ΠΑΝΤΕΙΟ ΠΑΝΕΠΙΣΤΗΜΙΟ ΚΟΙΝΩΝΙΚΩΝ ΚΑΙ
ΠΟΛΙΤΙΚΩΝ ΕΠΙΣΤΗΜΩΝ

PANTEION UNIVERSITY OF SOCIAL AND POLITICAL SCIENCES

Τμήμα Διεθνών, Ευρωπαϊκών και Περιφερειακών Σπουδών

Social State within the European Integration

ΔΙΔΑΚΤΟΡΙΚΗ ΔΙΑΤΡΙΒΗ

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Αθήνα, 2019

«Η Διδακτορική Διατριβή υλοποιήθηκε με υποτροφία του ΙΚΥ η οποία χρηματοδοτήθηκε από την πράξη «Πρόγραμμα χορήγησης υποτροφιών για μεταπτυχιακές σπουδές δευτέρου κύκλου σπουδών» από πόρους του ΕΠ «Ανάπτυξη Ανθρώπινου Δυναμικού, Εκπαίδευση και Δια Βίου Μάθηση», 2014-2020 με τη συγχρηματοδότηση του Ευρωπαϊκού Κοινωνικού Ταμείου (Ε.Κ.Τ) κα του ελληνικού δημοσίου».

PANTEION UNIVERSITY OF SOCIAL AND POLITICAL SCIENCES

Department of International, European and Area Studies

Social State within the European Integration

For the degree of

DOCTOR OF PHILOSOPHY

Maria I. Bafaloukou

Athens, 2019

"This research has been co-financed -via a programme of State Scholarships Foundation (IKY)- by the European Union (European Social Fund - ESF) and Greek national funds through the action entitled "Scholarshipsprogramme for postgraduates studies -2nd Study Cycle" in the framework of the Operational Programme "Human Resources Development Program, Education and Lifelong Learning" of the National Strategic Reference Framework (NSRF) 2014 – 2020".

Τριμελής Συμβουλευτική Επιτροπή

Νέδα-Μαρία Κανελλοπούλου-Μαλούχου, Αναπλ. Καθηγήτρια Παντείου Πανεπιστημίου (Επιβλέπουσα)
Δημήτρης Χρυσοχόου, Καθηγητής Εθνικού και Καποδιστριακού Πανεπιστημίου Αθηνών
Ανάργυρος Πασσάς, Αναπλ. Καθηγητής Παντείου Πανεπιστημίου

Abbreviations

CEEP: European Centre of Public Enterprises

Charter: Charter of Fundamental Rights

CoE: Council of Europe

CRA: Credit Rating Agency

EC: European Community

ECB: European Central Bank

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECJ: European Court of Justice

ECSC: European Coal and Steal Community

EEC: European Economic Community

EESC: European Economic and Social Committee

EFSM: European Financial Stability Facility

EGF: European Globalization Adjustment Fund

EMU: European Monetaty Union

EPSR: European Pillar of Social Rights

ESC: European Social Charter

ESCR: European Committee of Social Rights

ESF: European Social Fund

ESF+: European Social Fund Plus

ESM: European Stability Mechanism

ETUC: European Trade Union Confederation

EU: European Union

EURATOM: European Atomic Energy Community

GDP: Gross Domestic Product

ILO: International Labour Organization

IMF: International Monetary Fund

MoU: Memorandum of Understanding

MS: Member States

MMF: Multiannual Financial Framework

OECD: Organization for Economic Co-operation and Development

OMC: Open Method of Coordination

QMV: Qualified Majority Voting

SAPs: Social Action Programmes

SDGs: Sustainable Development Goals

SEA: Single European Act

SGP: Stability and Growth Pact

SPA: Social Policy Agenda

TEC: Treaty establishing the European Community

TFEU: Treaty on the Function of the European Unon

UNICE: Union of Industries of the European Community

YEI: Youth Employment Initiative

Acknowledgements

In the first place, I would like to express my sincere gratitude towards my advisor Assistant Professor Neda-Maria Kanellopoulou-Malouchou for her continuous support during my Ph.D. studies and the associated research, for her patience, motivation, and extensive expertise. Her guidance, her positive thinking and interest are elements embedded throughout the text.

Besides my advisor, I would also like to thank the rest of my thesis committee: Professor Dimitris Chryssochoou, Assistant Professor Anargyros Passas for their insightful comments and encouragement. Particularly essential for the completion of my doctoral dissertation was the scholarship provided by the State Scholarship Foundation (IKY), which funded my research from May 2017 to April 2019.

My sincere gratitude also goes to Ms. Kalliopi Raikou. Without her contribution, the quality and final result would be very different. I feel grateful for the hours she spent in order to accomplish the proof editing process. Her encouragement which she so generously provided reaffirms my conviction that she has confirmed the myth accompanying her name as a Muse of Inspiration.

During my dissertation I was given the opportunity to participate in the Institute of International Relations as a researcher. In that context, I would like to thank the Director of Research Programs Dr. Konstantinos Filis, who entrusted me with the coordination of the research team of 'Human Rights and Democracy'.

On a personal level, I would like to thank my mother Zoi Alexiou for all the advice she has given me as well as for her positive energy, supporting me spiritually throughout the development of this thesis. I would also like to thank my brother Panagiotis Bafaloukos for maintaining the notion to an extend greater than my own that I should carry on in spite of all the existing difficulties. I will never forget his reaction when he first learned about my scholarship. I thank my father Ioannis Bafaloukos who read every paper that I produced. His interest encouraged me to further advance my progress.

Special thanks to my closest friend Giorgia Dapei for always being supportive, to Konstantina Dakou, who with her unique character reminds me that progress is achieved with patience, insight and a kind soul. Finally, I would like to thank Ioanna Hatzikosta for her support and true love, Vassilis Karageorgos, who proves on a daily basis that what distinguishes the virtuous man is his actions.

I am rather grateful to Charalampos Mentis for enlightening me with his thoughts, advice, ideas and profound moral support. In every problem that occurred, he provided solutions. His scientific activity as an economist helped me clarify important research related issues and also inspired me to further support my argument that economy, society and the environment can operate more efficiently within a synergistic framework. By granting me the privilege of not engaging in a doctoral dissertation as a solitary project, I was able to keep this activity as interesting as it owes to be.

Thank you,

Maria Bafaloukou

Ευχαριστίες

Μια πρώτη επιθυμία που με συνόδευε από την αρχή εκπόνησης της διδακτορικής διατριβής ήταν να φθάσει η στιγμή που θα έγγραφα τις ευχαριστίες καθώς θα σήμαινε την εκπλήρωση του εγχειρήματος. Ωστόσο, τολμώ να πω ότι αναθεώρησα διότι η μελέτη και η ενασχόληση μου με τη συγγραφή του διδακτορικού, μου έμαθαν πως το κυρίαρχο συναίσθημα που έρχεται με το τέλος της συγγραφής είναι η επαλήθευση, ή μη, της αυτοεκτίμησης η οποία κερδίζεται από το γεγονός πως ολοκλήρωσες τον στόχο με ειλικρίνεια, αφοσίωση και σεβασμό.

Προς την κατεύθυνση αυτή οδηγήθηκα με την πολύτιμη βοήθεια της Αναπ. Καθηγήτριας Συνταγματικού Δικαίου, κα Νέδας-Μαρίας Κανελλοπούλου-Μαλούχου. Χαίρομαι πραγματικά που μου δίνεται η ευκαιρία να την ευχαριστήσω ειλικρινά που με εμπιστεύτηκε τόσο για την ανάληψη εκπόνησης της διδακτορικής διατριβής όσο και για τον τρόπο με τον οποίο μου «επέτρεψε» να εκφραστώ, να μελετήσω και να εκπονήσω το θέμα της παρούσας διατριβής. Η καθοδήγηση της, η θετική της σκέψη και το ενδιαφέρον της είναι στοιχεία που εμπεριέχονται σε όλο το κείμενο και με καθιστούν ευγνώμων. Θερμές ευχαριστίες θα ήθελα να εκφράσω στα μέλη της συμβουλευτικής επιτροπής, στον Καθηγητή κ. Δημήτρη Χρυσοχόου και στον Αναπλ. Καθηγητή κ. Ανάργυρο Πασσά για τις χρήσιμες παρατηρήσεις τους, την ευγένεια και την ενθάρρυνση τους.

Ουσιώδης για την εκπλήρωση της διδακτορικής μου διατριβής ήταν η υποτροφία από το Ίδρυμα Κρατικών Υποτροφιών (ΙΚΥ) η οποία χρηματοδότησε την έρευνα μου από τον Μάιο του 2017 έως τον Απρίλιο του 2019. Θα ήθελα επίσης να ευχαριστήσω για την πολύ σημαντική βοήθεια της στην επιμέλεια της διδακτορικής διατριβής την κα Καλλιόπη Ράικου. Δίχως εκείνη, η ποιότητα και το αποτέλεσμα θα ήταν πολύ διαφορετικό. Νιώθω ευγνωμοσύνη για τις ώρες που αφιέρωσε στο κείμενο μου, ούτως ώστε να ολοκληρώσει την αγγλική επιμέλεια. Η ηθική εμψύχωση που τόσο γενναιόδωρα μου προσέφερε, μου δημιουργεί την πεποίθηση πως επιβεβαίωσε το μύθο που συνοδεύει το όνομα της ως Μούσα της έμπνευσης. Κατά τη διάρκεια εκπόνησης της διατριβής μου δόθηκε η ευκαιρία να συμμετάσχω στο Ινστιτούτο Διεθνών Σχέσεων ως ερευνήτρια. Θα ήθελα να ευχαριστήσω τον Διευθυντή Ερευνητικών προγραμμάτων Δρ. Κωνσταντίνο Φίλη, ο οποίος μου εμπιστεύτηκε το συντονισμό της Ομάδας Ανθρωπίνων Δικαιωμάτων και Δημοκρατίας.

Σε προσωπικό επίπεδο θα ήθελα να ευχαριστήσω την μητέρα μου Ζωή Αλεξίου για κάθε συμβουλή που μου έδωσε, για την ηθική της συμπαράσταση για τη θετική της ενέργεια που με βοήθησε τόσο πολύ να ολοκληρώσω τη μελέτη μου. Κάθε της πράξη με οδηγεί να ανέβω ένα σκαλί ψηλότερα. Επίσης θα ήθελα να ευχαριστήσω τον αδελφό μου Παναγιώτη Μπαφαλούκο γιατί πίστεψε περισσότερο και από μένα ότι αξίζει να συνεχίσω και δεν θα λησμονήσω την αντίδραση του όταν έμαθε για την υποτροφία μου. Ευχαριστώ τον πατέρα μου Ιωάννη Μπαφαλούκο που διάβασε κάθε άρθρο και κάθε κείμενο για το οποίο τον ρωτούσα τη γνώμη του και με χαρά και παρότρυνση ενδιαφερόταν για την πρόοδο μου.

Θα ήθελα επίσης να ευχαριστήσω την αγαπημένη μου φίλη Τζόρτζια Νταπέι γιατί είναι πάντα δίπλα μου. Ιδιαίτερες ευχαριστίες στην Κωνσταντίνα Δάκου η οποία με το μοναδικό της χαρακτήρα μου υπενθυμίζει πως η πρόοδος επιτυγχάνεται με υπομονή, οξυδέρκεια και ευγένεια ψυχής. Τέλος, θα ήθελα να ευχαριστήσω την Γιάννα Χατζηκώστα για τη στήριξη της και την έμπρακτη αγάπη της, τον Βασίλη Καραγεώργο που αποδεικνύει καθημερινά πως αυτό που διακρίνει τον ενάρετο άνθρωπο είναι οι πράξεις του.

Ένα μεγάλο ευχαριστώ θα ήθελα να εκφράσω στον Χαράλαμπο Μέντη καθώς η μελέτη, η εκπόνηση και η συγγραφή εμπλουτίστηκαν με τις σκέψεις, τις συμβουλές, τις ιδέες και την βαθύτατη εμψύχωση του. Σε κάθε πρόβλημα μου, είχε μια λύση. Η επιστημονική του δραστηριότητα ως οικονομολόγου συνέδραμε στο να αποσαφηνιστούν σημαντικά σημεία που με απασχόλησαν κατά την έρευνα αλλά και να με εμπνεύσουν να στηρίξω το επιχείρημα μου πως η οικονομία, η κοινωνία και το περιβάλλον δύναται να λειτουργήσουν πιο εύρυθμα μέσω της συνεργασίας. Χαρίζοντας μου το προνόμιο να μην είναι η ενασχόληση με τη διδακτορική διατριβή ένα έργο μοναχικό, μου έδωσε δύναμη να παραμείνει η δραστηριότητα αυτή τόσο ενδιαφέρουσα όσο της άξιζε να είναι.

Ευχαριστώ

Μάρω Μπαφαλούκου

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Abstract

For the last few decades the much-vaunted European Welfare States have been under a slow destruction that has been accelerated because of the 2008 financial crisis and the implementation of the austerity measures across Europe. The aftermath of the current economic and financial crisis induced a social crisis that increased inequalities across the European Union. This social crisis emphasizes the argument that social rights are inherently vague and lacking in clarity. Moreover, exposes the hollowness that lies at the heart of "Social Europe". It is true that the measures undertaken to make the EMU more resilient have stirred the debate regarding the need for a stronger European Social dimension.

The present thesis examines the role of the European Social State. The fact that throughout the years social policy is subsidiary to economic progress creates structural problems to the function of the Social State. Hence, the social field is lacking legitimacy, since social rights have a vague status which is often correlated with the deprivation of judicial protection. The present thesis focused at the repercussions of the "Great Recession". The process of macro-economic reform, such as in the case of the European Semester, has drawn severe criticism on the future of the European integration. The reinforcing budgetary discipline has introduced neoliberal actions; thus, the social dimension of Europe is at risk.

It is really encouraging that the EU illustrates the significance and urgency in reversing this downturn of the social policy via the European Pillar of Social Rights. The EPSR can be considered as an opportunity to set the EU back on track. It unravels the necessity for a new political consensus in relation to the most appropriate "type of Europe" in which EU citizens wish to live in. The European Economic and Social Committee (EESC) denotes that "a realistic future for the European Union can only be based on marrying a sound economic basis with a strong social dimension".

Key words: *European Social Sate, Social Rights, Economic Crisis, New Economic Governance, European Pillar of Social Rights, Agenda 2030, Social Dimension*

Greek extended abstract

I. Κοινωνικό κράτος, Ευρωπαϊκή Ενοποίηση και κρίση

Το κοινωνικό κράτος, αν και αποτελεί κομμάτι της ιστορικής διαδρομής των Ευρωπαϊκών κοινωνιών, άρχισε να αλλάζει αρκετά χρόνια πριν εμφανιστούν οι συνέπειες της παγκόσμιας κρίσης του 2008. Μεταξύ άλλων, στις σημαντικότερες αιτίες εντοπίζεται η γήρανση του πληθυσμού, οι νέες μορφές οικογένειας, η πτώση των ποσοστών γεννήσεων, τα υπερφορτωμένα ευρωπαϊκά συνταξιοδοτικά συστήματα, με αποτέλεσμα ο χαρακτήρας και η λειτουργία του κοινωνικού κράτους να έχουν μετασχηματιστεί σε σημαντικό βαθμό. Η αυξανόμενη ζήτηση για εκπαίδευση και κατάρτιση, η αύξηση της ανεργίας, η μεταναστευτική κρίση διόγκωσαν τις προσδοκίες των πολιτών για επίτευξη της κοινωνικής προόδου. Ταυτόχρονα, η παγκόσμια οικονομική κρίση έχει κλονίσει ακόμα περισσότερο την (μη) ισορροπημένη σχέση μεταξύ αγορών και κρατών. Ως εκ τούτου, το κοινωνικό κράτος υπόκειται σε αναθεώρηση και αναδιάρθρωση.

Σε ένα γενικότερο πλαίσιο προσπάθειας αποτίμησης των συνεπειών της οικονομικής κρίσης υποστηρίζεται πως η Ευρωπαϊκή Ένωση κλήθηκε να αντιμετωπίσει το πρώτο κύμα της κρίση το οποίο προκλήθηκε από την κατάρρευση της Lehman Brothers το 2008. Στη συνέχεια η ευρωπαϊκή οικονομία κλονίστηκε ακόμα περισσότερο από το δεύτερο κύμα, το οποίο δημιούργησε η ελληνική κρίση χρέους τον Δεκέμβριο του 2009 με αποτέλεσμα τη δημιουργία ενός τρίτου κύματος, το οποίο ήταν η απειλή της βιωσιμότητας του ευρώ το 2011.[1] Με άλλα λόγια, η παγκόσμια οικονομική κρίση έγινε συστηματική με εμφανείς συνέπειες. Η πολιτική ολοκλήρωση δεν κατάφερε να ακολουθήσει την πρόοδο της νομισματικής ενοποίησης. Έτσι, τα τελευταία δύο χρόνια η Ευρωπαϊκή Ένωση έλαβε ενέργειες που φαίνεται να αντικατοπτρίζουν την πρόθεση εκ μέρους των ευρωπαϊκών θεσμών να επιλυθεί η ανεπάρκεια της ανεκπλήρωτης ευρωπαϊκής ενοποίησης και να αποφευχθούν τα σενάρια του τερματισμού της Ένωσης εν γένει (European Disintegration).[2] Πρόσφατα και μέσω των ευρωπαϊκών θεσμικών οργάνων ξεκίνησε η ενδυνάμωση της κοινωνικής

[1] A. Hemerijck, et all, (2012). The Welfare State After the Great Recession, *Intereconomics* 47(4), 220-229.
[2] D. Webber, (2018). *European Disintegration?* The European Union Series.

διάστασης της Ευρώπης. Αδιαμφησβήτητα αυξάνεται η συζήτηση πως το ευρωπαϊκό κοινωνικό κράτος είναι μη βιώσιμο και χρειάζεται μεταρρύθμιση. Μελετώντας το σκοπό του κοινωνικού κράτους, διαπιστώνεται πως είναι αρμόδιο για να αμβλύνει την οικονομική ανασφάλεια των πολιτών, να διευκολύνει τις αρνητικές συνέπειες των περιόδων ύφεσης του οικονομικού κύκλου.[3] Το κοινωνικό κράτος συνδέεται άμεσα με το οικονομικό σύστημα, καθώς οι οικονομικές παροχές είναι υπεύθυνες για το επίπεδο κοινωνική προστασίας που δύναται να προσφέρει το εκάστοτε κράτος. Η εξάρτηση αυτή δημιουργεί την απειλή να γίνει μια «ωρολογιακή βόμβα». Δεδομένου ότι είναι ευάλωτο στις αλλαγές, μια οικονομική αναταραχή λόγου χάρη μπορεί εύκολα να προκαλέσει υψηλή ανεργία. Η επικουρική λειτουργία του κοινωνικού κράτους έχει θεωρηθεί ως εμπόδιο στην οικονομική ανάκαμψη. Λόγω της οικονομικής ύφεσης, οι κυβερνήσεις σε πολλές χώρες αντιμετωπίζουν δίλλημα προκειμένου να κρίνουν τι είναι πιο αναγκαίο. Με άλλα λόγια η εκπλήρωση δύο στόχων, αφενός να αυξηθούν τα έσοδα του κράτους και αφενός να χρηματοδοτηθούν οι δημόσιες δαπάνες για την κοινωνική προστασία μοιάζει ένα ιδιαιτέρως δύσκολο εγχείρημα. Πράγματι, παρουσιάστηκε πτώση των πόρων που διατίθενται στις κοινωνικές υπηρεσίες σε συνδυασμό με μια πολιτική μείωσης των υπηρεσιών σε πολλά κράτη μέλη. Τέλος, η γενική απώλεια εμπιστοσύνης στο κοινωνικό κράτος δύναται να είναι η ρίζα της πολυδιάστατης κρίσης. Εν ολίγοις, τόσο η θεωρία όσο και η λειτουργία του κοινωνικού κράτους τίθενται σε κίνδυνο.

II. Επεξήγηση ορολογίας

Η έννοια του κοινωνικού κράτους (social state) δεν είναι εύκολο να προσδιοριστεί. Στη βιβλιογραφία αναφέρεται επίσης ο όρος του κράτους πρόνοιας (welfare state), ωστόσο στην Ευρωπαϊκή Ένωση η έννοια του κράτους πρόνοιας περιγράφει κάτι διαφορετικό το οποίο δεν αφομοιώνει τη λειτουργία του «Ευρωπαϊκού Κοινωνικού Μοντέλου», που βρίσκεται ακόμη σε αναζήτηση. Στην παρούσα διατριβή αναφέρεται ο όρος «κοινωνικό κράτος» (social state) προκειμένου να εξεταστεί ο ρόλος του και η λειτουργία του σε σχέση με την οικονομία εντός της ΕΕ.

[3] T. Andersen, (2012). The Welfare State and the Great Recession, ibid.

Το κοινωνικό κράτος μπορεί να οριστεί ως άμεση ή έμμεση αντίδραση στην ανθρώπινη ανάγκη. Οι κοινωνικοί κανόνες και οι ανάγκες αλλάζουν διαρκώς. Η κοινωνική πολιτική θα πρέπει να είναι ευέλικτη αφού, σε μια μεταβαλλόμενη κοινωνία, η κατάσταση που θεωρείται κάποτε ως πρόβλημα δεν αντιμετωπίζεται πλέον με αυτόν τον τρόπο. Οι καταστάσεις που κάποτε θεωρούνταν κανονικές αναγνωρίζονται ως προβλήματα και δημιουργούνται εντελώς νέα ζητήματα.[4] Τα τελευταία χρόνια, ο ρυθμός της οικονομικής ολοκλήρωσης στην Ευρώπη ήταν γρήγορος, όπως απεικονίζεται μέσα από την πορεία υιοθέτησης του ενιαίου νομίσματος των 19 από τα 28 κράτη μέλη της Ευρωπαϊκής Ένωσης. Η οικονομική ολοκλήρωση έχει αναπόφευκτα εγείρει σημαντικά και κρίσιμα ερωτήματα σχετικά με την πολιτική ολοκλήρωση, ιδιαίτερα τη σχέση μεταξύ των κρατών μελών και της Ευρωπαϊκής Ένωσης ως υπερεθνική βαθμίδα διακυβέρνησης.[5] Επομένως, υπάρχουν αμφιλεγόμενα θέματα όπως η κοινωνική πρόοδος. Δύναται η αυξημένη οικονομική και πολιτική ολοκλήρωση να εμπεριέχει ένα ευρωπαϊκό κοινωνικό κράτος;

Στην Ευρώπη, η έννοια των κοινωνικών κρατών διαμορφώθηκε με την παρούσα μορφή τους, μετά τον Β 'Παγκόσμιο Πόλεμο. Ωστόσο, μέχρι σήμερα αντανακλά τις εθνικές παραδόσεις. Ωστόσο, επειδή πολλοί κανόνες είναι κοινοί σε ολόκληρη την Ευρώπη, θα μπορούσε να γεφυρωθεί η μεγάλη ποικιλομορφία των βασικών αξιών των συστημάτων κοινωνικής πρόνοιας των κρατών μελών.[6] Είναι λοιπόν λογικό να μιλάμε για ένα ξεχωριστό ευρωπαϊκό κοινωνικό μοντέλο που συχνά προσδιορίζεται με τον καλύτερο δυνατό τρόπο σε σχέση με τα υπόλοιπα μέρη του κόσμου. Η πολιτική οικονομία της Ευρώπης έχει καθοριστεί από τη δεκαετία του 1950 με την ανάπτυξη σε κάθε ευρωπαϊκή χώρα ενός περισσότερο ή λιγότερο περιεκτικού προτύπου πρόνοιας, όπου το κράτος έχει αναλάβει κεντρικό ρόλο στην παροχή μιας σειράς κοινωνικών παροχών, οι πιο δαπανηρές από τις οποίες είναι οι συντάξεις, η στήριξη με τη μορφή επιδομάτων προς τους φτωχούς, η κοινωνική στέγαση και η υγειονομική περίθαλψη. Παράλληλα, όλες οι χώρες της ΕΕ προσπάθησαν να ρυθμίσουν τις αγορές εργασίας και να εξασφαλίσουν μια δίκαιη συμφωνία για τους

[4] D. Macarov, (1995). Social Welfare: Structure and Practice. Sage Publications.
[5] Α. Πασσάς και Τ. Τσέκος, (2009). *Εθνική Διοίκηση και Ευρωπαϊκή Ολοκλήρωση*, εκδόσεις Παπαζήση, Αθήνα, σελ. 72 επ.
[6] I. Begg, et all, (2015). Redesigning European welfare states – Ways forward. Vision Europe Summit 2015. Chatham House.

εργαζόμενους.[7] Μία από τις πιο σύνθετες προκλήσεις που αντιμετωπίζουν σήμερα οι ευρωπαϊκές κυβερνήσεις και κοινωνίες είναι η εναρμόνιση αυτών των δεσμεύσεων με την παροχή κοινωνικής προστασίας, οι οποίες υποστηρίζονται ευρέως πολιτικά, με πιέσεις που μπορεί να τις κάνουν μη «βιώσιμες» οικονομικά.

Στη σημερινή πραγματικότητα, δεν υπάρχει ένα ενιαίο «ευρωπαϊκό κοινωνικό κράτος». Αυτό που υπάρχει είναι είκοσι οκτώ κοινωνικά κράτη εντός της Ευρωπαϊκής Ένωσης.[8] Αυτά τα κοινωνικά κράτη έχουν τόσο ομοιότητες όσο και διαφορές. Η πιο σημαντική συγκριτική μελέτη τα τελευταία χρόνια είναι αναμφισβήτητα «Οι τρεις κόσμοι του καπιταλισμού της ευημερίας (*The Three Worlds of Welfare Capitalism* - 1990) του Esping-Andersen.[9] Ο Esping-Andersen βασίζει την τυπολογία του σε δύο βασικές έννοιες: την «απο-εμπορευματοποίηση» της εργασίας (de-commodification of labour), και στο γεγονός πως το κράτος πρόνοιας δρα ως ένα σύστημα διαστρωμάτωσης. Η «απο-εμπορευματοποίηση» αποτελεί χαρακτηριστικό όλων των κοινωνικών κρατών αλλά σε διαφορετικούς βαθμούς. Ο Esping-Andersen αναφέρει το βαθμό και την έκταση της «απο-εμπορευματοποίησης» σε καθένα από τα τρία βασικά είδη κοινωνικού κράτους. Σε εκείνα τα κράτη πρόνοιας στα οποία συναντάται ένα υψηλό επίπεδο κοινωνικής ασφάλισης, παρατηρείται αποδυνάμωση της «απο-εμπορευματοποίησης» ιδιαίτερα σε περιόδους οικονομικής ύφεσης. Πράγματι, στις χώρες αυτές, στον αγγλοσαξονικό κόσμο (σύμφωνα με τον Esping-Andersen), το αποτέλεσμα μπορεί να είναι η ενίσχυση της αγοράς αυξάνοντας την επιθυμία για ιδιωτική ευημερία για εκείνους που μπορούν να το αντέξουν οικονομικά. Στη δεύτερη ομάδα χωρών υπάρχει υποχρεωτική κρατική κοινωνική ασφάλιση με σχετικά καλά δικαιώματα παροχών. Αλλά και αυτό δεν επιφέρει ουσιαστική «απο-εμπορευματοποίησης», καθώς τα οφέλη εξαρτώνται αυστηρά από τις εισφορές και επομένως από την εργασία και την απασχόληση. Το τρίτο μοντέλο τύπου προσφέρει τη δυνατότητα πλήρους «απο-εμπορευματοποίησης», αλλά στην πράξη, τέτοια συστήματα σπανίως προσέφεραν οφέλη σε επίπεδο που αποτελεί πραγματική επιλογή

[7] Χ. Ταγαράς, (2002). *Η ελεύθερη κυκλοφορία εμπορευμάτων, προσώπων, υπηρεσιών, κεφαλαίων στην Ευρωπαϊκή Ένωση: σύμφωνα με τη νομολογία του Δικαστηρίου των Ευρωπαϊκών Κοινοτήτων και υπό το φως των διατάξεων της συνθήκης του Άμστερνταμ και της Νίκαιας*, εκδόσεις : Αντ. Ν. Σάκκουλας, Αθήνα.

[8] Στις 23 Ιουνίου 2016, το Ηνωμένο Βασίλειο ψήφισε να εγκαταλείψει την Ευρωπαϊκή Ένωση (ΕΕ) μετά από 43 χρόνια ως κράτος-μέλος.

[9] G. Esping-Andersen, (1990). *The Three Worlds of Welfare Capitalism.* Princeton, New Jersey: Princeton University Press.

στην επίσημη αγορά εργασίας. Αργότερα ένας τέταρτος, «κόσμος» της Νότιας Ευρώπης προστέθηκε με βάση το έργο του Maurizio Ferrera.[10]

Η κοινωνική αποστολή και οι στόχοι της ΕΕ είναι να προωθήσουν την ευημερία των λαών της (άρθρο 3 ΣΕΕ), να εργαστούν για την αειφόρο ανάπτυξη με βάση μια ιδιαίτερα ανταγωνιστική κοινωνική οικονομία της αγοράς, με στόχο την πλήρη απασχόληση και την κοινωνική πρόοδο, καθώς και υψηλό επίπεδο προστασίας. Η ΕΕ καταπολεμά τον κοινωνικό αποκλεισμό και τις διακρίσεις, προάγει την κοινωνική δικαιοσύνη και προστασία, την ισότητα μεταξύ γυναικών και ανδρών, την αλληλεγγύη μεταξύ των γενεών και την προστασία των δικαιωμάτων του παιδιού. Προωθεί επίσης την οικονομική, κοινωνική και εδαφική συνοχή και την αλληλεγγύη μεταξύ των κρατών μελών. Σε ένα γενικότερο πλαίσιο, η κοινωνική διάσταση της Ευρώπης εμπεριέχεται στις αξίες που πρεσβεύει η ΕΕ σύμφωνα με το Άρθρο 2 ΣυνθΕΕ: «*Η Ένωση βασίζεται στις αξίες του σεβασμού της ανθρώπινης αξιοπρέπειας, της ελευθερίας της δημοκρατίας, της ισότητας, του κράτους δικαίου, καθώς και του σεβασμού των ανθρωπίνων δικαιωμάτων*».[11]

Ο όρος των «κοινωνικών δικαιωμάτων» χρησιμοποιείται ευρέως για να αναφερθεί στην ομάδα δικαιωμάτων που αφορούν την οικονομική και κοινωνική ευημερία. Τα κοινωνικά δικαιώματα εμπλουτίζουν το Σύνταγμα με τις αξίες της κοινωνικής αλληλεγγύης, της ίσης αξιοπρέπειας και της δικαιοσύνης. Οι αξίες αυτές μέσα από τη συνταγματική κατοχύρωση των κοινωνικών δικαιωμάτων αποκτούν νοηματική και κανονιστική αυτοτέλεια και συμβάλλουν στη παραγωγή μιας νέας «κανονιστικότητας». Ωστόσο, καθίσταται δύσκολη η συναγωγή κανόνων «με προσδιορισμένο περιεχόμενο και δεσμευτική συνταγματική ισχύ»[12] εξαιτίας του ρευστού, αόριστου και ελαστικού χαρακτήρα των κοινωνικών δικαιωμάτων. Και παρά τον λόγο του αδιαίρετου χαρακτήρα που χαρακτήρισε το διεθνές κίνημα για τα ανθρώπινα δικαιώματα τον περασμένο μισό αιώνα ή περισσότερο, οι αξίες που χαρακτηρίζονται ευκολότερα ως «αστικά και πολιτικά δικαιώματα» είναι προνομιακά νομικά και πολιτικά έναντι εκείνων που κανονικά χαρακτηρίζονται ως «οικονομικά και

[10] M. Ferrera, (1996). The "Southern Model" of Welfare in Social Europe, *Journal of European Social Policy*, 6 (1).
[11] Ν. Κανελλοπούλου-Μαλούχου, (2012). *Η Χειραφέτηση της Ευρώπης*, εκδόσεις Παπαζήση, Αθήνα, σελ. 271επ.
[12] A. Manitakis, (1994). *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας των νόμων,* Sakkkoulas, Athens-Thessaloniki; D. Tsatsos, (1988). Συνταγματικό Δίκαιο, Θεμελιώδη Δικαιώματα Ι. Γενικό μέρος, Τόμος Γ', Sakkoulas, Athens-Komotini.

κοινωνικά δικαιώματα». Σε πολλές περιπτώσεις, ωστόσο τα δικαιώματα μπορούν «να διασταυρώνονται και να αλληλοεπιδρούν.[13] Για παράδειγμα, η απαλλαγή από την καταναγκαστική εργασία, αν και χαρακτηρίζεται ως ένα από τα βασικά κοινωνικά δικαιώματα, μπορεί επίσης να νοηθεί ως αρνητική προσωπική ελευθερία και το δικαίωμα να μην γίνονται διακρίσεις μπορεί εύκολα να περιγραφεί ως ατομικό δικαίωμα, όπως μπορεί κοινωνικό ή οικονομικό δικαίωμα. Τα ατομικά και πολιτικά δικαιώματα, παραδοσιακά νοούνται ως αρνητική ελευθερία από την κυβερνητική παρέμβαση, αναγνωρίζονται πιο συχνά ως εθνικό συνταγματικό καθεστώς και συνήθως επιβάλλονται με αυστηρότερα και αμεσότερα νομικά και δικαστικά μέσα. Τα κοινωνικά και οικονομικά δικαιώματα, τα αποκαλούμενα δικαιώματα δεύτερης γενιάς, θεωρούνται συχνά ως προσδοκώμενα ή προγραμματικά παρά ως συγκεκριμένα καθορισμένα δικαιώματα και ως συλλογικά και όχι μεμονωμένα. Πιστεύεται γενικά ότι απαιτούν πιο εκτεταμένες και άμεσες δαπάνες και παρεμβάσεις από τις παραδοσιακές πολιτικές και πολιτικές ελευθερίες και συνήθως απολαμβάνουν ασθενέστερη νομική επιβολή. Το κεντρικό ερμηνευτικό πρόβλημα των κοινωνικών δικαιωμάτων είναι η έκταση της νομικής τους δεσμευτικότητας. Η δομική νομική διαφορά ανάμεσα στα ατομικά (status negativus) και στα κοινωνικά δικαιώματα (status positivus) είναι πως το περιεχόμενο των κοινωνικών δικαιωμάτων είναι κάτι που δεν υπάρχει και πρέπει να παρασχεθεί ή να δημιουργηθεί από το κράτος.[14] Από αυτή τη δομική νομική διαφορά προκύπτει αβίαστα και η διαφορά τους ως προς την έκταση της νομικής ισχύος τους. Έτσι, τα κλασικά ατομικά δικαιώματα έχοντας περιεχόμενο πολύ συγκεκριμένο και ήδη υπαρκτό, θεμελιώνουν έννομη αξίωση των δικαιούχων για την πραγμάτωσή τους. Αντίθετα, το περιεχόμενο των κοινωνικών δικαιωμάτων καλείται να (πρωτο)δημιουργήσει με παροχές ή θεσμικές προβλέψεις η κρατική εξουσία. Μολονότι είναι αναμφισβήτητο ότι ορισμένα ατομικά ή πολιτικά δικαιώματα - το δικαίωμα στη ζωή, στην ιδιωτική ζωή ή στην σωματική ακεραιότητα στο πλαίσιο της άμβλωσης ή

[13] N. Kanellopoulou-Malouchou, (2011). Οι μεταμορφώσεις του Συντάγματος και το status mixtus. Retrieved from: https://www.constitutionalism.gr/1982-oi-metamorfwseis-toy-syntagmatos-kai-to-status-mix/

[14] Σύμφωνα με την παραδοσιακή διάκριση, όπως την εισήγαγε ο Georg Jellinek, τα θεμελιώδη δικαιώματα διακρίνονται σε ατομικά, πολιτικά και κοινωνικά, κάθε κατηγορία των οποίων αντιστοιχεί στα τρία status του προσώπου, ήτοι το status negativus, κατάσταση του προσώπου που απαιτεί την αποχή του κράτους από επεμβάσεις στο χώρο ελεύθερης δράσης του προσώπου, το status activus, κατάσταση που απαιτεί τη συμμετοχή του προσώπου στην κρατική εξουσία και το status positivus, που απαιτεί την παροχή από την πλευρά του κράτους αγαθών στα μέλη που απαρτίζουν το κοινωνικό σύνολο, ως υποδομή του κρατικού εποικοδομήματος. Status, κατά τον Jellinek είναι η νομική σχέση του υπηκόου με την κρατική εξουσία.

της ελευθερίας έκφρασης στο πλαίσιο του φυλετικού μίσους, για παράδειγμα - μπορεί να είναι εξαιρετικά αμφισβητήσιμα σε όρους νομικής και πολιτικής επιστήμης. Φαίνεται ότι η ίδια η ιδέα των κοινωνικών και οικονομικών δικαιωμάτων εγείρει ουσιώδη ζητήματα με έναν τόσο άμεσο και άμεσο τρόπο, που οδηγεί σε αυστηρότερα πολιτικά, ιδεολογικά και οικονομικά μέτρα και αναδιανεμητικές πολιτικές για τις κυβερνήσεις στο σύνολο τους.[15]

III. Ερευνητικά Ερωτήματα

Η υπόθεση εργασίας στην παρούσα διδακτορική διατριβή εστιάζεται στην αναζήτηση του ρόλου του κοινωνικού κράτους στην Ευρωπαϊκή Ενοποίηση. Η παρούσα εργασία επιχειρεί τη μελέτη της εν εξελίξει μεταβολής του κοινωνικού κράτους, κατευθύνοντας την προσοχή στους νέους κοινωνικούς κινδύνους που προκύπτουν από τη μετάβαση προς τη μεταβιομηχανική κοινωνία. Η διατριβή εξετάζει την εμφάνιση νέων κοινωνικών πολιτικών και πρωτοβουλιών που στοχεύουν στην άμβλυνση των κοινωνικών κινδύνων σε επίπεδο Ευρωπαϊκής Ένωσης. Η Ευρωπαϊκή Ένωση απέτυχε μάλλον να δημιουργήσει ένα κοινό πλαίσιο για την ευρωπαϊκή κοινωνική πολιτική. Οι περισσότερες κοινωνικές πολιτικές της ΕΕ είτε απορρέουν αμέσως από την οικονομική ολοκλήρωση της ΕΕ και από δεσμεύσεις για μια δίκαιη ανταγωνιστική αρένα και την ίση μεταχείριση των πολιτών ως εργαζομένων είτε αποτελούν μέρος μιας στρατηγικής συντονισμού.[16] Η επιτυχία της ΕΕ στην εγκαθίδρυση μιας Ενιαίας Ευρωπαϊκής Αγοράς επιβραδύνεται και γεννάται η ανάγκη να προσανατολιστούν οι στόχοι της ΕΕ προς μια ενδυναμωμένη κοινωνική πολιτική προκειμένου να αντιμετωπίσει τους αναδυόμενους νέους κινδύνους. Η ευρωπαϊκή κοινωνική πολιτική περιορίζεται σε μεγάλο βαθμό σε τομείς που συνδέονται άμεσα με την οικοδόμηση μιας ανοικτής αγοράς εργασίας και αγαθών: ευκαιρίες απασχόλησης για νέους και άτομα με ειδικές ανάγκες. Συνεπώς, η κοινωνική εντολή είναι το αποτέλεσμα μιας μακράς και σταδιακής ανάπτυξης. Με άλλα λόγια, η κοινωνική πολιτική με την ευρεία έννοια άρχισε ως μέσο για την εξασφάλιση της ολοκλήρωσης της αγοράς και έχει εξελιχθεί σε μια μέθοδο για την

[15] G. de Burca, and B. de Witte, (2015). *Social Rights in Europe*. Oxford.
[16] P. Teylor-Gooby (2005). *New Risks, New Welfare. The Transformations of the European Welfare State*. Oxford.

