible ways to operationalise them".[193]

The EPSR should therefore not be confused with a new catalogue of rights, complementing the rights of the EU Charter of Fundamental Rights in the areas insufficiently covered by this instrument. As stated again in March 2018 in the Commission Staff Working Document accompanying the Communication "Monitoring the Implementation of the European Pillar of Social Rights": "Given the legal nature of the Pillar, for these principles and rights [listed in the EPSR] to be legally enforceable, they first require dedicated measures or legislation to be adopted at the appropriate level."[194]

It is therefore incorrect to state, as the Commission does in its presentation of the Principles included in the EPSR that the added value of the Pillar is to define as a right what was merely an advantage granted, in the absence of any legal obligation, to the individual.[195] The Pillar remains for now a policy instrument: it provides useful guidance, but is does not create legal guarantees enforceable before courts of other independent bodies. This is also why the efforts developed within the EU legal order to strengthen the protection of social rights as enforceable entitlements should be pursued, and this concerns in particular the strengthening of the relationship with the European Social Charter. As stated again in the above-mentioned Commission Staff Working Document:

> Nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting principles and rights recognised in relevant fields of application, by EU law or international law and by international agreements to which the EU or all the Member States are party, including the European Social Charter of 1961 and the relevant ILO Conventions and Recommendations. Implementation of the Pillar could be reinforced by ratifying relevant ILO conventions, the Revised European Social Charter of 1996 and its Additional Protocol Providing for a System of Collective Complaints.

190. SWD(2018) 67 final of 13.3.2018, p. 33.
191. See SWD(2018) 67 final of 13.3.2018, p. 60: "Member States may ratify, if not done so, and apply the relevant ILO conventions on social security, the European Code of Social Security and the Revised European Social Charter, and may review the reservations made for some Articles of the revised European Social Charter."
192. Communication from the Commission, *Launching a consultation on a European Pillar of Social Rights*, *op. cit.*, para. 2.4.
193. *Id.*, para. 3.1.
194. SWD(2018) 67 final of 13.3.2018, p. 4.
195. For instance, the Commission notes concerning Principle 11 that : "The Pillar establishes that *all* children *have the right to* good quality early childhood education and care (ECEC)" (SWD(2018) 67 final of 13.3.2018, p. 55). As regards Principle 12 (Social Protection), the Commission states: "The Pillar transforms the call for a replacement income which will maintain the workers' standard of living in [Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies, OJ L 245 of 26.8.1992, p. 49] *into a right*." But such statement are incorrect, or purely rhetorical, as long as the guarantees listed in the Pillar shall be enforceable in the absence of further legislative action, at EU or Member State level. It would be more accurate to state that the reference to such "rights" in the Pillar expresses an intention to transform such objectives into claimable entitlements.

(ii) **Whereas the EPSR generally goes beyond the existing *acquis* of the EU in the area of fundamental social rights -- providing guarantees that are more detailed than those of the EU Charter of Fundamental Rights and then stipulated in EU legislation --, some wording in the Pillar may be seen to threaten existing safeguards.**

For instance, whereas Principle 5 of the EPSR promises to ensure "Secure and adaptable employment", it includes a commitment to foster "the transition towards open-ended forms of employment"; it pledges to ensure, "in accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context"; and to encourage "innovative forms of work that ensure quality working conditions ... Entrepreneurship and self-employment shall be encouraged". These commitments, in essence, are to ensure that the employment regulatory framework is sufficiently flexible to adapt to the needs of the gig-economy; however, it is doubtful whether, as they are currently defined, they will truly benefit workers.

