

## The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union

### Les deux constitutions de l'Europe: intégrer les droits sociaux dans la nouvelle architecture économique de l'Union

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#### Abstract

*The new socio-economic architecture of the European Union established following the sovereign debt crisis of 2010-2011 is having significant impacts on the ability of the EU Member States to design, finance and implement public policies in support of social rights – including in the areas of healthcare, pensioners' rights and unemployment and sickness benefits –. It also encourages important “structural reforms” in the organization of the labour market. Yet, the new tools that have appeared in recent years (the European Semester, the “Six-Pack” and the “Two-Pack” regulatory reforms, the Fiscal Compact or the European Stability Mechanism) are almost entirely silent on the need to ensure that efforts aiming at economic convergence shall not lead to making it more difficult or impossible for the EU Member States to comply with their obligations to respect, protect and fulfill social rights. This article assesses the current attempts to fill this void. It puts forward certain proposals to ensure a better fit between the attempts to strengthen economic governance in the EU (and within the Euro Area in particular) and the fulfilment of social rights. It argues that, for reasons both of legitimacy and of effectiveness, there is an urgent need to rebalance the economic and the social constitutions of the EU.*

#### Résumé

*La nouvelle architecture socio-économique dont l'Union européenne s'est dotée à la suite de la crise de la dette souveraine de 2010-2012 affecte de manière significative la capacité des États membres de l'UE de mettre sur pied, de financer et de mettre en œuvre des politiques publiques permettant de réaliser les droits sociaux – y compris dans les domaines de la santé, des droits des pensionnés, des allocations de chômage de maladie-invalidité –. Elle encourage par ailleurs des réformes dites « structurelles » du marché de l'emploi. Pourtant, les nouveaux outils de gouvernance auxquels cette architecture fait appel (le semestre européen, les réformes réglementaires regroupées sous le « Six-Pack » et le « Two-Pack », le pacte budgétaire européen ou le mécanisme européen de stabilité) sont pratiquement muets à propos de la nécessité de s'assurer que ces outils visant à la convergence économique ne fassent pas obstacle à ce que les États membres se conforment à leurs obligations de respecter, protéger et mettre en œuvre les droits sociaux. Cette étude évalue les tentatives actuelles de combler cette lacune. Elle met en avant un ensemble de propositions afin d'assurer une plus grande cohérence entre les efforts visant à renforcer la gouvernance économique de l'UE (et au sein de la zone euro en particulier) et la garantie des droits sociaux. Elle explique pourquoi, pour des raisons de légitimité aussi bien que d'efficacité, il est à présent urgent d'aller vers un meilleur équilibre entre les constitutions économique et sociale de l'Union.*

## I. Introduction

Europe is reinventing itself. It was born as an international organization dedicated to the establishment of what was then called a “common market” between its Member States. With the Treaty of Maastricht, it gradually developed into an economic and monetary union. In the late 1990s, it grew into an area of freedom, security and justice. And now, as if to confirm the boldest predictions of the neofunctionalist school,<sup>1</sup> the European Union has developed various tools to steer the macro-economic policies of the Member States and to influence their budgetary choices.

The result of these successive expansions of the remit of EU law and policies has been to question the division of labour that was initially established between the economic and the social in the process of European integration. It had been thought that economic integration would support economic growth, and that this in turn would allow the Member States to finance welfare programs: in this view of “embedded liberalism”,<sup>2</sup> the constitutionalization at EU level of freedoms of movement and of freedom of competition was seen as entirely compatible with the role of the national governments in securing workers’ rights and in maintaining strongly redistributive social policies to protect the population from the risks of unemployment, of illness or disability, and of old age.<sup>3</sup> What we are now witnessing is the fall of this separation. First, economic freedoms are increasingly seen as threatening the ability for Member States to maintain existing levels of protection of social rights, whether there are seen as obstacles to the freedom of establishment or to the freedom to provide services or whether they are seen as unaffordable in an EU-wide competition within an increasingly heterogeneous Union. Secondly, the economic and financial crisis of 2009-2010, which soon developed into a public debt crisis following the massive bailouts to the financial sector and the increased demands on the national welfare systems, laid bare the fragility of an economic and monetary union: whereas the EMU led to the adoption of a single currency and trusted an independent institution to maintain a low level of inflation, it lacked the tools allowing to ensure any significant convergence between the macro-economic policies of the Member States. But economic convergence cannot be ensured without a strong social dimension. Just like the interpretation of economic freedoms cannot ignore their impacts on social rights, such impacts cannot be ignored by the instruments to ensure the convergence of economic policies within the EMU.

<sup>1</sup> See E. HAAS, *The Uniting of Europe*, Stanford, Stanford University Press, 1958. Among other influential contributions to this approach to European integration, according to which any expansion of the competences of the EU automatically leads to further expansions due to various spill-over processes, see L.N. LINDBERG, *The Political Dynamics of European Economic Integration*, Stanford, Stanford University Press, 1963; S. GEORGE, *Politics in the European Union*, Oxford, Oxford University Press, 1991.

<sup>2</sup> John G. RUGGIE, “International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order”, *Int. Org.*, vol. 36, n° 2, 1982, pp. 379 ff.

<sup>3</sup> C. JOERGES, F. RÖDL, “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval”, *European Law Journal*, vol. 15, n° 1, 2009, pp. 1-19.

This contribution offers an assessment of the role of social rights in the new socio-economic architecture of the European Union, following the significant reforms introduced after the 2009-2010 crisis. It proceeds in four steps. Section II replaces the new architecture in its context: it recalls how the EU Member States reacted to the sovereign debt crisis. Section III provides a description of the four pillars on which the socio-economic governance now relies. It examines how the Stability and Growth Pact (SGP), initially part of the compromise agreed when the EMU was launched with the Treaty of Maastricht, was revised, describing successively the role of the European Semester, the “Fiscal Compact” introduced in 2012 to impose stronger fiscal discipline on the Member States, the “enhanced surveillance” imposed on States experiencing financial difficulties, and the establishment of the European Stability Mechanism. We show that these new tools are almost entirely silent on the need to ensure that efforts aiming at economic convergence shall not lead to making it more difficult or impossible for the EU Member States to comply with their obligations to respect, protect and fulfill social rights. Section IV assesses the current attempts to fill this void. It reviews the contribution of the Court of Justice of the European Union, which now insists that the institutions of the EU were bound to respect and ensure respect for the Charter of Fundamental Rights. It also examines in this regard the role of external actors such as the European Committee on Social Rights as well as other human rights treaty bodies. It describes, finally, the promise of the “European Pillar of Social Rights”, an initiative formally presented by the European Commission in March 2016. Section V then puts forward certain proposals to ensure a better fit between the attempts to strengthen economic governance in the EU (and within the Euro Area in particular) and the fulfilment of social rights. Section VI concludes briefly: we express our conviction that, for reasons both of legitimacy and of effectiveness, there is an urgent need to rebalance the economic and the social constitutions of the EU. The best time to do this was when the tools were initially set up, in the hectic months between the first call for support from Greece in April 2010 and the agreement on the Fiscal Compact in March 2012. The second best time is now.

## II. The Bail-Outs: Managing the Sovereign Debt Crisis

The sovereign debt crisis took the European Union by surprise. While several EU Member States were about to default on their public debt, priority was given not to address the causes of the crisis, or the structural flaws of the architecture of the EMU, but to prevent defaults from occurring in the countries at risk, and thereby to avoid contagion to the rest of the Eurozone. Bankruptcy was prevented by the provision of fresh money. Part of it came from the IMF, although involving the IMF (which was done at the insistence of Germany in particular) was important not so much for its financial contribution, but because this allowed bringing in an actor situated outside the EU, and therefore presumably better placed to enforce

conditionalities on the States that were to be rescued. Indeed, most of the liquidities were made available, first by the Eurozone members directly via multilateral loans, and then by the two temporary financial assistance mechanisms set up following the outburst of the crisis: the European Financial Stability Facility (EFSF), a special purpose vehicle established as a *société anonyme* in Luxembourg for assisting Eurozone members,<sup>4</sup> and the European Financial Stabilisation Mechanism (EFSM), an emergency funding programme directly supervised by the European Commission.<sup>5</sup> The granting of financial assistance was made on strict conditions, however: the State receiving assistance was to implement a fiscal consolidation programme under supervision of the EU institutions. The details of these conditionalities were enshrined in Memoranda of Understanding (MoU),<sup>6</sup> concluded by the borrowing State with the lenders.<sup>7</sup> Typically, an MoU would impose strong cutbacks on public budgets, and require comprehensive reforms in the fields of social security, healthcare, public administration or education. The adoption of the austerity programmes anticipated in the MoUs concluded with bailed-out countries of course had a significant impact on the general level of enjoyment of social and economic rights in those countries. This systemic downgrading of the level of social and economic protection was widely criticized, and it did not take long before various judicial organs (both national and supranational) across Europe were asked to address the matter. As we will see, the reactions of these organs varied widely, from strong condemnation to a professed unwillingness to interfere with choices of a macro-economic nature.

Greece has become both the symbol and the most vivid illustration of the dramatic impacts that austerity measures can have on a population. It is there that the crisis, and the successive fiscal consolidation plans implemented in its aftermath, hit the hardest. The circumstances are sufficiently well known to be only briefly summarized here.<sup>8</sup> After the Greek government revealed, in October 2009, that the public deficit had been grossly underestimated by the previous governments, the country faced speculation on the financial markets that significantly raised its costs of borrowing, to the point that the situation became unsustainable. Greece called for financial assistance on 23 April 2010. In response, the other Euro Area Member States decided on 2 May 2010 to provide stability support through a Loan Facility Agreement.<sup>9</sup> Through this channel, they secured a rescue package of

<sup>4</sup> See Decisions of the Representatives of the Government of the Euro Area Member States meeting within the Council of the EU, 9 May 2010, Doc. No. 9614/10.

<sup>5</sup> Regulation (EU) n° 407/2010 of the Council of 11 May 2010 establishing a European financial stabilisation mechanism (O.J. L118, 12 May 2010, p. 1).

<sup>6</sup> It is important to note that the most important elements of the MoUs concluded under *ad hoc* settings (whether in the framework of multilateral loans, or under the EFSF or the EFSM) were included in Council Decisions directed to the recipient State at stake.

<sup>7</sup> During the crisis, the practice of the European Commission in imposing conditionalities, together with the ECB and the IMF (colloquially described as the "troika"), is in many ways comparable to that of the IMF when it negotiated and concludes stand-by arrangements with borrowing States.

<sup>8</sup> For an excellent summary, see L. PAPAIOPOULOU, "Can Constitutional Rules, even if 'Golden', Tame Greek Public Debt?", in M. ADAMS, F. FABBRINI, P. LAROCHE (eds), *The Constitutionalization of European Budget Constraints*, Oxford, Hart, 2014, pp. 223-247.

<sup>9</sup> Loan Facility Agreement between the following Member States whose currency is the Euro: Kingdom of Belgium, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia,

80 billion euros in loans.<sup>10</sup> The disbursements, however, were made conditional upon the adoption of a series of measures listed in the “Economic Adjustment Programme for Greece”. The austerity measures, intended to restore the fiscal balance of Greece, entailed 30 billion euros worth of cuts in spending for the period 2010-2014; the privatization of State assets, for an amount of 50 billion euros; and “structural measures”, involving in particular the flexibilisation of the labour market, as a means to restore the competitiveness of the Greek economy.<sup>11</sup> This first set of measures however soon appeared insufficient. In June 2011, the Eurozone Member States granted a second loan for an amount of 130 billion euros for the years 2012-2014. This second bail-out was carried out through the EFSF and the EFSM. The “Second Economic Adjustment Programme for Greece” was formally approved by the Euro Area Finance Ministers on 14 March 2012.<sup>12</sup>

The two successive adjustment plans had dramatic socio-economic impacts on the Greek population, that non-governmental organizations were swift to denounce.<sup>13</sup> Unemployment rates peaked up to 30%, with youth unemployment passing the 50% mark on several occasions. Dramatic cuts in the health sector led to hospitals closing and medical staff being reduced. As a result, average waiting time tripled, unmet medical needs raised by 50%, and diseases not seen for a long time, such as tuberculosis, re-emerged. The number of patients unable to pay for their medication substantially increased too. Pension benefits were reduced up to 40%, and retirement age was raised to 68 years. Others sectors such as education or justice also greatly suffered from the budgetary cuts foreseen by the successive MoUs the Troika imposed on Greece.

The Greek government, led at the time by Andreas Papandreou from the PASOK (socialist) party until he resigned from office 11 November 2011, was trapped. It requested that the International Labour Office send a High-Level Mission to Greece in order to assess the social impacts of the measures that had been imposed on the country. When the mission visited the country in September 2011, it was told by its interlocutors within the government that Greece had been unable to raise the question of the social impacts of the austerity measures with the Troika, and that they hoped that the ILO would be acting as a counterweight to the impositions of the European Commission, the European Central Bank and

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Slovak Republic and Republic of Finland and KfW, acting in the public interest, subject to the instructions of and with the benefit of the guarantee of the Federal Republic of Germany, as Lenders and The Hellenic Republic as Borrower, the Bank of Greece as Agent to the Borrower, 8 May 2010 (hereinafter, Loan Facility Agreement, 2010).

<sup>10</sup> With the understanding that the International Monetary Fund, to which Greece had also turned for assistance, would provide another 30 billion euros.