υλοποίηση κοινωνικών πολιτικών. Οι πιέσεις που ασκούνται στα δημόσια οικονομικά και το βάρος που επιβάλλουν οι κοινωνικές δαπάνες στα «παραγωγικά» τμήματα των οικονομιών εγείρουν ερωτήματα σχετικά με το αν οι ευρωπαϊκές χώρες μπορούν να εξακολουθήσουν να στηρίζουν τα κοινωνικά τους κράτη.[17] Τα κοινωνικά κράτη θα πρέπει επίσης να προσαρμοστούν στους νέες κοινωνικές επιταγές που απορρέουν από τη μεταβαλλόμενη φύση των ευρωπαϊκών οικονομιών, ιδίως όσον αφορά την εξέλιξη των μορφών εργασίας και απασχόλησης. Θα πρέπει να χρησιμοποιούν αποτελεσματικότερα τους πόρους και να αξιοποιούν στο έπακρο τις σχετικές τεχνολογικές εξελίξεις, χωρίς να θυσιάζουν αδικαιολόγητα βασικές αρχές όπως η αλληλεγγύη. Το αποτέλεσμα είναι ότι μεγάλο μέρος της συζήτησης σχετικά με το σχεδιασμό ενός κοινωνικού κράτους και την εκτίμηση των οφελών και ελλείψεων των διαφόρων συνιστωσών του επηρεάζεται από την πολιτική ιδεολογία. Για κάποιους, το κράτος πρέπει να διαδραματίσει κεντρικό ρόλο στην ανακατανομή του εισοδήματος, προκειμένου να διατηρήσει τους προϋπολογισμούς κοινωνικής πρόνοιας. Για άλλους, η ικανότητα παροχής κοινωνικής πρόνοιας είναι ένα παραπροϊόν της λιγότερο παρεμβατικής προσέγγισης της οικονομικής διακυβέρνησης. Αναπόφευκτα, οι ιδιαίτερες πολιτικές προοπτικές επηρεάζουν τότε τις μεθόδους με τις οποίες μια κυβέρνηση επιδιώκει να υλοποιήσει πολιτικές κοινωνικής πρόνοιας.[18] Το κρίσιμο ερώτημα είναι πώς να προωθηθεί η ανοδική σύγκλιση σε ένα πλαίσιο που δεν υπονομεύει τη δημοσιονομική εξυγίανση.

Προκειμένου να μελετηθούν οι υποθέσεις εργασίας, η έρευνα χωρίστηκε σε δύο μέρη, υποδεικνύοντας τον αντίκτυπο της κρίσης ως σημαντικό παράγοντα που μπορεί να απεικονίσει το ρόλο του κοινωνικού κράτους στην ευρωπαϊκή ολοκλήρωση.

Στο *Μέρος Ι «προ-κρίσης. Ο επικουρικός ρόλος του κοινωνικού κράτους στο πλαίσιο της διαδικασίας της ευρωπαϊκής ολοκλήρωσης»* η διατριβή αναλύει την ανάπτυξη της κοινωνικής διάστασης ως μια διαδικασία «βήμα προς βήμα» η οποία συνεχώς εξελίσσεται. Η μελέτη των Συνθηκών και των σημαντικών εργαλείων καταδεικνύει ότι οποιαδήποτε πρόοδος στον κοινωνικό τομέα εξυπηρετούσε στόχους

[17] W. Schelkle, (2008). *Can there be a European social model*? at *Law, Democracy and Solidarity in a Post-national Union*, edited by E. Eriksen, et all, Routledge. London and New York, 109-131.
[18] I. Begg, et all, (2015). The Welfare State in Europe Visions for Reform. Chatamhouse, The Royal Institute International Affairs (Europe Programme, research paper). Retrieved from: https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20150917WelfareStateEuropeNiblettBeggMushovelFinal.pdf

οικονομικής ολοκλήρωσης (Κεφάλαιο 1). Η συνεισφορά του Συμβουλίου της Ευρώπης εξετάζεται επίσης καθώς η δυναμική δράση της στον τομέα της κοινωνικής προστασίας λειτουργεί θετικά στο ευρωπαϊκό πλαίσιο (Κεφάλαιο 2). Επιπλέον, η διατριβή προσπαθεί να κατανοήσει την ευρωπαϊκή κοινωνική διάσταση μέσω μιας ενδεικτικής αναφοράς σημαντικών υποθέσεων του Ευρωπαϊκού Δικαστηρίου. Διερευνάται αν και σε ποιο βαθμό τα χαρακτηριστικά της ασάφειας και της αμφισβήτησης που έχουν τα κοινωνικά δικαιώματα μπορεί να ερμηνεύσουν την αστάθεια τους και τον ρόλο τους στην ΕΕ. Το Ευρωπαϊκό Δικαστήριο κλήθηκε πολλές φορές να εξισορροπήσει τις οικονομικές ελευθερίες με τα θεμελιώδη δικαιώματα (Κεφάλαιο 3). Τα παραπάνω συμπεράσματα οδηγούν στα τελικά συμπεράσματα του Μέρους Ι σχετικά με τη σχέση μεταξύ κοινωνικού κράτους και αγοράς. Λαμβάνοντας υπόψη τον επικουρικό ρόλο του κοινωνικού κράτους, αξίζει να σημειωθεί ότι η οικονομία και η κοινωνική πολιτική αλληλοεπιδρούν μεταξύ τους, συνεπώς η ευημερία της κοινωνίας απαιτεί και τα δύο μέλη να είναι «υγιή». Στο *Μέρος ΙΙ, «Μετά την κρίση. Η «συγκαλυμμένη» ισότητα του φιλελευθερισμού και η ανάγκη επίλυσης των συνταγματικών ανισορροπιών μεταξύ της αγοράς και του κοινωνικού κράτους*», η διατριβή επικεντρώνεται στην επίδραση της κρίσης. Πρώτον, αναλύει τα μέτρα λιτότητας που υιοθέτησαν οι ευρωπαίοι ηγέτες μετά από το σοκ της κρίσης που οδήγησε στη Νέα Οικονομική Διακυβέρνηση (Κεφάλαιο 4). Ως εκ τούτου, η άνευ προηγουμένου διεύρυνση και εμβάθυνση των αποκλίσεων στην Ευρώπη χαρακτηρίστηκαν όχι μόνο από μακροοικονομικές ανισορροπίες αλλά κυρίως από κοινωνικές ανισορροπίες, οι οποίες πρέπει να θεωρηθούν επίσης ως υπερβολικές ανισορροπίες (κεφάλαιο 5). Λαμβάνοντας υπόψη τα σοβαρά αποτελέσματα της «μεγάλης ύφεσης», οι ηγέτες της ΕΕ φαινόταν να συνειδητοποιούν τη σημασία της αλληλεγγύης. Μέσα από νέες πρωτοβουλίες προσπάθησαν να επιβάλουν την κοινωνική διάσταση της ΕΕ. Ως εκ τούτου, η διατριβή εξετάζει τα πιθανά οφέλη από αυτές τις ενέργειες (κεφάλαιο 6). Είναι σημαντικό να συναχθεί ένα συμπέρασμα αναλύοντας τα αλυσιδωτά κινήματα των ευρωπαϊκών θεσμικών οργάνων προκειμένου να κατανοήσουμε την πολιτική βούληση. είναι το κοινωνικό κράτος μέρος της ΕΕ ή είναι ένα εργαλείο που εξυπηρετεί τις λειτουργίες της ενιαίας αγοράς; Μετά την κρίση, πώς επιθυμεί η ΕΕ να συμβιβάσει τις κοινωνικές και μακροοικονομικές διαστάσεις; Στα τελικά συμπεράσματα η μελέτη επισημαίνει ότι η ευρωπαϊκή χάραξη πολιτικής θέτει σε κίνδυνο τη συνοχή και θυσιάζει την κοινωνική ασφάλιση. Ωστόσο, οι πολύ πρόσφατες ενέργειες της Ευρωπαϊκής Ένωσης για την

ενίσχυση της κοινωνικής διάστασης ως αντίδραση στη σοβαρή κρίση επιβεβαιώνουν την υπόθεση ότι το κοινωνικό κράτος είναι μέρος του «ευρωπαϊκού συνταγματικού πολιτισμού». Ωστόσο, η απάντηση θα μπορούσε να επιβεβαιώσει μόνο τον επικουρικό, ρόλο του κοινωνικού κράτους. Η πρόκληση αν το κοινωνικό κράτος πρέπει να αναβαθμιστεί σε ένα ισοδύναμο στοιχείο με την αγορά παραμένει.

IV. Μεθοδολογία

Στο μεθοδολογικό επίπεδο, η έρευνα επιδιώκει ερμηνευτικές / ποιοτικές προσεγγίσεις μέσω της θεωρητικής έρευνας της πρόσφατης βιβλιογραφίας (πρωτογενών και δευτερογενών πηγών), της αρθρογραφίας και της νομολογίας. Επιπλέον, στη διατριβή χρησιμοποιήθηκαν αρκετά στατιστικά στοιχεία για να απεικονιστεί η αποδυνάμωση του κοινωνικού κράτους μέσω της μελέτης λ.χ των ποσοστών της ανεργίας, της εργασιακής ανισότητας των φύλων, των κοινωνικών δαπανών. Το επίκεντρο της προσοχής είναι η θεωρητική μελέτη του καθεστώτος του κοινωνικού κράτους στην Ευρωπαϊκή Ένωση. Τα ερευνητικά ερωτήματα αφορούν τις ενέργειες που έχουν αναληφθεί μέχρι σήμερα στη διαδικασία της ευρωπαϊκής ολοκλήρωσης. Το επίκεντρο της μελέτης είναι το «Ευρωπαϊκό Κοινωνικό Κράτος». Με λίγα λόγια, εξετάζεται η διαμόρφωση, η αποσύνθεση και η μεταρρύθμιση του κοινωνικού κράτους μέσα την Ευρωπαϊκή Ολοκλήρωση. Είναι σημαντικό να υπογραμμιστεί το γεγονός ότι κατά τη στιγμή της συγγραφής της διατριβής, υπάρχει μεγάλη αβεβαιότητα σχετικά με τη μελλοντική πορεία της Ευρωπαϊκής Ένωσης. Το ρίσκο είναι υψηλό, καθώς ο κίνδυνος να βρίσκεται η ΕΕ σε αδιέξοδο είναι μεγάλος. Τόσο η οικονομική αστάθεια της ευρωζώνης, όσο και ο κοινωνικός αποκλεισμός, η ανεργία και το ακροδεξιό κλίμα που έχει εντείνει τον Ευρωσκεπτικισμό δημιουργούν ένα σκιώδες περιβάλλον. Οι διαρκώς μεταβαλλόμενες συνθήκες εγείρουν αμφιλεγόμενα δεδομένα, που προκαλούν περιορισμούς στα συμπεράσματα.

Introduction

I. Social State, European Union and the crisis

The social state was a prestigious element throughout the history of the European countries during the 20th century. It relates to the socio-political European identity and includes the considerable European value system, with the emphasis on the principles of democracy, equality, allegiance and social justice. Over the past decade, significant changes at the global and national level have called into question these principles. Furthermore, the current European crisis has dramatically increased pressures on the social state by making visible the risk of widespread weakening. The Social State started changing several years before the current global crisis. Due to the population ageing, the new family forms, the declining birth rates, the overburdened European pension systems, the character and the function of the Social State got transformed significantly. Rising demand for education and training, rising unemployment, migration crisis uplifted the expectations of citizens that social progress is needed. At the same time, the global economic crisis has shaken even more the (un)equilibrated relation between markets and the states. Therefore, Social State is subject to revision, and restructuring.

The European Union faced the first wave of crisis, which was the Lehman Brothers' collapse in 2008, the second wave, which was the Greek debt crisis in December 2009 and the third one, which was the threat of the viability of euro in 2011.[19] In other words, the global financial crisis became systematic with apparent consequences. Political integration has failed to keep up the progress of the economic integration. Thus, the last couple of years the European Union has taken actions that proved the intention of resolving the deficiency of the unfulfilling European integration. Recently, and through the European Institutions has been launched the enforcement of '*Social Europe*'. There is a growing sense that the European Social State is unsustainable and in need of reform. The purpose of the Social Model is to cushion individuals from economic insecurity, adverse consequences of business cycle

[19] A. Hemerijck, et all, (2012). The Welfare State After the Great Recession, *Intereconomics*, 47(4), 200-229.

downturns.[20] However, Social State is directly linked to the economic system, thus in an austerity age it is possible the State to reduce the social benefits. Since it is vulnerable to changes, an economic turbulence may easily provoke high unemployment. In other words, there is a threat to pose a 'time bomb' into the function of the social policy. The social measures are being seen as a barrier to economic recovery. Due to the economic recession, governments in many countries face a 'chasm' between the resources necessary to finance public expenditure and the revenue actually raised. Moreover, a downfall in the resources available to the social services followed, recently, by a deliberate policy of reduction in services in many Member States. Finally, a general loss of confidence in the social system of the Social State might be the heart of the crisis.

In short, both practice and rationale of the Social State are in jeopardy.

II. Social State, a fuzzy concept: Definitions and terminology

- **Social State / Welfare State**

Social State is a term forged in the Nation State, also described as welfare state. In general, an accepted definition that better describes the notion of the welfare state might be the following:

'*Welfare State is a nation's system of programs, benefits, and services that help meet those psychological, social, and economic needs are fundamental to well-being of individuals and society*'. [21] [22]

However, this is followed by several pages defining social benefits, economic needs and well-being. Indeed, the words social and welfare are subject to many

[20] A. Hemerijck, et all, (2012), ibid.

[21] R. Barker, (2014). The Social Work Dictionary, 6th Edition, Washington, DC: NASW Press.1-528. For more information about definition of social welfare see also: R. Titmuss, (1974). Social Policy: An Introduction. Pantheon Press, New York.

[22] The Encyclopedia Britannica defines a welfare state as a: concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. Espinf-Andersen refers to the "common textbook definition" that a Welfare State involves "state responsibility for securing some basic modicum off welfare for its citizens".

interpretations. Social State can be defined as a direct or indirect response to human need. Social norms and behaviors are constantly changing. Social policy should be flexible since, in a changing society, the situation once considered as a problem is no longer viewed that way. Situations once considered normal become identified as problematic, and entirely new problems arise.[23]

In Europe, the notions of Social State or Welfare State were constructed, in their present form, following the World War II. However, till today they reflect national traditions and accommodations. Many norms are common across Europe. Hence, the considerable diversity in the core values of the national Member States' welfare systems might be bridged.[24] It is reasonable, therefore, to speak of Social or Welfare State as most easily defined in terms of what other parts of the world lack. European countries developed their welfare systems during a period when the region's benign demographic profile could support extensive social spending and when solid economic growth made it affordable. The political economy of Europe has been defined since the 1950s by the development in each European country of a more or less comprehensive welfare model, whereby the state has taken a central role in providing a range of social benefits, the most costly of which are pensions, support for the poor, social housing and healthcare. In parallel, all European countries have sought to regulate labour markets and ensure a fair deal for workers. One of the most complex challenges currently facing European governments and societies is to reconcile these commitments to welfare provision, which are widely supported politically, with pressures that may make them unsustainable economically.[25]

The way the European countries implement Social or Welfare State may present both similarities and differences. The most influential comparative study in recent years has undoubtedly been Esping-Andersen's *The Three Worlds of Welfare Capitalism* (1990).[26] Esping-Andersen bases his typology on two key concepts: the de-commodification[27] of labour; and the Welfare State as a system of stratification.[28] De-

[23] D. Macarov, (1995). Social Welfare: Structure and Practice. Sage Publications.
[24] I. Begg, et all, (2015). *Redesigning European welfare states – Ways forward*. Vision Europe Summit 2015. Chatham House.
[25] Ibid.
[26] G. Esping-Andersen, (1990). *The Three Worlds of Welfare Capitalism.* Princeton, New Jersey: Princeton University Press.
[27] i.e. income support for those outside the labour market.
[28] The effects of welfare policies on social class and mobility.

commodification is a feature of all Social States but to differing degrees. Esping-Andersen relates the degree and extent of de-commodification to each of three basic types of welfare state. In those welfare states dominated by social assistance, the low level of benefits and means being tested severely weakens the amount of de-commodification. Indeed, in these countries, the Anglo-Saxon world (according to Esping-Andersen) the effect may be to strengthen the market by increasing the desirability of private welfare for those who can afford it. In the second group of countries, there is compulsory state social insurance with relatively good benefit entitlements. But this too does not bring about substantial de-commodification, as benefits depend strictly on contributions, and hence on work and employment. The third type-model offers the possibility of full de-commodification, but in practice, such schemes have rarely offered benefits to a level that represents a real option to the formal labour market. Later a fourth, southern European "world" was added based on work by Maurizio Ferrera.[29] *"[T]the south European welfare state is characterized by a peculiar mode of political functioning, which distinguishes it, not only from the highly homogeneous, standardized and universalistic welfare states of northern Europe, but also from the more fragmented continental systems…Welfare rights are not embedded in an open, universalistic, political culture and a solid, Weberian, state impartial in the administration of its own rules. Rather, they rest on a closed, particularistic culture and on a 'soft' state apparatus, both still highly imbued with the logic of patron-client relationships which has been a historical constant in this area of Europe*."[30]

- **The EU-term: European Social Model (social rights and social policy)**

In the European Union the term usually adopted concerning social state is "European social model" (ESM). Nevertheless, Social State does not seem to suit the function of the European Social Model", which remains a quest.[31] One group of scholars referred to the ESM as a model that incorporated common features, such as shared institutions

[29] M. Ferrera, (1996). The "Southern Model" of Welfare in Social Europe, *Journal of European Social Policy*, 6 (1).
[30] Ibid.
[31] W. Schelkle, (2008). *Can there be a European social model*? at *Law, Democracy and Solidarity in a Post-national Union*, edited by E. Eriksen, et all, Routledge. London and New York, 109-131.

and values.[32] A second group of scholars described the ESM as an ideal-typical model, in the Weberian sense, which combined economic efficiency with social justice.[33] A third group of scholars perceived the ESM as a European project. In other words, the ESM was seen as a work-in-progress and an emerging transnational phenomenon.[34] A fourth group of scholars, do not accept the existence of the ESM and/or argued that such a formation was unlikely to develop or was under threat.[35] In general, the ESM was seen as an impossible dream. The discourse of the ESM, thus far, suggests that it is not a well-considered, internally consistent entity, fully realized in practice across the internal market and largely on the way to fulfilment in the Member States.[36]

The social mission and objectives of the EU are clearly mentioned in the Treaties and are part of the EU values as stated in articles 2 and 3 TEU. The EU shall promote the well-being of its peoples to work for the sustainable development based on a highly competitive social market economy, aiming at full employment and social progress, as well as a high level of protection. The EU shall combat social exclusion and discrimination, promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall also promote economic, social and territorial cohesion, and solidarity among the Member States. Thus, the ESM should rely on two grounds provided for in the Treaties: social rights and social policy.

[32] See in more detail, Vaughan-Whitehead, EU Enlargement versus Social Europe? ; B. Ter Haar, and P., Copeland, 2010. What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy, *European Law Journal*, 16(3), 273–291; F. Scharpf, 2002. The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies*, 40(4), 645–670; T. Sakellaropoulos, and J. Berghman, 2004. *Connecting Welfare Diversity within the European Social Model*, (Eds.), Oxford: Hart Publishing.

[33] See in more detail, B., Ebbinghaus. (1999*). Does a European Social Model Exist and Can It Survive?* in G. Huemer, and F. Traxler, (Eds.) The Role of Employer Associations and Labour Unions in the EU, Aldershot: Ashgate; L. Hantrais, 2007. *Social Policy in the European Union*, Third Edition, Basingstoke: Palgrave Macmillan.

[34]See in more detail, J. O'Connor, 2005. Policy Coordination, Social Indicators and the Social Policy Agenda in the European Union, *Journal of European Social Policy*, 15, (4), 345–361; I. Schmidt, 2009. New Institutions, Old Ideas: The Passing Moment of the European Social Model, *Studies in Political Economy*, 84, 7–28.

[35] J. Grahl, and P. Teague, 1989. The Cost of Neo-liberal Europe, *New Left Review*, 174, 33–50; J., Michie, and J., Smith.1994. *Unemployment in Europe*, London Academic Press.

[36] See in more detail, W. Baimbridge, M. & Mullen, A. (2014). Revisiting the European Social Model(s) Debate: Challenges and Prospects. *L'Europe en Formation*, 372(2), 8-32. doi:10.3917/eufor.372.0008.

- **Social State and European Integration**

Undoubtedly, at present there is no European Social State. What do exist are twenty-eight Social States[37] within the European Union. Yet, over the last years, the pace of economic integration in Europe has been rapid, depicted by the adoption of the single currency by 19 of the 28 Member States of the European Union. Increased economic integration has inevitably raised important and crucial questions about political integration, particularly the relationship between the Member States and the European Union as a supra-national tier of governance. Therefore, there are controversial issues as far as social integration is concerned. Does increased economic and political integration imply prospectively a European Social State?

The present thesis deliberately adopts the term of 'Social State' in order to address the European Union in its perspective towards political integration. By Social State the present thesis intends to underline its role and its function in relation to the economy within the EU.

III. Research Questions

The focus in this thesis is the prospective of the Social State within the European Union. Assuming that the Social State is part of the common European culture, the question is whether its role should be advanced in order to consolidate European integration. It appears that in the EU, social policy - in the broad sense - began as a means of securing market integration and has developed into a method to deliver social policies, thus it is restricted in a subsidiary role.

The present thesis develops understanding of current Social State transformations by directing attention to the new social risks that result from the transition to post-industrial society. It discusses the emergence of new social risks of policies to address them at the European Union level. In this perspective the recent crisis is considered as a turning point, a decisive challenge in building a European Social State as part of political integration.

[37] A referendum was held on Thursday 23 June, 2016, to decide whether the UK should leave or remain in the European Union. Leave won by 51.9% to 48.1%. The referendum turnout was 71.8%, with more than 30 million people voting.

In the European framework social policy- and social state-competence lies mainly with the Member States. The competence of the EU is mostly coordinative and supportive. The EU has been rather unsuccessful in creating a common standard for social policy. On the other hand, most EU social policy-making either follows immediately from EU economic integration and commitments to a fair competitive arena and equal treatment of citizens as workers or is part of a policy coordination strategy that is much less directive.[38] The success of the EU in establishing a Single European Market spills back into pressure for social policies to deal with emerging new social risks at the European Union level. As a result, European social policy is largely restricted to areas directly related to the construction of an open market in labour and goods: employment opportunities for young and disabled people.

Moreover, pressures on public finances, and the burden that social spending imposes on the "productive" parts of economies, raise questions about whether European countries can still afford their Social States. Thus, Social States will also have to adapt to new social risks resulting from the changing nature of European economies, especially evolving patterns of work and employment. They will have to use resources more efficiently and make the most of relevant technological advances, without unduly sacrificing key principles such as solidarity.

Arguably, much of the debate about designing a Social State and judging the benefits and shortcomings of its different components is influenced by political ideology. For some, the state should play a central role in income redistribution in order to sustain welfare budgets. For others, the capacity to deliver social welfare is a by-product of a less interventionist approach to economic governance. Inevitably, the particular political outlook then influences the methods by which a government seeks to deliver welfare policies.[39] The crucial question remains how to promote upward convergence in a framework that does not undermine fiscal consolidation.

[38] P. Teylor-Gooby, (2005). *New Risks, New Welfare. The Transformations of the European Welfare State*. Oxford.

[39] I. Begg, et all, (2015). The Welfare State in Europe Visions for Reform. Chatamhouse, The Royal Institute International Affairs (Europe Programme, research paper). Retrieved from: https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20150917WelfareStateEuropeNiblettBeggMushovelFinal.pdf

IV. Structure of the thesis

The research has been separated in two parts indicating the impact of the crisis as a significant factor which may illustrate the status of the Social State within the European integration.

In **Part I "Pre- crisis. The subsidiary role of social state within the process of European integration"** the thesis analyses the development of the social dimension as a 'step-by-step' procedure which continues to evolve. Studying the Treaties and the significant tools demonstrates that any progress at the social field served economic integration goals (Chapter 1). The contribution of the Council of Europe is also examined since, its action at social protection is rather powerful and it operated positively in the European framework as well (Chapter 2). In addition, the thesis attempts the understanding of the European social dimension through an analysis of significant cases of the European Court of Justice: The characteristics of ambiguity, vagueness and contestability[40] that the social rights have, might explain their fragility and their role within the EU law; the ECJ called numerous times to balance economic freedoms with fundamental rights (Chapter 3). The above findings lead to the Part I final conclusions concerning the relation between social state and market: Taking into account the subsidiary role of the social state, it is highly desired to introduce the perception that the economy and social policy interact with each other in a way that the well-being of society requires both "members to be heathy".

In **Part II, "Post-crisis. The 'masked' equality of liberalism and the need of resolving the constitutional imbalances between the market and the social state"**, the thesis focuses on the impact of the crisis. Firstly, it analyzes the austerity measures adopted by European leaders after the shock of the crisis which led to New Economic Governance (Chapter 4). As a result, the unprecedented widening and deepening of divergence in Europe have been characterized not only by macroeconomic imbalances but notably by social imbalances, which are to be regarded as excessive imbalances as well (Chapter 5). Taking into consideration the severe outcomes of the 'Great Recession', the EU leaders seemed to realize the importance of solidarity. Through new

[40] Indeterminacy is a general term used in philosophical and legal literature to capture three different issues in law. For more information see: J. Waldron, (1994). Vagueness in Law and Language: Some Philosophical Issues. *California Law Review*, 82 (3).

initiatives they tried to enforce the social dimension of the EU. Hence, the thesis examines the possible benefits of these actions (Chapter 6). It is significant to draw a conclusion by analyzing the chained movements of the European institutions in order to understand the political will; is Social State a part of the EU, or it is a tool that services the functions of the single market? In the aftermath of the crisis, how does the EU desire to reconciliate social and macroeconomic dimensions? In the final conclusions the study points out that European policy-making jeopardizes cohesion and sacrifices social security. However, the very recent actions of the European Union for enhancing the social dimension as a response to the severe crisis verifies the hypothesis that Social State is part of the 'European constitutional culture'. Yet, the response might only confirm the subsidiary, conjunctural role of the Social State. The challenge whether Social State should be upgraded to an equivalent element to the market remains.

V. Methodology

At the methodological level, research is based on a political science analysis. The research is sought interpretive/qualitative approaches through theoretical investigation of recent literature, bibliography (primary and secondary sources) and case law. Furthermore, in the dissertation has been used several statistics data to illustrate the undervalued status of the Social State; unemployment rates, youth unemployment rates, gender inequality, social expenditures.

The focus of attention is the theoretical study of the status of the Social State in the European Union.[41] The research questions are aimed at the actions that have been taken in the process of the European integration till today in order to address the question whether the concept of the Social State is a part of the 'European Constitutional Culture'[42], and if the answer is yes, to determine its role at the European integration process.

In a nutshell, it examines the foundation, the decay and the reform of the Social

[41] Referring primary to the overlapping systems of the European Union and the Council of Europe.
[42] The concept of 'European constitutional culture' is linked both to the 'general principles of Union law' in Article 6 (3) of the EC Treaty, as highlighted by the ECJ case law and the so-called EU value system. See in detail, N. Kannellopoulou-Malouchou, (2012). Η Χειραφέτηση της Ευρώπης, Papazisis, Athens.

State with the European integration. It is essential to underline the fact that at the time of writing this dissertation, there is considerable uncertainty about the future course of the European Union. The stakes are high; the threats of disintegration and divergence, social exclusion, long-term unemployment and increasing eurosceptism are real. The constantly altered conditions create controversial data, that provoke limitations to the conclusions.

PART I. PRE-CRISIS

The subsidiary role of social state within the process of European integration

PART I. PRE-CRISIS

The subsidiary role of social state within the process of European integration

During the first stages of European integration, European Union (EU) had been considered one of the most successful projects in regional integration. It had evolved progressively from the starting point of a common market towards a political Union. However, through the years the European Union has been called to rethink many of its aims, structures and values. Initially, the European Union was intended to be a purely monetary community, therefore was no need for a bill of rights. Because of this institutional weakness the Union suffered from severe criticism and faced great challenges. Thus, at the dawn of the EU a democratic deficit was observed.[43]

There is no denying that finding the right formula to tackle the economic interests with the social protection represents an extraordinary challenge. As far as the genesis of the 'European Social State' is concerned, it is obvious that the initiative purpose was to operate as a safety net at the market failures.[44] The Social State is axiomatically a state that acts within the private economy. It is claimed that decoupling of economic integration and social protection has characterized the real process of European integration.[45] The gradual enactment of the Social State served the open market and operated as corrective action under the socioeconomic systems.[46] Hence, the Social State aims to address the deficiencies and weaknesses of the open market. This priority for the economy over the Social State described the European social

[43] See in more detail C. Majone, (1998). Europe's Democratic Deficit. *European Law Journal*, 4(1), 5-28 Retrieved from: https://pdfs.semanticscholar.org/6835/9f48ddd18838ac09002584182433885e184f.pdf and E. Bomberg, (2001). How to Democratize the EU…And Why Bother? By Philippe C. Schmitter. Lanham, MD, and Oxford: Rowman & Littlefield, 2000. 150p. *American Political Science Review*, 95(2), 522-523. doi:10.1017/S0003055401842027

[44] See in more detail F. Scharpf, (2002). The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies* 40(4), 645-70. doi:10.1111/1468-5965.00392 and S. Leibfried, Stephan and P. Pierson, (eds.) (1995) *European Social Policy: Between Fragmentation and Integration*, Washington/DC: The Brookings Institution. 432-66.

[45] See in more detail F. Scharpf. (1999). *Governing in Europe, Effective and Democratic?* Oxford: Oxford University Press. doi:10.1093/acprof:oso/9780198295457.001.0001

[46] See in more detail about 'market correcting' in F. Scarphf, and Schmidt, A. Vivien A. (2000a) 'Conclusions', in: Fritz W. Scharpf and Vivien A. Schmidt (eds.) *Welfare and Work in the Open Economy. Volume I. From Vulnerability to Competitiveness*, Oxford: Oxford University Press, 310-36.

protection.

By laying down the foundation of the social rights, balancing financial freedoms and fundamental human rights was the 'Achille´s heel' of a powerful 'European Social Model'. The core purpose of the European integration was the creation of a single market without internal borders. This notion may explain that even the first attempts of social policies had to deal with the deficiencies in the process towards the single common market, such as the principle of non-discrimination.[47] The prohibition of discrimination on the grounds of nationality (Article 18 TEU) ameliorates the free movement of workers (Article 45 TFEU). It is also enriched of the non-discrimination based on gender and the ensuring of equal opportunities and equal treatment of men and women in employment.[48] Promotion of equality between women and men was succeeded in Amsterdam Treaty[49] (see Chapter 1.1.1), but it is worth mentioning that the European Court of Justice has played an important role (see Chapter 3.3.3).

In overall terms, economic freedoms were given superior status, involving liberalisation measures of the open market. Shaping the 'social dimension' of the European Union illustrated the concept of the subsidiary role of the Social State within the EU. Interestingly, these factors create the hypothesis of how equipped and secure the EU was in order to protect the value of the 'European Social State' against a severe external shock such as a financial crisis.

[47] According to Article 2 of the TEU, the non-discrimination principle is one of the fundamental values of the Union. Article 10 of the TFEU requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community *OJ* 2007 C 306/01 17.12.2007, Common Provisions. Available at: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/9-article-5.html

[48] This concept is also known as 'gender mainstreaming'. See European Parliament, Equality between men and women. Available at: http://www.europarl.europa.eu/factsheets/en/sheet/59/equality-between-men-and-women

[49] Treaty of Amsterdam (new Article 13). See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, European Communities, 1997. Available at: http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf

Chapter 1. The foundation of the social dimension in the European Union

1.1 Crucial steps via treaties towards social policy

The European Union (EU) is a unique economic and political union[50] between 28 European countries.[51] EU is often considered as 'sui generis'[52] status. The scholars have used the Latin phrase in order to explain the uniqueness of the EU. One of the main reasons is its legal system, which comprehensively rejects any use of retaliatory sanctions by one-member state against another.[53] To understand the function of the EU and how it behaves, we need to perceive the coherence of the Founding Treaties. As Founding Treaties, we refer to the first three treaties, the treaty of Paris, establishing the European Coal and Steal Community (ECSC) in 1951 and the two treaties of Rome establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957. It turned out that integration was less of an automatic process. Hence, the Founding Treaties were consequently reformed several times by new ones. The Founding Treaties of the European Economic Community were oriented to single market goals; social development was a 'side effect'. It is worth mentioning that the economic integration was the primary motivation for the expansion of the EU's action in adopting social measures and for the advanced role of the Member States in the social field. The development of the social dimension of European integration has been a 'step-by-step' procedure which continued to evolve.[54]

The revisions of the European treaties involve European social policy. Noteworthy, the most critical improvements have been introduced via treaties.[55] The term of social policy refers to the whole range of public policies that concern society in

[50] Europa, Goals and values of the EU. Available at: https://europa.eu/european-union/about-eu/eu-in-brief_en#from_economic_to_political_union

[51] A referendum was held on Thursday 23 June, 2016, to decide whether the UK should leave or remain in the European Union. Leave won by 51.9% to 48.1%. The referendum turnout was 71.8%, with more than 30 million people voting.

[52] Latin, literally: of its own kind. The legal nature of the EU is widely debated because its mixture of intergovernmental and supranational elements causes it to share characteristics with both confederal and federal entities.

[53] See among others, D. Chryssochoou. (2009). *Therorizing European Integration*, 2nd edition. London and New York, Routledge.

[54] L. Hantrais, (2007). *Social Policy in the European Union*, 3rd edn, Basingstoke: Palgrave Macmillan.

[55] T. Hervey, (1998). *European Social Law and Policy*, Longman: London and New York; F. Scharpf. (1997). Economic Integration, Democracy and the Welfare State, *Journal of European Public Policy* 4(1), 18-36.

general. The practices of social policies have as their object social needs and social risks to those citizens who due to their economic and financial competitive orientation of society is not a priority for the market economy. In the broad sense of the term social policies are meant those policies of the social state (employment, health, insurance, etc.) which are made after income redistribution processes, institutional regulation and benefits policies.[56]

According to Richard Morris Titmuss[57] father of the academic foundation of social policy, one policy must have three objectives: the well-being of citizens, making use of economic and non-financial means and its redistributive resource practice.[58] Social policy is an interdisciplinary field of study of whether society understands and addresses social needs.[59]

As far as the European integration is concerned, the need for common social policies in the European area was presented to combat the issues that arise mainly in the areas of employment and social protection. The first steps have been characterized by aversion and have the characteristics of a first exploratory effort to meet social needs. The first discussions took place when the founding treaties of the Union were concluded, but the most decisive steps were taken by the 1990s and then, when the social needs of the Member States seemed to be affected by the common economic policy they followed. The Treaty of Maastricht in 1992, which gave the Community a social dimension, was the focal point, and one year later, with its constitution White Paper on Social Policy, it seems that European leaders are beginning to realize that only the development of the common market is not enough to achieve the goals that have been set. Although the steps taken in the context of the founding treaties of the Union are progressing, it appears to have a more auxiliary role and the Member States to be the ones who finally make the decisions on which they will follow as far as their social character is concerned. It also appears that the economic and social policy of the Union is directly dependent on each other, and often it is involved or shaping the other. This

[56] Th, Sakellaropoulos. (2011). *Η κοινωνική πολιτική της ευρωπαϊκής ένωσης*, Dionikos, Athens.
[57] R, Titmuss. (1958). *Essays on the Welfare State*, Policy Press, Bristol University Press; R, Titmuss. (1974), *Social Policy: An Introduction*, George Allen and Unwin, London. Google Scholar; R, Titmuss. (1951). Social Administration in a Changing Society, *British Journal of Sociology*, 2, 83-97.
[58]D, Venieris. (2015). *Κοινωνική πολιτική. Έννοιες και σχέσεις*. Topos, Athens.
[59] Ibid.

is linked to the view that the economy is one that can exacerbate or mitigate social problems and, accordingly, social conditions are those that can affect the economy.

Table 1. Evolution timeline

Paris Treaty 1951	Rome Treaty & Euratom 1957	Single European Act 1986	Maastricht Treaty (TEU) 1992	Amsterdam Treaty 1997	Nice Treaty 2001	Lisbon Treaty 2007
	Articles 48 -51 referred to Social Policy	Article 118[a]	Protocol 14	Mention to the ESC and the Community Charter of the Fundamental Social Rights of Workers[60]	Article 137 (social exclusion)	Charter of Fundamental Rights equal legal power with the Primary Law (A. 6)
			White Bible	Open Method of Coordination	Charter of Fundamental Rights	
		Community Charter of the Fundamental Social Rights of Workers[61]	Mention to the ECHR			

[60] It was only adopted by the United Kingdom in 1998 as part of the integration of the principles of the Charter into the Amsterdam Treaty.

[61] Community Charter of the Fundamental Social Rights of Workers, adopted in Strasbourg on 9 December 1989 by the member states, with the exception of the United Kingdom, *OJ* C 013 12.02.1974. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31974Y0212(01)

1.1.1 The Rome Treaty[62]

The 1957 Treaty of Rome, the founding treaty on which the EU Primary Law[63] is based, created the European Economic Community (EEC), that later evolved into the European Community (EC) and, subsequently, the European Union (EU). The roots of European social policy are found in the Rome Treaty; however, because the national sovereignty of the six original nations[64] was still highly protected during this early stage of the EU, no decision-making authority was granted. The dominant ideology granted by Rome was that social programmes would be funded through economic growth that was brought about through integration, rather than via regulatory or distributive methods. The core of the social sphere was focused on the rise of standards of living. The main role of the European Commission was to promote 'closer relations' between the Member States in the social field. Specifically, in the field of employment, Article 3c mentioned the abolition of obstacles to freedom of movements for persons, services and capital. Part 3, Title III Chapter 1 also introduced Social Policy by referring to labour law and working conditions; vocational training; social security, workplace safety and collective bargaining. Social issues were considered under Articles 48-52 of the Rome Treaty, which provided for the free movement of workers, services, capital, and goods; something which was important for an efficient integrated market to be achieved. Allowing for the free movement of production factors meant permitting workers to take their benefits along with them. It also prevented social discrimination in the member states to which they moved. In addition, the Treaty also established equal pay between men and women. The principle of equal pay without discrimination by sex was to be founded on work of equal value (Article 119).[65]

It was admitted that the above could only be fulfilled through conducting studies, sharing opinions and arranging consultations. The hesitation feeling of the Member States was apparent. As far as the Commission's role is concerned according

[62] Treaty establishing the European Economic Community (EEC Treaty) signed in Rome on 25 March 1957. It is also known as 'Treaty Establishing the Communities' (TEC). Available at: http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf

[63] Primary law (primary or original source of law) is the supreme source of law of the European Union (EU), that is it prevails over all other sources of law. The Court of Justice is responsible for securing that primacy through a variety of forms of action, such as the action for annulment (Article 263 of the Treaty on the Functioning of the European Union (TFEU) and the preliminary ruling (Article 267 of the TFEU).

[64] That is, France, Germany, Italy, Belgium, Netherlands and Luxembourg.