Strengthening the synergies between the European Pillar of Social Rights and the European Social Charter

The EPSR is neither a legislative instrument, nor is it a binding catalogue of rights. It is, rather, a set of principles that shall lead to measures of implementation at EU and Member State levels, in the form of legislative and policy initiatives; and it is already ensuring that social rights are taken more systematically into consideration in the social and economic governance of the EU. As such, thanks to the flexible nature of the implementation measures that could be considered, the EPSR provides a unique opportunity to improve the synergies with the European Social Charter, and to make progress towards overcoming the deficits identified in part I of the study. Six proposals are made in order to ensure that this opportunity is seized:

Proposal 1

To the extent that there is an overlap between the EU Charter of Fundamental Rights and the EPSR, strengthening the references to the European Social Charter in the commentary to the EPSR could help compensate, in part at least, for the paucity of references to the European Social Charter in the Explanations appended to the Charter of Fundamental Rights, which serve as an authoritative guide to its interpretation. The commentary to the EPSR is currently presented in the form of a Commission Staff Working Document, accompanying the March 2018 Communication from the Commission on monitoring the implementation of the European Pillar of Social Rights. This document contains very few references to the European Social Charter, and it is entirely silent about the interpretation of the European Committee of Social Rights. It is likely however that the commentary shall be further enriched and updated, as the legislative programme of the Commission in the fields covered by the EPSR shall make progress. In these future iterations, the commentary to the EPSR should refer explicitly to the provisions of the European Social Charter which correspond to the principles listed in the EPSR. The Table of correspondences provided as an Annex to this study could serve as a departure point to that effect.

Proposal 2

The references in the European Pillar of Social Rights to the corresponding provisions of the European Social Charter should be accompanied by a recommendation to take into account their interpretation by the European Committee of Social Rights. The reference to the authoritative interpretation by the European Committee of Social Rights shall serve what is the primary objective of the European Pillar of Social Rights: to ensure social convergence in the economic and monetary union, and thereby to prevent the risk of imbalances emerging as a result of social dumping and regulatory competition in the internal market. This objective is best served by the European Union institutions and the EU Member States converging on a single interpretation of the provisions of the EPSR. It is this interpretation that the European Committee of Social Rights may provide, at least for the provisions of the Pillar (the overwhelming majority) which correspond to guarantees listed in the European Social Charter.

Proposal 3

The references to the European Social Charter and to its interpretation by the European Committee of Social Rights shall constitute a strong encouragement to the Court of Justice of the European Union to align the status of the European Social Charter with that of other international human rights instruments ratified by all the EU Member States, and to treat as authoritative its interpretation by the European Committee of Social Rights. At present, the provisions of the European Social Charter are only taken into account by the Court of Justice, as a source of inspiration for the development of general principles of Union law, to the extent that such provisions correspond to provisions of the EU Charter of Fundamental Rights. In that sense, the European Social Charter is treated as less authoritative than the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child. The reasons for this are both the uneven levels of commitments of the EU Member States in the framework of the European Social Charter (not all EU Member States have ratified the most recent version of the European Social Charter, and not all States have accepted all the paragraphs of the European Social Charter), and the traditional uneasiness of the Court of Justice to accept that social rights have immediate effects, without prejudice of the principle of conferral and of the allocation of competences between the EU and the Member States. This lack of recognition of the European Social Charter, however, constitutes a major obstacle to the establishment of a sound division of labour between the Court of Justice of the European Union and the European Committee of Social Rights, based on mutual trust between these two bodies; and it increases the risk that EU Member States shall face conflicting obligations, imposed respectively by EU law and by the European Social Charter.

An alternative scenario may emerge in the future, which would allow such mutual trust to develop and significantly reduce the potential of conflicts. As the European Social Charter shall be better recognized in the EU legal order and as its interpretation by the European Committee of Social Rights shall gradually be considered as authoritative, the risk of the EU Member States being faced with conflicting obligations shall be considerably lessened. In time, such an evolution may lead the Committee to accept a standing (albeit rebuttable) presumption of conformity with the European Social Charter of all measures adopted by the EU Member States by which they seek to comply with an obligation imposed under EU Law.