<sup>11</sup> See European Parliament, Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28 February 2014); Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Mission to Greece (22-26 April 2013), (27 March 2014) (U.N. doc. A/HRC/50/15/Add.1).

<sup>12</sup> See European Commission, Report on the Second Economic Adjustment Programme for Greece, March 2012.

<sup>13</sup> See the report by the International Federation for Human Rights, “Downgrading Rights: the Costs of Austerity in Greece”, published in November 2014.

the IMF.<sup>14</sup> Human rights bodies also stepped in, facing the uncomfortable position of having to condemn Greece for measures the country would have preferred not to have been forced to take.<sup>15</sup>

Although it may be the prime example of the concerns austerity-driven rescue packages have raised regarding the protection of social and economic rights, and although it has become a symbol, Greece was not the only State concerned by the austerity measures adopted in response to the sovereign debt crisis that swept across Europe in the aftermath of the financial crisis of 2008-2009: we could have exposed the situation in the other countries that were granted financial assistance, either from the EFSF and the EFSM (as did Ireland and Portugal), from the Balance of Payments facility<sup>16</sup> (for Hungary or Romania, who are not part of the euro area) or from the European Stability Mechanism (for Cyprus or Greece with its Third Rescue Package). The situation of these countries, which adopted significant reforms in compliance with certain conditionalities imposed on them, by and large compares to that of Greece.

What is at issue? The conditionalities attached to the financial assistance obtained by bailed-out countries following negotiations with their lenders had dramatic impacts on the general level of enjoyment of social and economic rights. Yet, in none of these countries does one get the impression that fundamental rights were seriously taken into account, and used as a prioritisation criteria for the allocation of spending cuts and budgetary efforts. In the following section, we describe the four components of the new social and economic governance of the European Union – as it was redesigned following the financial crisis and the threats to the stability of the Eurozone –, with a particular focus on whether social impacts (or, even more precisely, impacts on social rights) play a role in the adoption of measures aimed at preserving macro-economic stability. We conclude they do not.

<sup>14</sup> See International Labour Office, *Report on the High Level Mission to Greece (19-23 September 2011)*, Geneva, 22 November 2011, para. 88 (reporting the views expressed by the Greek government according to which, although “approximately 20 per cent of the population was facing the risk of poverty”, “it did not have an opportunity, in meetings with the Troika, to discuss the impact of the social security reforms on the spread of poverty, particularly for persons of small means and the social security benefits to withstand any such trend. It also did not have the opportunity to discuss the impact that policies in the areas of taxation, wages and employment would have on the sustainability of the social security system. In the framework of the obligations undertaken under the Memoranda and in order to maintain the viability of the social security system, Article 11(2) of Act No. 3863 stated that the expenditures of the social security funds had to remain within 15 per cent of GDP by 2060. A contracting GDP would necessarily lead to shrinking expenditures. Even though this did not endanger the viability of the system from a technical point of view, it did affect the levels of benefits provided and could eventually put into questioning the functions of the social welfare state. The Government was encouraged by the fact that these issues were on the agenda of an international organization and hoped that the ILO would be in a position to convey these issues to the Troika”).

<sup>15</sup> See below, pp. 22-26.

<sup>16</sup> In that regard, see Council Regulation (EC) No. 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States’ balances of payment (*O.J. L 53*, 23 February 2002, p. 1).

### III. The New Socio-Economic Governance of the European Union and Fundamental Rights

The sovereign debt crisis led to the adoption of a number of emergency measures in order to prevent immediate default in several Eurozone countries: we have described some of these measures above. The crisis however also called for a deeper restructuring of the architecture of the Economic and Monetary Union (“EMU”), since it brought to light the many structural deficiencies of economic governance in the EU – or, more precisely perhaps, of the lack thereof, an anomaly for a group of States sharing a single currency. In this section, we review the position of fundamental social and economic rights under the new socio-economic governance framework of the European Union, following the changes brought about by the many reforms implemented in answer to the Eurozone crisis.

The consensus was that fiscal discipline was too weak, and tools to ensure macro-economic convergence too few, in the Eurozone, leading to an imbalance between the monetary and the economic integration.<sup>17</sup> 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 was mainly carried out by the *Six-Pack*, 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). In what follows, we review the main components of the new architecture of socio-economic and fiscal governance of the European Union, which resulted from these various reforms.<sup>18</sup>

<sup>17</sup> For a clear presentation of that structural asymmetry between the economic and the monetary union, 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.

<sup>18</sup> 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.

## A. THE EUROPEAN SEMESTER

At the core of the new socio-economic governance of the EU now lies the European Semester.<sup>19</sup> An institutional process of macroeconomic, budgetary and structural policy coordination driven by the European Commission, the European Semester is designed to enhance macroeconomic and systemic convergence across the Eurozone and the Union. It is the single most important innovation resulting from the dramatic strengthening of the EU economic and budgetary governance which took place in response to the Eurozone crisis, and is to be considered as the main cornerstone of the new constitutional settlement of the EMU.<sup>20</sup> Briefly put, the European Semester is to trigger an overall rebalancing of the EMU, through a strengthening and extension of “the powers and capacities of European institutions to monitor, coordinate and sanction the economic and budgetary policies of Member States”,<sup>21</sup> thus fixing the structural deficiencies of the initial European system of economic and monetary governance.

The European Semester brings under one single regulatory and institutional umbrella various policy coordination mechanisms, some preexisting, others new: the Europe 2020 Strategy,<sup>22</sup> the Stability and Growth Pact,<sup>23</sup> the EuroPlus Pact<sup>24</sup> and the Macroeconomic Imbalance Procedure.<sup>25</sup> Furthermore, since May 2013, the Two-Pack (and more specifically Regulation No. 473/2013<sup>26</sup>) requires Member States of the Eurozone to submit, within the framework of the European Semester, draft budgetary plans for review by the Commission. In short, the main axes of action under the Semester may be summarized as follows: structural socio-economic reforms, budgetary and fiscal surveillance and the prevention and correction of macroeconomic imbalances. As a meta-coordination process, the Semester rests on a complex mix of soft and hard law instruments.

The Semester is run following a complex, synchronized timeline, which provides for both *ex ante* orientation and *ex post* correction and assessment.<sup>27</sup> It starts

<sup>19</sup> 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).

<sup>20</sup> 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.

<sup>21</sup> B. VANHERCKE, J. ZEITLIN, “Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020”, *SIEPS*, Report n° 2014 :7, p. 23.

<sup>22</sup> A soft law coordination cycle, centered on growth and competitiveness.

<sup>23</sup> 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).

<sup>24</sup> 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.

<sup>25</sup> 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 (O.J. L 306, 23 November 2011, p. 25).

<sup>26</sup> 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 (O.J. L 140, 27 May 2013, p. 11).

<sup>27</sup> In this regard, see the official detailed timeline provided by the Commission on [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm) (lastly consulted on 08/02/2017).



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,<sup>28</sup> 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, 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 analyzed 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 European Union. It should be noted that 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.

One now has a sense of how the European Semester streamlines and dramatically deepens fiscal, social and macroeconomic coordination within the European Union and the EMU. This complex machinery substantially strengthens the policy-steering capacity of the European institutions (and mainly that of the European Commission<sup>29</sup>), enabling them to supervise and monitor, with various levels of 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.

What, then, may be said about the status of fundamental rights under the European Semester? May they provide guidelines for the action of the European institutions under the European Semester? Are they perceived as constraints? As relevant at all? What, if any, are the mechanisms foreseen in the Semester to ensure that they are complied with, or at least taken into consideration?

<sup>28</sup> And now also accompanied by a set of recommendations specific to the Eurozone area.

<sup>29</sup> 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.

Whether we consider the primary law of the Union (Articles 121, 126 and 148 TFEU, Protocol No. 12 on the Excessive Deficit Procedure) or secondary legislation (Regulation No. 1466/97, Regulation No. 1173/2011, Regulation No. 1176/2011, Regulation No. 1174/2011 and Regulation No. 473/2013), none of the legal instruments refer explicitly to a duty to take into account fundamental rights. The only exceptions are to be found in 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: these instruments 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”.<sup>30</sup>

The careful reader however, will spot certain recurring elements that suggest that fundamental rights will be given at least some consideration by the EU institutions when acting in the framework of the European Semester. First, many instruments encourage a strong involvement of all relevant stakeholders, with a specific emphasis on the social partners, and the organizations of civil society.<sup>31</sup> 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<sup>32</sup>). 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.<sup>33</sup> Others emphasize the need for the European Semester to respect national practice and institutions for wage formation.<sup>34</sup> One will have noted that 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”. Finally, the intervention of the European Parliament, and exceptionally of national parliaments, is also provided for, notably through the establishment of an Economic

<sup>30</sup> Recital n° 7 and Article 1(2) of Regulation No. 473/2013; Recital n° 20 and Article 1(3) and 6(3) of Regulation No. 1176/2011.

<sup>31</sup> Article 2a Regulation No. 1466/97.

<sup>32</sup> See above, note 25.

<sup>33</sup> See above, note 30.

<sup>34</sup> See, for example, Article 1(2) of Regulation No. 473/2013.

Dialogue with the Commission and the Council.<sup>35</sup> 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.<sup>36</sup>

The more important point however is that, when acting in the framework of the European Semester, EU institutions remain bound 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. ■

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 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.<sup>37</sup> The Explanations relating to the Charter of Fundamental Rights strongly support this reading:<sup>38</sup> the explanations to Article 51 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*.<sup>39</sup>

If there is indeed 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 (and we are convinced there is), such a duty appears to be more honored in the breach than in the observance. Building on the existing literature on the topic<sup>40</sup> and our observation of the Semester’s

<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> 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 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.

<sup>38</sup> Praesidium of the European Convention, Explanations relating to the European Charter of Fundamental Rights (O.J. C 303, 14 December 2007, p. 17).

<sup>39</sup> 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.

<sup>40</sup> See B. VANHERCKE, J. ZEITLIN, *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”, *CEVIPOLE 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,

output so far, we offer three observations. First, despite an increased attention being paid to employment, social fairness and inclusion issues,<sup>41</sup> 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, if not purely virtual, remains kept to a strict minimum.<sup>42</sup> 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 it regularly engages in bilateral dialogues. The European Parliament<sup>43</sup> and the European Trade Union Confederation (ETUC) have voiced concerns in that regard.<sup>44</sup> Thirdly, at the supranational level, the Commission mainly has the upper hand, as the Council of the EU only marginally alters the output proposed by the Berlaymont (especially so regarding the country-specific recommendations).<sup>45</sup>

The Commission’s methodology in the framework of the European Semester remains particularly obscure. It is therefore very difficult for the external observer to know the kind of assessments the key instruments of the Semester (whether the AGS or the CSR’s) rest on, and the extent to which, if at all, they take into account fundamental rights. We believe that they actually do not. This is hardly consistent with the commitment of the Commission to “better regulation”, however. The CSR recommendations or AGS recommendations the Commission submits to the Council are the kind of initiatives that may require an Impact Assessment under the Commission’s own rules as stipulated in its Impact Assessment Guidelines. These guidelines state that: “In general, IAs are necessary for the most important Commission initiatives and those which will have the most far-reaching impacts. This will be the case for all legislative proposals of the Commission’s Legislative

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.

<sup>41</sup> In that regard, see B. VANHERCKE, J. ZEITLIN, *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.

<sup>42</sup> Such observation echoes a more general institutional trend the Eurocrisis seems to have triggered, or at least amplified, and which 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.

<sup>43</sup> European Parliament, “Country-Specific Recommendations need national owners and social partners”, Press Release, 23.06.2015.

<sup>44</sup> See, for example, ETUC Statement on the 2014 CSR’s concerning wages and collective bargaining systems, 4 June 2014.

<sup>45</sup> 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.

and Work Programme (CLWP) and for *all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts* (with the exception of routine implementing legislation) and for non-legislative initiatives (such as white papers, action plans, expenditure programmes, negotiating guidelines for international agreements) which define future policies. It will also be the case for certain implementing measures (so called ‘comitology’ items) which are likely to have significant impacts”.<sup>46</sup> We explain below why the launch of the initiative “Towards a European Pillar of Social Rights” in March 2016 may announce a shift in this regard.<sup>47</sup>

Though fundamental rights are barely referred to in the instruments organizing the European Semester, these instruments do comprise several safeguards, such as the 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, which may contribute to ensuring that fundamental rights are taken into account in the design of national reform programmes or of convergence/stability programmes. However, these safeguards suffer in practice from poor (and, at national level, uneven) implementation. They are therefore unlikely to form an adequate substitute for a more explicit recognition of the role of fundamental rights in the process. Moreover, despite the increased visibility of social concerns in the action of the Commission under the Semester, we found no indication that it is giving the protection of fundamental rights the critical role it would deserve to play in that framework. Nowhere does 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. Of course, this does not, in itself, imply that the EU institutions’ action under the European Semester systematically flouts the fundamental rights they are legally bound to respect. The odds are however, that it does. Yet, as already mentioned, the EU institutions, and the Commission in particular, are fully bound, when acting in the framework of the European Semester, by the Horizontal Social Clause (Article 9 TFEU).<sup>48</sup> They also must comply with the Charter of Fundamental Rights, which includes in its chapter IV entitled “Solidarity” a range of social “rights” or “principles”: the inclusion of this chapter was precisely meant to ensure that economic imperatives would not lead to sacrifice social standards.<sup>49</sup>

<sup>46</sup> European Commission, Impact Assessment Guidelines, 15 January 2009, SEC(2009)92, p. 6 (emphasis added).