[65] Article 143 of the Lisbon Treaty which is on force till today.

to Articles 193–8 was to monitor and report on the progress made in these areas in consultation with the European Economic and Social Committee (EESC). The aim of the Committee was to improve the democratic expression in the European integration and to familiarize the citizens with the EU. *The Committee plays a dual role as a 'facilitator' and 'institutional mentor'*. [66]

Another tool for promoting employment and social inclusion is the European Social Fund (ESF). According to Article 125[67] the Treaty of Rome established the European Social Fund to support unemployed workers through grants for vocational training and resettlement. The goals of the ESF are to create more and better jobs and to avoid social exclusion. These principles were added later to the Europe 2020 strategy[68] for generating smart, sustainable and inclusive growth in the EU.

In a general framework, the Rome Treaty is characterized with vague expressions regarding its provisions in the social realm. For instance, Article 130a9 of the Treaty stated, "*The Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion."*[69] In a nutshell, under the Rome Treaty, social policy power was under the control of the member states and the newly formed European Community had limited interference in that policy area.

[66] M. Westlake, (2016). *The European Economic and Social Committee − the House of European Organised Civil Society*, London: John Harper Publishing.
[67] Part 3, Title VIII, Chapter 2, A.123-125.
[68] Europa. Europe 2020 strategy.
Available at: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy_en
[69] The term 'social cohesion', as used in the Treaty of Rome, is very specific including the harmonization of some social measures to enable the movement of workers within the EU.

1.1.2 The Single European Act[70]

Evolving the Single Market purpose, the Europea0n Community signed the Single European Act (SEA) in 1986. During that period, the EU (former European Community) expanded from nine to twelve[71] Member States. The SEA was a treaty that mostly revised the existing treaties as far as the social policy is concerned. It required improvements at the decision-making capacity of the Council of Ministers. The SEA also illustrated the need for strengthening the powers of the European Parliament. A fact that obtains more significance since the EP had been elected for the first time in 1979. SEA also connected economic unification to welfare policies. Specifically, it introduced a social charter that identified the social obligations of the EU. For instance, it included the right to freedom of movement, employment and remuneration, improved living and working conditions, social protection, and vocational training as well.

The Member States bore the responsibility of implementation of the social measures, since the SEA did not have the force of law. Business and labour union should have cooperated in order to apply the necessary actions. It is worth mentioning that the decision-making authority on social issues remained to the European Council. As a result, numerous member governments tried to avoid control on social policy. However, the EU's progress at the economic integration worked as motivation and created an increasing need for improvements in national policies. Welfare budgets were oriented to that direction.

To sum up, the SEA did not change the core of the social policy that was secured by the EC Treaty. The main alterations were the elimination of barriers to the freedom of movement of workers and the creation of the single market. An important step forward was the establishment of the qualified majority voting (QMV) in the Council to 'encourage improvements, especially in the working environment, as regards the health and the safety of the workers' (Article 118a). Section 2 of A.18a also is an example of the adding value of the SEA which stressed that: "*Such directives shall avoid imposing administrative, financial and legal constraints in a way which would*

[70] SEA was signed in 1986 and entered into force in 1987. It was a single legal instrument to ensure the completion of the EEC's internal market by the end of 1992. It inserted into the EEC Treaty a number of new legal bases for Community action, esp. on economic and social cohesion. https://www.avrupa.info.tr/fileadmin/Content/EU/bir_bakis/SingleEuropeanAct-TekSenet.pdf

[71] In 1973 was the first enlargement of the EU; UK, Denmark and Ireland became MS.

hold back the creation and development of small and medium-sized undertakings". The enhancement of the social dialogue was another breakthrough to the social dimension of the EU and the reorganization of the EU social funds (A. 130a-e).[72]

[72] R. Geyer, (2007). *Exploring European Social Policy*, Polity Press.

1.1.3 The Maastricht Treaty[73]

The 1991 Maastricht Treaty revised once again the Rome Treaty. The Maastricht Treaty is the most known one because of its radical character; it altered the European Community to the present European Union and facilitated even more the development of the Single Market.

An adding value of the Maastricht Treaty was the Subsidiarity principle,[74] which was formally introduced by the Maastricht Treaty, and included a reference to it in the Treaty establishing the European Community (TEC). "The principle of subsidiarity and the principle of proportionality govern the exercise of the EU's competences. In areas in which the European Union does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorizes intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, by reason of the scale and effects of the proposed action".[75] In Section 3b on Subsidiarity principle, Maastricht states that: *"…the EU may act in the broad areas where it has competence only when objectives of proposed action cannot be sufficiently achieved by member states."* During the period between the Treaties of Maastricht and Amsterdam, the EU accepted three additional applicant states,[76] increasing its membership to fifteen European nations. Hence, the continually enlargement of the Union from its original six members (1957) to fifteen members (1995) introduced a wide diversity of opinion. As a result, it was demonstrated rather difficult to agree on issues regarding social policy that required a unanimous voting within the European Council. While the Member States initially wanted to restrict Union's decision-making authority, they actually further complicated their ability to make a decision. Over the years, these factors enabled the Commission to invoke Section 3b frequently and legitimately when any complex issue was under

[73] Treaty on European Union, signed in Maastricht on 7 February 1992. It is also known as the Treaty on European Unity (TEU). Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf

[74] Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[75] European Parliament, The Principle of Subsidiarity. Available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf

[76] In 1995 Austria, Finland, and Sweden acceded to the European Union (EU).

discussion. For that reason, EU possesses the strongest level of influence and autonomy in the economic area; the decision-making ability of the European institutions is more powerful than the individual's member nations. As for the Social Policy, the Maastricht Treaty adopted Protocol N. 14. However, the background of this initiative raises an interest, since this discourse created controversial opinions regarding the extension of community competences in the social field. The appending protocol regarding this area is signed by eleven member states, with the exception of the United Kingdom[77] which was opposed. The Protocol notes "*that 11 Member States 'wish to continue along the path laid down in the 1989 Social Charter [and] have adopted among themselves an Agreement to this end*". The Social Policy Protocol (Protocol No. 14) to the Maastricht Treaty allowed the Member States to apply community regulations in the social area. The Social Policy Agreement which was annexed to Protocol No. 14 defined the community lines of work in the social domain and created the legal framework for negotiation and consultation between social partners at a European level.[78] The Protocol created a number of institutional changes which generated the potential for a substantial intensification of social policy development. In general, the changes included: an expansion of the consultative powers (the co-decision procedure) of the Parliament, the creation of the qualified majority voting in the Council in new areas of social policy (health and safety, working conditions, information and consultation of workers, equal opportunities and treatment for men and women, and integration for people, excluded from the labour market), which promoted the 'social dialogue' between capital and labour.[79]

[77] UK benefited from an opt-out.
[78] P. Cechin-Crista, et all, (2013). The Social Policy of the European Union. *International Journal of Business and Social Science*, 4(10), 16-25. [Special Issue – August 2013]. Retrieved from: http://ijbssnet.com/journals/Vol_4_No_10_Special_Issue_August_2013/2.pdf
[79] R. Geyer, (207), ibid.

1.1.4 The Amsterdam Treaty[80]

The 1999 Amsterdam Treaty brought advances both for employment and social policy. Amsterdam was significant because a new paragraph has been added to the Preamble of the TEU,[81] which confirms the Union's attachment to the fundamental social rights as defined in the Council of Europe's European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers.[82] It has been characterized as an innovative one, because for the first time within the European integration a treaty was devoted to social policies. Until then, employment was addressed only in terms of it being a 'by-product' of economic integration. Although, employment was a crucial challenge for many EU Member States, past treaties approached it in relation to the Single Market project. A new Title on Employment, or "employment chapter", is included in the TEC under Title VI which sets the objective of working towards the development of a "coordinated strategy for employment and particularly for promoting a skilled, training and adaptable workforce and labour markets responsive to economic change".[83] Amsterdam Treaty mentioned that each government was required to prepare an annual assessment (Article 4 of the employment chapter) of employment strategies. Where necessary, the Council can make recommendations to Member States on their employment policies. It also established the Employment Committee with advisory status to promote cooperation on employment and labour market policies (Article 6 of the employment chapter). [84] Furthermore, every member state ought to have participated in problem-solving and brain-storming at the European level. Other social issues deemed of paramount importance in Amsterdam included environmental policy[85] and the Common

[80] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, European Communities, 1997. Available at: http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf

[81] Part One Substantive Amendments, Article 1§1.

[82] Community Charter of the Fundamental Social Rights of Workers, adopted in Strasbourg on 9 December 1989 by the member states, with the exception of the United Kingdom, OJ C 013 12.02.1974. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31974Y0212(01)

[83] T. Weber, (1997). Amsterdam Treaty brings small advances for employment and social policy. *Eurofound*. Retrieved from: https://www.eurofound.europa.eu/observatories/eurwork/articles/amsterdam-treaty-brings-small-advances-for-employment-and-social-policy

[84] Ibid.

[85] Community responsibilities in relation to environmental protection are also strengthened and the concept of sustainable development is evoked in the Preamble of the Treaty.

Agricultural Policy (CAP) that subsidizes EU farmers. Moreover, principles of non-discrimination and equality referred to Article 119 in which a new paragraph is added allowing the Council, using the co-decision procedure, to adopt measures so as to ensure the application of the principle of equal opportunities and equal treatment of men and women in employment, including the principle of equal pay for work or work of equal value. It is also worth mentioning that Amsterdam strengthened the EP by extending the number of policy areas in which they may exercise their powers under co-decision voting procedures. Co-decision allowed the EP to veto legislation in specific policy areas and to consult with the Council in a "conciliation committee" to iron out differences in their respective drafts of legislation.

An important aspect of Amsterdam Treaty was also the adoption of the Open Method of Coordination (OMC).[86] The first area applied to the OMC was the employment sector and has since been extended to other sectors.[87] Whilst the character of the OMC is non-binding, it is a remarkable complementary tool in shaping social policy. The Open Method of Coordination (see Chapter 1.2.2), first introduced as a form of soft law in the 1998 Employment Guidelines,[88] was extended to other areas of social policy, providing a mechanism for a more cooperative approach to social integration.[89]

[86] At the 1996 Florence European Council, a strategy was agreed on that became the model for what the later 2000 Lisbon European Council was to entitle the Open Method of Coordination (OMC).

[87] F. Scharpf, (2002). The European Social Model. Copying with the challenges of diversity. JCMS: *Journal of Common Market Studies*, 40(4), 645-670. doi: 10.1111/1468-5965.00392

[88] Employment Guidelines in 1998 (OJ C30/01 28.01.1998) as a means of strengthening social inclusion through employment.

[89] L. Hantrais, (2017). The Social Dimension in EU and UK Policy Development: Shaping the Post-Brexit Legacy, Working Paper CIS/2017/04 Centre for International Studies London School of Economics,1-33.
Retrieved from: http://www.lse.ac.uk/international-relations/assets/documents/cis/working-papers/cis-working-paper-2017-04-hantrais.pdf

1.1.5 The Nice Treaty[90]

The 2001 Nice Treaty came at a time of renewed interest in the European Social Policy. The Charter of Fundamental Rights of the European Union was adopted by the European Council, Parliament and Commission in December 7, 2000 and includes provisions regarding civil, political, economic, and social rights. These provisions are rounded by regulations of the community institutions in specific domains of social policy such as work legislation, work conditions, employment, gender equality, discrimination, or community social dialogue. What is more; the new treaty introduced revisions to the EU's decision-making procedures that would bring implications for social policy development in the UK. In paving the way for enlargement,[91] the Nice Treaty proposed a re-weighting of votes to ensure that the influence of the smaller countries would not become disproportionate to their size. The treaty extended QMV and applied the co-decision procedure with the European Parliament,[92] which the Thatcher Government had also opposed, to, anti-discrimination measures, mobility and specific actions for economic and social cohesion.[93]

In Nice alongside the amended treaty, the European Council also adopted the Commission's Social/ Policy Agenda (SPA)[94] which forms the roadmap for the modernization of the European social model and the realization of the ambitious new goal.[95] The SPA seeks to align and promote the Union's economic, employment, and social policies in a triadic model. Through a new Article 144 of the EC Treaty, the Treaty of Nice incorporates within the treaty the Social Protection Committee which had been established by the Council pursuant to the conclusions of the Lisbon European Council. Two members for each country raised the responsibility to monitor the social

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[90] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2001/C 80/01 10.03.2001. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12001C/TXT&from=EN

[91] In 2004 ten more nations became MS.

[92] D. Chryssochoou et all. (2003). *Theory and reform in the European Union*, 2nd edition, Manchester and New York, p. 100.

[93] L. Hantrais, ibid.

[94] European Commission Communication: Social Policy Agenda, COM (2000), 379 final.

[95] M. Andenas, and J. A Usher, (2003). *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform*. Hart Publishing, Oxford and Portland, Oregon. Google Scholar. Retrieved from: https://books.google.gr/books?id=Oeu3ZZqpqhIC&pg=PA271&lpg=PA271&dq=the+nice+treaty+for+social+policy&source=bl&ots=Q_8792voH8&sig=yvXi9EGL71LOQYdq6527JEA2g-0&hl=el&sa=X&ved=0ahUKEwjO44KtiozaAhXP3KQKHfWnAC8Q6AEIYjAH#v=onepage&q=the%20nice%20treaty%20for%20social%20policy&f=false

status, promote exchange of information and prepare reports and opinions. In a section on the European Social Agenda, the Nice Presidency Conclusions stressed the 'indissoluble link between economic performance and social progress', seen as 'a major step towards the reinforcement and modernization of the European social model'.[96]

[96] European Council – Nice 7-10 December 2000. Conclusions of The Presidency. (see European Parliament, 2000: IV A.13). Available at: http://www.europarl.europa.eu/summits/nice1_en.htm

1.1.6 The Lisbon Treaty[97]

On 1 December 2009, the Treaty of Lisbon entered into force. Its content was developed around 2001–2003 by the so-called European Convention, convened especially to give birth to a European Constitution.[98] After the failure of the Draft Treaty Establishing a Constitution for Europe with the French and Dutch refusals in the ratification process of the Treaty,[99] the Lisbon Treaty entered into force in 2009. Concerning this very recent development, there are very slight differences in the field of social policy when it is compared with the Draft Constitutional Treaty.[100]

The Lisbon Treaty[101] significantly amended the Treaty on the European Union (TEU) as well as the former EC Treaty, renamed Treaty on the Functioning of the European Union (TFEU). The turning point of the European Social Policy was the fact that the Charter of Fundamental Rights[102] became legally binding on the EU institutions and on national governments just like the EU Treaties themselves (see Chapter 1.2.2).[103] It is added that the Charter of Fundamental Rights (hereinafter referred to as the Charter) shall have the same legal value as the Treaties, but it is also explicitly asserted that the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Furthermore the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the Explanations referred to, in the Charter that set out the sources of those provisions (Article 6 TEU).[104] The Charter strengthens the protection of fundamental rights by making these rights more visible and more explicit

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[97] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community *OJ* 2007 C 306/01 17.12.2007, Common Provisions. Available at" http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/9-article-5.html

[98] Treaty establishing a draft Constitution for Europe, signed in Rome on 29 October 2004, *OJ* C310 16.12.2004. Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf

[99] The draft Constitutional Treaty was submitted at the European Council meeting in Rome in 2003, and signed on 29 October 2004 by the 25 member states and three candidate countries, but was blocked when the French and the Dutch electorates failed to ratify it in national referenda held in May and June 2005.

[100] L. Hantrais, ibid, p.15.

[101] The Lisbon Treaty gives the EU full legal personality.

[102] The Charter was initially solemnly proclaimed at the Nice European Council on the 7th December 2000. At that time, it did not have any binding legal effect.

[103] See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 1(8), 2007 O.J. C 306. at 13.

[104] N. Bruun., K. Lorcher., I. Schomann, (2012). *The Lisbon Treaty and Social Europe*. Hart Publishing.

for citizens, as well. The Charter[105] demonstrates the evolution of the EU legal order of the single market to a community of fundamental rights. The fact that the Charter has become legally equal with the European Primary Law stresses on European nature as a system of values; a democratic union in which human rights are accorded a high degree of respect.[106] The Charter consists of 54 Articles divided into seven chapters. The first six chapters contain substantial fundamental rights provision, and the final chapter contains the general clauses which relates to the scope and applicability of the Charter. It embodies civil and political rights of the third generation. Poland and the UK, however, secured a protocol to the Treaty relating to its application in their respective countries. The intention of Protocol 30 (TFEU 2010/C 83/01, article 1) was to prevent the European Court of Justice or any court of Poland or the UK from being able to find 'that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms'.[107]

A far-reaching step of the Lisbon Treaty was the Article 6 (2) TEU that refers that 'Union shall accede the European Convention for the Protection of Human Rights and Fundamental Freedoms' (see Chapter 2.2.3). The accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR) denotes the process through which the EU as a part of the community of 45 European States. That concludes that the EU has agreed to be under the supervision of the European Court of Human rights and hence to comply with its decisions. It is noteworthy, that the accession of the EU to the ECHR has been characterized as a turning point in European legal history because it will make it possible, at last, for individuals and undertakings to apply to the European Court of Human Rights for review of the acts of EU institutions. However, in December 2015 the negotiated agreement was put to the Court of Justice for opinion without a positive outcome. It ordered that the agreement did not provide for sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction. For the time being, no new accession agreement has been drafted, but both the Parliament and the

[105] Charter of Fundamental Rights of the European Union, *OJ* C 364/1 18.12.2000. Available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[106] W. Scmale, (2010). Europe as a cultural reference and value system, *European History Online*. Retrieved from: http://ieg-ego.eu/en/threads/theories-and-methods/europe/wolfgang-schmale-europe-as-a-cultural-reference-and-value-system

[107] L. Hantrais, ibid.

Commission underline the need for EU accession. Till now the accession has been postponed. The discourse of this decision has divided the scholars, some claim that accession would be promising, whilst others express doubts about the contribution into the EU.

Finally , the Treaty of Lisbon aims to create a more democratic and transparent Europe, by giving a stronger role to the European Parliament and national parliaments as well as more opportunities for citizens' participation. In that framework, the strengthened role for the European Parliament, aims to enhance democracy and increase legitimacy in the functioning of the Union.[108] Through the Lisbon Treaty it has been introduced the concept of 'social market economy'. It was claimed that the Lisbon Treaty, had the potential to become Europe's 'Maastricht for Welfare'. Because of the instruments that introduced it could balance market and non-market objectives.[109] Ironically though the EU has never been so far from incorporating this promising concept due to the global economic turmoil. When the Treaty entered finally into force, the EU had just entered the post-financial crisis phase.[110]

[108] L. Hantrais, ibid.
[109] See in more detail M. Rhodes, (2000). Lisbon: Europe's Maastricht for Welfare? *ECSA Review*, 13(3), 2-7.
[110] A. Crespy, (2016). *Welfare Markets in Europe*, Palgrave Studies in European Political Sociology.

1.2 Momentous instruments

Table 2. Benefits and shortcomings

	Legal Status	Main Critique
The Charter of Fundamental Rights	✓ Equal to primary law	Principles – no Rights
The Open Method of Coordination	X Soft-Law	Non-binding
Social Dialogue	X	A role as producers of social standards
Europe Social Fund	X	Policy instrument
Action Programmes	X	Non-legislative activities

1.2.1 The Charter of Fundamental Rights

The European Union has attempted to address the controversy created by the lack of a European bill of fundamental rights. Thus, the EU has drawn up the Charter of Fundamental Rights as decided by the leaders of the Member States at the Cologne Summits[111] (June 1999) and Tampere (October 1999). The task was assigned to a special committee of 62 people, called the 'Conference'.[112] The Charter was accepted by the European Council in Nice in December 2000 and was the subject of a solemn declaration by the European Parliament, the Council and the Commission. The Charter based on the fundamental rights and freedoms recognized by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter the Community Charter of Fundamental Social Rights of Workers, and other international conventions to which the EU or its Member States are parties. The year 2009 saw the ratification of the Lisbon Treaty and the Charter of Fundamental Rights of the European Union was finally integrated and became legally binding. The Charter includes fundamental civil rights which are linked to Union citizenship and social rights as well. It is divided into six Titles: Dignity (Articles 1-5), Freedom (Articles 6 to 19), Equality (Articles 20-26), Solidarity (Articles 27-38), Democracy (Articles 39-46) and Justice (Articles 47-50). The Charter enshrines between civil and political rights and a series of social rights and guarantees, which are mostly included in the "Solidarity" section. However, Member States have reservations about the adoption of a list of social rights. Specifically, The United Kingdom and Poland raised objections as it supported the existence of the Charter only as a political declaration.[113] In the negotiations leading up to the signing to the Lisbon Treaty, Poland and the United Kingdom secured a protocol[114] to the treaty relating to

[111] Cologne European Council, 3–4 June 1999, Conclusions of the presidency. Annex IV—European Council decision on the drawing up of a charter of fundamental rights of the European Union. Available at: www.europarl.europa.eu/summits/kol2_en.htm#an4

[112] See in more detail Tampere European Council 15 And 16 October 1999. Presidency Conclusions. European Parliament. Available at: http://www.europarl.europa.eu/summits/tam_en.htm

[113] D. Anderson Q.C., and C. C. Murphy, *The Charter of* Fundamental *Rights: History and prospects in Post –Lisbon Europe*, European University Institute Working Papers, Department of Law 2011/08, p.4 and 9-12. Retrieved from: http://cadmus.eui.eu/bitstream/handle/1814/17597/LAW_2011_08.pdf?sequen

[114] Article 1(1) states that the "Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or actions of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms". Article 1(2) then says that the Title IV

the application of the Charter of the Fundamental Rights in their respective countries. Besides these Member States, Sweden also expressed the fear that a high level of social benefits would be hindered by the possible introduction of a minimum level of social protection. Yet the French were not prepared to accept a Charter without a significant number of social rights.

Under Article 51 (1), "*the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiary and the Member States only when they are implementing Union law*". The EU Charter of Fundamental Rights since its proclamation in Nice in 2000, even before it was incorporated into the draft Constitutional Treaty and before the Treaty of Lisbon, although it was formally a political declaration and did not have legal binding, however, in practice, it developed a pre-action, creating some indirect effects. From the early year of 2000 the Charter was referred by the Prosecutors General of the ECJ, the Court of First Instance[115] of the European Communities (ECJ), bodies of the Union, such as the European legislator and the judges of the ECtHR and then the ECHR itself, even national courts. Significant are the *Viking Line*[116] and *Laval*[117] judgments claiming they refer to the purely social right of negotiation and collective action, including the right to strike. The European Court of Justice, in accordance with paragraph 43 of the Viking Line judgment, recognized the right to take collective action, including the right to strike, as enshrined in several international and European texts, including the Charter of Fundamental Rights of the EU. The same findings also result in the Laval judgment.[118] Through the recognition of the above social rights, there has been a further step in the direction of the roadmap towards binding the Charter, as it is remarkable that these decisions were made before the ratification of the Lisbon Treaty (see Chapter 3.3.2). Progress in relation to the protection of fundamental rights has been sealed by bringing the Charter into a legally binding text of the same magnitude as the Treaties, while ensuring a level of transparency, clarity and legal certainty in the field of the

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of the Charter, which contains economic and social rights, does not create justiciable rights, unless Poland and the UK have provided for such rights in their national laws.

[115] Prior to the coming into force of the Lisbon Treaty on 1 December 2009, the General Court of EU (EGC) was known as the Court of First Instance.

[116] Case 438-05 The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line [2007] ECR I-10779.

[117] Case 341-05 Laval and Partneri Ltd [2007] ECR I-11767.

[118] G. Katrougalos, (2007). The (Dim) Perspectives of the European Social Citizenship. Jean Monnet Working Paper 5/07.

protection of fundamental rights, the legitimacy of the EU and the European integration is decisively promoted. The Charter becomes part of the primary law of the Union and now performs the following triple function. Firstly, it helps to interpret the law since both secondary Union law and national law must be interpreted in the light of the provisions of the Charter. Secondly, its provisions can be used as a basis for judicial scrutiny of legislative acts of both the Union institutions and the national authorities as long as they are within the scope of European law. Thirdly, it remains a source of inspiration for the abstraction of general principles of the European law. At the same time, its value in relation to the ECtHR is "upgraded", since the Court takes as its starting point the rights enshrined in the Charter, applies them on the basis of its pre-existing case law and the relevant case law of the European Court of Human Rights; relies only in a second phase and only if necessary on the provisions of the ECHR'.

However, the distinction imposed by Article 52 (5) of the Charter by saying 'rights' and 'principles' creates restrictions on the judicial protection of provisions containing principles, as it states that: "*The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality*." This distinction between 'rights' and 'principles' mainly concerns social rights. This distinction, therefore, is of particular importance in applying and invoking them before the courts because, according to the above provision, the 'principles' do not have direct effect such as the rights. It is also noteworthy that, according to the explanations of the Charter relating to Article 52 (5), paragraph 5, "*the principles do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities"*.[119] Nevertheless, once again, the Court is competent to clarify each time the exact nature and legal status of the rights of the Charter, since the boundaries between the two are liquid and the terms 'right' and 'principle' are used

[119] Official Journal of the European Union C 303/17 - 14.12.2007. See also European Union Agency for Fundamental Rights, EU Charter of Fundamental Rights, Article 52 - Scope and interpretation. Available at: http://fra.europa.eu/en/charterpedia/article/52-scope-and-interpretation-rights-and-principles

indiscriminately to examine whether the social provisions of the Charter can give rise to direct claims.

1.2.2 The Open Method of Coordination

The Open Method of Coordination is an essential tool for shaping social protection in EU, as it encourages the exchange of information, knowledge, experience and good practice among Member States. The Open Method of Coordination (hereinafter referred to as the OMC) is used on a case by case basis to succeed co-operation and to agree common goals and guidelines for Member States; sometimes backed up by national action plans as in the case of employment and social exclusion. In this framework, the OMC was adopted[120] at the European level Council of Lisbon (3/2000) with a view to facilitating implementation of the strategic goal of the decade (2000-2010), which then stood: "*to become the EU the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*".[121] The new governing mode was established by the Maastricht Treaty (Articles 98–104 TEC) for the purpose of co-ordinating national economic policies through 'broad economic policy guidelines' and recommendations of the Council[122] and it was again used by the Amsterdam Treaty to develop a co-ordinated strategy for employment (Articles 125–128 TEC).Without creating a new treaty base, the Lisbon summit then introduced the generic label of OMC and resolved to apply it not only to issues of education, training, R&D and enterprise policy, but also to 'social protection' and 'social inclusion'.[123]

Initially, the Open Coordination Method was applied to the fields of the economic policy (General guidelines for the Economic Policy, Stability and Growth Pact) and the employment strategy (Employment Strategy, 1997), and afterwards Lisbon (2000) became the central tool for shaping social policy in the EU.[124] Thus, the OMC has gradually been implemented in its fields of social inclusion (2000), pensions

[120] The roots of the OMC, however, go back to the so-called Luxembourg process which was adopted at the meeting of the European Council in Luxembourg in 1997 with a view to the implementation of the European employment strategy. It had been introduced in the Amsterdam Treaty, but was inspired by the idea in the Maastricht Treaty of 1993 about macro-economic co-ordination.

[121] Lisbon European Council 23 And 24 March 2000 Presidency Conclusions. Available at: http://www.europarl.europa.eu/summits/lis1_en.htm

[122] D. Hodson, and I. Maher, (2001), The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination. *Journal of Common Market Studies.* 39(4), 719–46. doi: 10.1111/1468-5965.00328

[123] F. Scharpf, The European Social Model. Copying with the challenges of diversity, ibid.

[124] A. Passas, and T. Tsekos, (2009). *Εθνική Διοίκηση και Ευρωπαϊκή Ολοκλήρωση*, Papazisis, Athens, p. 509.

(2001) and health (2004), where (from 2006 onwards) the OMC process takes place within a revised and streamlined scheme, under the umbrella of social protection and social inclusion (or otherwise social OMC). It is worth mentioning that OMC is a tool which is moving away from the 'Community method'.[125] It is a form of intergovernmental policy-making that does not result in binding EU legislative measures and it does not require EU countries to introduce or amend their laws. It is a part of the new forms of EU governance[126] and is based on the principle of subsidiarity,[127] as it is designed to subordinate Member States to gradually develop their policies. The OMC in the European Union may be described as a form of 'soft' law. A severe critique has been made as far as the non-binding status is concerned of this policy making tool.[128] It is also claimed that it has institutional weaknesses such as the lack of effectiveness, the lack of democratic legitimacy deficits. When compared with traditional hard legislation, the soft law approach was intrinsically too weak to achieve its stated ambitions.[129]

In short, the Open Method of Coordination has been opted by the EU for a new governing mode in order to protect social Europe. The Lisbon Treaty emphasizes even more the social framework of the Union. In the social policy field, the Treaties now contain three references to the OMC:

(i) In the most general terms, in Article 5(3) TEU.78

(ii) In Article 153(2)(a) TFEU

[125] Community method is described as the ordinary legislative procedure as it is mentioned at Article 294 TFEU.

[126]See in more detail C. Radaelli, (2008). Europeanization, Policy Learning and New Modes of Governance, *Journal of Contemporary Policy Analysis: Research and Practice*, 10(3), 239-254. doi:10.1080/13876980802231008 and S. Borras, and K. Jacobsson, (2004). The open method of coordination and new governance patterns in the EU, *Journal of European Public Policy*, 11(2), 185-208. doi: 10.1080/1350176042000194395

[127] P. Syrpis, (2002). Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination, EUI Working Paper LAW No 2002/10, European University Institute, Florence. Retrieved from: http://cadmus.eui.eu/bitstream/handle/1814/188/law02-10.pdf;jsessionid=77E049E898F3481FE94E363594935133?sequence=1

[128] V. Hatzopoulos, (2007). Why the Open Method of Coordination is Bad for you: A Letter to the EU. European Law Journal, 3/2007, 309-342. doi: 10.1111/j.1468-0386.2007.00368.

[129] F. Vandenbroucke, (2017). Comparative Social Policy Analysis in the EU at the Brink of a New Era, *Journal of Comparative Policy Analysis: Research and Practice*, 19(4), 390–402. doi: 10.1080/13876988.2016.1168618

(iii) In Article 156 TFEU

The new Article 156 (formerly Article 140 TEC) of the Treaty of Lisbon, which directly recognizes the Open Coordination method as an EU tool to enhance cooperation between Member States in the field of social policy and introduces one obligation to inform the European Parliament regularly about developments in the social OMC.

All in all, the "European Social Agenda", as defined through the OMC, aims at the optimum adaptation of social protection systems to its market pressures and budgetary constraints, but also at facilitating 'Re-commodification' of the work. The point, then, is to help Member States to discover smarter and more effective ways of adapting to the economic pressures the single internal market exerts. Another point to bear in mind is that during the first years of the Europe 2020 strategy, it concerns the crucial importance of economic policy: one cannot build a sustainable social policy on unsustainable financial and economic policies.[130]

[130] F. Vandenbroucke, ibid.

1.2.3 The Social Dialogue

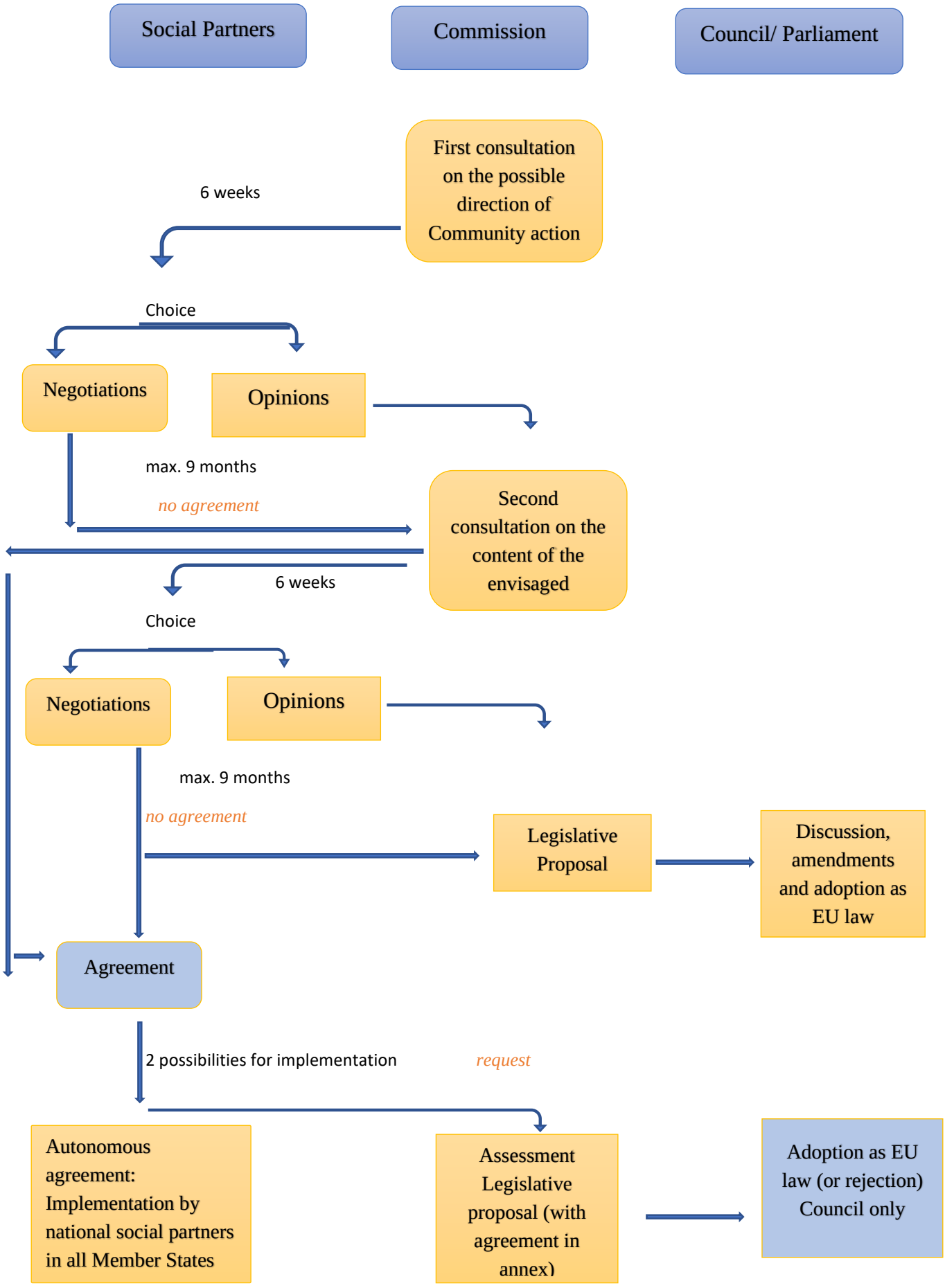
Social dialogue is an essential element of the 'European social model' that gained recognition in the Amsterdam Treaty. Social dialogue refers to the discussions, consultations, negotiations and joint actions that occur between social partners (representatives of management and labour) and the trade unions.[131] The fact that they participate actively to designing European social policy has developed the social dialogue to a fundamental instrument. Thus, it plays a crucial role in fostering competitiveness and fairness. By defining European social standards, it enhances the economic prosperity and social well-being. Besides the influence at the labour market and work, social dialogue helps at creating jobs, promoting economic growth and providing workplace fairness. It is worth mentioning, that the European Commission is responsible to encourage and support social dialogue. The 'social partners' role is to provide the Commission with an opinion or recommendation on the subject. [132]

Articles 151-156 of the Treaty on the Functioning of the European Union (TFEU) offers the Legal basis. Furthermore, the objectives of the Social Dialogue are: under Article 151 TFEU, "*The Union and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion".* Hence, the purpose of social dialogue is to encourage European governance through the involvement of the social partners in decision-making and the implementation process.

As far as the levels are concerned, there are two levels of Dialogue: the cross-industry level, covering the economy as a whole and the sectoral, covering workers and employers in more than 40 specific sectors of the economy.

[131] The ILO has a broad working definition of social dialogue, reflecting the wide range of processes and practices which are found in different countries. Its working definition includes all types of negotiation, consultation or simply exchange of information between representatives of governments, employers and workers, on issues of common interest relating to economic and social policy (ILO Declaration).
[132] Under Article 155 TFEU social partners can start negotiations on the matter themselves.

Figure 1. Consultation and negotiation procedure under Articles 154 and 155



There are two types of dialogue: The bipartite social dialogue and the tripartite social dialogue.

The European Commission was engaged from the early years with the task of promoting close cooperation between Member States. According to the Treaty of Rome the right of association and collective bargaining between employers and workers were at Commission's priority. However, there was a significant delay throughout the years. In 1985 at the initiative of Commission President Jacques Delors, the Val Duchess social dialogue[133] process, aimed to involve the social partners, represented by the European Trade Union Confederation (ETUC), the Union of Industries of the European Community (UNICE) and the European Centre of Public Enterprises (CEEP), in the internal market process.[134] The outcome of these meetings was rather helpful for starting the discourse for social issues such as employment, education, training. In 1986, the Single European Act (Article 118b) created a legal basis for the development of 'Community-wide social dialogue'. The term of *bipartite social dialogue* refers to dialogue between employers' organizations and workers, as well as negotiations held within its framework.[135] The action of the European social dialogue was supported with the establishment of a steering committee which in 1992 became the Social Dialogue Committee (SDC).[136] The Committee meets three to four times a year. Another important milestone was the Agreement on Social Policy which was signed by all the Members States except the United Kingdom to the Maastricht Protocol on Social Policy. The Maastricht Treaty laid the foundations for European Community legislation as well as European collective bargaining.[137] As mentioned above, the Treaty of Amsterdam was the one that made the social dialogue a fundamental component by incorporating the Agreement on Social Policy into the EU law. [138] Cross-industry results of this process were the adoption of framework agreements on parental leave

[133] The bipartite cross-industry social dialogue also called 'Val Duchesse Dialogue'.
[134] A. Kennedy, Social Dialogue. European Parliament.
Available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.3.7.pdf
[135] According to Article 154 TFEU, the Commission must consult the social partners before taking any action in the field of social policy. The social partners may then choose to stop the Commission's imitative and negotiate an agreement among themselves.
[136] The Social Dialogue Committee (SDC) is the main forum for bipartite social dialogue at European level.
[137] M. Ramos, (2018). Reconstructing Social Dialogue. *Perspectives on Federalism*, 10(1), 146-174. doi:10.2478/pof-2018-0008
[138] F. Scharph, The European Social Model. Copying with the challenges of diversity, ibid.

(1995), part-time working (1997) and fixed-term work (1999), which were implemented by Council directives.[139] What is more, via the Treaty of Lisbon the Article 152 TFEU was added which refers that: '*the Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national 'systems' and that 'it shall facilitate dialogue between the social partners, respecting their 'autonomy'.* Under the Article 153 TFEU Member States also gain the possibility to entrust the social partners with the implementation of a Council decision adopted on ratification of a collective agreement signed at European Level.[140]

The European tripartite social dialogue involves the European institutions (Commission, and were appropriate, Council and European Council), as well as the social partners. At the early years of the European integration, it was considered important to facilitate minimum standards of making those conditions that bind all Member States. Thus, Union tried to involve economic and social stakeholders in drawing up European legislation. The Article 152 TFEU acknowledges the role of the Tripartite Social Summit for Growth and Employment. Tripartite cross-industry social dialogue is related to political and technical issues, particularly in areas such as macroeconomic policies, employment, social security, education and training.[141] Undoubtedly, European social dialogue is a fundamental instrument for change, as it attempts to combine competitiveness with solidarity. It is claimed that countries which adopt Social Dialogue tend to have stronger, more stable economies. Enhancing European social dialogue in its various forms could improve the functioning of organizations by offering security and adaptability. Each Member State develops its political and social democracy; thus, the management of economic and social spheres requires properly organized social partners capable of negotiations at regional, sectoral and interprofessional levels. Facing the Member State's different agenda social dialogue struggle to balance economic interests. In response, social policies are limited to a subsidiary role.[142]

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[139] European Parliament, Social Dialogue.
Available at: http://www.europarl.europa.eu/factsheets/en/sheet/58/social-dialogue
[140] European Parliament, ibid.
[141] L.M. Buchner, and L. Ilieva, (2017). European Social Dialogue, A Hidden Phenomena of the Intercultural Dialogue in Europe. *Scientific Journal of Polonia University*, 22(3), 130-138. doi: 10.23856/2216
[142] In its resolution of 19 January 2017 on a European Pillar of Social Rights, Parliament called for updating of European social standards, including the provisions on working time.