Indeed, in *Confédération générale du travail (CGT) v. France*, the European Committee on Social Rights explicitly refused to establish such a presumption as regards compliance with the European Social Charter: it took the view 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".[196] This stands in contrast with the attitude adopted by the European Court of Human Rights vis-à-vis measures adopted by the Contracting Parties to the European Convention on Human Rights which implement Union law: the European Court of Human Rights has agreed since 2005 to establish a presumption of compatibility with the requirements of the ECHR of such measures, taking into account the status of the ECHR in EU law as well as the authority recognized by EU institutions (including the Court of Justice of the European Union) to the jurisprudence of the European Court of Human Rights.

Proposal 4

In the current situation, the budgetary discipline imposed under the "Fiscal Compact" may lead the EU Member States parties to the 2012 Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) to adopt measures that lead to violations of the European Social Charter. Article 3(3)(b) of the TSCG allows for certain deviations from budgetary commitments in the presence of "exceptional circumstances", defined as "an unusual event outside the control of the Contracting Party concerned". In the future, a finding by the European Committee of Social Rights that a particular measure, made in the name of fiscal consolidation, leads to a situation that is not in conformity with the European Social Charter, should be treated as such an "exceptional circumstance". It should thus allow a deviation from the budgetary commitments of that State. This is the only way to ensure that a State party to the TSCG shall not face conflicting obligations, imposed respectively by that Treaty and by the European Social Charter.

196. European Committee of Social Rights, *Confédération générale du travail (CGT) v. France*, Complaint No. 55/2009, decision on the merits of 23 June 2010, para. 35.

Proposal 5

Impact Assessments are currently prepared to accompany the legislative proposals filed by the Commission as well as its major policy initiatives, and the fundamental rights component of such IAs has been made more visible since 2005, by reference to the Charter of Fundamental Rights. The adoption of the European Pillar of Social Rights provides an opportunity to further strengthen the social rights component of such IAs. This could be achieved not only by reference to the EPSR, but also by an explicit reference to the European Social Charter.

In addition, such "second-generation" IAs, strengthened to include a more robust social rights component, should be seen as a tool to ensure greater social convergence in the EU, by guiding the macro-economic and budgetary choices in the social and economic governance of the Economic and Monetary Union (EMU). With that objective in mind, IAs should in the future also be prepared in order to assess the Stability or Convergence Programmes presented by the EU Member States as well as the country-specific recommendations (CSR) addressed to Member States in the European Semester cycle. They also should serve to assess prescriptions addressed to countries under the "enhanced surveillance" mechanism for countries of the Eurozone facing or threatened by, serious financial and budgetary difficulties (under Regulation No. 472/2013), so as to ensure that the structural measures these countries adopt (measures which, according to the terms of Regulation No. 472/2013, should be "aimed at addressing the sources or potential sources of difficulties" their economies and public finances encounter (Article 3(1)) do not lead to violations of fundamental social rights. IAs including a social rights component, finally, should allow to assess the Memoranda of Understanding negotiated and signed by the European Commission acting on behalf of the European Stability Mechanism (ESM) with the countries granted financial assistance, as such Memoranda of Understanding define the conditionalities attached to the provision of such assistance.

By thus revisiting the scope of Impact Assessments and their content, the requirements of the European Social Charter, as interpreted by the European Committee of Social Rights, would be effectively taken into account in the design and implementation of structural reforms required under the EU's social and economic governance framework. As the "Greek cases" presented to the European Committee of Social Rights illustrate, this is the only means to ensure that the States concerned shall not be faced with conflicting obligations. The institutions of the EU are already bound to comply with the Charter of Fundamental Rights in the negotiation of such reform programmes. It would be consistent with this duty to identify means to better take into account fundamental social rights in that context. Since the reference to the EU Charter of Fundamental Rights alone is not sufficient to avoid all violations of social rights (due to the gaps of the Charter of Fundamental Rights in the range of social rights covered), the IAs should also consider the impacts on the ability of the State concerned to implement the European Pillar of Social Rights, and to comply with its duties under the European Social Charter.