<sup>47</sup> On this initiative, see pp. 26 ff.

<sup>48</sup> From a constitutional perspective, the Horizontal Social 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).

<sup>49</sup> M. MADURO, “The Double Constitutional Life of the Charter of Fundamental Rights of the European Union”, in T. HERVEY, J. KENNER (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford, Hart, 2003, p. 285.

## B. THE FISCAL COMPACT

The revision of the Stability and Growth Pact, we have seen, as well as the adoption of the “Six-Pack” set of regulations and directives, significantly strengthened the coordination of the national budgetary and macroeconomic policies within the EMU. But for various reasons, this intervention via secondary law and policy coordination tools was not deemed sufficient, and there was a strong political will, especially on the part of Germany, 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, it was finally agreed to conclude an intergovernmental agreement, formally outside the Treaties.<sup>50</sup> 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<sup>51</sup>) in the margins of the European Council convened in Brussels. The TSCG entered into force, formally, 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”, to which the TSCG is often reduced. Despite introducing some minor innovations, the Fiscal Compact relies heavily on the existing instruments of secondary law we have already discussed (the revised SGP and the Six-Pack). In brief,<sup>52</sup> States parties 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 correc-

<sup>50</sup> However, consistency and connection with EU law are guaranteed in the Treaty (Article 2).

<sup>51</sup> In the meantime, the Czech Republic has decided to join the Treaty in March 2014. Since its accession to the EU in July 2013, Croatia is eligible to become part to the Treaty but has so far failed to do so.

<sup>52</sup> 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”, *R.A.E.*, 2012/4, pp. 716-731.

tion mechanism) in rules of constitutional rank in the domestic legal order.<sup>53</sup> Such internalization was considered by the Treaty makers as locking in budgetary discipline.

Just like the ESM Treaty,<sup>54</sup> 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. It is noteworthy that Article 3(3)(b) of the TSCG defines the notion of “exceptional circumstances” as referring to “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”; moreover, “exceptional circumstances” thus understood may only allow for a deviation “provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term”. It is highly unlikely that in the mind of the Treaty drafters, such “exceptional circumstances” could have encompassed a situation in which the requirement to balance public budgets might be incompatible with the fulfilment of economic and social rights.

### C. THE ENHANCED BUDGETARY AND ECONOMIC SURVEILLANCE FRAMEWORK

Formally located outside the European Semester, the second branch of the *Two-Pack*, Regulation No. 472/2013,<sup>55</sup> 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 EFSM, ESM, EFSE, or another relevant international financial institution such as the IMF).<sup>56</sup> 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:<sup>57</sup> 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.<sup>58</sup> The objective,

<sup>53</sup> 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”.

<sup>54</sup> 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).

<sup>55</sup> 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 (O.J. L 140, 27 May 2013, p. 1).

<sup>56</sup> For an extensive analysis of Regulation No. 472/2013, see M. IOANNIDIS, “EU Financial Assistance Conditionality after Two Pack”, *ZaōRV*, vol. 74, 2014, pp. 61-104.

<sup>57</sup> 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.

<sup>58</sup> In that regard, Regulation No. 472/2013 contributes to clarifying the relationship between EU law and the ESM/EFSE/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

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 enhanced surveillance mechanism can be summarized as follows. 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)). More specifically, the procedure includes, *inter alia*, intensive information exchanges with, and review missions by the Commission. The Council may also recommend to the Member State at stake, by qualified majority, the adoption of precautionary corrective measures or the preparation of a draft macroeconomic adjustment programme,<sup>59</sup> 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.<sup>60</sup>

Similar to many of the regulations organizing the European Semester (as seen above), 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”. But just like for the European Semester, it is nowhere explicitly confirmed that fundamental economic and social rights will be duly taken into account in the preparation, and implementation, of such programmes.

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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.

<sup>59</sup> 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).

<sup>60</sup> 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).



The impression that the commitment to preserve basic social and economic rights in the framework of the “enhanced surveillance” mechanism remains only theoretical and is not given much practical bite is further reinforced by a general overview of the two most recent macroeconomic adjustment programmes adopted under Regulation No. 472/2013: the third Greek Rescue Package,<sup>61</sup> adopted in the Summer of 2015, and the 2013 Cyprus bail-out programme.<sup>62</sup> The relevant decisions do include reassuring statements that, on their surface at least, seem to guarantee the social dimension of those programmes. Thus, reference is made to the need to minimize harmful social impacts (Article 1(3) of Decision 2013/463, Article 1(3) of Decision 2015/1411), especially so on disadvantaged people and vulnerable groups (Article 2(2) of Decision 2013/463, Article 2(2) of Decision 2015/1411); and 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, when analysing the political background against which these programmes were adopted, especially the resistance they encountered from workers’ unions and from public opinion in Cyprus and, even more, in Greece, one is left to wonder how these programmes can possibly be presented as having been adopted through “inclusive” processes. More fundamentally, even a superficial examination of the set of policy reforms required under those programmes in the sectors of healthcare, education, social security, pension or public administration, immediately confirms that consideration for social and economic rights, and the preservation of a minimal level of protection of those rights, has not been a major concern for policy makers acting under the framework of Regulation No. 472/2013, which seem to have been mainly driven by financial consolidation and competitiveness concerns. In no way do fundamental rights appear to have been taken into account as criteria of prioritisation for the allocation of the budgetary efforts. 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, the burden of the “consented” efforts is particularly heavy on the middle classes (which are the core recipients of social and economic rights), unlike other fringes of society. This is particularly blatant in the case of Cyprus.<sup>63</sup>

<sup>61</sup> See Council Implementing Decision (EU) No. 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece (O.J. L 219, 20 August 2015, p. 12).

<sup>62</sup> 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 (O.J. L 250, 20 September 2013, p. 40).

<sup>63</sup> See Decision No. 2013/463, Article 2(8) to 2(14).

## D. THE EUROPEAN STABILITY MECHANISM

At the heart of the sovereign debt crisis 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.<sup>64</sup> The ESM was not established as an EU institution, but as a distinct international organization, based in Luxembourg. As a consequence, its founding act was not adopted within the framework of the EU Treaties, but has the status of an international treaty.<sup>65</sup> 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,<sup>66</sup> 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,<sup>67</sup> following the simplified amendment procedure provided for in Article 48(6) TEU.<sup>68</sup> The validity of this much contested amendment was later confirmed by the Court of Justice in its famous (and equally contested) *Pringle* ruling.<sup>69</sup>

As an international organization, 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”.<sup>70</sup> The granting of stability support follows a four-step procedure (Article 13): a request from the ESM Member; a principled decision of the ESM on

<sup>64</sup> See Recital 8, 12, 13 of the ESM Treaty, Article 13 and 38.

<sup>65</sup> The ESM Treaty was signed on the 2 March 2012, and entered into force on the 1 May 2013.

<sup>66</sup> In this regard, see J.-V. LOUIS, “The No-Bailout Clause and Rescue Packages”, *Common Market Law Review*, vol. 47, n° 4, 2010, pp. 971-986.

<sup>67</sup> 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”.

<sup>68</sup> European Council Decision 2011/199/EU of 25 March 2011 amending 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).

<sup>69</sup> Judgment in *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.

<sup>70</sup> Article 3 of the ESM Treaty.

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.<sup>71</sup> 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 Boards 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)).

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<sup>71</sup> The ESM being an international organization as such, the MoUs 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 consistency 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*).

The reader shall not be surprised that the ESM Treaty does not make any reference, even purely symbolic, to fundamental rights. As a consequence, the organs of the ESM, and the EU institutions that are associated to their action, have so far given little consideration to the preservation of fundamental rights when making their decisions, which are exclusively based on macroeconomic considerations.

#### IV. Rebalancing the Economic and the Social Constitutions

Whether when analyzing the emergency rescue packages imposed on bailed-out countries, or when examining the main aspects of the new socio-economic governance framework of the EU – as it was established after the crisis of 2009-2011 –, one cannot fail to observe a clear imbalance between the social and the economic constitutions of the current EU. While the crisis was full blown, and many Euro-zone countries were confronted with speculation on their debt on financial markets and, given the high premiums demanded, ran the risk of defaulting on their debts, social and economic rights were widely neglected: they were neither taken into account as means to set priorities for the allocation of budgetary efforts, nor even seen as setting clear limits to the fiscal consolidation or structural adjustment measures that were imposed on the borrowers by their creditors. Similarly, in the new economic governance framework of the EU, those rights have failed to act as efficient guidelines and constraints for the action of institutional actors. This substantive neglect is compounded by procedural deficiencies. The institutional actors which would be the most likely to contribute to their preservation (the European Parliament, national parliaments, trade unions and the civil society) have been until now broadly sidelined, and prevented from weighing on the new policy-making processes set up during the crisis (starting with the European Semester). It is difficult to disagree with Tuori and Tuori when they assert that the social constitution today is “a constitutional underdog which but very rarely has been able to assert itself in conflicts with the economic constitution”.<sup>72</sup>

This is neither inevitable, however, nor is it sustainable. We see two promising developments that could allow a gradual rebalancing of the social and the economic constitutions – allowing social rights to be taken into account as benchmarks in the design of macro-economic policies, and as limits imposed on the EU institutions in their role in the new economic governance of the Euro Area. First, courts and quasi-judicial bodies have stepped in. The Court of Justice of the European Union has recalled that the institutions of the EU were bound to respect and ensure respect for the Charter of Fundamental Rights: the fact that it has done so in a case concerning the ESM, which is formally an international

<sup>72</sup> K. TUORI, K. TUORI, *op. cit.*, p. 233. This may have already been true before the crisis, regarding the microeconomic constitution of the EU. It is now too for the macroeconomic constitution of the Union. See also A. HINAREJOS, *op. cit.*, pp. 81-83.

organization distinct from the Union, only makes this more significant. Pressure has also been exerted from outside the EU legal order. The European Committee on Social Rights, acting under the European Social Charter adopted in the framework of the Council of Europe, as well as various human rights treaty bodies, have made clear their expectations that greater attention should be paid to the social rights impacts of fiscal consolidation and structural adjustment measures adopted by the EU Member States either in order to conform themselves to the requirements of the European Semester, or to comply with the Fiscal Compact, or because they have been receiving financial support and are subject to enhanced forms of surveillance or have agreed to certain conditionalities.

Secondly, the European Commission has put forward a proposal, called the European Pillar of Social Rights, to strengthen the role of social rights in the EMU. While the final shape of the proposal remains undefined, this constitutes at the very least an admission that more needs to be done to rebalance the social constitution against the economic constitution. It also provides an opportunity that could be seized. At a minimum, it may lead to more robust social rights impacts assessments accompanying measures taken in the context of the EU's economic governance architecture. It could also encourage a more fundamental re-weighting of the economic and the social constitutions of the Union. We examine these two evolutions in turn.

## A. ASSESSING THE SOCIAL RIGHTS IMPACTS OF THE ECONOMIC AND MONETARY UNION

### 1. *The Role of the Court of Justice of the European Union*

The Court of Justice of the European Union was initially hesitant to intervene in the economic governance of the EU. When, in 2011-2012, domestic courts from Portugal and Romania, two countries which benefited from financial support respectively from the EFSF and the Balance of Payments facility,<sup>73</sup> requested preliminary rulings from the Court of Justice concerning the legality of national measures adopted following an MoU they concluded with the lending institutions, the Court politely declined to answer.<sup>74</sup> The national courts were concerned that

<sup>73</sup> See above, note 16.

<sup>74</sup> See, among others, Order in *Corpul National al Politistilor*, C-434/11, EU:C:2011:830; Order in *Corpul National al Politistilor*, C-134/12, EU:C:2012:288; Order in *Corpul National al Politistilor*, C-369/12, EU:C:2012:725; Order in *Sindicato dos Bancarios do Norte and Others*, C-128/12, EU:C:2013:149; Order in *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, EU:C:2014:2036; Order in *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-665/13, EU:C:2014:2327. In this last case for instance, the Court of Justice considered that it lacked jurisdiction to assess compliance with the Charter of Fundamental Rights of Portuguese Law No. 64-B/2011 of 31 Dec. 2011 approving the State Budget for 2012, which resulted in salary reductions for certain public sector employees, although the budgetary measures involved were explicitly stated in Article 21(1) of the 2012 Budget Law to be linked to the Economic and Financial Assistance Programme (EFAP) applied to Portugal). The General Court adopted a similar attitude in the case of Greece: Orders in *ADEDY and Others v Council*, T-541/10 and T-215/11, EU:T:2012:626 and EU:T:2012:627; Order in *Mallis and Malli v European Commission and European Central Bank*, T-327/13, EU:T:2014:909. In substance, these orders touched upon the issue of whether national authorities, when adopting the internal measures provided for in a MoU or a macroeconomic adjustment programme, are actually "implementing EU law", and therefore bound by the Charter of Fundamental Rights (Article 51(1)). In that regard, see K. LENAERTS, "EMU and the EU's constitutional framework", *European Law Review*, vol. 39, n° 6, 2014, p. 759.

the measures adopted at domestic level might be in violation with the requirements of fundamental rights, including with certain rights protected by the Charter of Fundamental Rights. The Court of Justice however took the view, in essence, that the link between EU law and the measures at stake was too weak to justify it accepting jurisdiction.<sup>75</sup> It held this position even when the content of the MoU had been replicated in a Decision of the Council.