1.2.4 The European Social Fund

The European Social Fund (hereinafter referred to as the ESF) was first set down in 1957 via the Rome Treaty. The main role of the ESF was to develop employment opportunities and occupational mobility within the Union (ex- Community). The ESF has always been a primary policy instrument in the social field. The ESF was established to prevent and tackle the unemployment, to increase educational opportunities and to improve the functioning of the labour market. It is important to mention that each Member State and each region is responsible for its own strategy. During the funding period the MS develop an operational programme (OP) that must be approved by the European Commission.

Due to the changing circumstances on the labour market the role and the functioning of the ESF were revised several times since 1957. Under the Articles 162-164, 174, 175, 177 and 178 of the Treaty on the Functioning of the European Union the ESF till today "*aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining"*. The ESF is implemented within the framework of seven-year programming periods.[143]

[143] The first step involves negotiations between the EU Member States, the European Parliament and the European Commission on the fundamental strategic direction and the amount of funding within the Multiannual Financial Framework.

Table 3. The History of the ESF

1957	Establishment of the European Economic Community and the birth of the ESF
1957-1971	First Funding Period Establishing a balance between MS
1972-1983	The third ESF setting the course for structural changes
1988	Delors Plan is adopted
1989-1993	The fourth ESF Support for disadvantaged regions
1994-1999	Creation of a funding instrument for structural policies
1997	Treaty of Amsterdam
2000-2004	MS coodrinate labour market
2007-2013	Strengthening transnational cooperation and supporting processes of convergence
2014-2020	The current EFS Creating better jobs and an inclusive society

Source: European Commission, 2019.

The current seven-year funding period for the ESF started at the begging of 2014. [144] The goals of the current ESF are the following:

i. sustainable integration of long-term unemployed into jobs subject to social security contributions,
ii. support for job-related language training,
iii. helping people with a migrant background acquire qualifications that lead to labour market integration that is in line with those qualifications,
iv. measures related to the skills shortage and demographic change and
v. helping disadvantaged young people and young adults obtain general education school-leaving qualifications and helping them transition to or integrate into training or work.
vi. social inclusion
vii. gender equality, non-discrimination and equal opportunities
viii. the implementation of reforms, in particular in the fields of employment, education, training and social policies

The legal framework of the European Social Fund consists of two regulations: The Regulation (EU) No 1303/2013 laying down common provisions on the European Structural and Investment and the Regulation (EU) No 1304/2013 on the European Social Fund (the ESF Regulation).

What is essential to mention is that the **Youth Employment Initiative** (YEI) complements the ESF actions addressing youth unemployment. In 2012 youth unemployment rate was more than 25%. Thus, the European Council launched the Youth Employment Initiative (YEI) to provide support to young people. The YEI is one of the main financial resources to promote the implementation of Youth

[144] European Commission, European Social Fund.
Available at: http://ec.europa.eu/esf/main.jsp?catId=35&langId=en

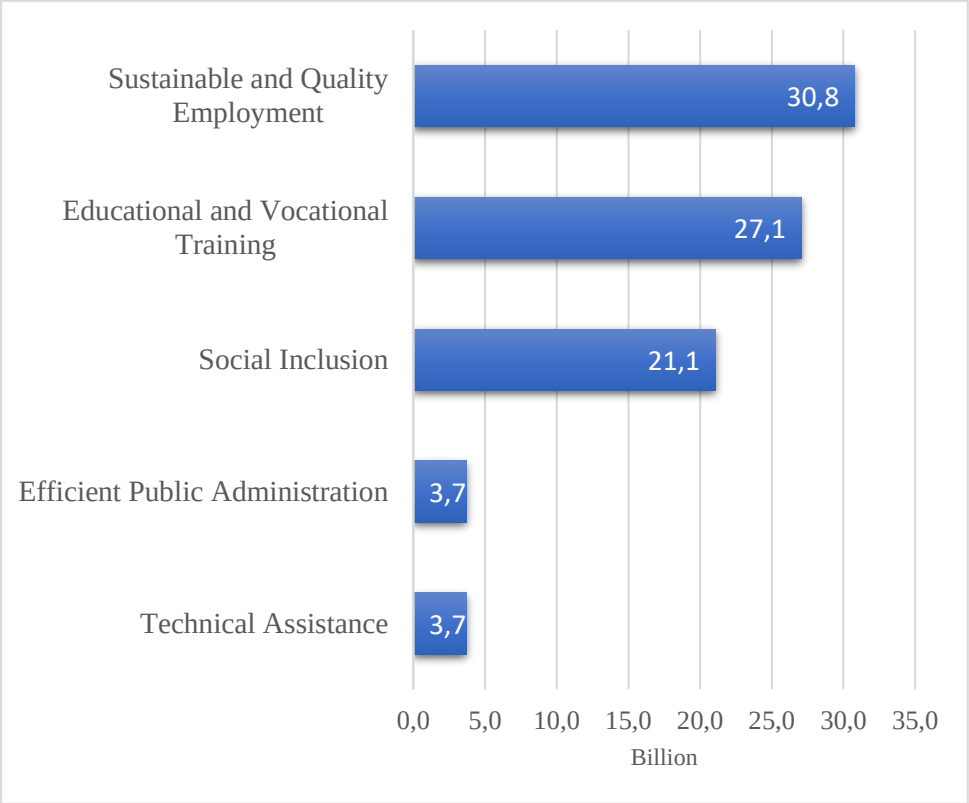
Guarantee.[145] The YEI exclusively addressed to young people *who are not in education, employment or training, including the long term unemployed or those not registered as job-seekers*. The YEI is implemented in accordance with the ESF rules. Of the total budget of €8.8 billion for the period 2014-2020, €4.4 billion comes from a dedicated Youth Employment budget line, which is complemented by €4.4 billion plus from ESF national allocations.[146]

The ESF is part of the general Union budget and is categorized as non-compulsory expenditure. In the 2014–2020 funding period, the European Union has established the same implementation rules for all European Structural and Investment Funds (ESI funds), among them the ESF. [147] The ESF budget[148] for 2014-2020, corresponds to 19 % of the budget reserved for all ESI Funds and 7.95 % of the Multiannual Financial Framework (MFF) 2014-2020.[149]

As illustrated in Figure 2, Member States have decided to spend most of the ESF allocation on the thematic objective 'Sustainable and quality employment', followed by 'Educational and vocation training' and 'Social inclusion'.

[145] The Youth Guarantee is a commitment by all Member States to ensure that all young people under the age of 25 years receive a good quality offer of employment, continued education, apprenticeship, Traineeship within a period of four months of becoming unemployed or leaving formal education.
See more at: European Commission, Employment, Social Affairs & Inclusion. The Youth Guarantee. Available at: http://ec.europa.eu/social/main.jsp?catId=1079&langId=en
[146] European Commission, Employment, Social Affairs & Inclusion.Youth Employment Initiative (YEI). Available at: http://ec.europa.eu/social/main.jsp?catId=1176
[147] ESF Programme Brochure. The European Social Fund – Funding Period 2014 – 2020.European Social Fund for Germany.
[148] The ESF allocation is €86.405.02 billion.
[149]European Parliamentary Research Service. M. Svášek, (2017). European Social Fund, Briefing How the EU budget is spent. Retrieved from: https://epthinktank.eu/2017/02/27/how-the-eu-budget-is-spent-european-social-fund/

Figure 2. ESF Contribution to thematic objectives 2014-2020 (€billion)



Source: European Commission, 2017.

For the next long-term EU budget 2021-2027 the Commission proposes to further strengthen the Union's social dimension with a new and improved European Social Fund, the **European Social Fund Plus** (ESF+) and a more effective **European Globalisation Adjustment Fund** (EGF).[150] The European Social Fund Plus, will be the main financial instrument to strengthen Europe's social dimension, by putting the principles of the European Pillar of Social Rights into practice (see Part II, Chapter 6.1). The Commission is proposing a total budget of €101 billion in current prices for the period 2021–2027. The European Social Fund Plus is the result of a merging of the existing European Social Fund, the Youth Employment Initiative (YEI), the Fund for

[150] European Commission Employment, Social Affairs & Inclusion European Social Fund. Available at: http://ec.europa.eu/esf/main.jsp?catId=67&langId=en&newsId=9118

Aid to the Most Deprived (FEAD), the EU Programme for Employment and Social Innovation (EaSI) and the EU Health programme.[151]

[151] Ibid.

1.2.5 The Social Action Programme

Social Action Programmes (SAPs) may take the form of non-legislative activities and less of the form of legislative proposals. The European Commission has launched the SAPs to ameliorate the promotion of the EU'S social objectives.

The first Social Action Programme was introduced in 1974 at the Summit of October 1972. By a resolution adopted in 21 January 1974, the Council of Ministers approved the SAP involving more than 30 measures over an initial period of three to four years. The main objectives[152] were the following:

i. The attainment of full and better employment in the Community.
ii. The improvement of living and working conditions.
iii. The increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies.

In December 1989, the European Commission was instructed to draw up an ASP which was aimed at implementing the Charter of the Fundamental Social Rights of Workers containing 47 proposals for initiatives as regards the social and labour rights.

Later, the Maastricht Treaty's Protocol and Agreement on Social Policy introduces the appropriate amendments that tackle the obstacles to implementation of the fundamental social rights of workers promised by the Charter.

In the framework of Social Policy Agenda EU and European Commission initiated ASP which ran from 1998 to 2000 and was followed by its Social Policy *Agenda 2000-2005*. The next Agenda 2006-2010 run under the Lisbon Strategy and which came to an end in 2010 and was followed by EU's current framework policy *Europe 2020 Strategy*, which contains a range of targets in the employment and social policy field. The cornerstone might be the *European Pillar of Social Rights*, endorsed in November 2017 and gives new momentum to initiatives at European level.

[152] European Foundation for the Improvement of Living and Working Conditions Social Action Programme. Available at: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-action-programme

Chapter 2. The contribution of the Council of Europe

"All human rights are universal, indivisible and interdependent and interrelated"[153]

The Council of Europe was founded in May 1949 by ten European states as a broad regional international organization for the intergovernmental and parliamentary cooperation of its members. It seeks the unity of its members in order to preserve the principles considered as their common heritage and to promote their economic and social progress. The Council of Europe remains firmly committed to democratic principles and is rightly considered to be the largest and most important political international organization in Europe. The United Nations' Universal Declaration of Human Rights[154] (adopted in 1948) recognized "*the unity and indivisibility of fundamental rights, including civil and political rights on the one hand and social and economic rights on the other hand*". The Council of Europe in order to give binding legal force to the rights of the milestone document of the Universal Declaration, adopted two separate treaties: The European Convention on Human Rights guaranteeing civil and political rights, adopted in 1950 and the European Social Charter guaranteeing social and economic rights, in 1961.[155]

[153] See in more detail Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
[154]United Nations, The Universal Declaration of Human Rights. Available at: http://www.un.org/en/universal-declaration-human-rights/index.html
[155] Council of Europe, European Social Charter and European Convention on Human Rights. Available at: https://www.coe.int/en/web/turin-european-social-charter/-european-social-charter-and-european-convention-on-human-rights

2.1 The European Convention on Human Rights

In the early years of the European integration several democratic deficits arose. Therefore, the ECHR obtained a pivotal role to the protection of the fundamental rights within the Union (ex-Community). Article 6 of the TEU[156] recognizes the ECHR among the sources of fundamental rights. The ECHR shifted the notion of dignity protection from the political and legal area into reality and introduced control mechanisms.

Table 4. The Evolution of the European Convention within the Council of Europe

Adoption and entry into force	Rome, 4 November 1950 In force on 3 September 1953
Developments	16 protocols have been adopted between 1952 and 2013[157]
States and substantives rights covered	The Convention has been ratified by all 47 Member States to the Council of Europe.[158] Although not all States have accepted some rights covered by the new protocols, all of them are bound at least by the 14 provisions covering substantive rights in the 1950 Convention
Scope	States are bound to guarantee respect of the Convention rights to any person within their jurisdiction
Supervisory body	The European Court of Human Rights, set up on 21 January 1959 and it is composed of 47 judges, elected by the Parliamentary Assembly of the Council of Europe for a non-renewable term of 9 years

[156] It also provides that the EU shall accede to the ECHR.
[157] The two latest 2013 protocols are not yet into force.
[158] As from 1974, any new member State accessing the Council of Europe must sign the Convention and ratify it within one year.

Supervisory mechanism	Judicial assessment of State or individual applications by the European Court of Human Rights, leading to judgments finding violations or non-violations of the Convention, or to friendly settlements
Follow-up of violations	The Committee of Ministers of the Council of Europe supervises the implementation by the respondent State of the individual and general measures that the Committee of Ministers considers to be required to remedy the violation found and prevent new ones from occurring.

Especially, the ECHR provides for Rights related to social protection in Article 4 § 2 which prohibits forced and compulsory labour,[159] Article 11 which recognizes freedom of association,[160] Article 1 of Protocol No. 1 concerning the protection of property and Article 2 of Protocol No. 1 that ensures the right to education.[161]

The existence of its own judicial system, the European Court of Human Rights (hereinafter referred to as the ECtHR), is a notional difference between the protection of fundamental rights guaranteed by the European Convention on Human Rights and other international documents.[162]

The European Convention on Human Rights through the broad interpretation of the Strasbourg Court has incorporated any social claims into the substantive rights expressly enshrined in the Convention despite the opposing theoretical views on the extension of the scope of the ECHR on social rights. Thus, the ECtHR has often given its case law a strong social dimension. This is particularly important because of the option which any person has as well as a non-governmental organization or group of

[159] Article 4 par. 2 requires that "*No one shall be required to perform forced or compulsory labour*".
[160] Article 11 in par. 1 mentions that: "*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests"*, and in par. 2. : "*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State*".
[161] ECtHR, 7Dec, 1976 Kjeldsen and others v. Denmark, Series A, No. 23 § 50.
[162] The ECtHR has been characterized as the guardian of the Convention.

individuals have to submit an application against contracting states, when the state violates their rights under the European Convention on Human Rights.[163] In 1979 via the most important decision *Airey c. Irlande*[164] the ECtHR found that although the ECHR refers to civil and individual rights, some of them are in accordance with economic and social values. A social right may be linked to another right which is guaranteed by the ECHR, therefore is not excluded from the scope of the Convention's protection. An example of a wide interpretation of certain individual rights to include important social rights is the *Marchx v. Belgium*[165] judgment in which the ECtHR extended family protection as enshrined in Article 8 (1)[166] of the ECHR, arguing in favor of the natural family. According to the Court's opinion, "family life", within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life. The ECtHR recognized that mother-to-child relationship, even without marriage, is a true family and does not differ from anything legitimate. Consequently, the biological affinity of the child with the mother giving birth falls within the protective framework of Article 8(1). The Court concurs that Article 8 makes no distinction between the "legitimate" and the "illegitimate" family. There are also examples of applying Article 8 that the ECtHR has shown reluctant to find positive social rights. Within the Article 8, the Strasbourg Court has rejected several attempts to recognize socio-economic obligations within substantive rights provisions. The ECtHR in *Jitka Zehnalová and Otto Zehnal v. the Czech Republic*[167] considered that Article 8 was not applicable in the case. The applicants were a woman with a physical disability and her husband who claimed that the fact that many public buildings were not equipped with access facilities for people with impaired mobility, violates their right to respect for private life, under Article 8 of the ECHR. Finally, the Court argued that

[163] Any person, having exhausted the available remedies under national law, may apply to the European Court of Human Rights on the ground of breach of the Convention.
[164] Airey v Ireland [1979]. Application no. 6289/73. See in more detail: P. Thornberry, (1980). Poverty, Litigation and Fundamental Rights: A European Perspective, *The International and Comparative Law Quarterly*, 29(2/3), 250-258. Retrieved from http://www.jstor.org/stable/758965 and S. Egan, L. Thornton, and J. Walsh, (2014). *The ECHR and Ireland: 60 Years and Beyond*, Bloomsbury, Dublin.
[165] Marckx v. Belgium [1979]. Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979. Available at: http://www.refworld.org/cases,ECHR,3ae6b7014.html
[166] Article 8 (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
[167] Jitka Zehnalová and Otto Zehnal v. the Czech Republic [2002] Application no. 38621/97.

there was not a direct link between the measures the state was urged to take and the applicant's private life.[168]

Furthermore, with the progressive widening of the concept of property to which social content has been given, the claims for social benefits, due to their property nature, are also protected by the ECHR. The Strasbourg case law[169] recognizes that claims for social benefits form, under certain conditions, a property right protected by Article 1 of the First Additional Protocol. However, in relation to the design and implementation of social policies, according to the case law of the ECtHR, there seems to be a wide margin of appreciation for each state. Especially for the level of social security benefits, the ECHR does not apply a legislative restriction on grounds of public interest. The *Valkov v. Bulgaria case*[170] emphasizes the concept of the Strasbourg Court regarding the pension system changes that the Member States adopt during periods of recession. The ECtHR reviewed the applications lodged by nine Bulgarian nationals who claimed that the statutory cap on their pensions breached their rights under the ECHR.[171] Rather than determining whether the pensions claimed constituted 'possessions' within the scope of Article 1 P. 1, the Court simply assumed that the article was applicable.[172] The Court concluded that there had not been a violation. In other words, the ECtHR found that this provision did not infringe Article 1 of the P.1 stating that the maximum age limit for retirement pensions was intended to serve a public interest. [173]

All in all, the protective scope of the ECHR was considered to cover only civil and political rights, yet the Strasbourg Court introduced social rights into the protective sphere of the ECHR with its interpretative dynamism. Gradually, the judgements proved the most significant documents of the ECtHR. Thus, the case-law seems to suggest that the neat division of socio-economic rights from civil and political rights is shrinking. The ECtHR succeeds to enshrine human dignity and expand the variety of

[168] A. Hedero, (2007). Social security as a human right, *Council of Europe Publishing*, Retrieved from: https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-23(2007).pdf

[169] See in more detail Gaygusuz v. Austria [1996]. Application no. 17371/90.
[170] Valkov and Others v. Bulgaria [2011]. Application no. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05.
[171] Valkov and Others v. Bulgaria, ibid.
[172] Ibid, paras. 87 and 113.
[173] E. Brems., and J. Gerards, (2013). *Shaping Rights in the ECHR: The Role of the European Court of Human Rights*. Cambridge University Press, New York.

human rights. The ECHR is a living instrument with a progressive and above all anthropocentric character.[174] For this reason, the ECtHR has as its basic principle the corrective and dynamic evolutionary interpretation of the ECHR. According to it, jurisprudence should not be stagnant, but must go dynamically in response to evolving sociopolitical needs and respond to the modern spirit of international change and time, always serving the human rights and fundamental freedoms of the individual beyond state feasibility and the interests of the countries.

[174] Tyrer v. United Kingdom [1978]. Application no. 5856/72.

2.2 The European Social Charter

Regarding the economic and social field, the European Social Charter (hereinafter referred to as the ESC) has been referred as the "social counterpart" of the European Convention on Human Rights (ECHR). It was adopted in 1961 by the Council of Europe and it was entered into force in 1965. Approximately 47 countries[175] signed the ESC though with reservations and derogations in some time.[176] Nevertheless, according to the Part III of the ESC "*any state ratifying the Charter must undertake to be bound by at least 5 of Articles 1,5,6,12,13,16 and 19 and by such a number of Articles or numbered paragraphs, provided that the total number of Articles or paragraphs is not less than 10 Articles or 45 numbered paragraphs of Part II of the ESC*". In a nutshell, the ESC demands the signatory states to take legal and administrative actions in handling life and security. The ESC based on a ratification system, enables states, under certain conditions, to choose the provisions they are willing to accept as binding international legal obligations. They are encouraged to progressively accept the Charters' provisions.[177]

The text of the ESC consists of five parts, as follows: Part I is the 'political declaration' of the ESC which contains principles and rights that the Contracting Parties recognize as a common goal of their policy. Part II sets out the rights reserved by the Contracting Parties.

Articles 1 to 19 of the European Social Charter[178] list the following fundamental rights:

- Article 1- The right to work
- Article 2- The right to just working conditions
- Aticle 3- The right to safe and healthy working conditions
- Article 4- The right to fair remuneration

[175] See Table 5 as far as the countries that signed and ratified the ESC till today.
[176] The European Social Charter 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. See in detail D. Harris, (1964). The European Social Charter. *International and Comparative Law Quarterly*, 13(3), 1076- 1087. doi:10.1093/iclqaj/13.3.1076
[177] Council of Europe, The Charter in four steps. Available at: https://www.coe.int/en/web/turin-european-social-charter/about-the-charter
[178]Council of Europe, "Details of Treaty No.035, European Social Charter". Available at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035

- Article 5- The right of workers and employers to organize
- Article 6- The right to bargain collectively
- Article 7- The right of children and young persons to protection
- Article 8- The right of employed women to protection
- Article 9- The right to vocational guidance
- Article 10-the right to vocational training
- Article 11- The right to protection of health
- Article 12-The right to social security
- Article 13- The right to social and medical assistance
- Article 14- The right to benefit from social welfare services
- Article 15- The right of disabled persons to vocational training, rehabilitation and social resettlement
- Article 16- The right of the family to social, legal and economic protection
- Article 17- The right of mothers and children to social and economic protection
- Article 18- The right to engage in a gainful occupation in the territory of other Contracting Parties
- Article 19- The right of migrant workers and their families to protection and assistance

Part III as mentioned above introduces the undertakings as far as the ratification is concerned. Part IV defines the control system. Part V provides the exceptions and limitations of the implementation of the ESC, the relations with domestic law and international agreements, the implementation by collective agreements, the territorial application, the signature, ratification and entry into force, the amendments and the denunciation. Finally, the annex sets out the scope of the ESC in relation to protected persons and introduces clauses on the rights.[179]

The social and economic rights guaranteed by the European Social Charter of 1961 were extended by the Additional Protocol of 1988[180] which added the following rights:

- Article 1 – Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

[179] Council of Europe, European Social Charter, collected texts 7th edition, updated: 1st January 2015.
[180] For more information see explanatory report on the Additional protocol of 1988 available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb346

- Article 2 – Right to information and consultation
- Article 3 – Right to take part in the determination and improvement of the working conditions and working environment
- Article 4 – Right of elderly persons to social protection

Until the mid 1990s the recognition of the ESC was quite weak. Unfortunately, the Committee of Independent Experts could not shed light on the factors because its conclusions were obscure and undisclosed. The fact that the ESC could not be invoked before national judicial bodies certainly caused the Charter's ineffectiveness. However, the 'revitalization' of the ESC which was launched in November 1990 changed several shortcomings. Through the improvement of the ESC the Council of Europe aimed to 'reset' its superiority setting the European standards at Human Rights protection. Needless to say, that was the period the European Union (then European Economic Community) adopted its own Community Charter of Fundamental Social Rights of Workers.[181] In order to implement the 'relaunching process' the Council introduced an ad hoc intergovernmental committee. The so-called *CHARTE-REL*[182] prepared a Protocol Amending the European Social Charter (Turin Protocol).[183] This Protocol opened for signature in Turin on 21-22 October 1991.[184] Although, the Turin Protocol has never entered into force (because it did not obtain the ratifications needed),[185] the discourse proved constructive. In a nutshell, the supervisory system via the proposed changes understood its function and its role better, so as to offer impressive results to the relations between the Committee of Independent Experts and the Governmental Committee and also to their general practice. The benefits of the Turin Process were numerous:

[181] European Parliament, The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights. p.7. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pd

[182] This Committee was made responsible for drafting proposals aimed to improve the Charter's effectiveness and in particular way its supervisory machinery perated. One of the aims of the Charte-Rel Committees' mandate was to reinforce the effectiveness of the rights guaranteed by the ESC and particularly to increase the participation of the social partners. See in more detail The Social Charter of the 20th Century, *Council of Europe Publishing*, 1997, p. 52.

[183] See CHARTE-REL (90)2, 1 et seq.; CHARTE-REL (90)23, 1. See also the text of the Protocol in Annex 1.

[184] The conference was held to mark the 30th anniversary of the signing of the European Social Charter.

[185] Ibid.

- Amending protocol of 1991

The contribution of the amending protocol of 1991[186] could be summarized in the improvement of the supervisory mechanism.[187] In other words, the Protocol confirms the political role of the Committee of Ministers and of the Parliamentary Assembly of the Council of Europe.

- Additional protocol of 1995 Providing for a System of Collective Complaints[188]

In 1995, an Additional Protocol to the European Social Charter Providing for a System of Collective Complaints was adopted. This instrument "*allows NGOs and organisations of employers and of workers to seek a declaration that certain laws and policies of the States parties are not compatible with their commitments under the Charter, without having to exhaust any local remedies which may be available to those aggrieved by such measures"*.[189] Despite its many innovative features, the Protocol entered into force already on 1 July 1998, after the number of 5 initial ratifications had been reached.

- Revised European Social Charter of 1996

In 1996, the Revised Charter does not bring changes to the control mechanism of the original Charter, but it enriches the list of the rights protected: the Revised Charter includes the 19 original guarantees listed in the 1961 instrument, sometimes with certain reformulations. It is gradually replacing the initial 1961 treaty. The ESC (revised) guaranteed fundamental social and economic rights. It takes into consideration the evolution which has occurred in Europe since the ESC was adopted 35 years from the initial treaty. The Revised European Social Charter of 1996 embodies[190] in one instrument Articles 1-19 in Part II of the Revised Charter,

[186]Council of Europe, "Details of Treaty No.142, European Social Charter" https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/142

[187] Council of Europe, The Amending Protocol reforming the supervisory mechanism. Available at: https://www.coe.int/en/web/turin-european-social-charter/the-amending-protocol-reforming-the-supervisory-mechanism

[188] G. de Burca., and B. de Witte, (2005). *Social Rights in Europe.* Oxford University Press, p. 285.

[189] G. de Beco, (2012). *Human Rights Monitoring Mechanism of the Council of Europe*. Routledge, New York, p.73.

[190] Council of Europe, Details of Treaty No.163 *European Social Charter (revised).* Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163

adding the list of the four guarantees contained in the Additional Protocol of 1998 (Articles 20-23) and completing the list by adding eight other rights:

- Articles 24- The right to protection in cases of termination of employment
- Article 25- The right of workers to the protection of their claims in the event of the insolvency of their employer
- Article 26- – The right to dignity at work
- Article 27-The right of workers with family responsibilities to equal opportunities and equal treatment
- Article 28-The rights of workers' representatives in undertakings and facilities to be accorded to them
- Article 29- The right to information and consultation in collective redundancy procedures
- Article 30-The right to protection against poverty and social exclusion
- Article 31-The right to housing

Finally, the Revised Charter also provides some amendments as follows:

- reinforcement of principle of non-discrimination
- improvement of gender equality in all fields covered by the treaty
- better protection of maternity and social protection of mothers
- better social, legal and economic protection of employed children
- better protection of handicapped people

Table 5: Ratification of the 1961 European Social Charter and the European Social Charter 1996 (Revised)

Member States	Signatures	Ratifications
Albania	21/09/1998	14/11/2002
Andorra	04/11/2000	12/11/2004
Armenia	18/10/2001	21/01/2004
Austria	07/05/1999	20/05/2011
Azerbaïjan	18/10/2001	02/09/2004
Belgium	03/05/1996	02/03/2004
Bosnia and Herzegovina	11/05/2004	07/10/2008
Bulgaria	21/09/1998	07/06/2000
Croatia	06/11/2009	26/02/2003
Cyprus	03/05/1996	27/09/2000
Czech Republic	04/11/2000	03/11/1999
Denmark *	03/05/1996	03/03/1965
Estonia	04/05/1998	11/09/2000
Finland	03/05/1996	21/06/2002
France	03/05/1996	07/05/1999

Georgia	30/06/2000	22/08/2005
Germany *	29/06/2007	27/01/1965
Greece	03/05/1996	18/03/2016
Hungary	07/10/2004	20/04/2009
Iceland	04/11/1998	15/01/1976
Ireland	04/11/2000	04/11/2000
Italy	03/05/1996	05/07/1999
Latvia	29/05/2007	26/03/2013
Liechtenstein	09/10/1991	
Lithuania	08/09/1997	29/06/2001
Luxembourg *	11/02/1998	10/10/1991
Malta	27/07/2005	27/07/2005
Republic of Moldova	03/11/1998	08/11/2001
Monaco	05/10/2004	
Montenegro	22/03/2005	03/03/2010
Netherlands	23/01/2004	03/05/2006
Norway	07/05/2001	07/05/2001
Poland	25/10/2005	25/06/1997
Portugal	03/05/1996	30/05/2002

Romania		14/05/1997	07/05/1999
Russian Federation		14/09/2000	16/10/2009
San Marino		18/10/2001	
Serbia		22/03/2005	14/09/2009
Slovak Republic		18/11/1999	23/04/2009
Slovenia		11/10/1997	07/05/1999
Spain		23/10/2000	06/05/1980
Sweden		03/05/1996	29/05/1998
Switzerland		06/05/1976	
«the former Yugoslav Republic of Macedonia»		27/05/2009	06/01/2012
Turkey		06/10/2004	27/6/2007
Ukraine		07/05/1999	21/12/2006
United Kingdom	*	07/11/1997	11/07/62
Number of States	47	2 + 45 = 47	9 + 34 = 43

Source: Council of Europe, 2017.

The dates on a dark blue background correspond to the dates of signature or ratification of the 1961 Charter; the other dates correspond to the signature or ratification of the 1996 revised Charter. * States of which ratification is necessary for the entry into force of the 1991 Amending Protocol. In practice, in accordance with a decision taken by the Committee of Ministers, this Protocol is already applied.

The recognition of Human Rights becomes more important and obtains a legal value, when it is accompanied by an effective control system. This issue had been the crucial aim of the "revitalization process" as it is mentioned above. The control system of the European Social Charter has been based on a multileveled monitoring mechanism for the implementation of its social policy. It is quite impressive that in the process are involved experts, committees, governments, employers, non-governmental organizations. The monitoring mechanism is based on the international law and has enriched in 1995 by the Collective Complaints Procedure.

The European Committee of Social Rights monitors compliance with the European Social Charter under two separate procedures: through reports drawn up by States parties (Reporting system) and through collective complaints (Collective Complaints procedure).[191]

The ESC bases its supervision on national reports. It sets up an international control system of its application by the Parties. In other words, the Parties are obliged to submit an annual report[192] regarding the accepted provisions of the ESC indicating how they implement the Charter in law and in practice. The European Committee of Social Rights (former Committee of Independent Experts) studies the reports[193] and makes a decision on whether or not the conditions in the countries concerned are in conformity with the ESC. In a case that a Party takes no action on a decision of nonconformity of the European Committee on Social Rights, the Committee of Ministers may address a recommendation to the Party, asking it to alter the situation in law and in practice. The Committee of Ministers 'work' is prepared by a Governmental Committee of the European Social Charter and European Code of Social Security comprising representatives of the governments of the Parties to the ESC, assisted by observers representing European employers' organization and trade unions.[194]

Although, the reporting system does not apply any real sanctions for infringing

[191] Lodged by the social partners and non-governmental organisations.
[192] According to the new reporting system which applied in 31.10.2007.
[193] The European Committee of Social Rights adopts conclusions which are published every year European Social Charter HUDOC Database. Available at: https://hudoc.esc.coe.int/eng/#{%22ESCDcType%22:[%22DEC%22,%22CON%22]}

[194] Council of Europe, The reporting system of the European Social Charter. Available at:https://www.coe.int/en/web/turin-european-social-charter/reporting-system

the rules the ESC has had a major influence on the legislation of the signatory states. For instance, in the 1970s, the United Kingdom and Denmark changed their merchant shipping acts since they violated the prohibition of forced labour referred in Article 1 (1) of the ESC.[195]

Figure 3. European Social Charter: The reporting system

[195] European Parliament, working paper, Fundamental social rights in Europe, p. 12.

As a complement to the reporting system of the ESC was introduced, the Collective Complaints procedure (as mentioned above via the Additional protocol of 1995). The establishment of a system of collective complaints aimed to give a new impetus to the ESC. The Collective Complaints procedure established under the Charter is a parallel protection system which complements the judicial protection provided under the European Convention on Human Rights. It is essential to refer that because of the collective nature, the complaints may only raise questions concerning non-compliance of a State's law or practice with one of the provisions of the Charter.[196]

The Right to submit belongs to:

- The European Social Partners for employers and employees
- The international non-governmental organizations (NGOs)
- Employers' organizations and trade unions in the country concerned
- The national NGOs

It is worth mentioning that the collective complaints procedure presents certain advantages that do not exist in other international control mechanisms. Firstly, the organizations which submit a collective complaint are not obliged to bear the consequences of the offense directly or to be victims of the violation. Secondly, there is no need of the exhaustion of domestic remedies under national law and thirdly, there is no deadline for the complaint's submission.

[196] See Council of Europe, The Collective Complaints Procedure. Available at: https://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1

2.3 The relations between the European Union and the European Convention on Human Rights

As mentioned above (see Chapter 1 1.1) the Founding Treaties of the European Union did not establish an effective protection of the fundamental rights. Thus, except for the European Court of Justice which developed a case law, the European Convention on Human Rights obtains a crucial role in the EU legal system as a source of fundamental rights in the form of general principles of the EU law as provided in Article 6 par. 3.

What is more, Article 52 par. 3 of the EU Charter of Fundamental Rights enfolds that: "*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".* [197] In addition, according to Article 53 of the Charter "*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by… the European Convention for the Protection of Human Rights and Fundamental Freedoms…*".[198]

The Lisbon Treaty tried to enhance the relation of the EU and the ECHR via the Article 6 par. 2 which provides the accession of the EU to the ECHR. However, in December 2014 the European Court of Justice ruled that the Draft Accession Agreement did not provide for enough protection of the EU's legal arrangements and the ECJ exclusive jurisdiction. This outcome divided the scholars; on the one hand they claim that accession could bring adding value, on the other hand some are more reluctant and express doubts as far as EU citizens protection is concerned.[199]

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[197] S. Douglas-Scott, (2011). The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review* 11:4, 645-682. doi: 10.1093/hrlr/ngr038

[198] See in more detail, B. de Witte, (2014). *Article 53 –Level of Protection*, in S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights –A Commentary*, Oxford, Hart; J. Bering Liisberg, (2001). Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? 38 *Common Market Law Review* 1171–99. A Widmann, (2002). Article 53: Undermining the Impact of the Charter of Fundamental Rights, 8 *Columbia Journal of European Law* 342–58.
Community Law?' (2001) 38 Common Market Law Review 1171–99.

[199] See in detail S. Peers, (2014). The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection. *EU Law Analysis*. Retrieved from: http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html; D. Halberstam, (2015). It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR,

The legal basis of the accession is the Article 6 of the Treaty on European Union, which refers in paragraph 2 that "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*". The provision of Article 6(2) does not mention any deadline, or any conditions for the accession to the ECHR. Moreover, Protocol No 8 under Articles 1,2 and 3 ensures that the agreement "*must make provision for preserving the specific characteristics' of the EU and its legal system*", and that "*the accession would not affect the situations of the MS in relation to the ECHR and its protocols*". [200] As for the ECHR, the accession of the EU to the Convention was made legally possible with the entry into force of Protocol[201] No 14 of 13 May 2004. A new paragraph was added to Article 59 of ECHR which provides that "*The European Union may accede to this Convention*".[202]

Since the 1970's there is an ongoing discourse for the European accession to the European Convention on Human Rights.[203] The question of accession to the ECHR first became an issue due to the German Constitutional Court's reaction to the lack of protection of fundamental rights in the EEC. In the *Solange I* judgment,[204] the Commission President envisaged accession in order to counter the risks of censure of Community legislation by national constitutional courts.[205] It should be noted that from

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and the Way Forward. *16 German Law Journal 105, U of Michigan Public Law Research Paper No. 439.* doi: 10.2139/ssrn.2567591 and S. Douglas-Scott, (2014). Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice. *Verfassungsblog On Matters Constitutional*. Retrieved from: http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/#.VKf4oyvF8bc

[200] Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. OJ C 326 (2012) (p. 273). According to Article 51 TEU – is an integral part of the Treaties and is therefore legally binding as a source of primary law. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F08

[201] Protocol No. 14 To the Convention for The Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention.
Available at: https://www.Echr.Coe.Int/Documents/Library_Collection_P14_Ets194e_Eng.Pdf

[202] Protocol No 14 had been signed five years before the entry into force of the Charter of Fundamental Rights as part of EU primary law.

[203] The idea of accession was also mentioned in 1984, when the European Parliament adopted the Draft Treaty Establishing the European Union, widely referred to as the "Spinelli Treaty". Chapter 1 (Article 4. 2) refers to *"economic social and cultural rights derived from the Constitutions of the Member States and from the European Social Charter".*

[204] Judgment of the Court of 17 December 1970, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 11/70 also known as '*Solange I'*.

[205] European Parliament, J. Jacqué, What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR? doi: 10.2861/07148. Retrieved from:
http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556975/IPOL_STU(2016)556975_EN.pdf

the very beginning the case law[206] of the ECJ observes that the EU autonomy is a priority to the EU. However, the EU took into serious consideration the idea of the accession due its benefits. In other words, the accession could offer two advantages. Firstly, the political goal is to bring an end to any double standard in the protection of fundamental rights within the EU. Secondly, in technical terms another purpose is to decrease the risk of divergence in case law between the European Court of Human Rights and the Court of Justice of the EU. On 5 April 2013, a Draft Agreement[207] provided that the EU accedes to the ECHR itself and to the two protocols to which all Member States are parties, while permitting the EU to accede to other protocols at a later stage. The several negotiations between the Council of Europe and the European Commission ended up to the Draft Agreement,[208] which established a system of shared responsibility enabling the EU or Member States to stand as respondent alongside the entity challenged in the event of uncertainty regarding the division of powers. Furthermore, the Council of Europe highlighted that accession should not alter the existing obligations of State Parties under the ECHR and that the existing ECHR monitoring mechanism is to remain intact.[209]

Under Article 218(11) TFEU the ECJ was asked to provide an *Opinion* on the compatibility with EU law of the draft agreement for EU accession to the ECHR. Indeed, on 18 December 2014 the ECJ delivered its negative advisory *Opinion 2/3*. [210] The ECJ concluded that the accession agreement is not compatible with EU law. According to the ECJ the accession's obstacles are almost impossible to be avoided. The fact that the Court expressed concerns about its constitutional position and

[206] See also Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L. Case 6-64 and C- 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration [1963] ECR 1.

[207] A. Buyse, (2014). CJEU Rules: Draft Agreement on EU/ Accession to ECHR. *ECHR Blog*. Retrieved from: http://echrblog.blogspot.co.uk/2014/12/cjeu-rules-draft-agreement-on-eu.html,

[208] Draft Explanatory report to the agreement on the accession of the European Union to the convention for the protection of human rights and fundamental freedoms. Strasbourg (2 April 2013).