Proposal 6

Most of the provisions of the European Pillar of Social Rights require to be implemented not by the EU (or not by the EU only), but (also) by the EU Member States. The process of convergence encouraged by the EPSR would be significantly facilitated if all EU Member States ratified the most recent version of the European Social Charter and accepted all its provisions; or, if that cannot be achieved, if they agreed on a number of paragraphs that they all accept as binding. Indeed, the Commission has already noted that the ratification by the EU Member States of relevant international instruments figures among the tools that could support the implementation of the principles of the European Pillar of Social Rights. While most references in this regard are to ILO conventions, the commentary of Principle 12 of the EPSR (Social Protection) includes a reference to the contribution to the implementation of the EPSR that could result from the ratification of the European Social Charter and from the extension of the list of accepted provisions by Member States. This is a welcome invitation that should receive wide support.

Appendix

Comparative overview of the 1961 European Social Charter, the 1996 Revised European Social Charter, the 2000/2007 EU Charter of Fundamental Rights, and the European Pillar of Social Rights.

NOTE. This table provides a summary overview of the correspondence between the European Social Charter, in its 1961 and 1996 versions, the EU Charter of Fundamental Rights, and the European Pillar of Social Rights: it paraphrases the wordings used in the respective instruments, although not always exactly reproducing such wording *verbatim*. The 1996 Revised European Social Charter builds on the 1961 European Social Charter, adding a total of 11 rights to the 19 rights that the original Charter listed.[197] In addition however, the 1996 Revised European Social Charter amends some of the provisions of the original Charter: it strengthens the principle of non-discrimination (see Article E of the Revised European Social Charter); it improves the recognition of gender equality in all fields covered by the treaty; it improves the protection of maternity and social protection of mothers (Article 8); it provides for a better social, legal and economic protection of employed children (Article 7); and it reinforces and updates the protection of persons with disabilities (Article 15). Where such amendments were made, this is indicated in the table by highlighting some wording in the relevant sections of the 1996 Charter, where the changes are most significant. The table includes a reference to Article E of the 1996 Revised European Social Charter, which contains a general principle of non-discrimination in the enjoyment of the rights of the Charter: although this provision is listed in part V of the Charter, it clearly is a substantive provision, relevant to determining the extent of the guarantees it provides. Finally, since the version of the EU Charter of Fundamental Rights that was revised in 2007 with a view to incorporating it in the European Treaties does not differ, as regards the substance of the rights protected, from the original version as proclaimed in 2000, no distinction is made here between these two successive versions.

197. The 1996 Charter incorporates as part of these 11 additional rights the four provisions added by the 1988 Additional Protocol to the European Social Charter (CETS No. 128), which entered into force on 4 September 1992. The 1988 Additional Protocol is therefore not included in this comparative table.

1961 European Social Charter	1996 Revised European Social Charter	2000/2007 EU Charter of Fundamental Rights	European Pillar of Social Rights
Art. 1. Right to work, implying that (1) Contracting Parties 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; (2) they protect effectively the right of the worker to earn his living in an occupation freely entered upon; (3) they establish or maintain free employment services for all workers; (4) they provide or promote appropriate vocational guidance, training and rehabilitation.		Art. 5(2). No one shall be required to perform forced or compulsory labour. Art. 15. Freedom to choose an occupation and right to engage in work. 1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. 2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. 3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. Art. 29. Right of access to placement services. Everyone has the right of access to a free placement service. Art. 14(1). Everyone has the right … to have access to vocational … training.	Principle 1 - Education, training and life-long learning. Everyone has the right to quality and inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market. Principle 4 - Active support to employment a. Everyone has the right to timely and tailor-made assistance to improve employment or self-employment prospects. This includes the right to receive support for job search, training and re-qualification. Everyone has the right to transfer social protection and training entitlements during professional transitions. b. Young people have the right to continued education, apprenticeship, traineeship or a job offer of good standing within 4 months of becoming unemployed or leaving education. c. People unemployed have the right to personalised, continuous and consistent support. The long-term unemployed have the right to an in-depth individual assessment at the latest at 18 months of unemployment. Principle 13 - Unemployment Benefits The unemployed have the right to adequate activation support from public employment services to (re)integrate in the labour market and adequate unemployment benefits of reasonable duration, in line with their contributions and national eligibility rules. Such benefits shall not constitute a disincentive for a quick return to employment.