This is changing, however. The Union's judicature has come to realize that it may have an important role to play in order to ensure compliance with EU law, and particularly with the Charter of Fundamental Rights, in the economic governance of the EU. Perhaps surprisingly, it has done so, at the end of 2016, in the least auspicious of contexts, where conditionalities were attached to lending by the ESM. The circumstances made such a position particularly unlikely: indeed, the ESM itself, as a distinct international organization with its own legal personality, separate from that of the Union, lies outside the scope of application of the Charter. Moreover, on 27 November 2012, in its *Pringle* ruling, the Court of Justice of the European Union had made clear that EU Member States were not implementing EU law, within the meaning of Article 51(1) of the Charter, when they established the ESM;<sup>76</sup> this would have seemed to extend *a fortiori* to situations when they implement the MoUs they concluded with the ESM in the framework of a financial assistance programme.

In *Pringle* however, the Court had remained silent on the applicability of the Charter to the Commission and the ECB when they act within the framework of the ESM Treaty. Indeed, in the opinion she delivered in that case, Advocate General J. Kokott had argued that EU institutions are to remain bound by the full extent of EU law, including the Charter, even when acting under the ESM.<sup>77</sup> Various authors appeared to share this position.<sup>78</sup> It is now one that the Court of Justice itself appears ready to endorse.

The opportunity arose for the Court of Justice to clarify its position as a result of actions for compensation filed against the Commission and the ECB, challenging the impacts of measures adopted following the conclusion of the Memorandum of Understanding between Cyprus and the ESM. The claimants argued before the General Court that the conditions listed by the MoU regarding the restructuring

<sup>75</sup> On this, see A. HINAREJOS, *op. cit.*, pp. 131-136.

<sup>76</sup> *Thomas Pringle v Government of Ireland*, *op. cit.*, 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".

<sup>77</sup> Opinion of AG Kokott in *Thomas Pringle v Government of Ireland*, C-370/12, EU:C:2012:675, para. 176 ("the conclusion and ratification of the ESM Treaty would only infringe European Union law if that Treaty required the Commission to perform tasks which the Treaties prohibited. The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights").

<sup>78</sup> See, for example, A. POULOU, "Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?", *German Law Journal*, vol. 15, n° 6, 2014, pp. 1158; C. BARNARD, "The Charter, the Court – and the Crisis", *Cambridge Legal Studies Research Paper Series*, No. 18/2013, pp. 11-12.

of the banking sector were in violation of the right to property as ensured, among others, by Article 17 of the Charter of Fundamental Rights. The restructuring in question had been decided on 25 March 2013 by decrees (Nos. 103 and 104) of the Governor of the Central Bank of Cyprus acting by delegation under a Law of 22 March 2013 on the resolution of credit and other institutions. The claimants however attributed the decision, ultimately, to the Commission and the ECB, who had been negotiating with the Cypriot government the conditions attached to the financial support to be given to the country. The General Court rejected such claim. It ruled that the ECB and the Commission, while entrusted with some tasks relating to the implementation of the objectives of the ESM Treaty, were not fulfilling those tasks acting in their own name, but only on behalf of the ESM. The MoU for example, even if negotiated by the Commission, is solely concluded by the country concerned (as ESM member requesting assistance) and the ESM itself. As a consequence, the General Court reasoned, the Charter does not apply to the EU institutions when acting under the ESM framework.

*Ledra Advertising Ltd v. Commission and European Central Bank (ECB)*, one of five similar cases filed simultaneously, may serve as an illustration.<sup>79</sup> In *Ledra Advertising*, the applicant complained that the restructuring of the Bank of Cyprus had violated his right to property, since it had involved the conversion of debt instruments or obligations into equity, leading to a substantial reduction of the value of the deposit of the applicant in the Bank of Cyprus – the decree in other terms amounted to what, in common parlance, is sometimes referred to as a “haircut” on account owners. Though legally distinct, the measure was politically connected to the support provided to Cyprus by the ESM: on 16 March 2013, the Eurogroup had publicly welcomed that a political agreement had been found between the Republic of Cyprus and the other Euro Area Member States on a MoU which referred to some of the adjustment measures envisaged, including the introduction of a levy on bank deposits;<sup>80</sup> and when the MoU was finally signed on 26 April 2013 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 (allowing a first tranche of aid to be provided to the Republic of Cyprus), it included a reference to the restructuring of the two major banks of the country, the Bank of Cyprus and Laïki. Did the involvement of the Commission and/or the ECB imply that they, as institutions of the EU, might have engaged their extra-contractual responsibility, by approving terms of

<sup>79</sup> Order in *Ledra Advertising Ltd v. Commission and ECB*, T-289/13, EU:T:2014:981. Four similar orders were adopted on the same day by the General Court in the following cases: *CMBG Ltd / Commission et BCE*, T-290/13, EU:T:2014:976; *Eleftheriou et Papachristofi v. Commission and ECB*, T-291/13, EU:T:2014:978; *Evangelou v. Commission and ECB*, T-292/13, EU:T:2014:977; *Theophilou v. Commission and ECB*, T-293/13, EU:T:2014:979; *Fialtor Ltd v. Commission and ECB*, T-294/13, EU:T:2014:980.

<sup>80</sup> In fact, on 19 March 2013, the Cypriot Parliament rejected the Cypriot Government's Bill relating to the introduction of a levy on all bank deposits in Cyprus. As an alternative, the Cypriot Government drew up a new Bill providing only for the restructuring of two banks, the Bank of Cyprus and Laïki. The Parliament adopted the new bill on 22 March 2013.

the MoU that, allegedly, led to a violation of the right to property? The General Court believed not. Citing *Pringle*, it expressed the view that:

■ The MoU was adopted jointly by the ESM and the Republic of Cyprus. It was signed on 26 April 2013 by the Cypriot authorities ..., on the one hand, and by the Vice-President of the Commission on the Commission's behalf, on the other. However, it is apparent from Article 13(4) of the ESM Treaty that the Commission is to sign the MoU only on behalf of the ESM. [A]lthough the ESM Treaty entrusts the Commission and the ECB with certain tasks relating to the implementation of the objectives of that Treaty, it is apparent from the case-law of the Court of Justice that the duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and, moreover, that the activities pursued by those two institutions within the ESM Treaty solely commit the ESM (Case C-370/12 *Pringle* [2012] ECR, para. 161).<sup>81</sup> ■

The applicant in *Ledra Advertising Ltd* argued, alternatively, that the source of the liability of the EU for the purposes of Article 340 TFEU stemmed from the failure of the Commission to guarantee the conformity of the MoU with EU law. For non-contractual liability to be established however, in addition to the conduct having to be unlawful and to a damage being incurred, it is necessary to establish the existence of a causal link between the conduct and harm alleged. The General Court noted that such a link was particularly required “in cases where the conduct allegedly giving rise to the damage pleaded consists in refraining from taking action”: the damage in such cases must be shown to be “actually caused by the inaction complained of and could not have been caused by conduct separate from that alleged against the defendant institution”.<sup>82</sup> The Court considered that the complainants had not met the burden of proving, to a sufficient degree, the existence of a direct link between the conclusion of the MoU and the reduction in the value of the applicant's deposit at the Bank of Cyprus: “That reduction”, the Court recalled, “actually occurred on the entry into force of Decree No. 103 [of 25 March 2013], pursuant to which part of that deposit was converted into shares or convertible instruments. Therefore, the applicant cannot be regarded as having established with the necessary certainty that the damage it claims to have suffered was actually caused by the inaction alleged against the Commission”.<sup>83</sup> Indeed, the MoU was formally approved only on 8 April 2013 by the Board of Governors of the ESM, *after* the adoption of the said decree. However, although the Court seems to attach great weight to this chronology, this approach does seem rather formalistic, in the light of the fact that the adoption of decree No. 103 was fully in line with the political agreement reached between Cyprus and the Eurozone Member States, publicly announced already on 16 March 2013.

After these orders by the General Court were appealed before the Court of Justice, Advocate General Wahl issued an opinion generally in line with the approach of

<sup>81</sup> *Ledra Advertising Ltd. v. Commission and ECB*, T-289/13, *op. cit.*, paras. 44-45.

<sup>82</sup> *Id.*, para. 53.

<sup>83</sup> *Id.*, para. 54.



the General Court.<sup>84</sup> Remarkably however, he joined his colleague AG Kokott and the doctrine which considers that, in whichever capacity it takes action, the Commission, as an institution of the EU, is bound to comply with the Charter of Fundamental Rights. AG Wahl said to have “no doubt that the Commission is to respect the EU rules, especially the Charter, when it acts outside the EU legal framework. After all, Article 51(1) of the Charter does not contain any limit as to the applicability of the Charter with respect to the EU institutions, as it does for Member States. Furthermore, that provision also calls on the EU institutions to *promote* the application of Charter”.<sup>85</sup> In his view however, it did not follow that the Commission should impose that the Charter be complied with by *non-EU actors* acting outside the EU framework: when negotiating and concluding an MoU on behalf of the ESM, the Commission is not “required to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU framework”.<sup>86</sup> The implicit suggestion was that, far from discharging its duties to comply with the Charter if it were to impose that the Charter be taken into account in the MoUs, the Commission would be acting in violation with the limited scope of application of the Charter, as defined by its Article 51(1).

Events then took a different turn. In its judgment of 20 September 2016 delivered in Joined Cases C-8/15 P to C-10/15 P,<sup>87</sup> the Court of Justice, sitting in Grand Chamber, expressed its disagreement with AG Wahl. It considered that “the tasks allocated to the Commission by 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”,<sup>88</sup> 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”.<sup>89</sup> The Court concluded that the General Court erred in dismissing the claim filed by the appellants seeking compensation for the damage resulting from the inclusion of the paragraphs concerning the “bail-in” in the Memorandum of Understanding – which, in their view, was an infringement of the European Commission’s supervisory obligation. Instead, the Court of Justice agreed to assess such claims for compensation taking into account the duty of the EU institutions 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, the Commission is

<sup>84</sup> Opinion of AG Wahl in *Ledra Advertising Ltd and al. v European Commission and European Central Bank*, C-8/15 to C-10/15, EU:C:2016:290.

<sup>85</sup> *Id.*, para. 85 (referring to S. Peers, cited above note 39).

<sup>86</sup> *Id.*, para. 86.

<sup>87</sup> The appeal concerns three of the five orders adopted on 10 November 2014 by the General Court.

<sup>88</sup> 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.

<sup>89</sup> *Id.*, para. 59.

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.<sup>90</sup> ■

In examining the merits of the claim, the Court did conclude that the non-contractual liability of the European Union was not engaged, since the restrictions to the right to property were proportionate to the legitimate aim pursued.<sup>91</sup> The significance of the case lies elsewhere, however. It is that the Commission has a duty to ensure that fundamental rights as part of the general principles of EU law, and as recognized in the Charter, are fully complied with in the design and implementation of the Memoranda of Understanding concluded with States seeking support from the European Stability Mechanism.<sup>92</sup> 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 be engaged.<sup>93</sup> It is noteworthy that, according to the Court of Justice, it follows from Article 13(3) of the ESM Treaty (which provides that MoUs shall be consistent with EU law) and Article 17(1) TEU (according to which the Commission promotes the general interest of the Union and oversees the application of Union law), that the Commission does not have a mere best-efforts obligation (as suggested by AG Wahl<sup>94</sup>) when it comes to ensuring compliance of a MoU with EU law (and more specifically, with the Charter): instead, it has a true performance obligation in that regard – a duty of result, rather than merely an obligation of means.

<sup>90</sup> *Id.*, para. 67.

<sup>91</sup> *Id.*, para. 74. In the view of the Court, the restrictions to the right of property under scrutiny met an objective of general interest, the stability of the banking system of the euro area (and the prevention of dangerous spillovers across the euro area Member States), and did not constitute a disproportionate and intolerable interference impairing the very substance of the right to property.

<sup>92</sup> Interestingly, in a related series of cases (also linked to the Memorandum of Understanding concluded between Cyprus and the ESM), AG Wathelet issued an opinion in which he pointed at the bridges existing between the ESM legal order and the EU legal order. He suggests an alternative avenue to trigger the judicial review of the MoU conditionalities imposed by the ESM on EU Member States under financial assistance: since the adoption of Regulation No. 472/2013, the main elements contained in MoUs have to be translated into an Macroeconomic Adjustment Plan, formally adopted by the Council of the EU in the form of an Implementing Decision (in the case of Cyprus, see Decision No. 2013/463 mentioned above note 62). Such a decision is an EU legal act directly or indirectly challengeable before the Court: see Opinion of AG Wathelet in *Mallis and al. v European Commission and European Central Bank*, C-105/15 to C-109/15, EU:C:2016:294. On this point, see also R. SMITS, “ESM Conditionality in Court: two Advocate Generals on 14 Cypriot Appeal Cases pending in Luxembourg”, <https://acelg.blogactiv.eu/>, 22 April 2016.

<sup>93</sup> 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.

<sup>94</sup> See para. 70 of AG Wahl's opinion: “... I do not agree with the appellants that [the obligation of EU institutions to fully comply with EU law even when they act outside the EU framework] is so extensive that it may be considered that an obligation as to the *result* is imposed on the Commission to avert any possible conflict or tension between the provisions of an act adopted by other entities and any EU rule which may be applicable to the situation. At most, I could conceive that an obligation might exist for the Commission to *deploy its best endeavours* to prevent such a conflict arising” (emphasis added). As regards more specifically the duty to ensure that the Charter is complied with, according to AG Wahl, such a duty could at best consist in a duty “to promote” (para. 85).