[209] S. Morano-Foadi., and S. Andreadakis, (2016). The EU Accession to the ECHR after Opinion 2/13: eflections, Solutions and the Way Forward, Google Scholar. Retrieved from: http://www.europarl.europa.eu/cmsdata/104503/EP%20Hearing%20Contribution%20MoranoFoadi%20Andreadakis%20April%202016.pdf

[210] CJEU Opinion 2/13 (2014). Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=264579

autonomy of EU law raised a critique[211] that the ECJ is preferred not to lose its sovereignty, rather than ensure human right protection. Some authors did not expect such a turn in process of the accession of the EU to the ECHR. The *Opinion* will generally render future accession highly difficult and delay it, since already the negotiations of the draft agreement proved protracted and complex. Till today, negotiations have not been re-scheduled. Only, the Commission President Junker declares in April 2016 that the accession was a political priority for Commission's Agenda. The reason may be that the EU, after the economic turmoil, is currently concerned with important issues (see the following Part II of the present thesis). Moreover, from the ECHR perspective it has also raised doubts. In particular, there is a speculation of what changes may be resulted after the *Opinion 2/13*. Could the so-called *Boshporus*[212] presumption (the rule on the relationship between EU law and the ECHR) which has been developed in the ECHR's jurisprudence be questioned? Recently, on 23 May 2016 the ECtHR delivered its judgment in the case of *Avotiņš v. Latvia*.[213] In this case the ECtHR shows its reflections of how it views the EU law principle of mutual trust.[214] Finally, another issue that might be an obstacle at re-opening the negotiations is the tense relationships to the ECHR Contracting Parties such as Russia[215] and Turkey. Any changes to the accession agreement will have to be negotiated by all 47 of the signatories to the ECHR.

[211]See among others, P. Eeckhout, (2015). Opinion 2/13 on EU accession to the ECHR and judicial dialogue: Autonomy or autarky? *Fordham International Law Journal*, 38, 955-992. Available at: https://ir.lawnet.fordham.edu/ilj/vol38/iss4/2 and C. Krenn, (2015). Autonomy and effectiveness as common concerns: A path to ECHR accession after opinion 2/13. *German Law Journal*, 16 (01), 147-212. Retrieved from: https://www.academia.edu/12365238/Autonomy_and_Effectiveness_as_Common_Concerns_A_Path_to_ECHR_Accession_After_Opinion_2_13_in_German_Law_Journal_2015_and A. Lazowski., and R. Wessel, (2016). When caveats turn into locks: Opinion 2/13 on accession of the European Union to the ECHR. German Law *Journal*, 16 (01), 179-212. Retrieved from: https://www.utwente.nl/en/bms/pa/research/wessel/wessel108.pdf

[212] Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (Application no. 45036/98).

[213] Case of Avotiņš v. Latvia.Application no. 17502/07.

[214] Ø. Johansen.,(2016). EU law and the ECHR: the Bosphorus presumption is still alive and kicking - the case of Avotiņš v. Latvia. *EU law analysis*. Retrieved from: http://eulawanalysis.blogspot.com/2016/05/eu-law-and-echr-bosphorus-presumption.html

[215] It should be noted that in 2015 Russia's Constitutional Court stated that judgements of the ECHR would not be implemented if they contradicted Russia's constitution.

Chapter 3. Evaluating the EU social acquis through judicial protection

3.1 The EU social acquis

Taking into consideration what is mentioned in the previous Chapters, the notion of the 'European Social State' is the outcome of a long and gradual process. As it has already been mentioned the EU social acquis in the early beginning evolved to support the single market. The development of the social policy started as a means of securing market integration and had developed into a method to adopt social policies. [216] First and foremost, the EU social acquis secured via the Treaties. In the TFEU's preamble as the resolve to ensure the "*social progress of their States by common action to eliminate the barriers which divide Europe"*. Moreover, in the TEU's preamble in its reference to "*fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers*" and the promotion of 'social progress', and in the EU Charter of Fundamental Rights[217] that recognizes a wide range of social rights (see Chapter 1 1.2.1). The EU Charter must be read in conjunction with the Treaties. The Charter does not establish any new power or task for the Union.[218]

Article 3 TEU expressed the concept of the EU since it is referred to as "a social market economy". Having as main purposes the full employment and social progress, EU provides that it *"shall combat social exclusion and discrimination and shall promote social justice and protection".* What is more, the majority of these objectives should be furthermore implemented across all EU policies, in accordance with Article 9 TFEU which mentions 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".*[219] The TEU refers that the EU should support the well-being of its citizens,

[216] European Commission. (2016). The EU social acquis. Commission Staff Working Document, 3-17.
[217] S. Garben, C. Kilipatrick., and E. Muir, (2017). Towards a European Pillar of Social Rights: upgrading the EU social acquis. *College of Europe Policy Brief*, 1, 1-7. Retrieved from: https://www.coleurope.eu/research-paper/towards-european-pillar-social-rights-upgrading-eu-social-acquis
[218] A wide range of social rights and principles are laid down in the EU Charter. The EU Charter is binding on the EU institutions, which means that they have to respect and observe it whenever they act in accordance with the powers conferred on them by the Treaties. In addition, the Charter is binding on the Member States when they are implementing EU law, for instance when transposing directives into their national law.
[219] European Commission. (2016). The EU social acquis, ibid.

tackle social exclusion and discrimination, promote social justice and protection, secure equality between men and women, ensure solidarity between generations and protect the rights of children. It is notable that, the EU shall respect these social objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties (Article 5 par.2 TEU). The use of these competences shall comply with the *principles of subsidiarity and proportionality* (Article 5 par.3 and 5 par.4 TEU).[220] Some of these social measures were adopted on the general internal market process (for instance under Article 114 TFEU) but the EU has implemented its social mandate on the basis of Article 153 TFEU of the Social Policy Title X.[221] The aim is to enhance working conditions, ensure social security and social protection, protect workers' health and safety, provide information and consultation of workers, and enable the integration of persons excluded from the labour market. Title X provides the legal basis for the EU to "*to support and complement the activities of the Member States".* Adoption of Directives on several social issues is allowed under Article 153 TFEU. Furthermore, according to Article 155 TFEU[222] allows Social Partner Agreements which can be implemented by a Council directive. It is important to mention these constitutional rights and principles were implemented by directives and given further value by the ECJ's case law. In particular, ECJ strengthened social rights' protection in its significant cases. [223] Finally, as far as fundamental social rights are concerned the initial

[220] Article 5(3) TEU states that: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol and Article 5(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality".*

[221] Consolidated Version of the Treaty on the Functioning of the European Union. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT

[222] Articles 152, 154 and 155 TFEU provide the legal framework for this European-level social dialogue (see Chapter 1.1.4).

[223] Already before the entry into force of the EU Charter, the CJEU attached considerable importance to it when interpreting EU law. See Case C-540/03, Parliament v Council, paragraphs 38 and 58; Case C-432/05, Unibet, paragraph 37; Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union, paragraphs 90 and 91; Case C-275/06, Promusicae, paragraphs 61 to 65; Joined Cases C-402/05 P and C-415/05, P Al Barakaat International Foundation v Council and Commission, paragraph

point of reference in the EU legal order was the Community Charter of the Fundamental Social Rights of Workers, adopted in 1989 by all Member States except the UK. Not legally binding, the 1989 Community Charter was a political instrument and a point of reference for the ECJ. Many of the 1989 Community Charter's rights are now featured in the EU Charter.

As mentioned above, the largest part of the EU social rights forms via secondary legislation. In the 'shape' of directives, most of the social rights obtain a more concrete expression and a more effective implementation. There are two significant fields of social rights that contain several regulations in order to bind the MS. Firstly, is the branch of "*work environment and access to work".* Under Article 153 TFEU the EU has launched directives[224] in a number of areas including:

- Equal treatment in the workplace (e.g Directive 2000/43/EC and Directive 2006/54/EC)
- Reconciling family and professional life (e.g Directive 92/85/EEC)
- Awareness of conditions of employment (e.g Directive 91/533/EEC)
- Equal treatment regardless of type of contract (e.g Directives 1999/70/EC,97/81/EC, 2008/104/EC)
- Limitation of working time (e.g Directive 2003/88/EC)
- Protection of health and safety (e.g Directives 89/391/EEC, 92/29/EEC, 2003/10/EC, 2006/25/EC)
- Posted workers (e.g Directive 2014/67/EU)
- Third country nationals (e.g Directive 2014/36)
- Protection in the event of termination (e.g Directive 92/85/EEC, Directive 2000/78/EC)
- Organisation, information and consultation of workers (e.g Directive 2002/14/EC)
- Prohibition of child labour and protection of young people at work (e.g Directive 94/33/EC)

335; Kücükdeveci and Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke and Eifert, paragraph 45 et seq. See also Case T-177/01 Jégo-Quéré v Commission.

[224] European Commission. (2016). The EU social acquis, ibid.

On the contrary, at the second field of *"social protection",* EU social acquis is quite limited. Although, EU has adopted directives in the area of "security and social protection of workers", [225] failed to tackle "social exclusion"[226] or adopt legislation for 'the modernization of social protection systems.[227] Thus, there exists regulation at areas such the "social security coordination" and "Equal treatment in social security and social integration". In particular, as for the social security coordination, the regulation applies to national legislation on issues such as sickness, maternity and equivalent paternity benefits, old-age pensions, unemployment and family benefits, benefits in respect of accidents at work and occupational diseases.[228] A rather significant directive is *Directive 2011/24/EU* which guarantees citizen's right to receive healthcare services in another EU Member State. Furthermore, as far as the equal treatment is concerned, it is secured by the following directives:[229]

- Directive 79/7/EC on the protection against discrimination in the scope, contributions and benefits of social security schemes
- The Gender Recast Directive ensures respect for the principle of equal treatment for men and women in occupational social security schemes
- The Racial Equality Directive 2000/43/EC on the protection against discrimination based on race or ethnic origin in social protection (including social security and healthcare) as well as access to goods and services, including housing
- Directive 2014/92/EU on Payment Accounts seeks to improve access to low income individuals for basic bank accounts

All In all, the EU has gradually built up a social acquis that, for many years, supported improvement in living conditions and economic and social convergence within the EU.[230] The EU's social acquis, comprised of the EU Charter, Treaty Provisions,

[225] Article 153 par. 1(c).
[226] Article 153 par. 1(j).
[227] Article 153 par. 1(k).
[228] See Regulation (EC) 883/2004 on the coordination of social security systems.
[229] European Commission. (2016). The EU social acquis, ibid.

[230] D. Rinaldi, (2016). A New Start for Social Europe. *Jacques Delors Institute*, 7-113. Retrieved from: http://www.institutdelors.eu/wp-content/uploads/2018/01/newstartsocialeurope-rinaldi-jdi-feb16.pdf

legislation and case law provides a floor of social rights, protecting workers' health and safety, equal treatment and job security. Through a legal framework the EU social acquis could ensure fair remedies, on the one hand for the citizens and on the other hand for the economic circles. EU law is enforceable and more effective than international standards.

Table 6. The legal basis of the EU social acquis

Primary law	Treaty on the European Union	Treaty on the Functioning of the European Union	Charter of Fundamental Rights
Most important Articles	**Article 3:** Promote well-being, social justice and protection, equality between men and women, solidarity between generations and the rights of the child. **Article 5:** pursue these goals under compliance with principles of subsidiarity and proportionality	**Article 4:** EU is granted law making competences for certain fields (under "shared competence") **Article 5:** EU can start different forms of initiatives to adopt social policy legislation (see: OCM) **Article 9:** social "mainstreaming" obligation: align social policies to promotion of high level of employment, social protection and fight against social exclusion.	**Article 5:** prohibition of forced labour **Article 7:** respect for privacy and family live **Article 21:** right not to be discriminated **Article 23:** equality between men and women in all areas

		Article 21: EU has competence to adopt measures concerning social security or social protection **Article 153**: EU "supports and complements the activities of MS" regarding social policy	**Article 31:** the right to fair and just working conditions, maximum working hours, breaks and holidays **Article 34:** entitlement to social security and assistance
Secondary law **Most important topics**	**Work environment and access to work** • Equal treatment in the workplace • Reconciling family and professional life • Awareness of conditions of employment • Equal treatment regardless of type of contract • Limitation of working time • Protection of health and safety • Posted workers • Third country nationals • Protection in the event of termination of employment	**Social Protection** • Social security coordination • Equal treatment in social security and social integration	

	• Organization, information and consultation of workers • The prohibition of child labour and protection of young people at work	

Source: Data adapted by European Commission. (2016). The EU social acquis. Commission Staff Working Document.

3.2 The European Court of Justice as a regulatory aspect at the protection of social rights

The legal status of social rights has been a controversial issue. The conceptual division of rights in three separate categories, civil, political and social has been associated with the notion that the latter held an inferior status. According to traditional approach, social rights require from the State to act positively (status positivus),[231] imposing on the state measures to provide goods or services such as work, housing, healthcare, education, welfare and social security. Considering that the content of social rights is by definition to be open-ended and it is also dependent upon economic growth may explain the fact that it is engaged to continuous balancing actions. Their inevitable dependency upon external factors such as social conflict, economic growth, political and ideological trends weakens their judicial enforcement.[232] In other words, it is not possible for social rights to be fulfilled by the courts in the same way as civil rights (status negativus).[233] Hence, the narrative of social rights as a 'wish list' without substantial consequences and no commitment leads to a weaker form of constitutional protection. It is notable that, during the first era of social rights constitutionalization, they were treated as non-binding principles, setting goals to the government. The Constitution of Weimar (1919) contained a large list of social rights, which, nevertheless, lacked any binding legal content. The Weimar Constitution was a constitution because it included the fundamental political decisions for democracy, such as a republic, a federal structure, a parliamentary representative form of government, and a civil *Rechtsstaat*.[234] In addition, the Weimar Constitution incorporated a set of constitutional provisions[235]including several compromises reflecting diverse political, social and religious convictions.[236] It is true that the provisions of social content are formulated in

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[231] Georg Jellinek identifies four status the passive status (status subjectionis), the negative status (status libertatis), the positive status (status civitatis), and the active status, or status of active citizenship. See G. Jellinek, System der subjektiven öffentlichen Rechte, 2nd edn. (Tubingen 1905) p. 86; see also R. Alexy, (2002). Theory of Constitutional Rights, translated by J. Rivers, Oxford University Press, New York.

[232] X. Contiades, and A. Fotiadou, (2012). Social Rights in the age of Proportionality. *ICON*, 10(3), 600. Retrieved from: http://www.corteidh.or.cr/tablas/r30046.pdf

[233] See among others D. Currie, (1986). Positive and Negative Constitutional Rights. *University of Chicago Law Review*, 864-872. Retrieved from: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5993&context=journal_articles

[234] C. Schmitt, (2005). *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by Schwab, G. University of Chicago Press. Chicago. Google Scholar.

[235] See under the Section "Basic Rights and Obligations of the Germans" (Second Part).

[236] C. Schmitt, (2008). *Constitutional Theory* translated and edited by Seitzer, JeffreyDuke University Press, Durham and London. Google Scholar.

a general and elastic way, therefore in their application they need to be specified. Even in cases where social rights are considered justiciable, the interpreter's quest is to specify their content in order to force the legislator to take social welfare measures. Though, the justicability of social rights has been intensely argued for long, it remains unsettled. The crucial question that arises is the following; '*do social rights have an inviolable minimum core that cannot be limited by the legislator and may not be subjected to any balancing acts?*' The theoretical discourse of the judicial enforcement of social rights[237] has raised some critics. Some scholars, for instance claim in case social rights were put into constitutional texts, courts would be reluctant to do anything with them.[238] The fact that sometimes social rights' judicial intervention is ineffective could actually lead the courts to merely ignore them. The positive dimension of rights is mostly debated regarding social rights such as the rights to education, health, housing, or water. It is worth mentioning the case of the South African Constitutional Court's socio-economic rights rulings. The South African Constitutional Court case law offers a characteristic example of the attempt to establish a minimum core of social rights.[239] Socioeconomic rights protected by the South African Constitution include rights to housing, health care, food, water, social security, and education, among others.[240] The famous *Grootboom* decision,[241] referred to the right of housing. In the Grootboom decision, the Court set out a novel and promising approach to judicial protection of socio-economic rights. The South African Constitutional Court held that "*the political branches in South Africa has violated the Constitution by failing to develop a housing plan that would meet the immediate needs of the poorest people most in need of assistance like the plaintiff*". [242] For the first time in the history of the world, a

[237]See among others M. Langford, 2008). *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law.* Cambridge University Press; V. Gauri., and D. Brinks, (2008). *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge University Press.

[238] See in detail F. Cross, (2001). The error of positive rights. *UCLA Law Review*, 48(4),864-68. Retrieved from: https://researchers.dellmed.utexas.edu/en/publications/the-error-of-positive-rights

[239] See in detail S. Koutnatzis, (2005). Social Rights as a Constitutional Compromise: Lessons from Comparative Experience, *Columbia Journal of Transnational Law*, 44, 74-133. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=878173

[240] S. AFR. CONST. ch. 2, §§ 26(1), 27(1), 29(1) (adopted May 8, 1996).

[241] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000). See also the former case Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

[242] South Africa v. Grootboom, ibid, paras. 93-96.

constitutional court has initiated a process that might well succeed in the endeavor of ensuring that protection without placing courts in an unacceptable managerial role.[243]

To sum up, the major problem concerning social rights is how to delineate their legal content. The legislator appears to be reluctant of social rights, being responsible for their activation and realization. On the contrary, civil rights jurisprudence focuses on blocking the legislator's interference. Civil rights usually create justiciable claims while social rights in most cases ground objective obligation as binding on the government, although these obligations do not correspond to subjective rights. Since, positive rights require the state to actually *act,* makes the issue of their justiciability one of the main objections to recognizing social rights.

The ECJ has developed a rich jurisprudence on the protection of the 'social acquis'. The protection of the social rights has been mainly succeeded by making use of the provisions of the Treaty on the European Union in combination with those against discrimination. The ECJ carried out a substantial amount of work in the field of social protection. The praetorian case-law of ECJ has been formed due to the need of further legislation in this area.[244] Thus, the ECJ adopted in several times an autonomous role which helped the EU social law to adjust and incorporate ECJ's decisions.

In the beginning the ECJ oriented its decisions in giving the status of the 'fundamental rights' to the social rights. In *Van Gend & Loos* case,[245] social rights *"become part of Member States legal heritage"*. In other words, social rights should be included among the "*fundamental rights enshrined in the general principles of Community law and protected by the Court*". According to the ECJ at *Stauder* case[246] these fundamental rights as general principles of EU law are rooted in the national legal cultures and reflect the constitutional traditions of the Member States.

[243] C. Sunstein, (2001). *Social and Economic Rights? Lessons from South Africa*, The Law School The University of Chicago, (John M. Olin Program in Law and Economics Working Paper No. 124.
[244] M. Maduro, (1998). *We the Court: the European court of Justice and the Economic Constitution*, Oxford.
[245] Case 26/62, *Van Gend & Loos* [1963] ECR1.

[246] Case 29/6, *Stauder* [1969].

3.2.1 Positive discrimination; a controversial issue

This theoretical approach seemed to be confirmed in the *Defrenne* case[247] when the ECJ recognized the right to "equal pay for equal work". It is worth mentioning that these rights were also protected in Article 119 EEC Treaty (now Article 157 TFEU). Moreover, the same concept recognized in the *Defrenne III* case[248] when the ECJ held that it "*has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure*" and added in relation to Article 119 that "*there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights*".[249] An example which also illustrates how some decisions influenced the EU law is the *Kalanke* case.[250] In 1997, the Amsterdam Treaty added two paragraphs on legislative procedure and positive measures. Prior to the Amsterdam Treaty the relevant guideline was Article 2(4) 1996 Equal Treatment Directive, which allows '*measures to promote equal opportunity for men and women*'. However, the *Kalanke* case caused implications since the ECJ stated that programmes targeted at women would not be accepted. In brief, the ECJ concluded that laws giving automatic preference to women with the same qualifications as men, and who are applying for identical positions in employment fields in cases that women are under-represented, violate Community law. Nevertheless, in 1997, the ECJ in the *Marschall* case[251] distinguished *Kalanke*, based on the concept that unlike *Kalanke*, the provision in this case contained a savings clause so that women would not enjoy beneficial terms if reasons specific to a male candidate tilted the balance in his favour. Finally, the Amsterdam Treaty subsequently added a new fourth paragraph to ex TEC Article 141, (now Article 157(4) TFEU) and in the *Abrahamsson,*[252] the ECJ determined that Article 141(4) might justify broader affirmative action programmes than those accepted on the basis of the Equal Treatment Directive. The principle of positive discrimination is confirmed by Article 23 par. 2 of the Charter of Fundamental Rights according to which "*the principle of equality shall*

[247] Case 43/75 *Defrenne v Sabena* [1976] ECR 455.
[248] Case 149/77 *Defrenne (No 3)* v. *SABENA* [1978] ECR 1365, 1378.
[249] Conference on Social rights in today's Europe: The role of domestic and European Courts Nicosia, 24 February 2017 Social rights in the case-law of the Court of Justice of the European Union: the opening to the Turin Process Luis Jimena Quesada.
[250] Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.
[251] Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363
[252]Case C-407/98 *Abrahamson* [2000] ECR I-5539.

not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex".

3.2.2 Conflicts among the rights

Fundamental rights and the four fundamental freedoms co-exist in Community law. In many cases the European Court of Justice had to draw a conclusion between two or more controversial rights.[253] Specifically, on the one hand the ECJ had to protect an economic freedom, and on the other hand to defend a social right at the same decision. It is rather interesting to examine whether there is an interference or a conflict between economic freedoms and social rights. This was crucial in the cases of *Schmidberger, Omega*,[254] *Viking Line* and *Laval, Ruffert, Commission v. Luxembourg*. It is in those conflicting situations that one can really observe the relations between these two fundamental interests in the EU. The fact that a fundamental right might impede a fundamental freedom, or vice versa, leads the ECJ to reconcile the two competing values with each other. Hence, the ECJ attempts to handle each case with a different approach. In other words, a 'case to case" perspective is the one that has been followed, so that the competent authorities have a wide margin of discretion. This also can be explained since there are different status and protection types of fundamental rights. What is more, among the Member States the measures of protection are different. It is not a surprising reasoning to allow the Member State a margin of discretion.[255]

a) The right to take collective action and the right to strike

In the *Schmidberger*[256] case the ECJ was called to strike a balance between the freedom of expression and assembly and the free movement of goods in accordance with Article 28 TEU. The *Schmidberger* was the first case where the respect and protection of a

[253] G. De Búrca, (2002*). Convergence and divergence in European public law: the case of human rights*, in Beaumont, Lyons and Walker, Convergence and divergence in European public law, Hart Publishing.
[254] In Omega case the two fundamental interests that the ECJ called to balance were on the one hand the right to human dignity and on the other hand the freedom to provide services. See in more detail Case C-36/02 *Omega* [2004] ECR I09609.
[255] H. Westermark, (2008). The Balance between Fundamental Freedoms and Fundamental Rights in the European Community. Master Thesis. Retrieved from: http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1562978&fileOId=1566135
[256] Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

fundamental right were directly relied upon by a Member State as a justification for a restriction of a free movement provision. *Schmidberger*, the international transport undertaking in Germany brought proceedings against Austria claiming that the authorities failed to guarantee the freedom of movement of goods in accordance with the EC Treaty. It claimed that authorities failed to promote the freedom of movement on the grounds that it gave the permission to close the Brenner motorway by the environmental protesters.[257] The outcome was that the demonstration caused a temporary closure of the Brenner motorway lasting 28 hours. Therefore, Schmidberger claimed damages in respect of standstill periods, loss of earnings and additional related expenses.[258] Austria concluded that the claim should be rejected because the decision to allow the demonstration was taken following a detailed examination of the specific facts, namely that information had been given of the closure of the Brenner motorway and that the demonstration did not result in substantial traffic jams or other incidents. Austria considered that the freedom of provisions was permitted since the obstacles were neither severe nor permanent. Assessment of the interest involved should lean in favour of the freedoms of expression and assembly since fundamental rights are inviolable in a democratic society.[259] More importantly, the national Court of Austria made a reference to the ECJ asking in essence whether free movement of goods requires a state to keep major transit routes open, and whether that obligation takes precedence over the protection of fundamental rights such as the freedom of expression and assembly guaranteed by the national constitution and Article 10 and 11 of the ECHR.[260] In short, the ECJ held that the demonstration constituted a restriction of free movement of goods but that the fact that the restriction was justifiable in the light of the authorities' concerns for the protection of the demonstrators' fundamental freedom of expression and assembly. The specific goal of the demonstrators was not considered as important in the dispute at hand. In light of its preceding fundamental right jurisprudence the ECJ held that the protection of fundamental rights is a legitimate interest, which in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as

[257] The Transitforum Austria Tirol, an environmental protection association, gave notice to the Austrian authorities of an intention to hold a demonstration against the pollution caused by the heavy transport in the Tirol Region.
[258] Schmidberger, para 15.
[259] Ibid, para 17.
[260] Ibid, paras 20-25.

the free movement of goods.[261] The right to expression and assembly are, however, not absolute but must be viewed in relation to its social purpose. A restriction of these rights is thus possible, provided that the restriction corresponds to objectives of general interest and does not constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.[262] In this case, the ECJ finally weighed on the exercise of two fundamental rights, namely freedom of expression and the right to peaceful assembly as enshrined in the ECHR. This decision confirms the view that there is no hierarchy between fundamental freedoms and fundamental rights. In order to balance these two concepts, the ECJ, when in conflict, carries out checks on the basis of the criteria based on the principle of proportionality.[263] In this judgment, the ECJ itself carried out a proportionality test to finally balance the freedom of assembly by considering that the restriction of the freedom of movement of goods was appropriate, necessary and not disproportionate to the realization of the freedoms of expression and assembly as enshrined in the ECHR.

In the *Viking Line*[264] and the *Laval*[265] the ECJ had to balance fundamental freedoms with fundamental social rights. These two landmark cases show that the exquisite matter of how to harmonize social policy objectives with economic freedoms have become more apparent than ever in the EU. Furthermore, the Union's extensive enlargement in 2004 has created tensions on the internal market. One reason that caused this was that most new Member States had a labour market with considerate lower wages than many of the old Member States. Hence, this tension is the primary aspect in *Viking Line* and *Laval.*[266]

In the *Viking Lin*e, the issue focused on the Finnish ferry company which wishes to re-flag the loss-making Rosella[267] to Estonia so it would be able to employ an Estonian crew and thereby paying lower salaries. Finnish Seamen's Union (FSU) is a Finnish Marine Trade Union, which includes Rosella crew members and is a member of the International Transport Workers' federation (ITF) based in London. One of the

[261] Ibid, para 70.
[262] Ibid, para 80.
[263] See in more detail H. Westermark., ibid.
[264] Case 438-05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line* [2007] ECR I-10779.
[265] Case 341-*05 Laval and Partneri* [2007] ECR I-11767.
[266] A.C.L. Davies. (2008). One Step Forward, Tow Steps Back? The Viking and Laval Cases in the ECJ, *Industrial Law Journal*, 37, pp.126- 148.
[267] A Finnished-flagged ferry operating between Tallin and Helsinki.

main policies of the latter is the fight against 'flags of convenience' with boycotts and other solidarity actions among workers. The Viking Line announced its proposal to transfer the ferry, to FSU which clearly expressed its opposition and asked ITF to call on all its trade unions not to negotiate with Viking Line and its subsidiary, Viking Eestie. Following the expiration of the collective labor agreement with the Rosella crew, FSU not having the obligation to respect labor law, as imposed by Finnish law, announced a strike demanding that Viking Line on the one hand increase Rosella's crew and, on the other hand, ship's re-registration plan. Viking Line agreed to increase the crew by eight members but refused to give up the re-flagging plan of Rossella.[268] The FSU, relying on the need to protect Finnish jobs, laid down conditions for the renewal of the crew agreement and announced its intention to declare a strike demanding both an increase in the number of Rosella crew members and a collective agreement providing that, in the event of a transfer, the Viking Line would continue to abide by Finnish labor law and would not dismiss any crew member. Viking Line appealed to the Helsinki District Court to ban the strike mobilized by the FSU. Viking Line, in the state of the above pressures, settled the dispute, accepted the claims of the trade union, resigned from the legal proceedings and pledged not to start the regaining process before February 28, 2005.

In the light of the EU enlargement in 2004, Estonia became an EU Member State and decided to bring the issue before the English Court of Appeal, since the ITF is based in London. Viking Line asked for an order to stop the ITF and the FSU from taking any action to prevent the re-flagging of the Rosella since it claimed that this would be a restriction on the freedom of movement. An English Court of Appeal posed several questions to the ECJ for a preliminary ruling concerning the application of the Treaty rules on freedom of establishment and whether the actions of the FSU and ITF constituted a restriction on freedom of movement. The ECJ upheld Viking Line's request, with the view that collective action and threats of collective action by ITF and FSU imposed restrictions on freedom of establishment which were contrary to ex TEC Article 43 (now TFEU A. 49) and, in the alternative, constituted excessive restrictions on the freedom of movement of workers and the freedom to provide services within the

[268] S. Feenstra, (2017). *How Can the Viking/ Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?* Cambridge University Press, 307-308.

meaning of ex TEC Articles 39 and 49. [269] ITF and FSU appealed, inter alia, claiming that the right of trade unions to take collective action to maintain jobs is a fundamental right recognized by ex TEC Article 136. By its first question, the national court asks whether a collective action taken by a trade union or an association of trade unions against a private undertaking in order to compel it to conclude a collective agreement which would prevent the undertaking concerned from making use of the freedom of establishment falls within the scope of ex TEC Article 43.[270] The ECJ first of all pointed out that it is settled case-law that ex TEC Articles 39, 43 and 49 on freedom of movement, namely freedom of movement for workers, right of establishment and freedom to provide services, governs not only the action of public authorities, but extends to other rules which regulate collectively the tenant and the self-employed, as well as the provision of services.

To review, for the first time the ECJ had to examine the right to take collective action. Finally, it concluded that ex TEC Article 43 did not preclude trade unions from taking collective action which had the effect of limiting the right of establishment of an undertaking that intended to relocate to another Member State in order to provide protection to the workers due to that. According to the ECJ the actions taken by the unions constituted a restriction of the freedom of establishment. It was left to the national court to determine because the ECJ pointed out that the aim could not be considered legitimate since it was not accurate if the occupations or conditions of employment were under serious threat. [271] In the case of the *Viking Line*, the Court left it to the national Court to apply the proportionality test.[272]

The ECJ handed the Viking Line on the 11 of December 2007 and the *Laval* only one week later. Both were Grand Chamber decisions. As far as Laval's real facts are concerned, it is worth mentioning that Laval is a Latvian company active in the construction sector, which has outsourced to its subsidiary, L&P Baltic Bygg AB, hiring workers from Latvia to carry out construction work in Sweden, particularly the construction of school premises. The Laval and Baltic companies and the Swedish trade union workers in the construction sector have begun negotiations to adjust the salaries

[269] Viking Line, para 23.
[270] Ibid, para 32.
[271] Ibid, para 84.
[272] The ECJ did not reach the third step of the proportionality test, *the proportionality stricto sensu.*

of posted workers and Laval's membership in the relevant building construction agreement. Likewise, the negotiations did not reach an agreement. After that, Laval signed collective agreements with the Latvian trade union organization of construction workers, which accounted for 65% of the posted workers. The Swedish trade union then launched a collective action in the form of the exclusion of the Laval sites in Sweden. The strike was also attended by the Swedish electrotechnical syndicate, in solidarity with the strikers, which prevented the Swedish companies belonging to the employers' organization of electricians from providing services to Laval. Laval asked the Swedish police to help them intervene, but those who claimed that collective action was lawful, according to national law, did not intervene. After the cessation of work, for a certain period of time, Baltic was declared bankrupt.[273]

The Swedish court has referred questions to the Court of Justice for a preliminary ruling. Among other things, the Swedish court asked whether ex TEC Article 12, which prohibits all discrimination based on nationality and ex TEC Article 49, on freedom to provide services, and Directive 96/71 on the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union from attempting to compel a service provider established in another Member State to initiate wage bargaining by means of collective action in the form of site exclusion to be paid to detainees and to enter into a collective agreement which provides for more favorable conditions than those resulting from the relevant legislative provisions or relating to matters not covered by Article 3 of Directive 96/71.[274] By interpreting the relevant provisions of the Directive on posted workers in conjunction with those in force in Sweden, the ECJ concluded that a Member State in which the minimum wage thresholds are not defined in one of the ways laid down in Article 3 of Directive 69/71, is not entitled to impose on undertakings established in other Member States in the context of a transnational provision of services negotiations on a case-by-case basis at the place of work. The ECJ then assessed the collective action undertaken by the trade unions in terms of Article 49 EC. The ECJ stressed that the right to take collective action is recognized by various international texts, such as the European Social Charter and ILO Convention 87, but also by Community texts such as the Community Charter of the Fundamental Social Rights of Workers and the Charter of

[273] Laval, paras 27- 38.
[274] Ibid, para 53.

Fundamental Rights of the European Union.[275] The Court of Justice explicitly recognized the right to take collective action as a fundamental right, an integral part of the general principles of Community law, the observance of which is ensured by the Court of Justice, and invoked, inter alia, Article 28 of the Charter of Fundamental Rights of the European Union, according to which, that right is protected in accordance with Union law and national laws and practices. At the same time, it is stressed that the exercise of this right should be subject to certain restrictions and referred to earlier case-law in *Schmidberger* and *Omega* according to which the exercise of fundamental rights such as that of the assembly must be compatible with the requirements of the protection of fundamental rights protected by the Treaty and comply with the principle of proportionality.[276] Moreover, the Court has held that such collective actions constitute a restriction on the freedom to provide services since they make it less attractive or even more difficult for those undertakings to carry out construction works in Sweden.[277]

The *Viking* and *Laval* judgments were followed by the *Rüffert*[278] and the *Commission v Luxembourg*.[279] These cases highlighted the possible tension between the economic and social dimension of the EU and raised several controversial issues.

In the *Rüffert* case the Province of Lower Saxony instructed the Objekt und Bauregie to carry out construction works for the construction of a penitentiary. The contract signed included the obligation to pay workers at the building site at least the remuneration in force at the place where the work was carried out, pursuant to an imperative order by the Land of Lower Saxony on the application of the collective agreement *"Building and public works"*. Objekt und Bauregie has appointed a Polish-based company as a subcontractor, which allegedly paid employees a lower wage than that provided for, in the collective agreement. Hence, the Province of Lower Saxony denounced the works contract, it had entered into with the contractor, due to the fact that the company has breached its contractual obligation to comply with the collective agreement "*Building and Public Works*".[280] The ECJ examined whether the minimum wage threshold imposed by the Lower Saxony legislation on public procurement

[275] Ibid, para 90.
[276] Laval, ibid, para 93.
[277] Ibid, para 99.
[278] Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.
[279] Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.
[280] Rüffert, paras 10-11.

complies with the provisions of Directive 96/71 on posted workers.[281] The ECJ ruled that such a measure does not set the wage limit according to the provisions of Directive 96/71. Therefore, this salary limit cannot be considered as a minimum wage threshold or a more favorable employment and working conditions for workers.[282] The ECJ indicated that Member States could not adopt legislation restricting public works contracts to undertakings which agreed to pay rates for employees set by a collective agreement. The free movement of services would be violated under Article 56 TFEU by such an action. The ECJ, in order to make that decision, was based on and relied on the interpretation of Article 49 of the EC Treaty and Directive 96/71, which was interpreted narrowly. It is clear from the wording of its considerations whether the terms of a more favorable social content or conditions which facilitate the freedom to provide services depend on the law of the host State but always on the Directive 96/71 in Article 3 (1), first subparagraph, points (a) to (g). As noted in its ruling, the ECJ does not seem to be prepared to overcome the restrictions set out in Article 3 of the Directive by favoring the freedom to provide services, making it more attractive to the detriment of social rights.

In the *Commission v Luxembourg*[283] the ECJ reaffirmed, inter alia, that whenever a Member State does not apply or does not respect the principle of the freedom to provide services it must justify the reasons of its decision. In other words, any derogation of the principle must be examined by the purpose of necessity and proportionality of the restrictive measure. For these reasons the ECJ emphasized that the Member State must provide the necessary evidence on which it bases its view, so that the ECJ can judge whether the restrictive measures are necessary.[284] It is claimed that the 'infamous quarter' potentially weakens rights of trade union and workers[285] because according to the ECJ a Member State could not determine which national public policy provisions were so imperative that they should apply to national and foreign service providers equally, to counter such competition.

[281] Rüffert, para 23.
[282] Ibid, paras 30-32.
[283] Case C-319/06 Commission v Luxembourg [2008] ECR I-4323.
[284] Commission v Luxembourg, para 52.
[285] J. Nugent, (2018). Research Handbook on EU Law and Human Rights. Edited by Sionaidh Douglas-Scott and Nicholas Hatzis. Cheltenham, UK; Northampton, MA; Edward Elgar Publishing, 2013. Pp. v, 576. ISBN: 978-1-78254-639-9. US$ 283.50. International Journal of Legal Information, 46(1), 64-65. doi:10.1017/jli.2018.6

Under the Charter (Article 28) the Court confirmed that jurisprudence: in *Commission v Germany*[286] case, the Court stated that "*the terms of collective agreements are not excluded from the scope of the provisions on freedom of persons*" (par. 42). Furthermore, in the Case AX v ECB the European Union Civil Service Tribunal [287](F-73/13) the court stated on the binding force of the right of collective action as follows: "*at the very most, Article 6(2) of the European Social Charter, signed in Turin on 18 October 1961, 'encourages, but does not make mandatory, the promotion of "machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements"' and that, as for Article 28 of the Charter and Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 'although they enshrine the right to freedom of association, including the right for workers to form trade unions to protect their economic and social interests, their provisions do not include any obligation to introduce a collective bargaining procedure or to confer on those trade unions any joint decision-making power for the purpose of developing conditions of employment for workers' (judgment in Heath v ECB, F-121/10, EU:F:2011:174, paragraph 121)".*[288]

b. The right to social security and social assistance

In the *Decker*[289] and the *Kohll*[290] cases the ECJ ruled that the free movement of goods and the freedom to provide services respectively preclude national rules which makes the reimbursement of medical expenses incurred in another Member State subject to the prior approval of the competent insurance fund. More specifically, a Luxembourg national, Decker, bought in Belgium a pair of ophthalmic prescription glasses established in Luxembourg, without having first sought and obtained approval from the competent Luxembourg social security institution, which refused to reimburse him for the cost of these glasses.[291] Likewise, Mr Kohll, also a Luxembourg national, applied for authorization to obtain the costs he would be subject to in Germany for orthodontic treatment in which his minor daughter would be subjected. The Luxembourg Social

[286] Case C-271-08 Commission v Germany [2010].
[287] Case F-73/13 AX v ECB the European Union Civil Service Tribunal.
[288] AX v ECB, par. 252.
[289] Case C-120/95 *Decker v Caisse de maladie des employés* privés [1997] ECR I-3395.
[290] Case C-158/96, *Kohll v. Union des Caisses de Maladie* [1998] ECR I-1931;
[291] Decker, par. 2.