1961 European Social Charter	1996 Revised European Social Charter	2000/2007 EU Charter of Fundamental Rights	European Pillar of Social Rights
Art. 2. Right to just conditions of work, implying: (1) reasonable daily and weekly working hours, the working week to be progressively reduced; (2) to provide for public holidays with pay; (3) to provide for a minimum of two weeks annual holiday with pay; (4) to provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations as prescribed; (5) to ensure a weekly rest period.		Art. 31. Fair and just working conditions: 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.	Principle 5 - Secure and adaptable employment a. Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered. b. In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured. c. Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated. d. Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration.
Art. 3. Right to safe and healthy working conditions, implying: (1) issuing safety and health regulations; (2) providing for the enforcement of such regulations by measures of supervision; (3) consulting, as appropriate, employers' and workers' organisations on measures intended to improve industrial safety and health.		Art. 31. Fair and just working conditions: 1. Every worker has the right to working conditions which respect his or her health, safety and dignity.	Principle 10 - Healthy, safe and well-adapted work environment and data protection a. Workers have the right to a high level of protection of their health and safety at work. b. Workers have the right to a working environment adapted to their professional needs and which enables them to prolong their participation in the labour market. c. Workers have the right to have their personal data protected in the employment context.

1961 European Social Charter	1996 Revised European Social Charter	2000/2007 EU Charter of Fundamental Rights	European Pillar of Social Rights
Art. 4. Right to a fair remuneration, implies: (1) recognising the right of workers to a remuneration such as will give them and their families a decent standard of living; (2) recognising the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; (3) recognising the right of men and women workers to equal pay for work of equal value; (4) recognising the right of all workers to a reasonable period of notice for termination of employment; (5) permitting deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.		Art. 23. Equality between women and men. Equality between women and men must be ensured in all areas, including employment, work and pay.	Principle 2 - Gender equality a. Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression. b. Women and men have the right to equal pay for work of equal value. Principle 6 - Wages a. Workers have the right to fair wages that provide for a decent standard of living. b. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. c. All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners.
Art. 5. Right to organize: freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations.		Art. 12(1). Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.	

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Art. 6. Right to right to bargain collectively, implying: (1) promoting joint consultation between workers and employers; (2) promoting machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; (3) promoting the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; (4) recognising the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.		Art. 27. Workers' right to information and consultation within the undertaking. Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices. Art. 28. Right of collective bargaining and action. Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.	Principle 7 - Information about employment conditions and protection in case of dismissals a. Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period. Principle 8 - Social dialogue and involvement of workers a. The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States. b. Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies. c. Support for increased capacity of social partners to promote social dialogue shall be encouraged.

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Art. 7. Right of children and young persons to protection. The Parties undertake: (1) to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education; (2) to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy; (3) to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education; (4) to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training; (5) to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances; (6) to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day; (7) to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay; (8) to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations; (9) to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control; (10) to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.	Art. 7. Right of children and young persons to protection. The Parties undertake: (1) to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education; (2) to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy; (3) to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education; (4) to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training; (5) to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances; (6) to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day; (7) to provide that employed persons of under 18 years of age shall be entitled to *a minimum of four weeks' annual holiday with pay*; (8) to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations; (9) to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control; (10) to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.	Art. 32. Prohibition of child labour and protection of young people at work. The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.	