One may agree or not with the assessment that a 37,5% ‘haircut’ on account owners constitutes an acceptable and proportionate restriction to the right to property. However disappointing the final outcome may be to the individual claimant, the Court’s decision should be welcomed by anyone concerned with the preservation of fundamental rights in the framework of the new governance of the Euro Area. This ruling partially breaks down the barrier (which the Court itself had contributed to erect, or suggested might have to be erected) between the EU institutions and the intergovernmental *ad hoc* structures set up to deal with the crisis of the eurozone. Individuals may still be barred from directly seeking the annulment of MoU conditionalities before the Court of Justice – though even that may not be certain.<sup>95</sup> But it is now clear that they may challenge the legality of EU institutions’ bail-out actions by filing an action in compensation alleging the non-contractual liability of the EU. Whereas the route remains full of obstacles and concrete victories may be difficult to gain,<sup>96</sup> the statement of principle is an important one. The *Ledra Advertising* decision sends a strong signal to EU institutions: whether they act in the framework of EU law or at its margins, behind the screen of international agreements, the Commission and the ECB should duly take fundamental rights into account, and they should be ready to be held liable if they fail to do so. When acting as agents of the ESM, the Commission and the ECB no longer operate in legal limbo, below the radar of the Court. Judicial scrutiny can now be triggered, and the actions of the EU institutions will be tested against the standards of EU law, including those of the Charter. We therefore see *Ledra Advertising* as an important contribution to the rule of law in the EU, which shall inevitably lead to upgrade the status of fundamental rights in the decision-making processes of the EU institutions when acting in the framework of the new socio-economic governance of the EMU.

## 2. *The Pressure of Human Rights Bodies outside the European Union Legal Order*

Monitoring bodies outside the EU legal order have also gradually turned their attention to the impacts of the new socio-economic governance of the EMU, insisting that the European Union should urgently rebalance the social with the economic. Here again however, the process was a gradual one. Just like the Court of Justice of the European Union was initially hesitant to interfere too visibly with measures that were implementing macro-economic reforms adopted in response to the sovereign debt crisis, courts outside the EU legal order were at first reluctant to intervene.

<sup>95</sup> The question of whether they may do so by challenging the validity of a Council decision establishing a macro-economic adjustment programme following Regulation No. 472/2013 remains open. As noted above where reference was made to the Joined Cases of *Mallis and Others* (C-105/15 P to C-109/15 P), AG Wathelet suggested that may be an alternative avenue (see above, note 92).

<sup>96</sup> As Hinarejos rightly pointed out, if damages actions are subject to relatively generous rules of standing and time limits, the threshold to win a case in that setting is much higher than in annulment actions, as only sufficiently serious forms of illegality can give rise to non-contractual liability. See A. HINAREJOS, “Bailouts, Borrowed Institutions and Judicial Review: *Ledra Advertising*”, cited above, note 88, p. 2.

The European Court of Human Rights was provided the first opportunity to step in. On 20 February 2012, the Greek Supreme Administrative Court had rejected two applications complaining about the significant reductions in the wages and pensions of public servants, as well as reductions in other allowances and benefits. (One application was filed by an individual public servant; the other by the Public Service Trade Union Confederation, a union of public servants). The disappointed claimants turned to the European Court of Human Rights, alleging a violation of Article 1 of the Additional Protocol (No. 1) to the European Convention on Human Rights. This provision requires that any interference by a public authority with the peaceful enjoyment of possessions should be lawful, pursue a legitimate aim “in the public interest” and be proportionate to the aim sought to be realised. According to the Court’s own summary of its case-law, it thus requires that “a fair balance [...] be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden”.<sup>97</sup>

On 7 May 2013, the Court dismissed the applications as manifestly ill-founded, and thus inadmissible. It recalled that States parties to the European Convention on Human Rights should be recognized a broad margin of appreciation in the adoption of social and economic policies, and that it therefore in principle respects the national authorities’ judgment as to what is “in the public interest” “unless that judgment is manifestly without reasonable foundation”.<sup>98</sup> Broadly endorsing the assessment of the Greek Supreme Administrative Court, which has noted that the situation of the applicants had not “worsened to the extent that they risked falling below the subsistence threshold”,<sup>99</sup> the European Court of Human Rights took the view that “the extent of the reduction in the first applicant’s salary was not such as to place her at risk of having insufficient means to live on and thus to constitute a breach of Article 1 of Protocol No. 1. In view of the foregoing and of the particular context of crisis in which the interference in question occurred, the latter could not be said to have imposed an excessive burden on the applicant”.<sup>100</sup>

That attitude was not typical, however: though it was embarrassed by the applications it was presented with – leading it to suggest for the first time that whether or not a “subsistence threshold” has been crossed should be determinative in addressing the question of the interference with the peaceful enjoyment of possessions –, the European Court of Human Rights is not tasked under the European Convention on Human Rights to assess the compatibility of measures that might interfere with the right to an adequate standard of living, the right to health, or the right to work: interference with the “peaceful enjoyment of possessions” is a rather poor lens through which the compatibility of fiscal consolidation measures with human rights

<sup>97</sup> Eur. Ct. H.R. (1st sect.), *Koufaki and ADEDY v. Greece*, 7 May 2013, Appl. Nos 57665/12 and 57657/12, § 32.

<sup>98</sup> *Id.*, § 39.

<sup>99</sup> *Id.*, § 44.

<sup>100</sup> *Id.*, § 46.

can be assessed. Moreover, however much their situation may have been affected by the austerity measures denounced, the public servants were not the most vulnerable – nor even the hardest hit – by the adoption of these measures.<sup>101</sup>

It is perhaps unsurprising therefore that the United Nations human rights treaty bodies and Special Procedures of the Human Rights Council were far more condemnatory in their tone. Greece in particular was regularly challenged to justify the socially regressive measures it had adopted, in the name of the restoration of the public finances, at the request of its creditors. In April 2012, referring to Article 4 of the Convention on the Rights of the Child (which commits the States parties to that instrument to undertake measures for the implementation of the economic, social and cultural rights recognized in the Convention “to the maximum extent of their available resources”), the Committee on the Rights of the Child noted that “the recession and the current financial and economic crisis are taking their toll on families and on public social investment, including on the prospects of implementing the Convention, especially with regard to article 4 of the Convention”.<sup>102</sup> In March 2013, the Committee on the Elimination of Discrimination against Women expressed its concern that “the current financial and economic crisis and measures taken by the State party to address it within the framework of the policies designed in cooperation with the European Union institutions and the International Monetary Fund (IMF) are having detrimental effects on women in all spheres of life”.<sup>103</sup> The Independent Expert on foreign debt and human rights visited Greece a month later, and drew up a scathing report listing a range of rights that were under threat as a result of the adoption of the two austerity programmes of 2010 and 2012.<sup>104</sup> In 2015, the Committee on Economic, Social and Cultural Rights expressed its concern that, “despite the measures taken by the State party to mitigate the economic and social impact of the austerity measures adopted in the framework of the memorandums of understanding in 2010, 2012 and 2015, the financial and economic crisis has had a severe impact on the enjoyment of economic, social and cultural rights, particularly by certain disadvantaged and marginalized groups with regard to the rights to work, to social security and to health”.<sup>105</sup> It recommended that:

“the State party review the policies and programmes adopted in the framework of the memorandums of understanding implemented since 2010, and

<sup>101</sup> The Court has rendered similar rulings in other cases related to the financial crisis and national austerity measures: see Eur. Ct. H.R. (2nd sect.), *Da Conceicao Mateus and Santos Janeiro v. Portugal*, 8 October 2013, Appl. Nos 62235/12 and 57725/12 (on the reduction of pensioners’ Christmas and holiday subsidies); Eur. Ct. H.R. (1st sect.), *Da Silva Carvalho Rico v. Portugal*, 1 September 2014, Appl. No. 13341/14 (on the temporary reduction of old-age pension rights).

<sup>102</sup> Committee on the Rights of the Child, Concluding Observations on the combined second and third periodic reports of Greece (13 August 2012) (U.N. doc. CRC/C/GRC/CO/2-3), para. 6.

<sup>103</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations: Greece, (1 March 2013) (U.N. doc. CEDAW/C/GRC/CO/7), para. 6.

<sup>104</sup> Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Addendum: Mission to Greece (22-26 April 2013), (27 March 2014) (U.N. doc. A/HRC/50/15/Add.1).

<sup>105</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations: Greece, (27 October 2015) (U.N. doc. E/C.12/GRC/CO/2), para. 7.

any other subsequent post-crisis economic and financial reforms, with a view to ensuring that austerity measures are progressively waived and the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery. The State party should further ensure that its obligations under the Covenant are duly taken into account when negotiating financial assistance projects and programmes, including with international financial institutions".<sup>106</sup> ■

The clearest condemnation came however from the European Committee of Social Rights, and it is Greece again that was the focus of attention.<sup>107</sup> The first wave of fiscal consolidation measures, adopted following the conclusion of the 2010 MoU between Greece and its creditors, led to seven complaints being filed: in all seven of these cases, the Committee concluded that Greece had not complied with its obligations under the European Social Charter. In Complaint No. 65/2011, the Committee found that, by amending its labor 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 contract, which forms part of the right to a fair remuneration under Article 4(4) of the European Social Charter.<sup>108</sup> Complaint No. 66/2011, which was introduced by the same public sector unions, took issue in particular at the 'special apprenticeship contracts' that Greece had introduced in July 2010. These contracts, which could be concluded between employers and individuals aged 15 to 18, were designed without regard for most of the main safeguards provided for by labour and social security law. This, the Committee concluded, was in violation of Article 7(7) of the European Social Charter, which stipulates that employed persons under 18 years of age shall be entitled to not less than three weeks of paid annual holidays. It also was in violation of Article 10(2) of the European Social Charter, which requires States parties, as part of their duty to recognize the 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 Committee concluded moreover 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(3) of

<sup>106</sup> *Id.*, para. 8.

<sup>107</sup> Other bailed-out States, such as Portugal or Ireland, have not been subject to ECSR complaints. In the framework of the general reporting system of the European Social Charter, the Committee has however voiced similar concerns as to the compatibility with the Charter of some reforms implemented by those two countries under their respective financial assistance programmes. In its 2014 Conclusions for instance, the Committee found that the reduction of the minimum wage for workers in the private sector enacted in Portugal violated Article 4(1) of the Charter on the right to a decent remuneration. Similarly in the case of Ireland, the Committee found, expressly relying on the Greek case-law analysed below, that the reduction of the minimum wage for younger workers below the minimum income threshold did not comply with that same requirement. The Committee also observed that the reforms implemented by both Ireland and Portugal with regard to dismissal and termination of employment did not comply with Article 4(4) of the Charter, especially for workers in trial or probationary phase. For a more detailed analysis, see E.C.S.R., 2014 Conclusions (Portugal), 5 December 2014; E.C.S.R., 2014 Conclusions (Ireland), 5 December 2014.

<sup>108</sup> E.C.S.R., *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, C.C. No. 65/2011, dec. of 23 May 2012.

the Charter, which commits State parties to “endeavour to raise progressively the system of social security to a higher level”.<sup>109</sup> The same complaint also took aim at another provision of the July 2010 reform, which 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(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”.<sup>110</sup>

But could Greece be held responsible, when the measures that allegedly result in violations of the European Social Charter were largely adopted in order to satisfy its creditors, rather than being adopted by the country on its own motion? In its responses to complaints Nos. 65/2011 and 66/2011, the Greek government did mention the constraints imposed by its creditors: unless it agreed with the various conditionalities attached to the provision of the emergency support it requested, it argued in substance, it would have gone bankrupt. The Committee at first ignored the argument. It did consider it, however, in the five decisions it adopted subsequently, on 7 December 2012, following complaints filed by public sector pensioners’ unions.<sup>111</sup> At issue were significant reductions to the pensioners’ social protection, which were ultimately found in violation of the right to social security as enshrined in Article 12(3) of the Charter. The Greek government again insisted that these changes were “necessary for the protection of public interests, having resulted from Greece’s grave financial situation, and, in addition, result from the Government’s other international obligations, namely those deriving from a financial support mechanism agreed upon by the Government together with the European Commission, the European Central Bank and the International Monetary Fund in 2010”.<sup>112</sup> This time the European Committee of Social Rights did respond, only to swiftly dismiss the argument raised by Greece: it took the view that “the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter”.<sup>113</sup> More specifically, the Committee held: “[W]hen states parties agree on binding measures, which relate to matters within the remit of the Charter, they should – both when preparing the text in question and when implementing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter”.<sup>114</sup>

<sup>109</sup> E.C.S.R., *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, C.C. No. 66/2011, dec. of 23 May 2012.

<sup>110</sup> *Id.*, para. 65.

<sup>111</sup> E.C.S.R., *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, C.C. No. 76/2012; *Panhellenic Federation of Public Service Pensioners v. Greece*, C.C. No. 77/2012; *Pensioners’ Union of the Athen-Piraeus Electric Railways (I.S.A.P.) v. Greece*, C.C. No. 78/2012; *Panhellenic Federation of pensioners of the public electricity corporation (PAS-DEI) v. Greece*, C.C. No. 79/2012; *Pensioners’ Union of the Agricultural Bank of Greece (ATE) v. Greece*, C.C. 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 organizations, they all raise the same issues of substance, and may thus be considered together.

<sup>112</sup> E.C.S.R., *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, C.C. No. 76/2012 dec. of 7 December 2012, para. 10.