Security Agency refused to grant this approval. [292] As regards the application of the fundamental principle of free movement in the field of social security, the ECJ considered that Member States' social security measures, which may have an impact on the marketing of medicinal products and indirectly affect their import capabilities, as well as the particular nature of certain services, are subject to the principle of freedom of movement.[293]

The ECJ has pointed out that national legislation which makes reimbursement of these costs subject to the approval of the national social security institution discourages policyholders from acquiring medicinal products or requesting services in other Member States and therefore constitutes a restriction on the free movement of goods and the free services.[294] Furthermore, the ECJ has pointed out that purely economic purposes do not justify obstacles to the principles of free movement of goods and freedom to provide services. However, the risk of serious damage to the financial equilibrium of the social security system is an overriding reason in the public interest capable of justifying such an obstacle.[295] Also, under ex TEC Articles 56, 66, 323 the freedom to provide services may also be restricted for reasons of public health.[296] However, the burden of proof for such reasons lies with the Member States, which in the specific cases, at the discretion of the ECJ, have not been able to prove it.[297]

The same concept was followed by the ECJ in the *Geraets Smits and Peerbooms*.[298] The ECJ considered that there was justification for the protection of public health on the grounds that hospital care should be capable of being designed so as to ensure, within the Member State concerned, adequate and continuous access to high-quality hospital care and, on the other, controlling costs and avoiding any waste of economic, technical and human resources which concerned the reimbursement of costs by an insurance institution for hospital treatment in another Member State.[299] Unlike the Luxembourg insurance rules, which were reviewed in the *Decker* and the *Kohll*, the Dutch rules do not confer upon the insured a right to be reimbursed for the medical bills which they themselves have been paid to providers. Insured persons are

[292] Kohll, par. 2.
[293] Decker, par. 24 and Kohll, par.20.
[294] Decker, paras.35,36 and Kohll, par. 34,35.
[295] Decker, par. 39 and Kohll, par. 41.
[296] Kohll, par. 25.
[297] Decker, paras 44,45 and Kohll, par. 52.
[298] Case C-157/99, *Geraets Smits and Peerbooms* [2001] ECR I-5473.
[299] Ibid, paras. 77-80.

entitled to obtain medical benefits in kind and, apart from possible own contributions, free of charge. Providers are directly paid by sickness funds.[300] In *the Geraets-Smits and Peerbooms* Advocate General Ruiz-Jarabo Colomer concluded that the two applicants in the cases could not be regarded as recipients of services.[301] Since Mrs Geraets-Smits and Mr Peerbooms had relied on article 49 EC in order to have the costs of treatment paid by their sickness fund, the Advocate General considered whether the legal relationship of insured persons with their sickness funds could be defined in terms of the provision of services in the sense of article 50. He concluded that no such classification could be made.[302]

In the *Commission v. Spain* [303] the ECJ has in fact been called, as in previous cases concerning patient mobility, to weigh on the one hand the basic EU fundamental freedom, of 'freedom to provide services' and on the other hand the autonomy of each Member State to define the legislative framework of the national health system in accordance with Articles 153 TFEU and 168 TFEU. Although the EU has only a complementary and coordinating responsibility in the health sector, the ECJ has in the past not hesitated to limit the discretion of the Member States, prioritizing the protection of human health to a higher value. In this context, the ECJ distinguishes between cases of 'emergency care' and 'planned treatment' of a patient in a Member State other than that in which he is insured.[304] In the light of this, the ECJ considered that the provisions of national Spanish legislation did not infringe Community law, in particular ex TEC Article 49. That decision is the first of the ECJ concerning the provision of medical services within the EU and was adopted in the context of an infringement procedure against a Member State rather than a question from a national court. It is clear from the case-law that the right of migrant workers to benefits in kind on out-of-hospital treatment on the basis of the 'freedom to provide services' and the 'free movement of

[300] See in detail A. Van de Mei, (2002). Cross-Border Access to Health Care within the European Union: Some Reflections on Geraets-Smits and Peerbooms and Vanbraekel. *Maastrich Journal of European and Comparative Law*, 9(2), doi:10.1177/1023263X0200900204

[301] See V. Hatzopoulos, (2002). Killing national health and insurance systems but healing patients? The European market for health care services after the judgements of the ECJ in *Vanbraekel* and *Peerbooms*', *Common Market Law Review*, 683–729; and, V. Hatzopoulos, (2005). Health law and policy, the impact of the EU', in G. de Bïrca (ed.), *EU law and the welfare state: in search of solidarity* (Oxford: Oxford University Press, European University Institute, 123–60.

[302] Ibid.

[303] Case C-463/00, *Commission v. Spain* [2003] ECR I-4581.

[304] Case C-463/00, ibid, para. 58.

goods' is much wider than that laid down in Article 22 of Regulation 1408/71, which provides for the right to treatment in another Member State, subject to the approval of the competent State. This is because the fundamental freedoms make it necessary to cover the costs of sickness benefits in kind provided to others by the competent Member State, irrespective of the prior authorization, contrary to Article 22§1 of Regulation 1408/71.

Elseways, in the case of hospital care, prior authorization by the competent insurer may be required in order to ensure the viability and financial equilibrium of national health systems as an overriding reason in the public interest. This is because each Member State should be able to pursue rational planning in hospital care. In every but national insurance schemes can not deny the authorization of care in another Member State where the necessary treatment can not be provided by the health system concerned within a reasonable time.

On the other hand, in its decision *Kamberaj*[305] the Court held that any derogation according to Article 11(4) of Directive 2003/109 provided for equal social assistance and social protection between European citizens and foreign nationals long-term residence must be interpreted strictly (par. 86-87).

c. The right to education

In short, the *Baumbast*[306] case involves questions on the direct effect of the right of residence under ex TEC Article 18(1).[307] Since the adoption of the European Community, the freedom of free movements of workers has never been adjusted with a view to responding to social and economic developments.[308]

As far as the facts are concerned, Mr. Baumbast was a German national who, after having pursued an economic activity in the UK, was employed by German companies outside the Community. [309]The UK authorities refused to renew Mr. Baumbast's residence permit as he did not qualify anymore in the UK as a migrant worker and did

[305] Case C-571/10 Kamberaj. [2010].
[306] Case C-413/99 *Baumbast and R* v. *Secretary of State for Home Department* [2002] ECR I-0000.
[307] Article 21 TFEU.
[308] See points 19–27 of Advocate General Geelhoed's opinion.
[309] EU Case Law, Baumast Case. Available at: http://eucaselaw.blogspot.com/2013/05/baumbast-case.html

not satisfy the conditions for a general right of residence. Still his family lived in the UK and his children went to school there. In the *Baumbast and R vs. the Secretary of State for the Home Department*, the European Court of Justice dealt with the case to answer essentially whether children of an EU citizen who settled in a Member State when their parents exercised residence rights as migrant workers in that Member State have the right to reside there in order to continue to undergo general training. Mrs. Baumbast had a right to reside under Article 12 of Regulation No. 1612/68.[310] The main question was whether persons admitted into the UK as members of the family of an EC migrant worker continue to enjoy the protection of Community law when he or she is no longer a migrant worker within the meaning of Article 39. Mrs. R was a United State citizen, who came to the United Kingdom in 1990 when her French husband was working there. In 1992 the marriage was dissolved and Mrs. R was awarded primary care of the couple's two children. The children maintained regular contact with their father, who still resides in the United Kingdom and shares responsibility with the mother for their upbringing from both an emotional and financial point of view. In 1995 an application was made on behalf of Mrs. R and the two children for indefinite leave to remain. The Secretary of State granted this leave to the children but not to Mrs. R. Then, Mrs. R asserted that the refusal to grant indefinite leave to remain would interfere with the children's rights under Community law to be educated and to reside in the United Kingdom as well as the right to family life, but the Secretary of State found that the family circumstances were not so unusual as to justify the grant of leave to remain. In his view, the children were young enough to adapt in the United States if they had accompanied their mother there.

The ECJ made a distinction between the *R case* and the *Baumbast* case. In the former case, the situation was plain. The children's father still enjoys the status of Community worker and thus the ECJ had no difficulty in concluding that the children, as children of a Community worker, are entitled to continue to reside and to pursue education in the United Kingdom under Articles 104 and 12 of Regulation No.

[310] Article 12 reads: "*The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions*".

1612/68.[311] The ECJ concluded that Mr. Baumbast can indeed claim a residence right under ex TEC Article 18(1). In its judgment in *Baumbast*, ECJ thus made clear that the right of residence under article 18 (1) EC Treaty was conferred directly on every citizen of the Union by virtue of a clear and precise provision of the EC Treaty. In *Baumbast and R* cases the ECJ affirms this reasoning.[312] It also specifies that children of former workers who wish to complete their education where they have settled and can also claim a residence right under Article 12 and that all rights guaranteed by this provision cannot be made conditional upon the requirement that children are unable to continue their education in the State of origin. In *Baumbast and R* cases the ECJ established the rule that all children who have commenced an educational course in another Member State when one of their parents was working there retain the status of child of a worker in order to complete that course regardless of the fact that their parents may have moved elsewhere or the possibility of having diplomas or qualifications recognized in the State in question.[313]

It is obvious that the EU from the beginning was designed to be a purely economic union, so that there was no need for a bill of rights. However, the ECJ has based its fundamental rights protection on the common constitutional traditions of the Member States and on international treaties. The ECHR is also considered of particular importance and the ECJ often refers to the case law of the ECHR. There are also the rights in the EU Charter, as well as the general principles of law that the EU must respect.

As held above, through its interpretation, the ECJ, each time, by a case-by case analysis, participates in the law-making process. The ECJ does not only interpret the '*letter'*, but also the '*spirit of the law*'. There are cases in which we have a conflict of two opposing interests.[314] On the one hand, economic freedom and, on the other, social

[311] Baumbast, para. 50, 59.
[312] Ibid. para. 63.
[313] See in detail A. Var de Mei, (2003). Residence and the Evolving Notion of European Union Citizenship Comments on, Baumbast and R v. Secretary of State for Home Department, 17 September 2002 (Case C-413/99). *European Journal of Migration and Law* 5, 419–433. Retrieved from: https://heinonline.org/HOL/LandingPage?handle=hein.journals/ejml5&div=30&id=&page=

[314] V. Skouris, (2006). Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance, 17 *European Business Law Review*, 17(2), 225–239. Retrieved from: https://www.kluwerlawonline.com/abstract.php?area=Journals&id=EULR2006015

rights. It is up to the ECJ to find a balance between fundamental economic freedoms and social rights. Nevertheless, it is always moving within its role, as defined by the Treaty. In the balancing process between social rights and fundamental freedoms, the ECJ attempted to answer by using the general principal of proportionality in a flexible manner. It is worth to mention that the ECJ does not apply the third step of the proportionality test *(stricto sensu).* For instance, in Viking Line and Laval as it is mentioned above, the ECJ left it to the national Court to reach the test.[315] The ECJ has not tried to set up a hierarchy but has examined whether a potential restriction of these interests could be justified. The European Court of Justice has generally held that although workers' rights exist and are in place, but under the principle of proportionality, their claim cannot be enough to limit the exercise of economic freedoms, or even make it less attractive. In some cases, such as the *Schmidberger* case the ECJ recognized the right to collective action. While in others such as *Viking* and *Laval* the right to take collective action was at stake.

The ECJ has always had as major goal to secure the four fundamental freedoms since they are the very core of the internal market. The restriction of a *fundamental freedom* should be considered legitimate if at its exercising was appropriate, necessary and not disproportionate to the realization of the interests protected by the fundamental right. Conversely, the restriction of a *fundamental right* when exercised within the framework of the exercise of a fundamental freedom must be regarded as legitimate and appropriate, necessary and not disproportionate to the realization of the interests protected by that fundamental freedom.

[315] C. Barnard, (2013). The protection of fundamental rights in Europe after Lisbon: A question of conflicts of interests in S de Vries, U Bernitz and S Weatherill (eds) *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford: Hart Publishing 2013) 51.

Interim conclusions

Unravelling the ambivalent purpose of the social state under the market: Is social state a burden, a safety net or a solution?

It has been asserted that social rights impose a heavy burden on both governments and citizens, as well. There is also a perception that social rights do not have equal status with civil and political rights which tended to be privileged over social rights. Moreover, 'opponents' of social rights claim that they do not serve fundamental interests and that social rights are seen by governments and courts as aspirational goals. Studying the birth of the social state, it is perceived that the goal was to act as a response to market failures. The social state is acting *ex constitutio* within the framework of the private economy. The gradual 'establishment' of the social state was not an 'antagonist' to the free market but a corrective intervention within the current socio-economic system. Therefore, the social state aims to address the deficits and weaknesses of the free market economy. This priority to the economy over the social state is also clear, as mentioned above, in the social policy of the European Union. At the early years, the absence of a bill of fundamental rights caused a crucial democratic deficit. Because of this institutional weakness, the EU has been severely criticized. However, the main objective of the European integration was to create a single market without internal borders. Thus, the role of the social state seems to mirror Union's priorities.

The theories of 'government failure' led in 1970 to the perception that the remedial operation of the intervening state was responsible for the economic crisis of the 1970s. Hence, neo-liberal critique has attempted to highlight the inadequacies of state intervention, by blaming the overload of the political system and the crisis of democratic institutions. A typical example of the undervalue of the social state at that time has been Margaret Thatcher's decision to abolish state interventionism in an attempt to reduce inflation. However, the side loss of this initiative was the tripling of unemployment. Obviously, the plans for economic growth did not include a healthy social state. It is prevalent that the neo-liberal perception considered that social rights pose a limit to individual freedom, undermine equal opportunities and erode healthy competitiveness. There is a perception that the *minimal state* is the one that can be morally justified. Robert Nozick, in *Anarchy, State and Utopia* (1974) claims that "the

expansionist state can no longer be morally justified" because it "violates the rights of people".[316] Nozick believed that individuals are extremely dissimilar, so there is no community that could be viewed as ideal for all people because there is a wide range of perceptions about utopia. For this reason, he argued that only when individuals are free to judge what they want in a *laissez-faire* framework will radically overcome the differential expectations. In such a context, the less the state intervenes, the better for individuals. The same assertion was supported by Friedrick Hayek, who was firmly opposed to the government's legitimate intervention to enforce general rules which protect "life, freedom, and property". According to Hayek, governments are depressing when they intervene in the ability of people themselves to define their goals.[317]

Differently, there is an opposite theory which describes how important is the role of the social state. John Maynard Keynes expressed the benefits of social prosperity. The basic concept of his theory was that the pursuit of wealth should be an instrument and not an end. The purpose is to live "wisely, pleasantly and well". [318] Keynes attempted to incorporate economic theory into the political field by making social policy a flexible network. [319] The perception that the economy and social policy interact with each other has also created the insight that the well-being of society requires both "members" to be healthy. When the social state was in devastation the 1930s, Keynes in *The General Theory of Employment, Interest and Money* (1936) was able to discern that the "curse of unemployment is the root of the problem of economic recession."

In other words, the benefits of the social state should not arise from the surplus of growth, as any degradation still holds back the economy. On the contrary, the benefits of the social state should be a prerequisite for creating the conditions for economic growth. It is therefore the State which is responsible for ensuring the well-being of all citizens and for developing the infrastructures necessary for the functioning of the economic system. That is, a state – 'investor' rather than a 'consumer – state'. It is worth noting that Keynes believed in people's rational capabilities and their compatibility with democratic processes. He believed that achieving "well-being" could

[316] By a minimal state Nozick means a state that functions essentially as a "night watchman," with powers limited to those necessary to protect citizens against violence, theft, and fraud. See R. Nozick. (1974), Anarchy, State and Utopia, New York: Basic Books.
[317] D. Held, (2006). *Models of Democracy,* 3rd ed. Stanford University Press.
[318] R. Skidelsky, (2010). *Keynes: The Return of the Master*. London: Allen Lane.
[319] Ibid.

come through the path of justice.

It is apparent that state benefits may be the prerequisite to bring about economic growth and, on the other hand, the bloom of the economy may facilitate societal cohesion. Enhancing freedom through positive actions may provide social goods. In 'European culture' the political community expresses a value system which defines, and legitimizes that community and continues to do so. Yet, the recognition of values should not be descriptive, without content and application. In this context, the question is if the functioning of the social state should be re-examined so as to investigate whether it is possible to transform the economy and state relationship within the liberal system. Could the purpose of the social state be seen from a different perspective, in connection with the healthy functioning of the economic system? A different perspective, where social state would not be restricted in a subsidiary role, limited to supporting the weak in order to absorb social conflicts. A new European 'social contract' might be needed in order to highlight social state as an indispensable pillar of economic progress and to establish an equal cooperation between economy and the state, with the pillars of democracy and justice.

PART II. POST-CRISIS

The ‘masked’ equality of liberalism and the need of resolving the constitutional imbalances between the market and the social state

PART II. POST-CRISIS

The 'masked' equality of liberalism and the need of resolving the constitutional imbalances between the market and the social state

The European Union experienced its deepest crisis since it came into existence. The shock of the economic-financial crisis of the 2007-2008 has seriously threatened EU' cornerstones. The economy and political turmoil caused at once a simplex of crisis, including the social crisis which has affected the quality of life of the EU citizens. The consequences of the euro crisis, the implementation of the severe austerity measures (Chapter 4), and the repercussions at the already jeopardized European Social State (Chapter 5) led to discussions and actions for the ambivalent Future of Europe via promotion of tools that would enhance EU's social dimension (Chapter 6). In the question of how effective is to answer at harsh austerity measures by soft-law instruments, the easy one might be 'not much'. However, the issue needs a more thoroughly analysis. The internal market project, from which the EU has traditionally drawn impetus in time of crisis has steadily being losing force. The Social State called to operate as a safety net but its devastation was so apparent that its 'wrecking' echoed in the entity of the EU, raising questions about the significance of social protection and the need of resolving the imbalances between the economy and the Social State.

Although the good intention, it is quite difficult to solve the social state vulnerability by implementing non-binding law tools, such as the European Pillar of Social Rights (Chapter 6.1). It seems that in order to promote Social Europe, EU institutions shall identify the real obstacles to admit the need of 'constitutionalizing' social rights and to adopt equal justiciability with individual and political rights as well. It is crucial to reform the core of the European Social State and to reaffirm that the latter is a fundamental component of European market economy.

Chapter 4. Single market failures

4.1 The outbreak of the 2007-2008 economic-financial crisis

A decade after the 2007-2008 financial crisis, various interpretations have been proposed to explain what provoked the major collapse of several interconnected economies around the globe. It is essential to point out that even though the primary focus of the crisis was the financial system, the Great Recession emerged from the real economy, affecting the production field as well as several economies worldwide. In other words, the financial shock had long roots, but it wasn't until September 2008 that its consequences became transmittable. Unquestionably, the crash of the 'housing bubble' in the USA was the starting point for the devastation. Within a few weeks in September 2008, Lehman Brothers, one of the world's biggest financial institutions, went bankrupt. The Government (President George W. Bush) declared that there would be no bail-out; "*Lehmans, one of the oldest, richest, most powerful investment banks in the world, was not too big to fail"*. What followed was a combination of speculative activity in the financial markets, focusing particularly on property transactions – especially in the USA and Western Europe. The fact that the deep-rooted crisis of 2007-08 began in the market for derivatives of US subprime mortgages and has taken on international dimensions made it the worst recession since the 1930s. In a short time, the crisis affected several economies worldwide. Hence, the credit was transferred to other financial systems across the world. The cracks created in the banking and financial system of the states did not leave the real sector of the economy inviolable, the malfunctioning of the banking system was the outcome of the financial crisis (as it happened in European South Member States). It is observed that banking and financial crisis are the expressions of the same economic crisis that are fed by each other, thus strengthening each other. Indeed, what is taking place in the banking sector, have an immediate impact in the real economy.

In Europe the crisis converted into a sovereign debt crisis. In the beginning the crisis became apparent to the debt-driven economies and export-driven economies. Nevertheless, the export-driven economies recovered easier as they were not suffered from a debt overhang. In the USA the crisis was counted by counter-cyclical fiscal

policy[320] and by aggressive monetary policy in the form of quantitative easing.[321] Economic policy in Europe was less anti-cyclical. Therefore, while many countries adopted stimulus packages in the first year of the crisis, fiscal policy transformed to austerity more quickly. Europe is a special case study, given the features of the European structure consisting of the European Union and the Eurozone. The divergent modes of development created various implications. Those economies that were closely related with US financial markets, such as the UK, Ireland, the Benelux countries and to a lesser extent Germany and France, were affected directly by the financial crisis in the USA. The heavily export-oriented economies such as Germany experienced a severe downturn at their export revenues in 2008 and 2009.[322] This sharp decline in the German exports negatively affected Central and Eastern European countries (mainly the Czech Republic, Slovakia, Slovenia, and Hungary) that were closely related to the German export industry.[323] The destabilization of the financial sector in especially the Anglo-Saxon countries, and later in the Benelux countries, led to credit crisis while immediately affected private consumption and investment.[324] The European banking system turned out vulnerable as well. Hence, the Governments are pushed to deliver huge amounts of liquidity and to nationalize large credit institutions in order to avoid the risk of total collapse. More specifically, the impact of the financial crisis was that many banks were unable to absorb the damages caused by it so that the need for public intervention was made imperative in order to support even to rescue part or the entire banking system (Ireland case). This intervention had a short-term effect. The actual result of the intervention begun at the end of 2009 with the outbreak of the financial crisis, precisely because the state had intervened to rescue. Therefore, the budgets of these states were burdened, and financial imbalances were created, some of which were transformed into a sovereign debt crisis in the Eurozone and mainly in the periphery constituted the final phase of the global economy that made its appearance in the USA. The sovereign debt crisis has again revived the banking crisis, as it radically reduced the value of the heavily indebted Member States' bonds and increased the likelihood of

[320] Fiscal policy was moderate in the sense that given the extent of the recession it was far from sufficient to ensure full employment. However, by historical standards it was indeed substantial. The budget deficit (in the USA) peaked at 10% of GDP and stayed above 7% for four years.
[321] The increase in the balance sheet of the US Federal Reserve corresponds to some 15% of GDP since 2008.
[322] J. Jager, (2015). *Asymmetric Crisis in Europe and Possible Futures*. Routledge, New York.
[323] Ibid, p.89.
[324] Ibid.

future debt restricting or even payment default which was already burdened by the precarious Eurozone credit institutions. The current financial crisis has been the cause of a further destabilizing of the European banking system, the consequences of which cannot be estimated accurately. Notwithstanding that the banks which faced a solvency and liquidity problem were those that had in their portfolio the public debt of the heavily indebted Member States of the Eurozone (Greece, Ireland, Portugal and less Spain and Italy). The attempts to tackle the debt crisis led to a long-term recession of the economies of the MS that were unable to manage the already accumulated debts. In the face of these efforts, these heavily indebted economies have led to a new borrowing of large sum of money which in the event if bankruptcy will have a priority of payment against the older ones. In addition, the recession, which was increased due to the austerity measures, had reduced overall demand, thereby, worsening the investment crisis. The fact that the Credit Rating Agencies (CRAs) began to detect the fiscal imbalances of the euro area and consequently devaluated the debt of the MS of the periphery created bigger problems. Thus, the MS of the EU, mainly of the Eurozone, under the pressure of the markets and the need to cope with the sovereign debt crisis have established mechanisms to rescue those MS that are faced with liquidity problems or even debt sustainability – the Case of Greece. This is since countries such as Greece, Ireland or Portugal were not able to borrow from the financial markets at reasonable interest rates. So, the European Union has been forced to intervene by a mechanism for crisis resolution and financial protection has been created.

4.2 The European crisis. Structural weaknesses of the market project

The concept of Economic Union is defined in paragraph 1 of Article 119 TFEU, which states that "*For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition*". It is clearly deducted from the above definition of the economic union the asymmetry between economic and monetary union, since the economic union among the Member States does not exist. Specifically, while there is a single management of monetary policy at the Union level and therefore there is a Monetary Union, there is not yet an economic union but only economic co-ordination. So even the states that have adopted the common currency have not lost their autonomy in the pursuit of their fiscal policy. However, the principle of budgetary autonomy which governs the action of the Member States with regard to the implementation of fiscal policy is limited by the principle of coordination of the finances of the Member States (Article 121 TFEU), by the European solidarity measures (Article 122 TFEU) and budgetary discipline (Article 126 TFEU). While in times of normality and financial stability this asymmetry did not pose substantial problems, in times of crisis the divergence brought a series of obstacles to the operation of the Eurozone. The absence of rescue mechanisms of the Eurozone Member States in times of crisis is a consequence of the lack of a single economic policy. The institutional architecture of the EU and the EMU was designed to facilitate financial transactions and was therefore not properly prepared to deal with a so-called crisis.[325] More specifically, its architecture was designed to ensure price stability in the Eurozone by securing financial stability. As a result, Europe proved to be inadequate at crisis management, since it lacks regulatory and supervisory mechanisms. Thus, the crisis has found the EU with a heavy institutional system of economic governance. The euro and its institutions

[325] P. De Grauwe, (2011a). The gov-ernance of a fragile Eurozone, economic policy, CEPS working documents. Available at: https://www.ceps.eu/publications/governance-fragile-Eurozone; P. De Grauwe, (2011b). The ECB as a Lender of Last Resort. VoxEU. Available at: https://voxeu.org/?q%C2%BCnode%2F6884=

undoubtedly constitute a major financial support system in the EU and operate in a single framework for financial co-ordination in the form of the Stability and Growth Pact (SGP), which stipulates that the budget deficit of the MS must not exceed 3% GDP. Initially, the policy theory of EMU was based on the principle that the ECB's empowerment on price stability and an equally strong commitment to fiscal consolidation by member state governments, enforced by the Stability and Growth Pact, would raise competitive pressures among the economies of the Member States. The global economic crisis has brought the operational and structural shortcomings of the Eurozone and more specifically, the governance crisis at the heart of the European project. The debt crisis in the Eurozone is due to many causes. However, the systemic asymmetry in the EMU is the main cause of the current crisis.[326] Since the euro area's common monetary policy has strengthened the disparities of national economies, the gap widened really quickly in time of recession. Shortly, after the implementation of the euro, as a single currency non-euro money funds were transferred to Europe with the highest average interest rates compared to the US equivalents. The banks begun an extraordinary credit expansion mainly in the lending of real estate and consumer credit. In addition, due to the low risk posed by the placement of government bonds, banks have dynamically entered the government bond market. The absence of a banking union meant that each MS was responsible for guaranteeing bank deposits on its country. Therefore, the banking crisis when it started gave birth to the debt crisis of the MS as they were forced to support the national bank system and the deposits. In other words, the MS were 'obliged' to charge the banking debts in order to support them. Although the liberal economic system imposes the deregulation of the market, there is a series of interventions to put an end to the systemic crisis which, although at first started as a financial one, has evolved into sovereign debt. As a result, these governments saw their debt levels increase dramatically.

At the same time many countries mainly the Southern, including Greece have suffered a low interest rate shock, which while facilitating their access to the markets, did not secure the debt financing. Hence, trade deficits, as reflected in the current account balance have widened between southern and northern MS. In combination with

[326] C. Kopf, (2011). Restoring financial stability in the euro area, CEPS Papers 4292, *Centre for European Policy Studies*, 237, 2-20. Retrieved from: https://www.ceps.eu/publications/restoring-financial-stability-euro-area

loose budgetary surveillance and lack or real co-ordination of the economies of the MS, the problem worsened further. In particular, according to the Treaties the budgetary surveillance was very loose. Many MS have tried to conceal the amount of their public debt and their deficits. Nevertheless, the first public disclosures of real budgetary figures started with Greece and Ireland. As a consequence, a new aspect arose; the 'fear of unreliability'. The countries became insolvent because investors feared insolvency. It is about the phenomenon of 'self-fulfilling solvency crisis'.[327]

The economic and sovereign debt crisis threatening the stability of the Eurozone and the EU economy more generally had led to the adoption of harsh austerity measures in the affected countries. The new economic reality required amendment of the Stability and Growth Pact as the circumstances did not allow MS to comply with the provision of the Pact. A single economic policy that would be the precondition for further deepening of a political union has not yet been achieved. The lack of an economic union and consequently of a political one does not create a federal government and does not allow the 'solution of a central budget'. What is more, the theory of the Optimal Currency Region (OCR)[328] seems to be revived. Many have argued that the EU did not actually meet the criteria for an OCA at the time the euro was adopted and attribute the Eurozone's economic difficulties in part to continued failure to do so. EMU has managed to facilitate trade and reduce trade exchange rate costs but has not managed to harmonize the prices of goods and wages in all Member States. Furthermore, there is a difference in the living standards of the populations of its MS. There is, of course, an improvement in the free movement of capital, but the low labour mobility within the boundaries of the Union leads to losing economic stability and questioning its effectiveness as a European Optimal Currency Region.

[327] See in detail, P. De Grauwe, and Y. Ji, (2013). Self-fulfilling crises in the Eurozone: An empirical test. *Journal of International Money and Finance*, 34, 15–36. doi: 10.1016/j.jimonfin.2012.11.003 and M. Obstfeld, (1986). Rational and self-fulfilling balance-of-payments crises. *American Economic Review*, 76 (1), 72–81. Retrieved from: https://econpapers.repec.org/article/aeaaecrev/v_3a76_3ay_3a1986_3ai_3a1_3ap_3a72-81.htm

[328] R. Mundell, (1961). A Theory of Optimum Currency Areas. *The American Economic Review*, 51(4), 657-665. Retrieved from: http://www.jstor.org/stable/1812792

4.3 New Economic governance as a 'solution'

"Finally, the crisis has shown the need to strengthen (the Economic and Monetary Union's) ability to take rapid executive decisions to improve crisis management in bad times and economic policymaking in good times"[329]

It is argued that the euro was an economic project, and not simply a political one. Monetary Union in Europe started in the early 1970s after the collapse of the Bretton Woods system.[330] In short, the EMU offered its Member States a huge degree of freedom vis-à-vis the rest of the world, as well as towards the international markets and the international multilateral organizations. For a lengthy period of time the EMU was able to prevent strong external shocks. However, the EMU had also profound social and economic implications for Europe that eventually resulted in a deep crisis. In 2010, after the crisis had emerged fully, the so-called Troika consisting of the Commission, the ECB and the Monetary Fund (IMF) formulated adjustment programmes based on austerity and comprising of two main elements: fiscal adjustment and 'structural reforms'. The programmes reflected the German belief that 'austerity is the only solution'[331] and were to be imposed on all counties requesting financial support when access to international capital markets ceased or was blocked *de facto* by very high interest rates. [332]

- *Economic coordination-principles (Article 121 TFEU)*

It is essential to refer that the MS agreed in the Treaty of Maastricht that they would 'regard their economic policies as a matter of common concern and shall

[329] H. Rompuy, (2012) *Towards a Genuine Economical Monetary Union*. Available at: https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.
[330] The Bretton Woods system fixed the US dollar as the dominant form of world money in the post-war period. The US dollar is a form of credit money which acted as world money while being converted into gold at a fixed rate.
[331] As Wolfgang Scauble, the German Finance Minister, declared to the *Financial Times* on 5 September 2011.
[332] What is meant by economic governance? It combines the philosophy and architecture of economic policy-making with the institutions, machinery and practices that shape the evolution of the economy.

coordinate them within the Council' (Article 121 para.1). Nevertheless, the Council can only publish recommendations. In other words, the Council cannot do any more; its options end here.

- *Proceedings and sanctions regarding excessive deficits (Article 126 TFEU)*

The proceedings regulated by Article 126 TFEU achieved fame through the so-called 'Maastricht Criteria'. According to this article, the MS are obliged to avoid excessive deficits. Significant for evaluation are two reference values: the government debt and government deficit as a percentage of GDP (60 per cent and 3 per cent). Article 126 contains a multi-staged procedure whose steps are built on and depend on one another. To be able to justify 'hard sanctions', which can be imposed by the Council in the excessive deficits procedure (in contrast to procedure for economic coordination A.121 TFEU) and in order to give the MS the time and opportunity to reduce their excessive deficits, all procedural steps must be passed, before the Council can finally decide about administering sanctions.

- *The Stability and Growth Pact*

In order to further develop the procedure for economic coordination and the excessive deficit procedure, the Stability and Growth Pact was adopted in 1997. The Regulation 'on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies', also denoting the preventive component in the pact, was decreed on the basis of A. 121 par. 6 TFEU, which authorizes the Council to determine the 'details' of proceedings.

Although the EU has a number of instruments for the co-ordination of economic policy the crisis has shown that they have not been used to the full and that there are gaps in the current governance system. There is a broad political agreement that this has to change and that the EU needs to be equipped with a broader and more effective set of policy instruments to ensure its future prosperity and standards of living. Following these developments, the EU is presently on a crossroads, with each road having its own logic and consequences. The first aims to restore financial stability by sacrificing entire

national economies and states on the altar of the financial markets. It leads to deprivation and suffering of the populations, without providing a way out of the crisis, while at the same time it threatens to devour democracy and destroy European integration. The second road requires, among others, a cancellation of a large part of national debts, the socialisation of the banking and financial sector, the redistribution of income, the fight against corruption and a reconstruction of Europe's real economies according to ecological and social standards. The answer came in a wide range of measures resulting in an integrated system of coordination and surveillance of EU economic policies.

- *Tools for Stronger EU Economic Governance*

The New Economic Governance has been set up in three stages. In Autumn 2011, the so-called Six-pack[333] go into effect, a package of five regulations and a directive. In May 2013, the Two-pack, consisting of two regulations follow, and in 2014 the next step is planned: the 'contracts for competitiveness'. The rules are applied in the context of the European Semester,[334] an annual cycle of coordination and surveillance of the EU's economic policies.

Three of the six legal acts of the Six-pack are aimed at tightening the Stability and Growth Pact. With regulation 1175/2011[335], the preventive component of the SGP is tightened, especially by the following reforms:

i. If the debt level of a Member State is higher than 60 per cent of GDP, the annual improvement of the cyclically adjusted budget balance must be at least 0.5 per cent of GDP

[333] The "Six Pack" strengthened the Stability and Growth Pact and also introduced a new macroeconomic surveillance tool: the macroeconomic imbalance procedure.
[334] The European Semester is the six-month cycle of economic policy coordination in the European Union, starting in November last year and ending in June / July. The European Semester, introduced in 2010, ensures that Member States discuss their economic and budgetary plans with their EU partners at specific times in the first part of the year, so that national action could be accordingly taken in the second part of the year, notably with the adoption of the budgets for the subsequent year.
[335] Regulation (EU) 1175/2011, 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

ii. The Regulation introduces a rule to limit spending growth-the annual expenditure growth must not exceed the 'reference medium-term rate of the potential GDP growth'

iii. In resolving whether the concerned MS has failed to take remedial measures, the Commission has received upgraded support from the 'introduction' of a Reverse Majority Voting. Thus, the resolution 'shall be deemed to be adopted by Council unless it decides, by simple majority, to reject the recommendation within 10 days of its adoption by the Commission'

The corrective component of the SGP is tightening in particular by means of the Regulation 1175/2011, so as in the future the development of the government debt will have the same importance as that of the budget deficit. This was achieved by inserting a new sanction that more closely defines, just what is to be understood by sufficient regressiveness of the level of government debt: it exists when the difference from the reference value (now 60 per cent) has decreased in the past three years 'on an annual average by one twentieth' (Article 1a Reg. 1467/97 as amended by Reg. 1175/2011). The Regulation determines a sanction system for the preventive and corrective components of the SGP, but it is valid 'only' for those MS which are within the Eurozone (A. 1 Reg. 1175/2011). As regards the preventive arm, the MS will be obliged to deposit an interest-bearing security of 0.2 per cent of GDP, when the decision has been made that it has failed to undertake appropriate measures against a considerable deviation from the adjustment path.

It is claimed that the new instrument of the SGP from a legal and democratic perspective passed without the necessary legal competence. The 'introduction' of a Reverse Majority Voting which strengthens the European executive (European Commission) is illegal. According to Article 121 only the Council is granted the possibility to direct a recommendation to the MS. Article 121 TFEU neither provides for the legal act of a decision, nor calls on the Commission to adopt such a decision, which consequently receives its validity through inactivity of the Council as provided by Reverse Majority Voting.

- *Article 136 TFEU*

In its concept for the deepening of the EMU, the Commission explains that Article 136 TFEU forms a suitable basis for the 'contacts of competitiveness'.[336] Article 136 empowers the Council to enact measures for the euro area to:

i. 'strengthen the coordination and surveillance of…budgetary discipline'
ii. To 'set out macroeconomic policy guidelines for the Eurozone MS, while ensuring that they are compatible with those adopted for the whole of the EU' (Article 136 para.1 TFEU)

Based on the intergovernmental treaty signed by its Member States of the euro area on 2 February 2012 an intergovernmental organization is being set under the name 'European Stability Mechanism'. It is a permanent mechanism crisis resolution for the euro area countries that came to replace the EFSF.[337] It has a total subscribed capital of € 704.8 billion with a paid up a capital of € 80.5 billion and a capped capital of €624.3 million, its lending capacity is € 500 billion, including EFSM stability support pendulums. Its shareholders are the 19 Member States of the euro area and Chief Executive Officer Klaus Regling. On 17 December 2010, the European Council recognized the need and agreed to establish a permanent stability mechanism. To this end, on 25 March 2011, the European Council has adopted the Decision 2011/199 / EU25, which amends Article 136 of the TFEU and a paragraph[338] providing for it, is added establishing a stability mechanism. On 9 December 2011 the Heads of States or governments of the Member States whose currency is the euro have decided to move forward towards a stronger Economic Union with the introduction of the Treaty on Stability, Coordination and Governance in Economic and Monetary Union (TSCG).[339]

[336] COM (2012) 777, 26.
[337] The European Financial Stability Facility (EFSF) which was created as a temporary crisis resolution mechanism by the euro area member states in June 2010, providing financial assistance to Ireland, Portugal and Greece; and the European Financial Stabilisation Mechanism (EFSM) is an emergency funding programme reliant on funds raised on financial markets and guaranteed by the European Commission using the EU budget as collateral. It is supervised by the Commission and aims at preserving financial stability in Europe by providing financial assistance to member states of the EU in economic difficulty.
[338] See Article 1 para. 3: "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".
[339] All EU Member States except the UK, the Czech Republic and Croatia have now signed this Treaty.

Therefore, it is acknowledged and agreed that the financial assistance under new ESM programmes will provide that, starting from 1 March 2013, the ratification of the TSCG by the interested member of the ESM. The Treaty provides for all euro area Member States to become members of the ESM with full rights and obligations, as is the case for the Contracting Parties. ESM will provide financial loans such as the IMF. Indeed, ESM loans will be granted a status preferential creditor as those of the IMF, with the preferential regime an IMF creditor to take precedence over this ESM.

So far ESM has provided financial support to Spain, Cyprus and Greece. Regarding Spain in July 2012, it was adopted financial aid of up to € 100 billion. The programme was designed to cover a shortage of funds in a number of Spanish banks. However, the Spanish government did not disburse the full amount but € 39.5 billion in December of 2012 and € 1.8 billion in February 2013. These funds were provided to Fondo de Restructuración Ordenado Bancaria (FROB), the recapitalization fund banks of the Spanish Government and then channeled to the financial institutions involved. Financial assistance for Spain was accompanied by a reform programme on governance, on supervision and regulation of the financial sector. The programme expired on 31 December 2013.