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Art. 8. Right of employed women to protection. The Parties undertake: (1) to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks; (2) to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence; (3) to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose; (4) (a) to regulate the employment of women workers on night work in industrial employment; and (b) to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.	Art. 8. Right of employed women to the protection of maternity. The Parties undertake: (1) to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks; (2) to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period; (3) to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose; (4) to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants; (5) to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.	Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding	
Art. 9. Right to vocational guidance, requiring that the Contracting Parties provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including school children, and to adults.			

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Art. 10. Right to vocational training, requiring that Contracting Parties: (1) provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and grant facilities for access to higher technical and university education, based solely on individual aptitude; (2) provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments; (3) provide or promote, as necessary: (a) adequate and readily available training facilities for adult workers; (b) special facilities for the re training of adult workers needed as a result of technological development or new trends in employment; (4) encourage the full utilisation of the facilities provided by appropriate measures such as: (a) reducing or abolishing any fees or charges; (b) granting financial assistance in appropriate cases; (c) including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment; (d) ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.			

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Art. 11. Right to protection of health: the Contracting Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases.		Art. 35. Health care. Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.	Principle 16 - Health care. Everyone has the right to timely access to affordable, preventive and curative health care of good quality.
Art. 12. Right to social security, the Contracting Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security; (3) to endeavour to raise progressively the system of social security to a higher level; (4) to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure: (a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; (b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.		Art. 34. Social security and social assistance 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices. 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. 3. 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 Union law and national laws and practices.	Principle 12 - Social protection. Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection. Principle 14 - Minimum income Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.

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Art. 13. Right to social and medical assistance. The Contracting Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; (2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; (4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.		Art. 34. Social security and social assistance 3. 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 Union law and national laws and practices.	
Art. 14. Right to benefit from social welfare services. The Contracting Parties undertake: (1) to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment; (2) to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.			

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Art. 15. Right of the physically or mentally disabled to vocational training, rehabilitation and resettlement. The Contracting Parties undertake: (1) to take adequate measures for the provision of training facilities, including, where necessary, specialised institutions, public or private; (2) to take adequate measures for the placing of disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment.	Art. 15. Right of persons with disabilities to independence, social integration and participation in the life of the community. With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular: (1) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private; (2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services; (3) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.	Art. 26. Integration of persons with disabilities. The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.	Principle 17 - Inclusion of people with disabilities. People with disabilities have the right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society, and a work environment adapted to their needs.

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Art. 16. Right of the family to economic, legal and social protection by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.		Art. 33. Family and professional life. 1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.	
Art. 17. Right of mothers and children to social and economic protection, requiring that Contracting Parties take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.			Principle 11 - Childcare and support to children a. Children have the right to affordable early childhood education and care of good quality. b. Children have the right to protection from poverty. Children from disadvantaged backgrounds have the right to specific measures to enhance equal opportunities.
Art. 18. Right to engage in a gainful occupation in the territory of any other Contracting Party. The Contracting Parties undertake: (1) to apply existing regulations in a spirit of liberality; (2) to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers; (3) to liberalise, individually or collectively, regulations governing the employment of foreign workers; and they recognise: (4) the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Contracting Parties.			

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Art. 19. Right of migrant workers and their families to protection and assistance in the territory of any other Contracting State. The Contracting Parties undertake: (1) to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration; (2) to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey; (3) to promote cooperation, as appropriate, between social services, public and private, in emigration and immigration countries; (4) to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters: (a) remuneration and other employment and working conditions; (b) membership of trade unions and enjoyment of the benefits of collective bargaining; (c) accommodation; (5) to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons; (6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory; (7) to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article; (8) to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality; (9) to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire; (10) to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply.		Art. 15(3). Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.	