<sup>113</sup> *Id.*, para. 50.

<sup>114</sup> *Id.*, para. 51.

However, while the statement was clear as to the duty of the State implementing the austerity measures requested by the MoU, it begged the question whether the lenders – the Euro Area Member States other than Greece, if not the EU itself –, might also bear a responsibility in the situation resulting from the implementation of the adjustment programme imposed on Greece. One might indeed argue that, as the disbursement of loans to bailed-out countries was generally made conditional upon compliance with the terms and conditions of the MoU, the violations of the European Social Charter could also be attributed to the other Euro Area Member States. Couldn't these States therefore be said to have coerced Greece into disregarding its obligations under the Charter?

Greece, it shall be recalled, was reviewed by the Committee on Economic, Social and Cultural Rights in 2015.<sup>115</sup> It is with Greece in mind that, on 24 June 2016, this Committee adopted a statement titled “Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights”.<sup>116</sup> Specific paragraphs address international organizations such as the ESM providing loans, and the role of States as lenders, whether they grant bilateral loans or whether they are members of international organizations providing financial support. International organizations per definition are not bound by the International Covenant on Economic, Social and Cultural Rights as such, which is only open to accession by States. The Committee nevertheless recalled:

■ As any other subjects of international law, international financial institutions and other international organisations are “bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties” [International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, 73 at 89-90 (para. 37)]. They are therefore bound to comply with human rights, as listed in particular in the Universal Declaration of Human Rights, that are part of customary international law or of the general principles of law, both of which are sources of international law.<sup>117</sup> ■

As regards States as lenders, the Committee emphasized that “States parties to the Covenant would be acting in violation of their obligations if they were to delegate powers to [international organisations providing loans] and to allow such powers to be exercised without ensuring that they do not infringe on human rights. Similarly, they would be acting in breach of their obligations if they were to exercise their voting rights within such agencies without taking such rights into account”.<sup>118</sup> When States provide bilateral loans, they should keep in mind the prohibition imposed under international law of “coercing other States into

<sup>115</sup> See above, text corresponding to notes 102 et seq.

<sup>116</sup> Committee on Economic, Social and Cultural Rights, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (24 June 2016) (U.N. doc. E/C.12/2016/1).

<sup>117</sup> *Id.*, para. 7.

<sup>118</sup> *Id.*, para. 9.



violating their own obligations under either the Covenant or under other rules of international law.”<sup>119</sup> Therefore, the Committee concluded: “Both as Lenders in bilateral loans and as members of international organisations providing financial assistance, all States should [...] ensure that they do not impose on borrowing States obligations that would lead the latter to adopt retrogressive measures in violation of their obligations under the Covenant.”<sup>120</sup>

It matters not here whether the European Committee of Social Rights was being disingenuous in not allowing Greece to invoke that it was acting at the insistence of its creditors in defence of the measures allegedly in violation of its international obligations, or whether the Committee on Economic, Social and Cultural Rights goes too far in referring to the notion of coercion in that same context. Our argument is simply that these various bodies, established under Council of Europe or United Nations treaties, are increasingly expressing their uneasiness at what they see happening: an unprecedented assault on social rights, launched in the name of macro-economic considerations that almost entirely ignore these impacts and the need to reduce them to the minimum inevitable.

## B. THE PROMISE OF THE EUROPEAN PILLAR OF SOCIAL RIGHTS

Courts and quasi-judicial bodies have gradually grown in confidence, and they now appear increasingly willing to insist on the duties of the EU institutions to take into account fundamental social rights in the adoption of measures within the new, strengthened socio-economic governance framework of the EMU. The pressure has come from different angles, both from within the EU legal order and from without, and it has been based on the Charter of Fundamental Rights or on other instruments – but it has been steadily growing. Perhaps this mounting pressure, together with the EU’s quest for legitimacy at a time of rising scepticism towards European integration, explains a second significant development in this area. In September 2015, the President of the European Commission, Jean-Claude Juncker, announced in his State of the Union address the establishment of a European Pillar of Social Rights, and in a speech she delivered the following month, Commissioner for Employment and Social Affairs Marianne Thyssen explained that the Pillar would consist of two main components: “a legal one, that is modernising existing legislation, including by bringing in new laws, if necessary, and an economic one, by developing employment and social benchmarks”. She also expressed the hope that the Pillar would “foster upwards convergence and limit possible negative spill-overs [of macro-economic convergence meas-

<sup>119</sup> *Id.*, para. 11 (referring to International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4), Art. 18; and to Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, E/1998/22, para. 51).

<sup>120</sup> *Id.*, para. 11.

ures] in the field of employment and social protection”.<sup>121</sup> The European Commission provided further details on the initiative in March 2016.<sup>122</sup> The professed ambition of the Commission is to encourage a move towards a “deeper and fairer EMU”,<sup>123</sup> 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 sceptics of European integration will be quick to note that for all its alluring language, the initiative still clearly fits under the ordoliberal view, characteristic of social policy since the start of European integration. Under this view, social policy is complementary to market freedoms and should stimulate growth, while avoiding the distortion to competition that could result from “social dumping”. The communication published by the Commission on 8 March 2016 is indeed unapologetic about this: “social policy is conceived as a productive factor, which reduces inequality, maximises job creation and allows Europe’s human capital to thrive”.<sup>124</sup> This is consistent with the classic understanding of the “social market economy”. Initially coined by the ordoliberals,<sup>125</sup> the Treaty of Lisbon has now inserted the expression into the European Treaties,<sup>126</sup> at the risk of creating the impression that social policies might complement and support, but not distort, macroeconomic objectives and free competition. 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. The question however is 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.<sup>127</sup>

<sup>121</sup> See M. THYSSEN, *Speech at Roundtable with Civil Society Organisations: Forging Common Action to Achieve the Social Triple A for Europe*, Brussels, 1 October 2015.

<sup>122</sup> A consultation on the initiative was open until 31 December 2016.

<sup>123</sup> 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, para. 2.1.

<sup>124</sup> *Id.*

<sup>125</sup> The “social market economy” as promoted initially by Alfred Müller-Armack, one of the most influential figures of ordoliberalism, was premised on the idea that any social measures should be strictly “in conformity with the market” (*marktkonform*); otherwise it would be disruptive of the market’s equilibrium and it would distort the signals the market sends to economic actors through ‘normal’ price mechanisms (see A. MÜLLER-ARMACK, “The Meaning of the Social Market Economy”, in A. Peacock and H. WILLGERODT (eds), *Germany’s Social Market Economy: Origins and Evolution*, New York, Palgrave Macmillan, 1989, pp. 82-86 (initially published in 1956 in *Handwörterbuch der Sozialwissenschaften* 9)).

<sup>126</sup> See Art. 3(3) TEU (stating that the Union “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”).

<sup>127</sup> This is what the European Anti-Poverty Network note, not without lucidity, where they lament “[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).

One thing is clear: the proclamation of social principles under the Pillar is not seen as a substitute for the recognition of social rights. Quite to the contrary, the European Pillar of Social Rights refers 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.<sup>128</sup> The Pillar, it is 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”.<sup>129</sup>

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.<sup>130</sup> The Pillar, the Commission explains, “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”.<sup>131</sup> Interestingly, the principles put forward by the Commission for the consultation on the European Pillar of Social Rights include principles related to areas in which the European Union has not been attributed legislative powers. 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, the Commission proposes 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.<sup>132</sup> ■

<sup>128</sup> Communication from the Commission, *Launching a consultation on a European Pillar of Social Rights*, *op. cit.*, para. 2.4.

<sup>129</sup> *Id.*, para. 3.1.

<sup>130</sup> In an early contribution to the debate the International Labour Office highlights that, in a number of areas, since the economic and financial crisis of 2009–2010, the EU-28 are either diverging, or converging towards lower standards of protection or higher poverty levels: the implication is that unless affirmative action is taken to improve convergence towards improved standards, the macroeconomic disciplines imposed on the EU Member States may threatened part of the social *acquis* within the EU. 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”).

<sup>131</sup> 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 note 123.

<sup>132</sup> *Id.*

This is remarkable, since it suggests that the European Pillar of Social Rights could lead the European Union to penetrate into fields that have hitherto been left to the Member States, potentially leading to regulatory competition. 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 explicitly refer to wages (though it does refer to labor 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”. As to the Charter of Fundamental Rights, although it refers in Article 31 to the right to fair and just working conditions which respect the worker’s “health, safety and dignity”, it is silent about the level of wages.<sup>133</sup> Whereas the Committee on Economic, Social and Cultural Rights has clarified the meaning, in this regard, of Article 7, a), of the International Covenant on Economic, Social and Cultural Rights (which requires that the remuneration of workers should be based on “fair wages” allowing “a decent living for themselves and their families”),<sup>134</sup> the EU legislative framework has been hitherto entirely silent on this issue. This has resulted in highly diverging approaches across the EU Member States,<sup>135</sup> and in increased risks of social dumping.<sup>136</sup>

That is not to say, of course, that the European Pillar of Social Rights shall act as a magical wand to suddenly reverse the trend of austerity policies and the flexibilization of labor markets that we have witnessed in recent years. But it could contribute to a rebalancing between the economic and the social in the constitution of the Union. It could do so in three ways. Perhaps most obviously, it 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, were such a consensus to emerge from the initiative of the European Commission, could allow

<sup>133</sup> This indifference to the level of wages is confirmed by the Explanations attached to the Charter of Fundamental Rights, which, in order to clarify the significance of the expression “working conditions”, simply refers to Article 156 of the Treaty on the Functioning of the European Union. See *O.J. C 303* of 14 December 2007, p. 17.

<sup>134</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), (27 April 2016) (UN doc. C/C.12/GC/23), paras. 18-24.

<sup>135</sup> ILO, *Building a Social Pillar for European Convergence*, *op. cit.*, pp. 35-39.

<sup>136</sup> 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 favor 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.

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 favor accountability and ensure that a greater attention shall be paid to social rights in the adoption of such measures.

Indeed, it is remarkable that, whereas 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<sup>137</sup> and since they were generalized for other initiatives with the “Better Regulation” agenda,<sup>138</sup> there has been no systematic assessment of the impacts on social rights of the various measures adopted in reaction to the sovereign debt crisis. Since 2005, fundamental rights have gained visibility in the various IAs performed by the institutions of the EU.<sup>139</sup> But deficiencies remain. First, 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:<sup>140</sup> “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”.<sup>141</sup> 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,

<sup>137</sup> European Commission, Communication on Impact Assessment, 5 June 2002, COM(2002)276final.

<sup>138</sup> The tools developed as part of the “Better Regulation” agenda apply to all initiatives, whether legislative or regulatory and whether they consist in the introduction of new policies or in amendments to existing policies. Fundamental rights and (for the external dimension of EU action) human rights are now better integrated in these tools. They are explicitly taken into account in the Better Regulation “Toolbox” used by the Commission services, in which they constitute tool # 24.

<sup>139</sup> The guidelines adopted by the Commission for the preparation of impact assessments presented in 2005 already paid greater attention to the potential effects of different policy options on the guarantees listed in the Charter: see European Commission, Impact Assessment Guidelines, SEC(2005)791, 15 June 2005. Then, in 2009 and 2011, successive Staff Working Papers of the Commission raised the visibility of fundamental rights in impact assessments. See, respectively: European Commission, Impact Assessment Guidelines, SEC(2009)92, 15 January 2009; European Commission, Commission Staff Working Paper providing Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011)567 final, 6 May 2011. The new Interinstitutional Agreement on Better Law Making now commits all EU institutions involved in the legislative process to go further, by preparing in certain cases an impact assessment, which would presumably include considerations related to fundamental rights: see Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (O.J. L 123, 12 May 2016, p. 1), at para. 15: “The European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission’s proposal”.

<sup>140</sup> 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).

<sup>141</sup> 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.*).

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.<sup>142</sup>

Secondly, and even more troubling, 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”.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> The implications of this new approach are already visible. 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”.<sup>146</sup>

However, while these are promising signs, 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. Grounding reform programmes in fundamental social rights would require (i) basing the assessments explicitly

<sup>142</sup> *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).

<sup>143</sup> See the Better Regulation Toolbox, Tool #5: When is an IA necessary?, [http://ec.europa.eu/smart-regulation/guidelines/tool\\_5\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/tool_5_en.htm).

<sup>144</sup> 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.

<sup>145</sup> European Commission, *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)).

<sup>146</sup> Commission Staff Working Document, *Assessment of the Social Impact of the New Stability Support Programme for Greece*, SWD(2015) 162 final, 19 August 2015.

on the normative components of social rights; (ii) moving 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 both the Council of Europe Social Charter and the International Covenant on Economic, Social and Cultural Rights<sup>147</sup>; and (iii) ensuring that procedures are established to allow for 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.<sup>148</sup>

As mentioned above, the benchmarks that would be listed under the European Pillar of Social Rights could significantly strengthen this mechanism. Such social rights impact assessments could relatively easily be built into existing procedures under the ‘European Semester’ and the enhanced monitoring to which States under financial assistance are subjected, and this could help strengthen the role of unions and other stakeholders in assessing the proposed measures.<sup>149</sup> The preparation of such social rights impact assessments would also appear to be in line with the position of the European Commission, according to which (as stated by Commissioner M. Thyssen 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”.<sup>150</sup> The European Pillar of Social Rights thus provides an opportunity to go further than the current reference to “social fairness”, which is well-intended but vague and ultimately toothless.