On June 25, 2012, the Cypriot Government submitted a request for support stability to the Eurogroup President. Eventually the economic programme adjustment agreed in May 2013 and concerns the imbalances in the Cypriot financial sector. It included shrinkage of the country's financial sector, fiscal consolidation, structural reforms and privatizations. The agreement on the programme macroeconomic adjustment paved the way for the members of the euro area to make the decision for a package of financial assistance to Cyprus amounting to up to € 10 billion. Of this amount ESM has allocated € 8,968,000,000 and the International Monetary Fund (IMF) of around € 1 billion. The programme expires on March 31st of 2016. Finally, the third financial programme agreed in the framework of the ESM is the one which concerns Greece. The Greek government submitted a request for stability support from the ESM, in the form of a loan. The Greek authorities and the institutions reached a staff-level agreement on the Memorandum of Understanding for the new programme and on

August 19, 2015 the ESM board of governors approved the MoU.[340] On the same date the board of governors also approved the loan agreement. It was enough € 86 billion and had a three-year maturity date of August 20th2018.[341] The total amount of funding from ESM depended on IMF participation and implementation of the memorandum from Greece to the middle of 2018. The first installment was € 26 billion and paid on the 19th August 2015. This money was disbursed gradually and used by Greek government for debt servicing, recapitalization banking sector, offsetting debts and financing its budget. A basic requirement for the Greek government was to implement a series of radical economic reforms for which it has committed itself. These reforms are included in a relevant Memorandum of Understanding, which included the following objectives: restoration of fiscal sustainability, safeguarding financial stability, stimulating its growth, competitiveness and investment and its public administration reformation.

All in all, EMU countries are ill-prepared for 'stormy weather'. The economic and sovereign debt crisis threatening the stability of the Eurozone and the EU economy more generally has led to the adoption of harsh austerity measures in the affected countries. The Commission, through the European Stability Mechanism and its siblings, coordinates the financial support provided by Euro countries and the International Monetary Fund in the form of economic adjustment programmes, requiring reforms to address economic imbalances, specified in Memorandums of Understanding. Such Memoranda have been signed under the European Stability Mechanism, the European Financial Stability Facility and earlier financial assistance agreements, with Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Romania and Spain. Furthermore, the crisis has given momentum to the so-called European Semester, in which the Council, upon Commission proposal, adopts country specific recommendations as part of the coordination of Member States' economic and employment policy. The Semester brings together within a single annual policy coordination cycle a wide range of EU governance instruments with different legal bases and sanctioning authority, from the Stability and Growth Pact, the

[340] European Council. Council of the European Union. Timeline: the third financial assistance programme for Greece. Retrieved from: https://www.consilium.europa.eu/en/policies/financial-assistance-Eurozone-members/greece-programme/timeline/

[341] The Country is no longer reliant on ongoing external rescue loans for the first time since 2010.

Macroeconomic Imbalances Procedure, and the Fiscal Treaty to the Europe 2020 Strategy and the Integrated Economic and Employment Policy Guidelines. There have been highly detailed country specific recommendations concerning a range of labour market and social standards in a great number of Member States. While some of these recommendations encourage Member States to increase social inclusion and worker protection, many others entail the opposite.[342]

[342]S. Garben, (2017). The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union. *European Constitutional Law Review*, No. 13 p.23–61.

Chapter 5. The social impact of the harsh austerity measures

5.1 The decay of the social state

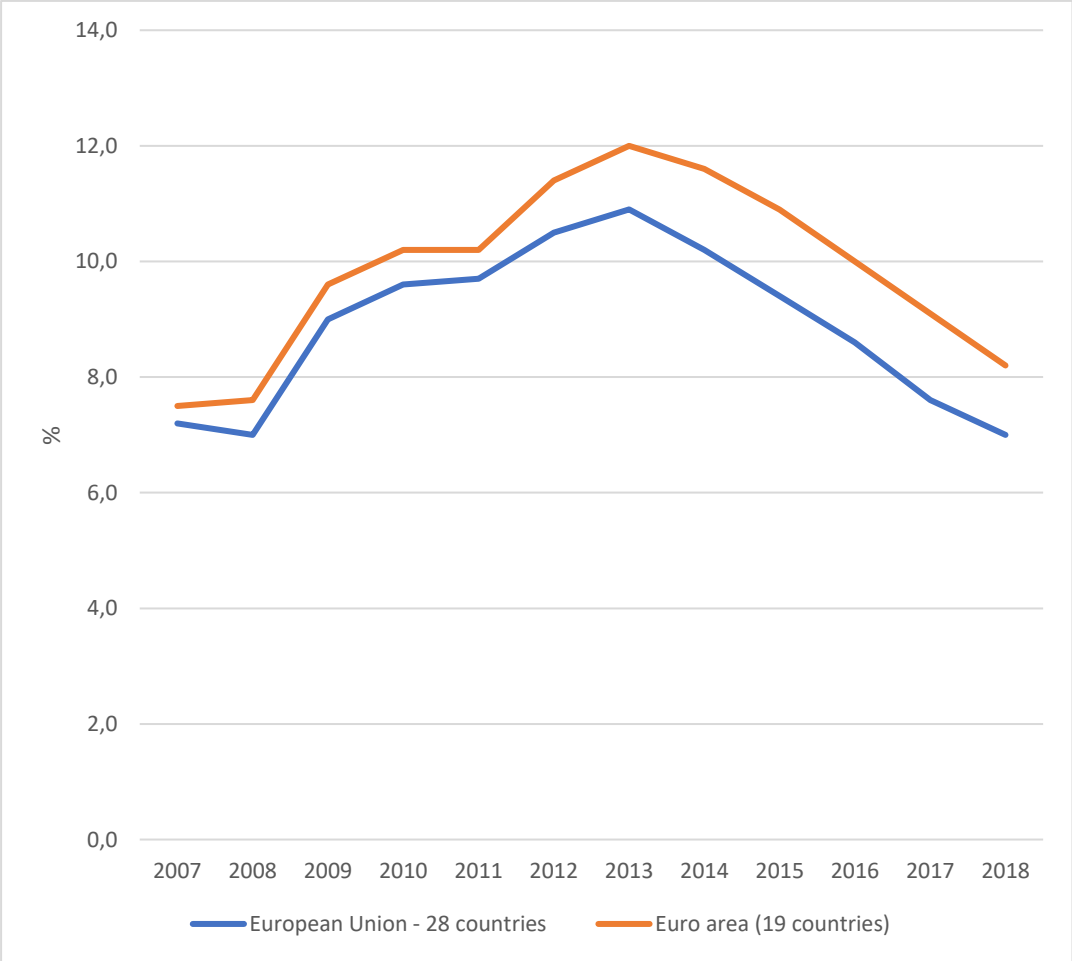
There is a growing sense that the social state has become under intense scrutiny as a result of austerity measures. Pressures on public finances, and the notion that social spending imposes on the 'productive' parts of economies, cultivate the conviction that the European social state is unsustainable and in need of reform. The change that has been occurred at the nature of the European economies posed new challenges to the social state. They had to adapt to new social risks, resulting from the new patterns of work and employment. The fact that the fiscal response to the 'Great Recession' was mainly based on tax cuts to stimulate the economy and on spending cuts to achieve fiscal consolidation[343] has resulted into the significant undervalued of the social state in all countries of the EU, especially in the Nordic ones. The patterns of response follow recent paths of institutional social state change. These new paths include the development of employment at the margins, which re-enforces patterns of labour market dualization, toughening access to unemployment and other benefits, as well as curtailing public expenditure in the areas of health care, pensions and education.[344]

The unemployment issue (see Figure 4) was the first severe outcome that shook the European 'edifice'. By 2009/2010, the average unemployment rate in the EU-28 stood at 9 per cent. The unemployment rate is an important measure of a country or region's economic health, and despite unemployment levels in the European Union falling slightly from a peak in early 2013, they remain high, especially in comparison to what the rates were before the worldwide recession started in 2008. This confirms the continuing stagnation in European markets, which hits young job seekers particularly hard as they struggle to compete against older, more experienced workers for a job, suffering under jobless rates twice as high as general unemployment.

[343] N. Bermeo, and J. Pontusson, (2012). *Coping with Crisis: Government Reactions to the Great Recession. Russel Sage Foundation*. New York.
[344] G. Bonoli, and D. Natali, (2012). The Politics of the New Welfare State. Oxford University Press.; P. Emmenegger et al, (2012). The Age of Dualization. Oxford University Press; A. Hemerijck, (2012). Changing Welfare States. Oxford University Press.

More specifically, according to Eurostat, when the crisis begun in 2008 the unemployment rate in EU-28 was at 7 per cent. Two years later, the unemployment level rose up taking the rate up to 9.6 (see Figure 4). The decline of unemployment in 2013 was a deceptive sign of an end of the crisis and of a stable improvement in labour market conditions in the EU-28. In fact, since 2011 and until 2013 unemployment steadily and markedly increased corresponding to a record rate of 10,9 %. Since then the rate has started to decrease, reaching 7 % at the end of 2018.

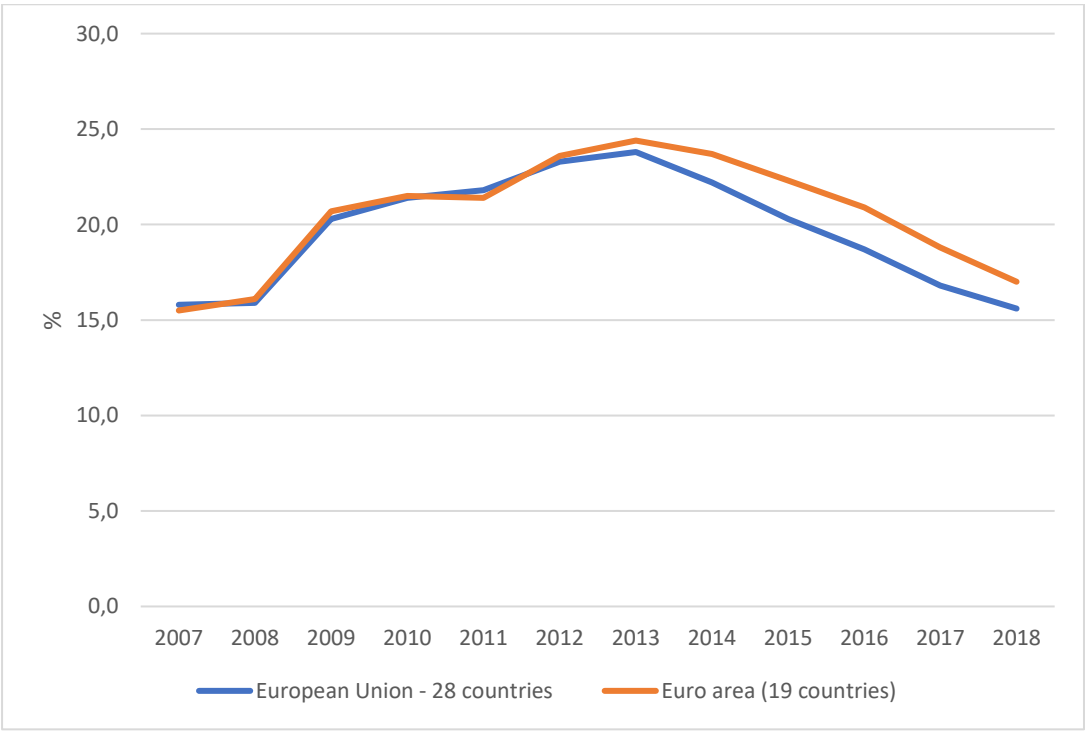
Figure 4. Unemployment rate (%) 2007-2018



Source: Eurostat, 2019.

Furthermore, the economic crisis severely hit the young. Youth unemployment rates, which are generally much higher, even double or more, than unemployment rates for all ages (see Figure 5). As for the rate for the total population, the youth unemployment rate in the EU-28 sharply declined between 2005 and 2008, reaching its minimum value (15.1 % in 2008). After 2008, the youth unemployment rate has taken an upward trend peaking in 23.8 % in 2013, before receding to 15.6 % at the end of 2018. The EU-28 youth unemployment rate was systematically higher than in the euro area (EA) between 2000 and mid-2007. Since then and until the third quarter 2010 these two rates were very close. Afterwards the indicator moved more sharply in the EA-19 than in the EU-28, first downwards until mid-2011, then upwards until the end of 2012. In 2012 the EA-19 youth unemployment rate overtook the EU-28 rate, and the gap increased until the end of the year. The gap became even larger in the second part of 2013 and during 2014 and 2015, when the rate for the euro area went down less than the rate for the EU-28. The gap remained at relatively high level (15.6) during 2018.

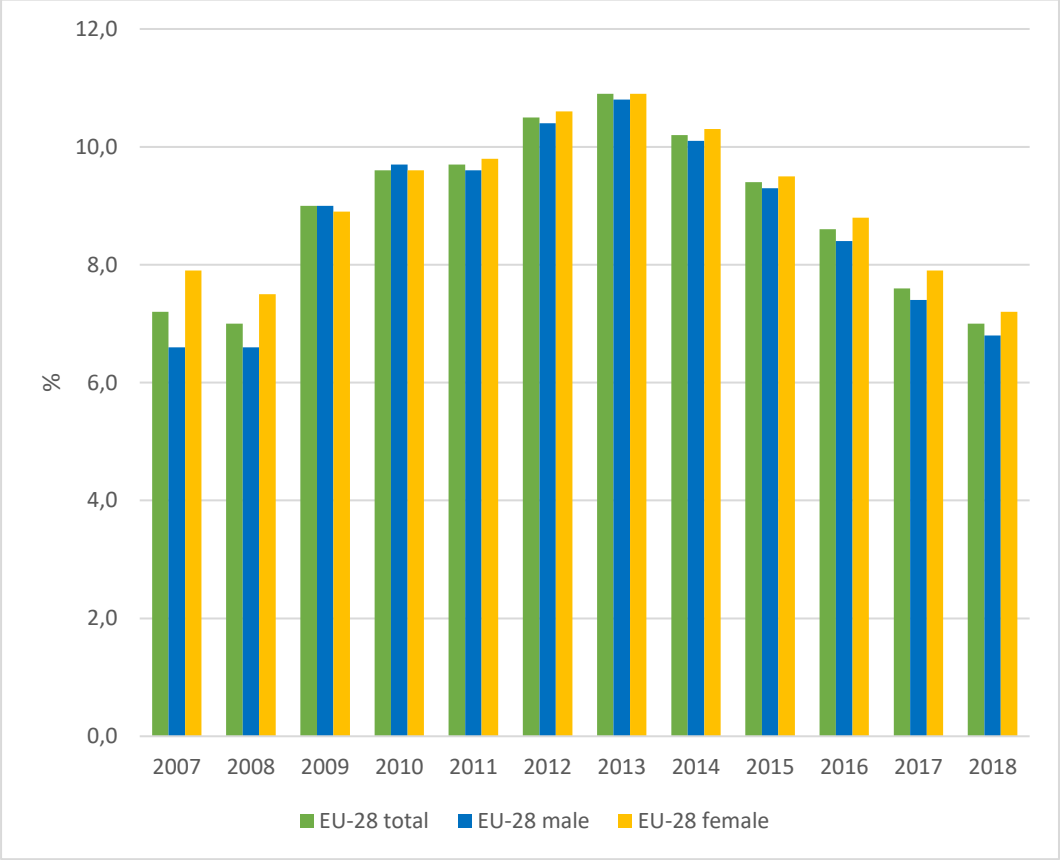
Figure 5. Youth unemployment (%) 2007-2018



Source: Eurostat, 2019.

Closing the gender gap was one of the most important goals of the European Union. Promoting gender equality was an opportunity to develop the social protection, as mentioned in Part I, Chapter 1 and Chapter 3 of the present thesis. This aim was rather difficult to be succeeded in the time of recession. In general, women have been more affected by unemployment than men. In 2008, when they were at their lowest levels of 6.6 % and 7.5 % respectively, the male and female unemployment rates in the EU-28 converged, and in 2009 the male unemployment rate was higher (see Figure 6). The decline of the men's rate during 2010 and the first half of 2011 and the corresponding stability in the women's rate over the same period brought the male rate below the female one once again. Since then the two rates have risen at the same pace until mid-2013, when they reached their highest value of 10.8 % for men and 10.9 % for women. In 2013 both the male and the female rates began to decline and reached respectively 6.8% and 7.2% at the end of 2018.

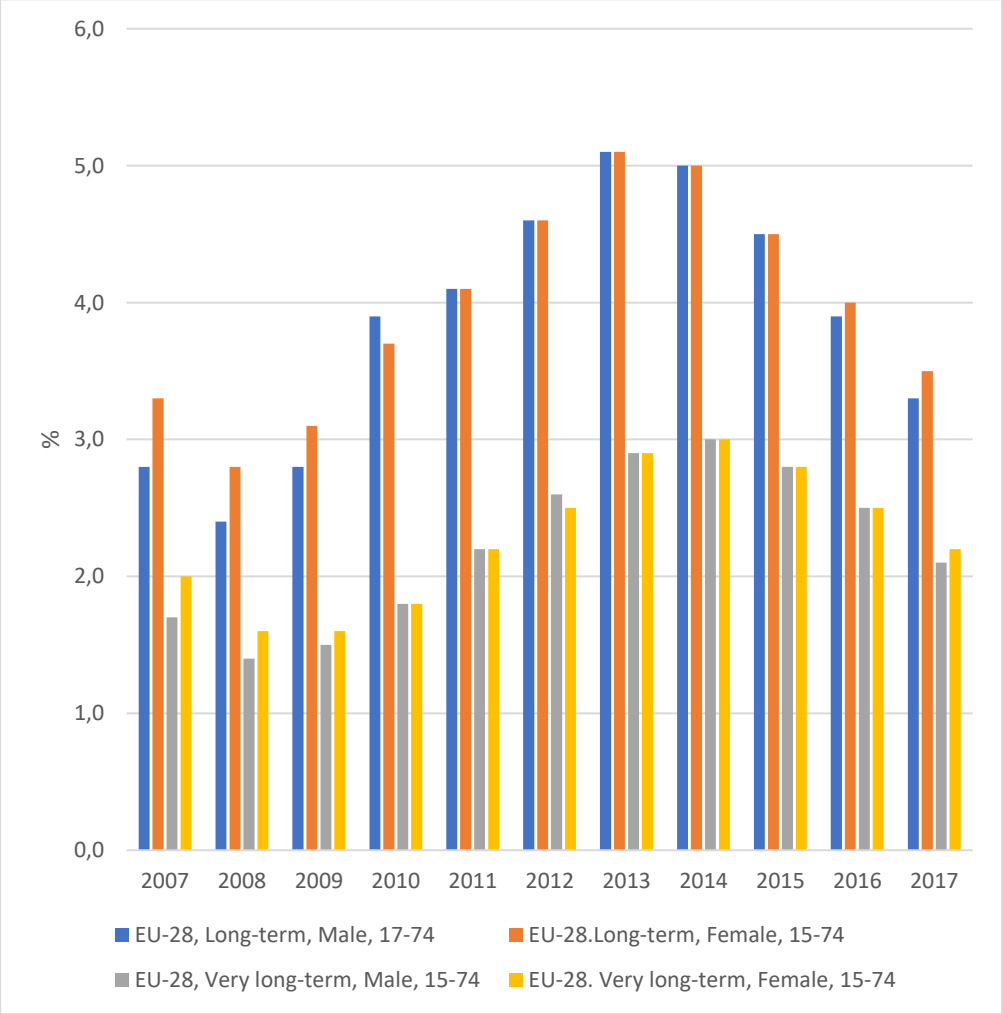
Figure 6. Unemployment rate by gender EU-28, 2007-2018



Source: Eurostat, 2019.

In 2007, EU-28 ‘unemployment long-term’ male had a low rate of 2.8% in comparison with female rate which was at 3.3% (see Figure 7). After crisis had made its disastrous appearance, the rates sharply increased; both male and female ‘unemployment long-term’ hit in 2012 4.6% and 5% in 2013. ‘Unemployment very long-term’ was not so high since 2014 when male and female ‘unemployment very long-term’ was increased at 3%.

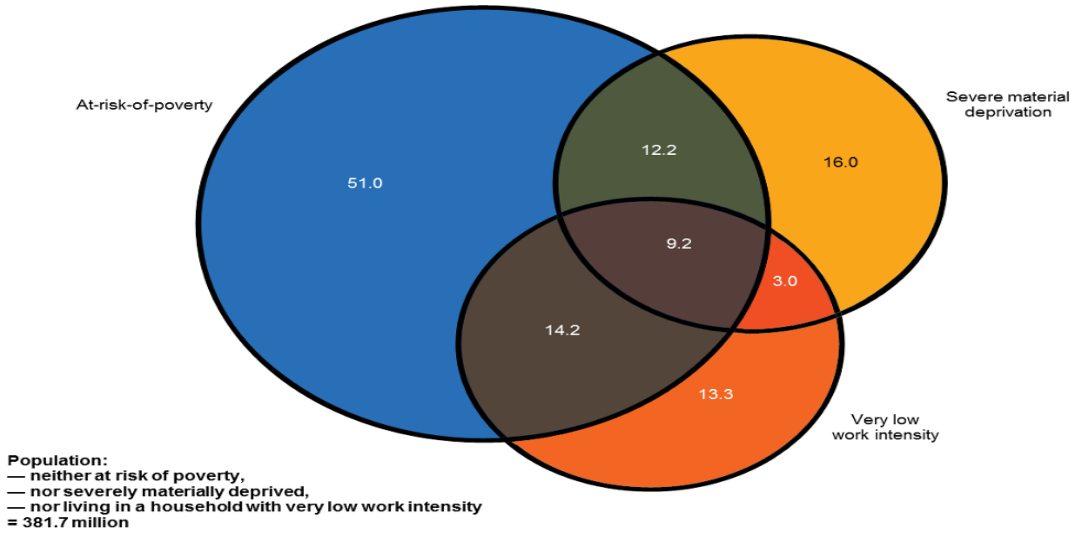
Figure 7. Unemployment rates (%) long-term and very long-term, EU-28 by gender (15-74) 2007-2017



Source: Eurostat, 2019.

Unemployment can have negative consequences not only for the quality of life of people but also for the full enjoyment of their fundamental rights and freedoms. The unemployed are likely to suffer less satisfaction from life and experience greater social exclusion. The European Commission notes that 'long-term unemployment' is closely linked to a high risk of poverty, which in turn leads to economic and social exclusion.[345] In 2015, there were 51.0 million people in the EU-28 living in households that faced income poverty, 16.0 million persons experiencing severe material deprivation and 13.3 million people living in households with very low work intensity According to these findings (see Figure 8) EU social policy in the field of poverty and social exclusion did not register good results.

Figure 8. Number of persons (millions) at-risk-of-poverty or social exclusion analyzed by type of risks, EU-28, 2015



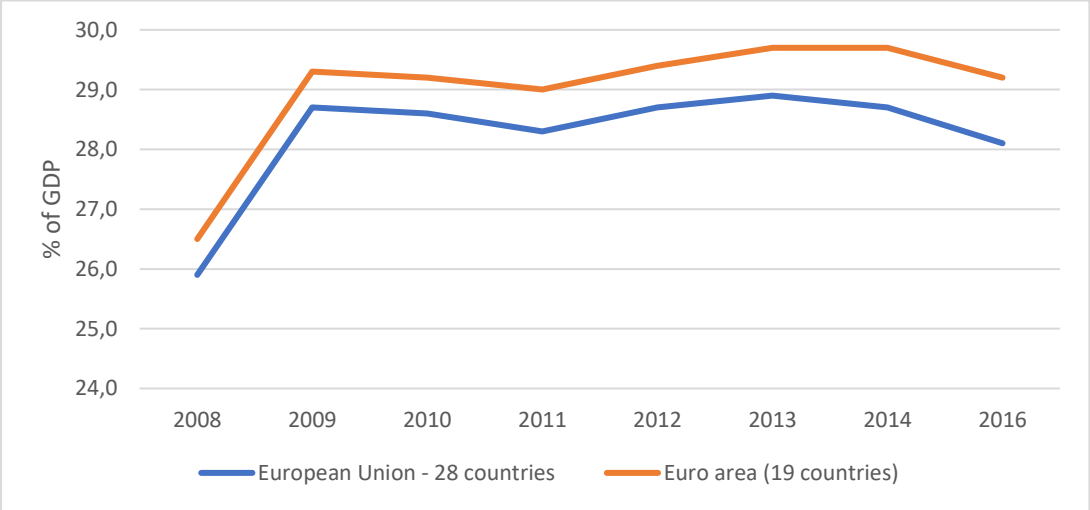
Note: the sum of the data for the seven groups at-risk-of-poverty or social exclusion differs slightly from the total (published elsewhere) due to rounding.
Source: Eurostat (online data code: ilc_pees01)

Source: Eurostat, 2019.

[345] FRA, "The European Union as a Community of values: safeguarding fundamental rights in times of crisis", Annual Report 2012, page 15. http://fra.europa.eu/sites/default/files/annual-report-2012-focus_en.pdf

Poverty and social exclusion issues appear to EU legislation but have had a relatively low political profile. Economic crisis had a major effect on the quality of life. Thus, it is interesting to examine the government expenditures (see Figure 9,10 and 11) on social protection to avoid the risk of poverty and promote social inclusion for the European citizens. In 2009, expenditure on social protection[346] relative to gross domestic product (GDP) was estimated at 28.7 % in the EU-28. And in EA-19 was 29,3, which decreased in 2011 reaching a rate of 29%. The following years the expenditure on social protection in the EU-28 and in EA-19 was not stable which might be explained by the economy imbalances. In 2014 decreased again and in 2016 fell at 28.1% and 29.2%.

Figure 9. Expenditure on social protection (% of GDP), 2008-2016

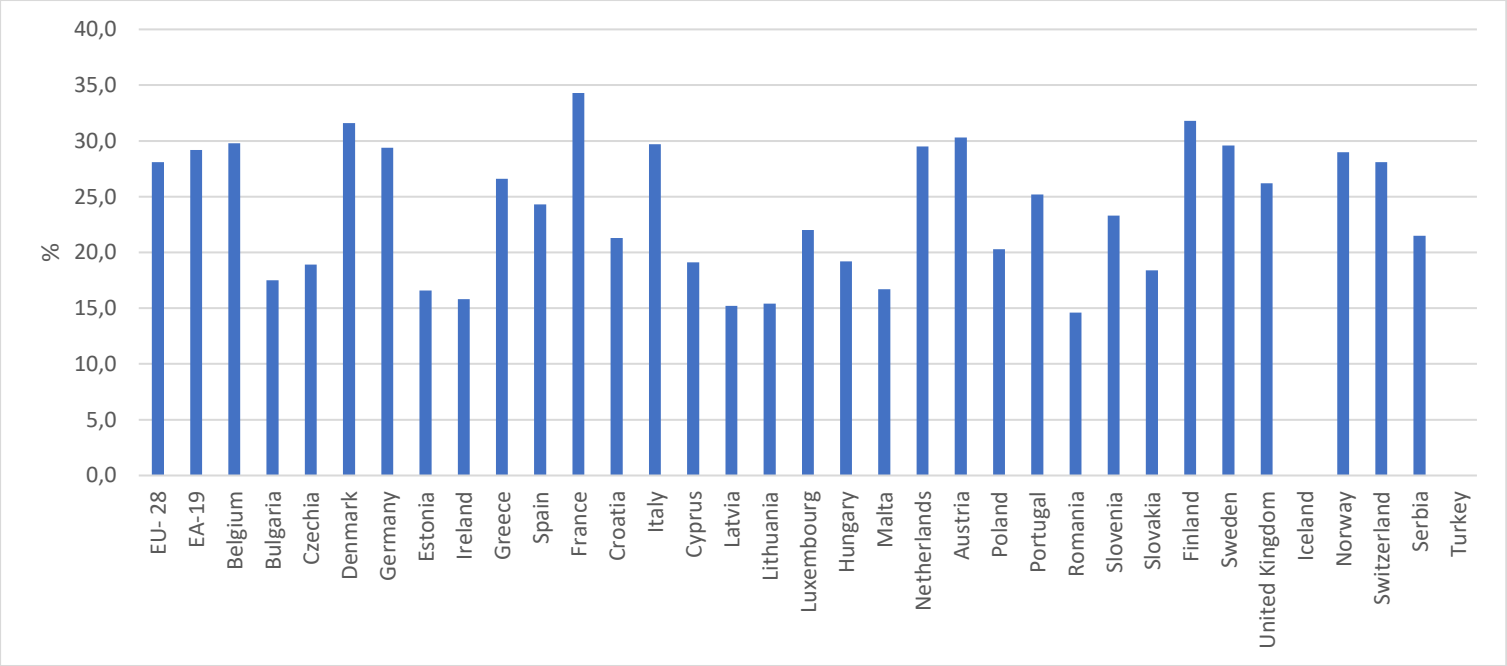


Source: Eurostat, 2019.

In 2016, expenditure on social protection[347] relative to gross domestic product *GDP) was estimated at 28.1 in the EU-28 (see Figure 10). Across the EU Member States, this ratio was highest in France (34.3), and Denmark (31,6), in Italy (29,7), while the lowest was in Romania (14.6), Latvia (15.2) and Lithuania (15.4).

[346] Expenditure on social protection contain: social benefits, which consist of transfers, in cash or in kind, to households and individuals to relieve them of the burden of a defined set of risks or needs; administration costs, which represent the costs charged to the scheme for its management and administration; other expenditure, which consists of miscellaneous expenditure by social protection schemes (payment of property income and other). It is calculated in current prices.
[347] 2015 break in series.

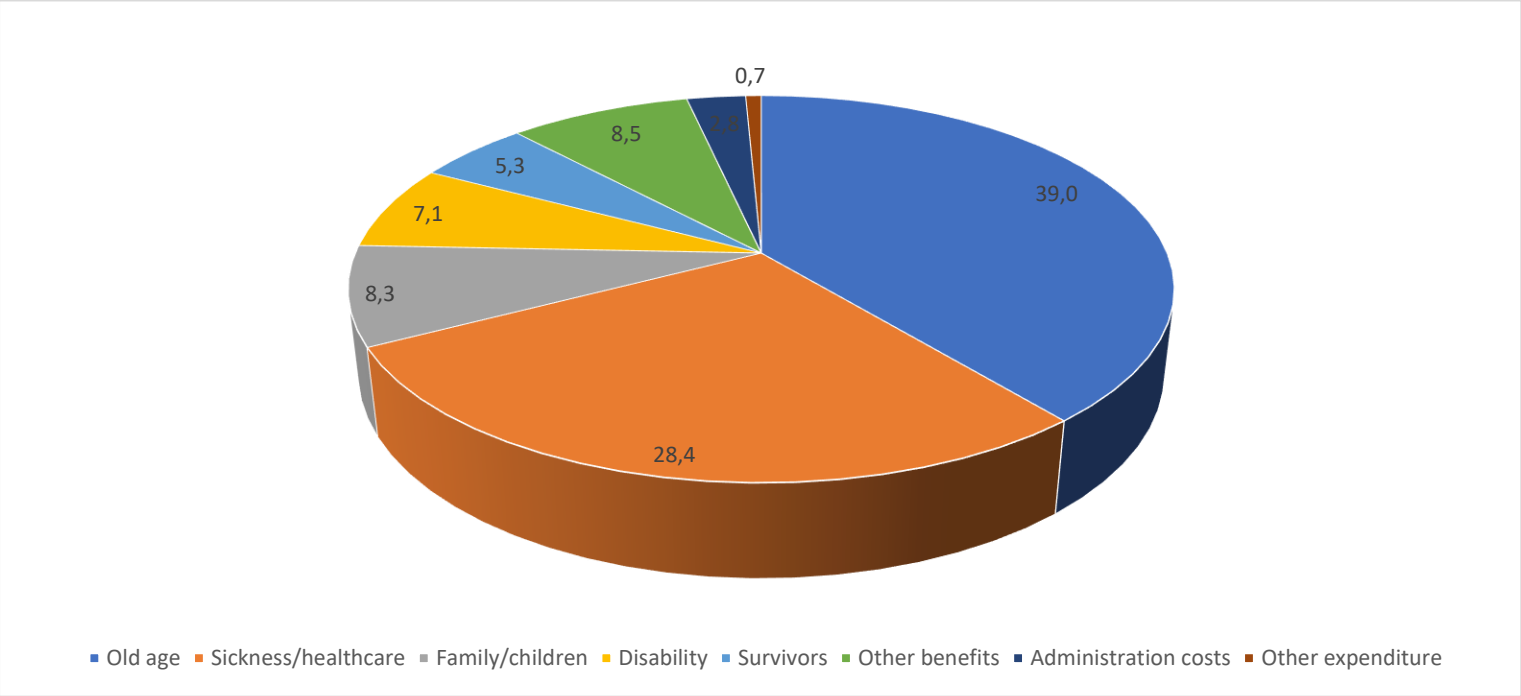
Figure 10. Expenditure on social protection (% of GDP), 2016



Source: Eurostat, 2019.

An analysis by function reveals that the highest levels of expenditure in the EU-28 were recorded for the old age and survivors function (largely composed of pensions). More specifically, in 2015, the first highest level of EU-28 expenditure on social protection benefits was for old age (39%). The second highest level of EU-28 expenditure on social protection benefits was for sickness/healthcare (28.4%). Together accounted for 67.3 % of total social protection expenditure while benefits related to family/children, disability, survivors and unemployment ranged between 8.3 % and 4.6 %; housing and social exclusion benefits not elsewhere classified accounted for the remaining 2.0 % and 1.9 % respectively.

Figure 11. Structure of social protection expenditure (% of total expenditure), EU-28, 2015



Source: Eurostat, 2019.

As regards the impact on the right to work, in addition to unemployment, the austerity measures have had a significant effect on labor conditions in the EU. Restrictions on employment in the public sector have been introduced in Cyprus, Greece, Ireland, Italy, Portugal and Spain; many countries have encouraged early retirement. In Spain, the notice period for dismissal in cases where a company suffers income losses for three consecutive months, or has declined sales for three consecutive quarters, declined in half from 30 to 15 days. Wages were also the target of direct and indirect intervention, both in the public and private sectors. While wages in the private sector are regulated by the market, with some intervention by the state, salaries in the public sector depend on state regulation. Although developments in each Member State are different, there are some common elements, at least in some Member States, including: continuous reductions over the years as the crisis continues, the elimination or reduction of allowances and additional aid, the attempt to protect the minimum wage. In cases where there were no direct cuts, a wage freeze was imposed. Thus, in Cyprus, Greece and Ireland, wages were cut across the public sector, while in Italy and Portugal a cut was introduced only for high incomes. In Spain, there has been a general reduction of 5%, although for some groups of workers, pay has fallen more for the highest paid.

As far as the right to education is concerned in the European area, this is particularly affecting countries such as Italy, Portugal and Greece, which are also facing the most serious consequences of the crisis, since cuts in public spending have led to measures such as the reduction of the number of schools, achieved either by merging or closing schools, reducing the number of teachers, increasing the pupil / teacher ratio and reducing administrative and other school-related costs. In the context of reducing education spending, teachers' wages - in the context of wage cuts for civil servants - have declined in several countries, while in countries such as Italy, Spain and Portugal their working hours have increased. In Cyprus, preparatory hours for teachers were abolished. In addition to staff costs, some administrative costs have fallen. In Italy, technical and auxiliary staff in schools decreased by 17%. In Greece, the position of the school guard was abolished. Prior to the crisis, Cyprus provided free transportation for children from rural areas and technical school pupils, and after the crisis did not. Ireland has, among other things, abolished grants for school books and funding for the poorest children, while in Spain, a total reduction of 45% was recorded in the provision of scholarships for the purchase of school books. In Ireland, subsidies for the purchase of

clothing and footwear also fell. In Belgium, school allowances for families in financial difficulties declined by 15% in 2013 and an additional 15% in 2014.[348]

In addition, the austerity policies affect the right to access to healthcare. In several countries, measures have been put in place to limit access to health care, to introduce or increase patient participation fees, to reorganize hospitals and health care, to reduce wages and to freeze the employment of health personnel, interventions in the cost of medicines and other services and administrative reforms. The impacts of the measures observed, are reduced access to healthcare, in addition financial burden on citizens, reducing the number of medical staff and facilities, reducing preventive care, and so on. Poor and homeless, elderly, disabled and their families, illegal immigrants are among the groups disproportionately affected by the measures imposed.[349]

Reflections

The fall out of the economic crisis of 2008 has greatly accelerated the disintegration of the much-vaunted Europe Social Model. The impact of the austerity measures introduced by most European states and in particular the scale of the social crisis has made it clear that a gulf currently exists between the rhetoric and the reality of 'Social Europe'. Unemployment is a strong indicator of social viability. With rising unemployment levels, the pressure on national welfare budgets increased while at the same time fewer resources were available because of negative economic growth and declining tax revenue rapidly shifting the fiscal balance into deficits. In combination with large rescue packages to prop up the banking sector to prevent a collapse of financial institutions and a wider economic meltdown, many Euro area countries breached the deficit rule of the EU's Stability and Growth Pact (SGP) (stipulating a maximum public deficit of 3 per cent of GDP) and had soaring rates of public debt. Moreover, the sharp increase in unemployment put a large proportion of the population at risk of poverty. Austerity measures and rescue packages have reinforced the negative repercussions of the recession on the distribution of incomes. For instance, the various

[348] A. Tamamović, (2015). The impact of the crisis on fundamental rights across Member States of the EU. Comparative analysis, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, European Union, Brussels, 43-45.
[349] Ibid.

Memoranda signed with Greece require inter alia an increase in 'flexible' forms of work, such as fixed term work and temporary agency work, extended probation periods, decreased protection against collective redundancies, reduction in pay, increased working time and allowing wage growth below sectoral agreements, increased retirement age, and decreased holiday pay. The negative social impact of the reforms is uncontested, and deplored. Furthermore, the legality of these measures is in dispute (see Chapter 5.2).

Regrettably neither the social acquis, such as the minimum standards laid down in the Working Time and Fixed-Term Work Directives, nor the fundamental social rights laid down in European law have proven sufficiently effective to remedy the social crises that have emerged in certain MS.[350] Regulation 472/2013 now requires that the draft macroeconomic adjustment programme implemented in a Member State in receipt of financial assistance *'shall fully observe Article 152 TFEU and Article 28 of the 'Charter' and that '[t]he Commission shall ensure that the Memorandum of Understanding is fully consistent with the macroeconomic adjustment programme approved by the Council'*, this provides a social safeguard only in a very indirect and minimal way. So, while Euro-crisis governance could be argued to be generally founded on a legal framework which certainly benefits from a degree of democratic legitimacy, much like in the case of economic governance the effect of the framework has been to authorise the 'outsourcing' of substantive questions balancing 'the economic' and 'the social' to be taken in the actual management of the Euro-crisis, most saliently the Memoranda, to an executive, intransparent and exclusive forum.[351]

As described above, the main response to the failure of the economies was the cuts in spending and savings in the budget. In areas such as pensions, health care and education, which absorb up to 70% of GDP in some countries, these regions were the first to be affected by emerging austerity policies. Some effects of the crisis and subsequent austerity measures were visible immediately or shortly after their implementation. Some effects will only become visible after decades. From this perspective, the defense of social rights, is considered more essential than ever, since it guarantees the right of a person to a dignified living. It is worth noting, however, that

[350] S. Garbern, ibid.
[351] Ibid.

the international and European guardians of the protection of rights have tried to respond to the threats posed by austerity to the protection of fundamental rights.[352]

[352] A. Tamamović, ibid, p.13.

5.2 How did courts respond? Judicial limitation as a result of the austerity policy

5.2.1 The role of the European Court of Justice

As mentioned in Part I of the present thesis, the European Court of Justice has been a key aspect in the process of the European integration. It enhanced the interpretation of the essential principles and characteristics of the EU law. However, the Great Recession denotes that the development of an economic union and the formatting of the European legal order are two different things. Moreover, it is pointed out that the reform of economic governance in the EU has affected the Eurozone counties, especially those receiving financial support. The strict fiscal measures create a euro-crisis law. The Courts have been called to challenge measures implemented by Member States in response to the economic crisis. The ECJ has been criticized not to succeed to act as a counterbalance to the implementation of austerity measures on crucial issues of European social policy. It is also argued that measures such as cuts on wages, pensions, public spending and restrictive collective bargaining are opposed to the purpose of social justice set out in Article 3 TEU. [353] The notion of a social market seems incompatible with the austerity policy measures. Furthermore, they are against the provisions of Article 9 TFEU which states 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*.' Therefore, the ECJ had to answer in several occasions about the legitimacy of the measures which have been implemented by the Troika. In the question whether the reforms are compatible with the Charter of Fundamental Rights, the ECJ has usually found these references inadmissible.