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	Art. 20. Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. The Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: (a) access to employment, protection against dismissal and occupational reintegration; (b) vocational guidance, training, retraining and rehabilitation; (c) terms of employment and working conditions, including remuneration; (d) career development, including promotion.	Art. 23. Equality between women and men. Equality between women and men must be ensured in all areas, including employment, work and pay.	
	Art. 21. Right of workers to be informed and consulted within the undertaking. The Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice: (a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and (b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.	Art. 27. Workers' right to information and consultation within the undertaking. Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices. (See also Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community).	

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	Art. 22. Right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking. The Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute: (a) to the determination and the improvement of the working conditions, work organisation and working environment; (b) to the protection of health and safety within the undertaking; (c) to the organisation of social and socio-cultural services and facilities within the undertaking; (d) to the supervision of the observance of regulations on these matters.		
	Art. 23. Right of elderly persons to social protection. The Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular: - to enable elderly persons to remain full members of society for as long as possible, by means of: (a) adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; (b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them; - to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: (a) provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; (b) the health care and the services necessitated by their state; - to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.	Art. 25. The rights of the elderly. The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.	Principle 15 - Old-age income and pensions a. Workers and the self-employed in retirement have the right to a pension commensurate to their contributions and ensuring an adequate income. Women and men shall have equal opportunities to acquire pension rights. b. Everyone in old age has the right to resources that ensure living in dignity. Principle 18 - Long-term care Everyone has the right to affordable long-term care services of good quality, in particular home-care and community-based services.

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	Art. 24. Right of workers to protection in cases of termination of employment. The Parties undertake to recognise: (a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; (b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.	Art. 30. Protection in the event of unjustified dismissal. Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.	Principle 7 - Information about employment conditions and protection in case of dismissals b. Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation.
	Art. 25. Right of workers to the protection of their claims in the event of the insolvency of their employer. The Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection.	Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer	
	Art. 26. Right of all workers to protection of their dignity at work. The Parties undertake, in consultation with employers' and workers' organisations: (1) to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; (2) to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.		

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	Art. 27. Right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers. The Parties undertake: (1) to take appropriate measures: (a) to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training; (b) to take account of their needs in terms of conditions of employment and social security; (c) to develop or promote services, public or private, in particular child day care services and other childcare arrangements; (2) to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice; (3) to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.	Art. 33. Family and professional life. 1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.	Principle 9 - Work-life balance Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.
	Art. 28. Right of workers' representatives to carry out their functions. The Parties undertake to ensure that in the undertaking: (a) they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking; (b) they are afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.		

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	Art. 29. Right of workers to be informed and consulted in situations of collective redundancies. The Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.	Council Directive 75/129/EEC of 17 February 1975 on collective redundancies, as amended by Council Directives 92/56/EEC and 98/59/EC	
	Art. 30. Right to protection against poverty and social exclusion. The Parties undertake: (a) to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; (b) to review these measures with a view to their adaptation if necessary.	Art. 34. Social security and social assistance 3. 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 Union law and national laws and practices.	Principle 19 - Housing and assistance for the homeless a. Access to social housing or housing assistance of good quality shall be provided for those in need. b. Vulnerable people have the right to appropriate assistance and protection against forced eviction. c. Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion.
	Art. 31. Right to housing. The Parties undertake to take measures designed: (1) to promote access to housing of an adequate standard; (2) to prevent and reduce homelessness with a view to its gradual elimination; (3) to make the price of housing accessible to those without adequate resources.	Art. 34. Social security and social assistance. 3. 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 Union law and national laws and practices.	

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	Article E. Non-discrimination. 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.	Art. 21. Non-discrimination. 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.	Principle 3 - Equal opportunities. Regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public. Equal opportunities of under-represented groups shall be fostered.

The European Social Charter, adopted in 1961 and revised in 1996, is the counterpart of the European Convention on Human Rights in the field of economic and social rights. It guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.

No other legal instrument at pan-European level provides such an extensive and complete protection of social rights as that provided by the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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