<sup>147</sup> These instruments provide a particularly apt reference point, since they have been ratified by all the EU Member States. As regards the European Social Charter however, the situation is a complex one. 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). Other States gradually joined the original instrument. The Revised European Social Charter (CETS No. 163) was opened for signature in Strasbourg on 3 May 1996, and entered into 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. All the 28 EU Member States are parties either to the 1961 European Social Charter, or to the 1996 Revised Charter; indeed, only eight EU Member States have not joined the more recent instrument. The undertakings remain uneven, however, 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. 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).

<sup>148</sup> It is to be welcomed in this regard that the Proposal for a Council Regulation on the establishment of the Structural Reform Support Programme for the period 2017 to 2020 (based on Articles 175 and 197(2) TFEU) (COM(2015) 701 final, 26 November 2015) makes explicit reference to its potential impact on fundamental rights on p. 9: “The proposal could have a positive effect in the preservation and development of Union fundamental rights, assuming that the Member States request and receive technical assistance in related areas. For example, technical assistance support in areas such as migration, labour market and social insurance, healthcare, education, the environment, property, public administration and the judicial system can support Union fundamental rights such as dignity, freedom, equality, solidarity, citizens’ rights and justice.”

<sup>149</sup> Indeed, 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”.

<sup>150</sup> Statement made by Commissioner M. Thyssen 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).

Nor is this all. Beyond its contribution to the definition of benchmarks allowing robust social rights impact assessments to be prepared, the European Pillar of Social Rights 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,<sup>151</sup> obliging all EU Member States to introduce a statutory adequate minimum income according to certain agreed criteria linked to the cost of living.<sup>152</sup> 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]”.<sup>153</sup>

Finally, the Pillar could lead the EU to set binding poverty and inequality reduction targets, 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. Referring to the “soft” mechanisms put in place in the EU since the European Employment Strategy was launched in 1997 to favor convergence in social policies (now streamlined under the Europe 2020 strategy), the ILO notes, rather diplomatically, 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”.<sup>154</sup> We concur.<sup>155</sup>

## V. The Way Forward

The current situation is not sustainable. The socio-economic architecture of the European Union must reinvent itself, both in order to rescue its legitimacy in the eyes of the Union’s citizens, and in order to answer the concerns expressed by various judicial and expert bodies that have intervened to ensure respect for social rights. As already mentioned, we believe the European Pillar of Social Rights provides an opportunity to achieve precisely this, in particular if it can

<sup>151</sup> O.J. 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).

<sup>152</sup> EAPN, *Last Chance for Social Europe? EAPN Position Paper on the European Pillar of Social Rights*, op. cit.

<sup>153</sup> ILO, *Building a Social Pillar for European Convergence*, op. cit., p. 41.

<sup>154</sup> ILO, *Building a Social Pillar for European Convergence*, op. cit., p. 31.

<sup>155</sup> 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.



lead to a process of greater social convergence within the Euro Area. In the short run, whether or not this forms part of the “Pillar” process, the priority should be to ensure that the adoption of various national reform programmes (the Stability and the Convergence programmes, respectively for countries within the Euro Area and for countries outside the Area) as well as the country-specific recommendations adopted under the European Semester framework, and the MoUs and macroeconomic reform programmes adopted by countries obtaining financial support, are guided by a robust social rights impact assessment. In the long run, what is required is a more fundamental re-weighting of the economic and the social in the governance of the EMU.

### A. SOCIAL RIGHTS IMPACT ASSESSMENTS

In discussing the European Pillar of Social Rights initiative, we mentioned the potential for strengthening, on that basis, the current “social impact assessments” of measures adopted in the socio-economic architecture of the EU. Indeed, the preparation of social rights impact assessments, both *ex ante* and *ex post*, to guide the adoption of fiscal consolidation and structural measures by borrowing countries imposed conditionalities by their creditors, is called for both by the Committee on Economic, Social and Cultural Rights, in the 2016 Statement referred to above,<sup>156</sup> and by the Guiding Principles on Foreign Debt and Human Rights.<sup>157</sup> The Guiding Principles, developed by the Independent Expert on the effects of foreign debt on human rights, were endorsed by the Human Rights Council in 2012.<sup>158</sup> They dedicate three paragraphs to the preparation of impact assessments:

12. States should analyse policies and programmes, including those relating to external debt, macroeconomic stability, structural reform and investment, with respect to their impact on poverty and inequality, social development and the enjoyment of human rights, as well as their gender implications, and adjust them as appropriate, to promote a more equitable and non-discriminatory distribution of the benefits of growth and services.

13. Such impact analyses should pay special attention to certain groups in society which may be particularly vulnerable to policies and programmes relating to external debt, macroeconomic stability, structural reform, trade liberalization and investment, including children, women, persons with disa-

<sup>156</sup> Committee on Economic, Social and Cultural Rights, *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, at para. 12.

<sup>157</sup> Guiding principles on foreign debt and human rights. Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, to the twentieth session of the Human Rights Council (10 April 2011) (U.N. doc. A/HRC/20/23).

<sup>158</sup> Human Rights Council resolution 20/10, The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (5 July 2012). The resolution was adopted by a vote of 31 to 11, with 5 abstentions. The Western countries either abstained (Norway) or voted against the resolution (Austria, Belgium, Czech Republic, Hungary, Italy, Poland, Republic of Moldova, Romania, Spain, Switzerland, United States of America).

bilities, older persons, persons belonging to minorities and migrant workers and members of their families.

14. States should pay particular attention to the gender impact of reductions in public services, social security benefits, childcare facilities and public employment and to women's share of increased unemployment and they should take measures to prevent greater impoverishment of women. ■

The preparation of social rights impact assessments as a means to ensure that measures aimed at macro-economic stability shall not jeopardize social rights is consensual enough: because it presents itself first and foremost as a procedural safeguard, it hardly seems threatening.<sup>159</sup> Yet, such impact assessments can bite more than is usually assumed. They can be effective, first of all, in identifying potential instances of discrimination. The requirement of non-discrimination implies not only a duty to remove discriminatory provisions from the States' constitution, legislation or policy documents, but also that substantive discrimination be addressed: in the realization of economic, social and cultural rights, priority should therefore be given to improving the situation of groups who have traditionally been marginalized or disadvantaged.<sup>160</sup> This implies, in particular, dedicating greater resources to groups who face systemic discrimination<sup>161</sup>: this is why, in its Letter of 16 May 2012 to the States parties to the Covenant on austerity measures, the Chairperson of the Committee on Economic, Social and Cultural Rights emphasized that fiscal consolidation policies "must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected". It also implies that particular attention should be given to any budgetary measure that would lower the level of provision of certain public services, such as in the areas of education, or of water or electricity provision, or that would diminish the right to social security, including the right to old age pension. Indeed, such budgetary choices may have especially severe impacts on women who – in the current division of gender roles that is still dominant in most regions of the world, including in many European countries – have traditionally been assuming the burden of caring for infants, children and the elderly.<sup>162</sup>

The preparation of social rights impact assessments presents its own challenges, however. These challenges go far beyond the need to trace causalities or the lack of

<sup>159</sup> In its above-mentioned resolution 20/10 endorsing the Guiding Principles on foreign debt and human rights, the Human Rights Council "calls upon creditors, particularly international financial institutions, and debtors alike to consider the preparation of human rights impact assessments with regard to development projects, loan agreements or poverty reduction strategy papers" (para. 23).

<sup>160</sup> See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/20) (2009), para. 8.

<sup>161</sup> *Id.*, para. 39.

<sup>162</sup> See Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the sixty-eighth session of the General Assembly, A/68/293 (9 August 2013).

reliable data, although these may be obstacles. The difficulties are also of a strictly normative nature: how to define a duty not to take measures that disproportionately affect social rights, in a way that is truly operational for policy-makers?<sup>163</sup> One challenge concerns the question of tradeoffs. Is it allowable, we may ask, to justify restrictions to the right to education (say, by lowering the teacher-student ratio), by the need to meet the costs of the healthcare system? Is it acceptable to lower the levels of pensions, for the sake of guaranteeing unemployment benefits in a context in which the number of unemployed is exploding? Another challenge concerns the question of retrogressive measures. Steps backward are generally looked upon with suspicion by human rights bodies. The Committee on Economic, Social and Cultural Rights takes the view, for instance, that “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.<sup>164</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which a group of academic experts adopted in 1997,<sup>165</sup> express this idea by listing, among the acts leading to the violation of rights of the International Covenant on Economic, Social and Cultural Rights, “the reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone”.<sup>166</sup>

These two challenges are obviously connected. No tradeoff can be envisaged if the non-retrogression principle is considered to impose an absolute prohibition. If, on the other hand, retrogressive measures can be allowed under certain conditions, one cannot evade the question: if the level of protection of certain rights is lowered as part of a macro-economic adjustment programme, when can this be said to be compensated by gains made in the fulfilment of other rights? Indeed, the question of tradeoffs has in fact become central, because the preservation of the *acquis* of the welfare States built in Europe between 1945 and 1975 simply would not be sustainable in the form in which social guarantees were provided at

<sup>163</sup> Recent years have witnessed a growing interest in the human rights analysis of public budgets, which in part seeks to answer this very question. See in particular M. ROBINSON *et al.* (eds) *Budgeting for the Poor*, New York, Palgrave MacMillan, 2008; R. BALAKRISHNAN, D. ELSON, J. HEINTZ, N. LUSIANI, *Maximum Available Resources and Human Rights: Analytical Report*, Center for Women's Global Leadership, Rutgers University, 2011; A. NOLAN, R. O'CONNELL, C. HARVEY, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Oxford: Hart Publishing, 2013; R. O'CONNELL, A. NOLAN, C. HARVEY, M. DUTSCHKE, E. ROONEY, *Applying An International Human Rights Framework to State Budget Allocations: Rights and Resources*, London, Routledge 2014.

<sup>164</sup> *Id.* See also the Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (noting that, in order to comply with the Covenant, austerity measures or adjustment programmes, as have been adopted by a number of States to face the financial and economic crisis after 2009, must be “necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights”). On the conditions for the adoption of retrogressive measures in the area of social security, see Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (UN Doc E/C.12/GC/19) (4 February 2008), para. 42.

<sup>165</sup> The Maastricht Guidelines were adopted by a group of experts convened in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists, the Urban Morgan Institute on Human Rights and the Centre for Human Rights of the Faculty of Law of Maastricht University. See further V. DANKWA, C. FLINTERMAN, S. LECKIE, “Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, *Human Rights Quarterly*, vol. 20, n° 2, 1998, pp. 705-730.

<sup>166</sup> *Ibid.*, para. 14, g).

the time. Human rights bodies cannot ignore, for instance, that the ratio of the employed population towards the total population cannot continuously decrease without affecting the fiscal sustainability of the scheme. Indeed, the Committee on Economic, Social and Cultural Rights noted, in its General Comment on the right to social security, that “the schemes should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for present and future generations”.<sup>167</sup> Moreover, there is a risk that a purely defensive position, focused on the preservation of the existing *acquis*, would end up protecting those that already are recognised certain entitlements (the ‘insiders’, who are employed or have been employed, and the more senior workers), at the expense of those who the State has only recognized limited protection hitherto, and are in a comparatively much more marginal position (the ‘outsiders’, who have never been in employment, and the young workers).<sup>168</sup>

The question of tradeoffs, which a more systematic reliance on social rights impact assessments shall inevitably raise, is not insurmountable. It calls for three answers, potentially complementary. Firstly, as mentioned above, the *principle of equality and non-discrimination* would rule out any trade-offs which would result in or exacerbate unequal and discriminatory outcomes, for instance by giving priority to providing health and education services to the more affluent parts of society, rather than to the most disadvantaged and marginalized groups. Secondly, beyond a certain level of enjoyment, the financing of economic and social rights has a decreasing marginal utility, which means that determining fixed percentages of public expenditure (or of a country’s total incomes) is hardly defensible. It has been shown, for instance, that whereas there is a relatively strong correlation between the growth of a country’s GDP and spending on healthcare (from both private and public sources), the gains in terms of increased life expectancy reach a plateau beyond approximately 3000 USD/person/year.<sup>169</sup> Thus, where the level of realization of one particular right is high, it may be acceptable to reduce that level, if the realization of other, competing rights would gain, where the latter rights are fulfilled to a significantly lesser extent. In other terms, an optimum could be sought after, in a context of limited resources, in which each of the social rights concerned could be realized to the fullest extent possible, up to the point at which a fuller realization of the right would impede the realization of other rights so that the losses would outweigh the gains.

Thirdly and finally, it is important to recall that social rights impact assessments are not a substitute for democratic deliberative processes: they are, in fact, a means to strengthen such processes by ensuring they are better informed. This is

<sup>167</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 19”, *op. cit.*, para. 11.

<sup>168</sup> For a similar critique focused on the role of courts in protecting social rights in developing countries, see D. LANDAU, “The Reality of Social Rights Enforcement”, *Harvard International Law Journal*, vol. 53, n° 1, 2012, p. 201 (noting that remedies typically used by courts in litigation concerning social rights, which either protect individual rights of claimants or prohibit the Executive or the Legislator from removing certain benefits that were formerly granted, ‘benefit primarily upper income groups’ rather than the poorest groups of the population).

<sup>169</sup> See World Health Organization, WHO factsheet No. 319: *Spending on Health: A global overview* (April 2012), available on: <http://www.who.int/mediacentre/factsheets/fs319/en/#> (last consulted on 18 October 2016).

particularly important where tradeoffs are concerned: the *process* of setting priorities must involve effective participation of all stakeholders, including the poorest and most vulnerable segments of the population. The institutional mechanisms through which impact assessments are prepared and feed into political decision-making must therefore allow for the views of these stakeholders to be fully taken into account, directly or through their legitimate representatives. Indeed, where retrogressive measures are adopted in the area of social security, the Committee on Economic, Social and Cultural Rights considers it relevant to ask whether such measures were taken with the “genuine participation of affected groups in examining the proposed measures and alternatives”,<sup>170</sup> and where a State cannot ensure a minimum level of protection against all risks and contingencies of life, it is recommended that it “select a core group of social risks and contingencies”, based on “a wide process of consultation”.<sup>171</sup>

#### B. REBALANCING THE ECONOMIC AND THE SOCIAL WITHIN THE NEW SOCIO-ECONOMIC GOVERNANCE OF THE ECONOMIC AND MONETARY UNION

Social rights impact assessments (whether self-standing or as part of broader human rights impact assessments) have important functions to fulfil. They can prevent the adoption of measures that would be unjustifiably retrogressive, or that would worsen patterns of inequality. They can improve accountability towards the most marginalized groups of the population. And they can ensure that priorities shall be set, not on the basis of macro-economic considerations alone, but also on the basis of human impacts. Yet, such impact assessments remain essentially reactive. They may limit the negative consequences on social rights of certain reform programmes, but they hardly are sufficient to ensure, *proactively*, that such programmes shall be guided by the need to fulfill social rights. Rights, however, are not simply to be seen as shields against State action that might interfere with existing levels of enjoyment; they also provide benchmarks, or objectives, that public policies should aim to achieve.

In the following paragraphs, we further investigate the proactive potential of social rights. We review each of the central features of the new governance architecture of the EMU we have described in Section II, and offer suggestions as to how social rights could be better integrated into decision-making processes.

Despite the Juncker Commission’s ambition to score a ‘social triple A’ for Europe, and despite what has been referred to as its gradual ‘socialization’,<sup>172</sup> what has so far been achieved under the European Semester still remains short of relying on social rights as a means to improve social convergence in the EU. First, Semester institutional actors still fail to rely on the normative components of social rights

<sup>170</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 19”, *op. cit.*, para. 42.

<sup>171</sup> *Id.*, para. 59.

<sup>172</sup> B. VANHERCKE, J. ZEITLIN, *op. cit.*

to assess progress made by Member States. Of course, the indicators and scoreboards their methodology rests on are no longer purely macroeconomic, and have been rearranged to include criteria related to employment and social performance, mainly derived from the Europe 2020 targets.<sup>173</sup> But DG Employment, the EPSCO Council and its advising committees (the Employment Committee and the Social Protection Committee), still are not relying on *rights-based* indicators, informed by European and international human rights law. The use of alternative indicators, based on social rights, would allow for a substantially more refined and informed policy analysis, and would help improve the overall relevance and legitimacy of outputs under the European Semester.

Secondly, inclusiveness remains an important structural weakness of the European Semester. As shown by Vanhercke, Zeitlin and Zwinkels,<sup>174</sup> the participation in the European Semester of parliamentary assemblies (both the European Parliament and national parliaments), social partners and the civil society leaves much to be desired, both at the national and European level. Despite modest reforms towards their inclusion into the process, those outsiders remain widely unable to weigh in on the Semester, and to have their voices heard and considered. Yet, only a strengthened and meaningful participation of those actors in the Semester process will ensure that its main outputs, starting with the CSRs, are adopted in full knowledge, after a complete assessment of their impact on specific groups and in specific contexts. We do not solely conceive participation and inclusiveness in terms of legitimacy. In our opinion, it ought to be taken as a source of learning, which can improve the very substance of policies and, in the specific case of the Semester, allow for a much better informed assessment and a more “granularized” design of policy outputs.

Finally, the accountability gap that characterizes the Semester as a policy process should be closed. As shown in the above, there are indeed few possibilities, if any at all, to trigger an external review as to the compatibility of Semester outputs (including CSRs and national programmes) with social rights as guaranteed under EU law. Rights require remedies, and ways to challenge potential incompatibilities before independent authorities should therefore be made available. This first and foremost requires a meaningful implication of the Court of Justice in Semester governance. The level of influence that the EU has gained in all spheres of socio-economic affairs under the Semester process should be matched with an appropriate degree of judicial control, consistent with the idea that the Union is based on the rule of law. The involvement of non-judicial, administrative review authorities should also be considered. The Fundamental Rights Agency, for example, has in our view the resources and the credibility to orientate the decision-making

<sup>173</sup> B. VANHERCKE, J. ZEITLIN, A. ZWINKELS, “Further Socializing the European Semester: Moving Forward for the ‘Social Triple A?’”, *European Social Observatory*, Final Report, 1 December 2015, pp. 19-21; p. 22.

<sup>174</sup> *Id.*, pp. 15-17.

processes under the Semester, and provide policy actors with the expertise and guidance they need.<sup>175</sup>

Under the Fiscal Compact too, there is room for a more rights-based approach of economic and budgetary governance. As explained in the above, Article 3(1)(c) of the Compact allows for temporary deviation from the budgetary medium-term objective, or the adjustment path towards it, in case of exceptional circumstances, which are defined in Article 3(3)(b). Although this escape clause is defined in narrow terms, it could be read in the future as including within the notion of exceptional circumstances the inability for a country to comply with its budgetary targets without compromising its obligations under international treaties it is a party to, or at least under the social provisions of the Charter.<sup>176</sup> Such a voluntarist reading would be consistent with the TSCG signatories' fundamental rights duties under EU law and international law. How realistic is it? Perhaps we should recall how generously a comparable "exceptional circumstances" clause (the "emergency financial assistance" clause in Article 122(2) TFEU)<sup>177</sup> has been construed to allow for the establishment of the EFSM.<sup>178</sup> Shouldn't legal imagination be placed, not only in the service of the single currency, but also in that of fundamental rights?

The recommendations we made as regard to the European Semester also apply *mutatis mutandis* to the enhanced surveillance mechanism set up by Regulation No. 472/2013. As to the substance of the mechanism, the assessment of the performances of the State under surveillance should not only rely on indicators drawn from the macroeconomic adjustment plan, but should also include social rights. This stems not only from primary law, but also from Regulation No. 472/2013 itself, which explicitly specifies in its Article 7(7) 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". This commitment should be fully lived up to, and that provision ought to be interpreted in line with the requirements of the social provisions of the Charter. Second, what we suggested about participation and inclusiveness *a fortiori* holds also for the enhanced surveillance mechanism, which has proven notably defective in that regard. Finally, as to the possibility of review, we have shown how Regulation No. 472/2013 has brought financial assistance conditionality back within the ambit of EU law, thus inevitably repatriating

<sup>175</sup> In this regard, see A. HINAREJOS, "A Missed Opportunity. The Fundamental Rights Agency and the Euro Area Crisis", *European Law Journal*, vol. 22, No. 1, 2016, pp. 61-73.

<sup>176</sup> Related to this, see Hemerijck's proposal of social investment exemptions from the SGP's fiscal targets: A. HEMERIJCK, "New EMU governance: Not (yet) ready for social investment?", *Institute for European Integration Research*, Working Paper, n° 1/2016, pp. 45-46.

<sup>177</sup> Article 122(2) TFEU provides that Union financial assistance may be provided by the Council to a Member State that is "in difficulties" or is "threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". This provision is to be read as a temperment to the "no-bailout" clause enshrined in Article 125 TFEU.

<sup>178</sup> M. RUFFERT, "The European Debt Crisis and European Union Law", *CMLR*, vol. 48, n° 6, 2011, pp. 1786-1788; K. TUORI, K. TUORI, *op. cit.*, pp. 136-145; J.-V. LOUIS, "Guest Editorial. The No-Bailout Clause and Rescue Packages", *op. cit.*, pp. 981-986.

all the acts and instruments adopted by EU institutions in that setting within the jurisdiction of the Court.<sup>179</sup> The involvement of external reviewers such as the Fundamental Rights Agency throughout the decision-making processes, would also be beneficial under enhanced surveillance.

Finally, concerning the ESM, it is beyond doubt since *Ledra Advertising* that the Commission and the ECB remain bound by the Charter in the fulfilment of their tasks under the ESM framework. Those institutions therefore have a duty to ensure that EU law, including the Charter of Fundamental Rights, shall be complied with in the negotiation and implementation of the MoUs. They should therefore make sure that their methodology and internal decision-making processes when they step in as agents of the ESM fully integrate fundamental rights. More specifically, in order to ensure that the Commission and ECB can effectively discharge this duty, the Charter of Fundamental Rights should in our view be approached as an operational tool, associated with a set of indicators allowing to concretely assess whether its guarantees are fully complied with. Unfortunately, the social provisions of the Charter, in particular those listed in Title IV (Solidarity), are as a general rule poorly understood, for the main reason that the case-law of the Court of Justice supposed to flesh it out remains too underdeveloped to provide adequate guidance. Therefore, further work needs to be done internally to make the content of these rights more explicit and operational. To that end, the European Social Charter, the International Covenant on Economic, Social and Cultural Rights and the whole body of case-law associated with these instruments should be seen as important sources of inspiration.

## VI. Conclusion

This paper is finalized at a time when the gap between the expectations of public opinion and what the European Union currently delivers has never been so wide. The Union is perceived as distant; as prioritizing fiscal discipline above growth; and as doing too much to protect the rights of market actors and too little to reduce inequalities within the population through robust social policies. To ensure that improved economic governance shall not lead to socially unjust outcomes is of considerable importance to maintaining and enhancing the legitimacy of the Union in the eyes of its citizens.

It also makes economic sense. It is now broadly recognized that the austerity measures proposed first as an immediate response to the sovereign debt crisis, and later as an antidote to the economic crisis, were premised on an outdated view of economics – one that has by now been widely discredited.<sup>180</sup> Redistributive fiscal policies and social spending, particularly on social security, have had a

<sup>179</sup> See *supra*, note 92.

<sup>180</sup> See, e.g., P. KRUGMAN, *End this Depression Now*, New York City, Norton, 2012; J. STIGLITZ, *The Euro – How a Common Currency Threatens the Future of Europe*, New York City, Norton, 2016.



major role to play to reduce the levels of inequality that would result from market incomes for different groups of the population. In OECD countries, public cash transfers, together with income taxes and social security contributions, were estimated to reduce inequality among the working-age population (measured by the Gini coefficient) by an average of about one-quarter across OECD countries during the period from the mid-1980s to the late 2000s.<sup>181</sup> A progressive tax system, combined with strong social policies that benefit the poor, can have a major impact on the reduction of inequalities. Contrary to a widely held assumption, this combination also contributes to wealth creation.<sup>182</sup> States adopting robust redistributive policies and providing high-quality public services ensure harmonious and strong economic growth: the International Monetary Fund (IMF) found that “the combined direct and indirect effects of redistribution, including the growth effects of the resulting lower inequality, are on average pro-growth”.<sup>183</sup> Indeed, more recent research from the same institution found “an inverse relationship between the income share accruing to the rich (top 20 percent) and economic growth”.<sup>184</sup>

Social rights are not an add-on, or a luxury item that States can afford only in good economic times: they are an indispensable ingredient in growth-enhancing economic policies, and a safeguard against the risk that the poor will pay for the rest, for the simple reason that their economic marginalization leads to their political disempowerment. It is in this spirit, and in the hope that the EU’s socio-economic governance shall in the future contribute better to the values on which the Union is founded, that we have written this contribution.

<sup>181</sup> Organisation for Economic Co-operation and Development, *Divided we Stand: Why Inequality Keeps Rising*, OECD, Paris, 2011.

<sup>182</sup> The assumption was popularized as the “Kuznets curve” after the work of Simon Kuznets who hypothesized in the mid 1950s that inequality was an inevitable price to pay during industrialization in fast-growing nations (see Simon KUZNETS, “Economic Growth and Income Inequality”, *American Economic Review*, vol. 45, 1955, pp. 1-28). However, quite apart from the fact that such a reasoning could not be transposed to advanced industrial economies in which the processes of urbanization and structural transformation associated with industrialization are completed, the ideological uses made of his work does not correspond to the actual findings of Kuznets; nor do such uses have any (other) solid data to rely on.

<sup>183</sup> Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26<sup>th</sup> session of the Human Rights Council (A/HRC/26/28) (22 May 2014), para. 40, citing J. OSTRY, A. BERG, C. TSANGARIDES, “Redistribution, Inequality and Growth”, IMF Staff Discussion Note, February 2014 (International Monetary Fund, Washington, D.C., 2014). See also A. BERG, J. OSTRY, “Inequality and Unsustainable Growth: Two Sides of the Same Coin?”, IMF Staff Discussion Note 11/08 (International Monetary Fund, Washington, D.C., 2011).

<sup>184</sup> E. DABLA-NORRIS, K. KOCHHAR, N. SUPHAPHIPHAT, F. RICKA, E. TSOUNTA, *Causes and Consequences of Income Inequality: A Global Perspective*, IMF Staff Discussion Note, June 2015, p. 7 (“If the income share of the top 20 percent increases by 1 percentage point, GDP growth is actually 0.08 percentage point *lower* in the following five years, suggesting that the benefits do not trickle down. Instead, a similar increase in the income share of the bottom 20 percent (the poor) is associated with 0.38 percentage point *higher* growth. This positive relationship between disposable income shares and higher growth continues to hold for the second and third quintiles (the middle class)”).