European Council Decision 2011/199 / EU of 25 March 2011 on the amendment of the Treaty and the establishment of the ESM in the simplified procedure under Article 48 (6) of the TEU gave rise to a new round of doubts as to the legitimacy of the choices made by the Member States and their compatibility with the Treaties. Issues were dealt with by the European Court of Justice in C-370/2012, *Pringle* case,[354]

[353] Article 3(3) TEU sets the objective that the EU be 'a highly competitive social market economy'.
[354] Thomas Pringle v. Gov't of Ireland, Case C-370/12, [2012] E.C.R.

following a preliminary ruling by the Supreme Court of Ireland. The questions referred for a preliminary ruling arose when the independent Member, Thomas Pringle, a member of the Irish Parliament, applied to the High Court against the Irish Government, Ireland and the Irish Advocate General on 13 April 2012, claiming that the amendment of Article 136 TFEU by Article 1 of the European Council Decision 2011/199 constitutes an unlawful amendment to the TFEU and, on the other, that by ratifying, approving and accepting the Treaty establishing the European Stability Mechanism it undertakes obligations which are incompatible with the Treaties in the field of Economic and Monetary Policy, directly assuming the exclusive competence of the Union in the field of Monetary Policy. The High Court dismissed his application, so Thomas Pringle appealed to the Supreme Court. In the course of the appeal, it decided to suspend the proceedings and to bring before the Court of Justice a series of questions.[355] It is worth mentioning that *Pringle* case was rather important as far as the legal rescue of the ESM is concerned. The need for stability and integrity of the Eurozone is apparent from the fact that the case was introduced in plenary of the ECJ, while a decision of the President of the Court was followed by an expedited procedure for answering the questions referred for a preliminary ruling. The ECJ answered the fundamental question of whether Member States are allowed under the Union Treaties to provide stability support to each other. Furthermore, it underlined that the Union's institutions—more specifically the European Commission, the European Central Bank (ECB), and the Court itself—could be 'borrowed' by the euro area Member States within the context of the ESM. As for the Monetary Policy, the ECJ held that the objective pursued by the ESM, "*which is to ensure the stability of the Euro Zone as a whole, is clearly distinguishable from the objective of maintaining price stability, which is the primary objective of Monetary Union policy. In particular, although the stability of the Eurozone may have an impact on the stability of the currency used in that area, an economic policy measure cannot be assimilated to a monetary policy measure simply because it may have indirect implications for the stability of the euro*".[356] In addition, as regards the means provided to achieve this objective, the Court found that 'Decision 2011/199 merely states that the Stability Mechanism will provide any required financial assistance without providing for anything else relating to its

[355] Ibid, paras 24-28.
[356] Pringle case, ibid, paras 56.

operation due to a mechanism. However, the provision of financial assistance to a Member State does not obviously fall under monetary policy. In view of the above, the ECJ has found that the establishment of the ESM does not affect the Union's exclusive competence in the field of monetary policy. However, the conclusion reached by the Court on the distinctive purposes of Monetary Policy has received severe critique, since, ultimately, the ECJ resorted to a 'legal formalism' in justifying its position.[357] Thus, it disregarded the fact that the two arms of EMU, despite different in nature, are closely interconnected, since the stability of the Eurozone as a whole is certainly a prerequisite for price stability in the Eurozone or, in other words, it is not clear that there could be price stability given the serious instability of the Eurozone as a whole. In order to avoid answering this question, the ECJ had to draw a hard line between monetary policy and economic policy. This raises questions as to what extent the highly centralized Monetary Union and the hitherto underdeveloped Economic Union are interrelated. The last question which it had to investigate, under Article 48 (6) TFEU, in order to rule on the legality of recourse to the simplified procedure for amending the Treaty, was to answer the question whether the amendment entailed new competences of the Union. On this issue, the ECJ took a negative attitude and justified its position by pointing out that "*the amendment of Article 136 TFEU by Decision 2011/199 does not create a new legal basis to allow the Union to take action that was not possible before from the entry into force of the amendment to the TFEU*". This position of the Court, reinforced further with the appropriate interpretation of the 'no-bailout' clause of Article 125 TFEU, reflects the line followed by the same for the legal rescue of the ESM and departs from that followed by the Member States, which have attempted, by an amendment to the Treaty, to make the establishment of the ESM legally compatible with Union law. The euro area Member States opted to establish the ESM outside the framework of the Union Treaties. To facilitate this move and take away doubts as to the compatibility of the new stability mechanism with the 'no-bailout' clause, the European Council agreed to add the following paragraph to article 136 of the Treaty on the Functioning of the European Union: "*The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard*

[357] V. Borger, (2012). The ESM and the European Court's Predicament in Pringle. *German Law Journal*. 14. (1), 1-28.; P. Craig, (2013). Pringle: Legal Reasoning, Text, Purpose and Teleology. *Maastricht Journal of European and Comparative Law*, Oxford Legal Studies Research Paper No. 53/2013. Retrieved from: https://ssrn.com/abstract=2264018

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"[358].

The Court was called upon to take a stand on the question of the legality of the establishment of the ESM under crisis, pressure and urgency (in this case, it has applied the accelerated procedure for a preliminary ruling). By legally transposing the ESM, it incorporated into the Union's law the concept of "rigorous policy conditions", known by the IMF's function as conditionality, since it has been accepted that these are a prerequisite for EU funding to be compatible with EU law. However, this interpretation was almost narrow, without further investigation of the impact on the fundamental principles and values of the Union's legal order, such as the rule of law, democracy and the protection of human rights.[359]

The Court, however, insisted on its position in cases C-128/12, *Sindicato dos Bancários do Norte*[360] and C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*,[361] which, following a reference from the Portuguese courts, raised the issue of legality in relation to the Charter of fiscal adjustment measures adopted by the Portuguese Parliament in application of the Memorandum of Understanding, the conclusion of which was a prerequisite for the financing of Portugal by the ESM. The ECJ, by its orders of 7 March 2013 and 25 June 2014 respectively, declared itself "*manifestly incompetent"* to rule on the questions referred. After reminding that *"in the context of a reference under Article 267 TFEU, the Court can only interpret Union law within the limits of the powers of the European Union"* found that the legislative measures taken by the Portuguese authorities *"were not intended to implement of Union law*". Consequently, the Court does not have jurisdiction to rule on the legality of the measures in relation to the Charter, and the Portuguese authorities under Article 51 (1) of the Charter refrain from checking compliance, since its provisions are "*addressed ... in the Member States, only when applying Union law*". Considered self-evidently the question referred for a preliminary ruling by the Portuguese labor disputes. The subject-matter of the proceedings before the Portuguese court support was the suspension of grant and the cut of Christmas bonuses and holiday, in which he carried out, in

[358] European Council Decision No. 2011/199/EU (Amending Art. 136 TFEU), 2011 O.J. L 91/1
[359] P. A. van Malleghem, (2012). Pringle: A Paradigm Shift in the European Union's Monetary Constitution. *Germal Law Journal*, 14(1), 166. Retrieved from: http://www.germanlawjournal.com/volume-14-no-01
[360] C-128/12 Sindicatos dos Bancarios.
[361] C-264/12, Sindicato Nacional dos Profissionais de Seguros e Afins.

execution of Law 64-B / 2011 for the state budget of the year 2012, Fidelidade Mundial, an insurance limited liability company financed by the Portuguese State. The question referred for a preliminary ruling was the question of compliance with the Charter of Fundamental Rights of the EU of the provisions of Law 64-B / 2011. The ECJ reiterated that, according to its case-law, since a pre-litigation case of an EU Member State's court has formed, the Court may interpret Union law, when implemented within the limits of the Union's competencies. On the other hand, where the question referred for a preliminary ruling does not contain information demonstrating that the national legislation in question is intended to apply of Union law, as in the present case, the Court is not competent to answer the question.

EU liability may be deflected if Member States have even a small discretion concerning how they implement the measures stipulated in Council Decisions. This was illustrated in the *ADEDY* case brought by trade unions in Greece, which concerned two Council Decisions[362] addressed to Greece requiring Greece to take deficit reduction measures. The actions were dismissed by the EU General Court for lack of standing. The Court found the applicants had failed to demonstrate that they were directly concerned, because the measures required implementation by the Greek authorities, which had a broad discretion how to implement them. Although domestic laws have implemented European adjustment programmes, national courts have not tended to approach them as 'implementing' EU law but instead restricted their scrutiny to domestic law, ignoring social rights in the EU Charter. For example, the Greek Supreme Administrative Court[363] assessed the relevant MoU without making a link between national and European measures, and so EU social rights could not be invoked, nor responsibility attributed to EU institutions. And, even in those cases in which references were made to the ECJ,[364] as mentioned above, the Court did not examine the merits of the case as it did not conceive domestic austerity measures as part of a European assistance package.

[362] Case T-541/10 *ADEDY and Others v Council*, [2013] OJ C26/45; Case T-215/11 *ADEDY and Others v Council* [2013] OJ C26/45.
[363] See Symboulio tis Epikrateias [StE] [Supreme Administrative Court] 1285/2012 and 1286/2012, para 21 (Greece).
[364] Case C-128/12 Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios, SA (n 109); see also the reference in Case C-264/12 Sindicato Nacional dos Profissionals de Seguros e Afins v Fidelidade Mundial (n 98), rejected by Order of the Court (Sixth Chamber) of 26 June 2014.

Recently, however, the ECJ has issued, following appeals against General Court's decisions, *the Ledra Advertising and Mallis*[365] decisions against the Commission and the ECB on the restructuring of the banking sector in Cyprus under the "support for stability, in the form of facilitated financial assistance to the Republic of Cyprus" on behalf of the ESM, which led to the' haircut 'of the appellants' deposits. In the first of these cases, depositors of two large Cypriot banks appealed against the Commission and the ECB requesting the partial annulment of the Memorandum of Understanding of April 26, 2013, adopted jointly by the ESM and the Republic of Cyprus, as well as the reparation of the damage which they suffered as a result of the subsequent restructuring of the two banks in question. In the second case, appeals were brought against the Commission and the ECB for the annulment of the Eurogroup statement of 25 March 2013, which concerned, inter alia, the restructuring of the banking sector in Cyprus. These cases once again considered the link between the ESM framework and the EU legal order. In particular, the question of the compatibility of the operation of the ESM in the fulfillment of its mission with the fundamental principles and values of the Union legal order, such as the safeguarding of the rule of law and the protection of rights guaranteed by the Charter, has been raised. The Court stressed that "*the fact that one or more Union institutions may have a certain role within the ESM does not alter the nature of the ESM acts outside the legal order of the Union*" did not alter its attitude, as first expressed in the Pringle judgment, rejecting the inadmissibility of the actions for annulment. However, it stressed that: "*this does not prevent the Commission and the ECB from relying, in an action for damages under Article 268 and the second and third paragraphs of Article 340 TFEU, on unlawful conduct linked, where appropriate, to the signing of a Memorandum of Understanding on behalf of the ESM*" and declared admissible actions for damages (*Ledra* case). Further, after recalling that "*the tasks entrusted to the Commission and the ECB under the ESM Treaty do not alter the competences conferred on Treaties*" and that the European Commission, in accordance with Article 17 (1) of the TEU *'promotes the common interest of the Union*' and '*oversees the application of Union law*' after stating that *'the tasks entrusted to the Commission by the ESM Treaty require, as provided for in Article 13 (3) and 4 of that Treaty, Subparagraph to the compatibility with EU law*

[365] Ledra Advertising and Others v. Commission and ECB (Joined Cases C-8/15 P to C-10/15 P Ledra Advertising and Others v. Commission and ECB.

of the Memoranda of Understanding concluded by the ESM', considered that the Commission retained its role as guardian of the Treaties under the ESM Treaty and therefore that it should not sign a Memorandum of Understanding on the compatibility of which with Union law it has doubts. Although the above-mentioned ECJ decisions do not constitute a spectacular shift in its case-law, since this affirmed its position in the *Pringle* case on the operation of the ESM outside the scope of the Charter, they suggest a timid shift in favor of protection of individuals recognizing the Union's liability for compensation in the event that its institutions which are involved in the fulfillment of the ESM mission contribute to the infringement of the rights protected by the Charter. It is not inconceivable to claim that the Court, by demonstrating a constant interest in the promotion of fundamental rights, seeks to introduce 'back door' protection in the context of the operation of the ESM.[366]

Ledra Advertising gave the opportunity to individuals affected by austerity measures in countries such as Greece, Portugal, and Ireland to launch actions for compensation against the EU.[367] Moreover, *Ledra Advertising* constitutes a landmark decision in the field of European financial assistance in which it clearly spells out the obligation of EU institutions to respect human rights when formulating financial assistance conditionality. Filling the gap left on this issue in *Pringle*, the Court of Justice followed the Opinion of Advocate General Kokott, explicitly stating that the Charter binds EU institutions in all circumstances, even when they act outside the EU legal framework.[368]

Another significant case which has recently been in the limelight is the *AGET-Iraklis case*[369] C-201/15. The case concerned collective redundancies in Greece. In this case the ECJ recalled the *Viking/Laval* case law (see Part I Chapter 3.3.2), since attempted again to strike a balance between labour law and the fundamental economic freedoms. More specifically, the Greek Council of State (Simvoulio tis Epikratias) posed the question whether the system of prior ministerial authorization for the implementation of a collective redundancies scheme provided for under Greek

[366] See in detail C. Kilpatrick and B. De Witte (2014), Social rights in times of crisis in the Eurozone: the role of fundamental rights' challenges', EUI Working Paper LAW 2014/05 (2014); A. Poulou, (2017). Soziale Grundrechte und europa¨ische Finanzhilfe.

[367] Poulou, ibid.

[368] Ledra, para. 27.

[369] Case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis

legislation was compatible with the freedom of establishment under Article 49 TFEU and the free movement of capital under Article 63 TFEU, also, the freedom to conduct a business (Article 16 of the EU Charter of Fundamental Rights), and the protection of workers in the event of collective dismissal. [370] It is worth mentioning that *AGET Iraklis* arose in relation to the severe economic recession and due to the extremely high unemployment in Greece. It gave birth to the first Article 267 TFEU preliminary reference from the Greek Council of State to the CJEU in this context. It shed light to the issue of legality of national economic policy that enacted in response to the economic crisis.

The Greek company AGET Iraklis, a cement producer whose principal shareholder is the French multinational Lafarge, contests the Ministry of Labour's decision not to authorise its collective redundancy plan (a plan which envisaged the closure of a plant in Chalkida on the island of Evia and the loss of 236 jobs). In Greece, when the parties do not reach agreement on a collective redundancy plan, the prefect or the Minister for Labour may, after assessing three criteria (namely the conditions in the labour market, the situation of the undertaking and the interests of the national economy), does not authorise some or all of the projected redundancies. If the redundancy plan is not authorised, it cannot be implemented. The Greek Council of State (Symvoulio tis Epikrateias), before the case was brought, has asked the Court of Justice whether such prior administrative authorisation is consistent with the directive on collective redundancies and with freedom of establishment as guaranteed by the Treaties (a freedom which the French multinational Lafarge exercises through the majority interest which it holds, in the present case, in the Greek company AGET Iraklis). If it is not, the Greek court has asked whether the Greek legislation may nonetheless be held compatible with EU law in the light of the fact that Greece is suffering an acute economic crisis and is faced with an extremely high unemployment rate. The ECJ first examined whether the Greek legislation was compatible with the directive. It holds that the Directive[371] did not preclude, in principle, a national regime which conferred upon a public authority the power to prevent collective redundancies by a reasoned decision adopted after the documents in the file have been examined and

[370] M. Markakis, (2017). Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis. *European Constitutional Law Review*, 13 (4), 724-743. Available at SSRN: https://ssrn.com/abstract=3096964

[371] Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.

predetermined substantive criteria have been taken into account, unless such a regime deprives the directive of its practical effect. To sum up, the Court examined the three criteria in the light of which the Greek authorities must examine projected collective redundancies. The Court held that the first criterion (interests of the national economy) cannot be accepted, since economic aims cannot constitute a reason in the public interest that justified a restriction on a freedom such as freedom of establishment. On the other hand, the other two criteria (situation of the undertaking and conditions in the labour market) did appear prima facie to be capable of relating to the legitimate objectives in the public interest that were constituted by the protection of workers and of employment.[372]

It is claimed that the similarities between *AGET* and *Viking/Laval* are many, and they might underline that labour rights are once again lost in the balance. The Court surely cannot be expected to broker an agreement between Greece and the institutions, as its proper role is to interpret and rule on the validity of EU law.[373]

In addition, in its recent decision *Sotiropoulou and Others v Council*[374] the General Court held that the reduction of pensions due to financial stability, the reduction of public expenses and the support of the system of pensions of the Member States are legitimated by the general interests of the Union and especially of the Eurozone.

[372] Ibid.
[373] Markakis, ibid.
[374] Case T-531/14, Sotiropoulou and Others v Council [2017].

5.2.2 European Court of Human Rights' interpretation

Applications are usually based on Article 1 (protection of property) of Protocol No. 1 to the Convention, which recognises that a State is entitled "*to enforce such laws as it deems necessary ... to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*". In several cases the Court has rejected applications (as it found them inadmissible as manifestly ill-founded) relating to austerity, notably in the field of wages and pensions. Here, the Court relied on the principles of proportionality and subsidiarity, and the limited and temporary nature of austerity measures.[375] More specifically, in the case of *Ioanna Koufaki and ADEDY v. Greece*[376] the ECtHR accepted that the cuts introduced by the disputed laws do not constitute deprivation of property but interference with the enjoyment of the right to property, which intervention is provided for, by law and is intended to public interest while it does not disturb the equitable balance between the public interest and the right to respect for property. The Court therefore concluded that, under the circumstances of the case, the applicant was not placed too heavy on the ground, taking into consideration that the applicants' complaint related to the breach of Article 1 of the First Protocol which was manifestly unfounded and had to be refused, pursuant to Article 35 3a and 4 of the ECHR. Finally, the other complaints of the latter were clearly unfounded and rejected of the applicant for breach of Articles 6, 8, 13, 14 and 17 of the ECHR. It is noteworthy that in assessing the public interest objective and the respect for the principle of proportionality, the ECtHR took into account, in particular, the explanatory memorandum to Law 3833/2010 and the recitals 668/2012 of the Plenary Session of the Council of State, issued on an application for annulment brought, inter alia, by the applicants.

In the case of *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal.*[377] The case concerning the reductions in pension and the suspension of the holiday pay that had been implemented by the Portuguese Memorandum. Hence, the applicants claimed that these cuts violated the right to equality against the law in accordance with the Article 13 of the Constitution. The State has a wide margin of

[375] See Khoniakina v Georgia, Bakradze v Georgia, Frimu and Other v. Romania, Da Conceição Mateus v. Portugal, Santos Januário v. Portugal and Da Silva Carvahlo Rico v Portugal.
[376] Koufaki and Adedy v. Greece (dec.) - 57665/12 and. 57657/12. Decision 7.5.2013 [Section I].
[377] Da Conceição Mateus v. Portugal and Santos Januário v. Portugal. (application no. 62235/12 and no. 57725/12).

discretion during the measures relating to the exercise of a broader economic and social policy. Its already wide discretion becomes even wider, when asked to evaluate the distribution of its limited public resources. However, it should not be considered that the discretion of the State is unrestricted. Indeed, the Strasbourg Court examines whether, as a result of the State's intervention in the property rights, the victim suffers an excessive and disproportionate burden. In any case, it is checked whether the state intervention results in its impairment the substance of the properties rights: in this case there is, in principle, a violation of Article 1 of the ECHR in the ECHR, as opposed to a reasonable and proportional reduction.[378] In the present case, the ECtHR recognized that the measures taken by the Portuguese Government within the framework of a wider social and economic programme, which was designed jointly with the European and the IMF, with a view to securing its short-term liquidity the Portuguese economy and the medium-term consolidation of public finances of the market, were legitimate. Thus, the Court of Justice held that "*the national governments ... have direct effect knowledge about society and its needs [and] is in principle better position by the international judge to assess what is in the public interest economic or financial perspective*"[379] and adopted the judgment of the Constitutional Portugal, that the measure to reduce the allowances was an important public interest. It concluded that the intervention in the applicants' property rights was not manifestly unreasonable. Finally, the European Court of Human Rights examined whether a fair balance between the property rights and the needs of general government exists. Taking into account both the maintenance of the unchanged level of the basic pension and the temporary nature of the measure, which, as the Portuguese Court of Justice has accepted, would apply for a period of three years (2012-2014), considered that the applicants had not borne a disproportionate burden[380]. Therefore, the ECtHR found that a fair balance had been struck between the interests of the general community and the rights of the applicants. Accordingly, the applications were found to be manifestly ill-founded and the Court declared them inadmissible.[381]

[378] Para 24.
[379] Para 22.
[380] Da Conceição Mateus v. Portugal and Santos Januário v. Portugal Da Conceição Mateus v. Portugal and Santos Januário v. Portugal, Para 29.
[381] In paragraph 26, the Court refers to Ioanna Koufaki and ADEDY v. Greece, arguing that "*as in Greece, these measures were adopted in view of an extreme economic situation, but unlike Greece these measures are transient*".

In the recent case *Aielli and Others and Arboit and Others v. Italy*[382] the applicants, who were all pensioners receiving more than three times the basic minimum pension, complained about the readjustment of their old-age pensions. The Court declared the application inadmissible as being manifestly ill-founded. It observed in particular that the Italian legislature had been obliged to intervene in a difficult economic context. The Legislative Decree in question had sought to provide for redistribution in favour of lower pensions, while preserving the sustainability of the social security system for future generations. The Italian government's room for manoeuvre options had also been restricted on account of the limited resources and the risk that the European Commission might take action for an excessive budget deficit. In conclusion, the Court took the view that the effects of the reform were not so severe that they risked causing the applicants difficulties in meeting living costs to an extent that would be incompatible with Article 1 of Protocol No. 1.

[382] Aielli and others and Arboit v. Italy 19.07.2018 (no. 27166/18 and 27167/18).

5.2.3 The European Committee on Social Rights; a different perspective

The European Committee of Social Rights (ECSR) seems to have a different attitude regarding the Greek austerity measures. On 19 October 2012, two important decisions of the European Committee on social rights were issued, which were substantively relevant, 65 and 66 / 21.2.2011130 collective actions brought before it by two representative Greek trade unions (GENOP / DEI and ADEDY). Following these decisions, the European Committee published on 25 April 2013 five further decisions following appeals by Greek unions against austerity measures. The complaints concerned the package of measures passed by the Greek Government in 2010 on pension rights: the variable reduction in proportion, but nevertheless significant, of the benefits from primary, supplementary and additional pensions; suspended pension payments or reduced payments where work was undertaken beyond a certain age; increased contributions to solidarity funds of pensioners; reduced "social solidarity" allowance paid to the lowest income pensioners in the private sector. The complainant organizations argued that the package of measures was contrary to article 12 of the European Social Charter in respect of social security.[383] On 11 May 2013, the ECSR issued that the austerity measures for public and private pension schemes violate the European Social Charter. According to Article 12 (3) of the ESC, the States Parties "*must strive to gradually increase the social security system to a higher level*". The ECSR notes that Greece does not comply with the provisions of this article as it has not ratified the revised European Social Charter (ECS).[384] The incentive for the Committe's decisions is to strengthen the effort to protect social rights even in times of economic instability and to encourage States to comply with the ESC so that both the standard of living and the conditions of living do not deteriorate at both national and European level; the social rights enshrined in the ESC are not luxury rights recognized in times of prosperity and abolished in periods of poor economic of the conjuncture.[385]

[383] See Article 12 of the European Social Charter.
[384] The Ratification succeeded later in 2016.
[385] Collective complaints no. 76/2012, Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece, 7 December 2012; no. 77/2012, Panhellenic Federation of Public Service Pensioners v. Greece, 7 December 2012; no. 78/2012, Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece, 7 December 2012; no. 79/2012, Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece, 7 December 2012; no. 80/2012, Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece, 7 December 2012

Chapter 6. Reforming 'Social Europe'?

6.1 European Pillar of Social Rights

The current economic and financial crisis induced a social crisis that increased inequalities across the European Union. It is true that the measures undertaken to make the EMU more resilient have stirred the debate regarding the need for a stronger European Social dimension. On 17 November 2017, the European Commission, the European Parliament and the Council signed the European Pillar of Social Rights (EPSR). The purpose of the EPSR is to tackle the negative effects of the crisis on the labour markets as well as social welfare systems. By analyzing the content, the legal nature and the implementation of the EPSR, examining the benefits and the weaknesses of this major action, a question is arising; throughout the years, social policy is subsidiary to economic progress, so could the EPSR alter this imbalance and enhance the vulnerable social protection? [386]

6.1.1 The scope of the initiative

In 2015 the European Pillar of Social Rights (EPSR) was first announced by the President of the European Commission, Jean-Claude Juncker. On 26 April 2017, the Commission presented the results of the public consultation, along with the final proposal which was signed on 17 November at the Gothenburg Summit. The EPSR is structured around three main headings and contains core principles for equal opportunities and access to labour market, for fair working conditions, and for social protection and inclusion. Twenty different key principles focus on the euro-area counties to secure "*a fair and truly pan-European labour market*", to secure "*a social triple-A rating*" for Europe.

As explained in Part I of the present thesis European Union's fundamental goal, protected in the Lisbon Treaty, was to create a 'social market economy' with a clear

[386] Material in this section (7.1) has been presented at 4th International Conference "Democracy, rights and inequalities in the era of economic crisis. Challenges in the field of research and education" 27 - 29 April 2018 Heraklion, Crete, Greece. The article, Bafaloukou, M. (2018). European Pillar of Social Rights: A(un) Promising Step Towards a Social Europe, has been approved (21/06/2018) to be published at the minutes of the Conference.

commitment to full employment, social protection, and effective anti-poverty policy. Although, principles such as non-discrimination, tolerance, justice, solidarity and equality are referred in Article 1a (Treaty on European Union), the social status of the European Union has been seriously undervalued in times of crisis. The model of a supranational economic governance based on the concept of social policy, embedded in the single market process, has proven ineffective. As a result, European leaders are forced to reverse this outcome and deal with the critique that the Union lacks the legal instruments to promote a strong social agenda. Recently, the initiative of the President of the European Commission to enhance the social dimension of the Union led to the so-called European Pillar of Social Rights (EPSR), which has been jointly signed by the European Parliament, the Council and the Commission on 17 November 2017, at the Gothenburg Social Summit.

This recent action of the Union illustrates that the European institutions still acknowledge the need for Europe to be equipped with a vigorous and tangible social dimension. Member States are facing crucial social challenges, high unemployment, and different status in standards of living. Since the Member States are drifting away from each other, the gap in terms of socio-economic performance continues to widen within the European Union. The EPSR was first announced by the President of the European Commission on September 2015, in his State of the Union speech. He illustrated that the aim of the initiative was to defend European social values, to secure a "fair and truly pan-European labour market" and to "secure a social triple A rating". President Juncker declared "*I will want to develop a European Pillar of Social Rights, which takes account of the changing realities of Europe's societies and the world of work. And which can serve as a compass for the renewed convergence within the euro area"*.[387] Examining this speech, it is obvious that the European leaders acknowledge the social wounds of Europe and the need for convergence within the euro area as well. In this context, the EPSR seems to be the first significant action in the European social policy via the European Commission.

[387] European Commission (2016a). Launching a consultation on the European Pillar of Social Rights, COM 127 final, Strasbourg.

6.1.2 The main content of the EPSR; doubts, potentials and implementation

The European Pillar of Social Rights contributes to social progress by supporting fair and well-functioning labour markets and social states. By virtue of strengthening the social acquis, it also focuses on delivering more effective rights to citizens. Regarding its content, the EPSR sets out 20 principles and rights, divided into three categories:

- equal opportunities and access to labour market
- dynamic labour markets and fair working conditions
- public support /social protection and inclusion

Table 7. The 20 principles of the EPSR

Chapter I	Chapter II	Chapter III
Equal opportunities and access to the labour market	Fair working conditions	Social protection and inclusion
1. Education, training and life-long learning	5. Secure and adaptable employment	11. Childcare and support to children
2. Gender equality	6. Wages	12. Social protection
3. Equal opportunities	7. Information about employment conditions and protection in case of dismissals	13. Unemployment benefits
4. Active support to employment	8. Social dialogue and involvement of workers	14. Minimum income
	9. Work-life balance	15. Old age income and pensions

	10. Healthy, safe and well-adapted work environment and data protection	16. Health care
		17. Inclusion of people with disabilities
		18. Long-term care
		19. Housing and assistance for the homeless
		20. Access to essential services

Source: European Commission, 2019.

Evidently, the EPSR focuses on the major threat of unemployment that EU is facing today. Member States are currently trying to cope with the issue of unemployment and all the related changes of work patterns which take a very heavy toll on individuals and society by bringing poverty, income inequality, skill erosion, insecurity and segmentation of the labour market. [388] Member States are facing huge social challenges as a result of the high unemployment rates. A first category of principles (Chapter I) is applied to properly establish the right to: i) quality and inclusive education, training and life-long learning for everyone, ii) equality of treatment and opportunities between women and men in all areas, iii) the right to equal treatment and opportunities to employment, social security, education and access to goods and services, regardless of gender, racial or ethnic origin, belief or religion, disability, age or sexual orientation and iv) active support in terms of direct and tailor-made assistance to improve employment or self-employment prospects.

The impact of the crisis has shown that national public employment services are often understaffed – specifically due to severe cuts in public services – and are unsuccessful in coping with young people who might not have been part of its usual target group before. The last principle of the first Chapter, which is called *'active support to employment'*, may enhance the conditions and enable young people towards entering new occupations. Social exclusion can be prevented via rapid and effective measures.[389]

The second category (Chapter II) contains a rather crucial set of principles. In this category rights regarding conditions of employment, wages, health and safety at work are denoted. In that sense, crucial objectives such as **'***work-life balance'* and '*social dialogue***'** are further pursued. The EPSR indicates that the employers should ensure an adequate level of protection from risks that may arise at work and also provide fair wages that secure a decent standard of living, emphasizing that *"in-work poverty shall be prevented"*.[390] EPSR has already been criticized in the context that it reaffirms and complements rights that are already present in the EU and international legal acquis,

[388] D. Reianu, and A. Nistor, (2017). The European Pillar of Social Rights: Adding Value to The Social Europe? On-line Journal Modelling the New Europe 22, 2-25. doi:10.24193/OJMNE.2017.22.01

[389] K. Lörcher, and I. Schömann, (2016). European Pillar of Social Rights: critical Legal analysis and proposals, Brussels: European Trade Union Institute, 3-125. Retrieved from: https://www.etui.org/Publications2/Reports/The-European-pillar-of-social-rights-critical-legal-analysis-and-proposals

[390] European Commission (2017b). White paper on the future of Europe and the way forward. Reflections and scenarios for the EU27 by 2025, COM 2025, final, Brussels.

rendering, thusly, the principles and rights contained in binding provisions of EU law more visible, more understandable and more explicit.[391] However, via the creation of the EPSR the European integration principle might obtain a guarantee in relation to a minimum level of dignity for all. For instance, as far as the '*wages'* (Principle 6, Chapter II) are concerned, the EPSR brings an impetus to think more about Minimum wage from the perspective of the Lowest Wage. That results into making wages 'livable' and guaranteeing workers the opportunity to pursue basic liberties, while reducing wealth and income inequality.[392] According to President Juncker, the EPSR represents something new for Europe. Over recent years, labour regulation has grown as a policy tool in importance. Expanding from its original function of protecting markets, it is increasingly being seen as a mechanism for stimulating employment growth. Yet, at the EU level, labour legislation is limited to a few specific areas, and in these areas-just as in the field of social policy- the EU has resolved to 'support and complement the activities of the Member States' under shared competences. Thus, the EPSR may offer a unique opportunity to address these shortcomings and embed stronger types of cooperation in European socio-economics governance process. The current framework, which is based on a common monetary policy, though, without any political governance of the euro area, was proven increasingly ill-conceived as the crisis unfolded, due to its inability to address asymmetric shocks.[393] A more decent standard of living also ensures Work–family policies that help people reconcile their working obligations with their care responsibilities (Principle 9, Chapter II). Work–family policies have turned out to be effective in increasing womens' labour market participation in several EU Member States, and rather important, as well for longer-term trends in population and labour supply. By supporting both dual-parent and single-parent households, these policies also play a role in reducing inequalities, and help families acquire or sustain middle class status.[394]

The Commission is oriented towards exploring effective ways of providing social security cover to as many people as possible. Poverty and social exclusion set

[391] L. Fontecha, (2017). The European Pillar of Social Rights, *ERA Forum* 18(2), 149–153. doi:10.1007/s12027-017-0473-4

[392] B. Fabo, and S. Belli, (2017). (Un)believable wages? An analysis of minimum wage policies in Europe from a living wage perspective, *IZA Journal of Labor Policy* 6(4), 2-11. doi: 10.1186/s40173-017-0083-3

[393] ILO, (2016). Building a social pillar for European convergence, Geneva, International Labour Organization.

[394] D. Vaughan-Whitehead, (2016). *Europe's Disappearing Middle Class? Evidence from the World of Work*, Edward Elgar, UK.

major threats in the European Union framework. Despite being mentioned as priorities regarding the European Law (Article 151 of TFEU), their levels remain high.

The third category (Chapter III) of the EPSR aims at these particular issues. In a nutshell, the EU aspires to overcome the current ineffective social policy. The 'soft law' of the Open Method of Coordination and the notion of the 'flexicurity' has been criticized for their lack of efficiency. The existing shortcomings in relation to the concept of 'social protections and benefits' such as *'Childcare and support to children', 'Unemployment benefits', 'Health care', 'Pensions'* have created a significant vacuum in social protection within the EU. It is worth mentioning that certain differences exist between the preliminary outline of the EPSR and its final proposal, an aspect that possibly reveals the ambiguity in terms of context regarding Chapter III as well as the hesitation of the European leaders to adopt adequate measures of social protection. For instance, the entitlements for people with disabilities have been reformulated as a right to income support (and not merely 'basic income security'), which would allow a person to live in dignity (and not merely a decent standard of living, as was formulated in the initial outline). The reference to 'a work environment adapted to their needs' has been added, while the reference to 'conditions of benefit receipt shall not create barriers to employment' has been discarded. Moreover, the principle of *'healthcare' (*Principle 16, Chapter III) has been shortened and simplified, when compared to the initial outline: "*everyone has the right to timely access to affordable, preventive and curative healthcare of good quality*".

6.1.3 Criticism

The outcome of the European Social Summit, held 20 years after the previous one, is a first step towards Social Europe. In times of crisis, the first official admission is related to the severe poverty risk and the seriously undervalued social protection. The consequences of the recession justify the conclusion that Social Europe must be reinforced. This statement is from itself 'indulging'. On the other hand, the initiatives and the strategic moves that the EU leaders decided to adopt open a constructive discourse. The EPSR has already been criticized that rather making genuine progress in the area of social rights, it runs the risk of being a mere compilation of social standards that already exist in European Law.[395] It is crucial to underline that whether EU wishes to achieve a triple A rating in the social policy, it should take measures to translate these principles into concrete results for the Europeans. The Commission should go further; the social dimension of the EU must be enhanced via the EPSR. In other words, it should create the opportunity for vital changes to be made in the economic and social software of the EU.

However, the EPSR itself must first overcome some shortcomings in order to bring tangible benefits to the EU. The fact that it is a non-binding document has raised several doubts as far as legitimacy is concerned. The legal nature of the EPSR is an aspect that may minimize its potential. The fact that it includes guidelines and principles leads to conclusions unable to establish a concrete social acquis. Similarly, Principles of the Charter of Fundamental Rights (Chapter IV, Solidarity and Citizenship's Rights) have also been criticized for their lack of legitimacy. The vulnerable status of the social rights is in need of legal approval. Therefore, according to the Commission *'the principles and the rights enriched the European Pillar are not directly enforceable, requiring a translation of them into appropriate action or legislation, the Pillar being presented in the form of a Recommendation, its implementation being primarily the responsibility of national governments, of public authorities and of social partners'*.[396] The implementation of the EPSR is another restriction that provokes skepticism about the productivity of the new initiative. The EPSR ensures equal treatment, equal opportunities, whilst, addressing discrimination issues, but it does not specify measures

[395] Fernandes, ibid.
[396] European Commission (2017a). Commission Recommendation on the European Pillar of Social Rights, C 2600 final, Brussels.

of implementations.[397] The European Anti-Poverty Network (EAPN) has expressed their doubts as far as this lack of clarity over implementation is concerned. In their position paper (September 2016) they referred "*that the legislative proposals are unlikely to have a major positive impact on living standards for the large amount of people in poverty who are not in work or in low paid/quality jobs, i.e. there is no proposal on Framework Directive on minimum income, or EU framework on minimum wage"*. Hence, they conclude "*that the implementation of the principles is still unclear, with the main burden falling on the European Semester, but without clear proposals of how systematic implementation of all the principles will be carried out".*

Another 'obscure' issue is the fact that the EPSR is addressed exclusively to the Eurozone. The Pillar has been conceived for the Member States of the euro area but is applicable to all Member States that wish to be part of it. This initial restricted scope is based on the specific needs and challenges confronting the euro area.[398] However, it has been criticized in terms of imposing common currency as a criterion for the implementation of the new initiative. It is claimed that such characteristics might act in contradiction to the aim of 'healing' the divergence across the Member States. Moreover, the fear of the creation or establishment of a two-speed social Europe is growing even more. A two-speed EU will produce the opposite results, via offering opportunities for inequality and social dumping as well. The Commission seems to give more attention to its economic goals over any social progress. By making euro the main area of focus, it, thusly, creates two categories of EU citizens; and the economic imperative therefore seems to win out, once again. These excessive social imbalances, just like excessive economic imbalances, threaten the viability of the monetary union and the credibility of the European integration.

Despite its apparent shortcomings, the EPSR consists of a considerable opportunity to widen the debate by securing the European Social Policy and reconsidering the benefits of a more balanced relationship between economic and social goals within the EU. It puts forward the discussion on the future of 'Social Europe', with the goal of paving the way towards a more inclusive growth model, applied first

[397] D. Reianu, and A. Nistor, (2017), ibid.

[398] L. Fontecha, (2017), ibid.

in the Eurozone, but with the incentive of further integration and consolidation by other Member States interested in following the initiative.

6.1.4 Observations

In light of the Social Summit of 2017, and as part of the overall debate on the future of Europe, the European leaders were forced, via the European Pillar of Social Rights, to promote convergence of Member States' economies and societies. Under, this notion, the European Union launched the EPSR to sustain the standards of living, to create more and better jobs, to equip people with the right skills and to create more unity within the Eurozone. In times of crisis, European Institutions adopt 'new economic governance' to deal with the dire consequences. Therefore, the process of macro-economic reform, such as in the case of the European Semester, has drawn severe criticism on the future of the European integration. The reinforcing budgetary discipline has introduced neoliberal actions; thus, the social dimension of Europe is at risk.

It is really encouraging that the European Commission, the European Parliament and the Council of Europe illustrate the significance and urgency in reversing this downturn of the Social Policy via the EPSR. The reconciliation of macro-economic and social objectives is a great challenge indeed. It needs a definitive response which the EPSR has not offered yet. Certain shortcomings exist that subsequently raise doubts in terms of effectiveness. As far as the content is concerned, the fact that it is addressed only to the Eurozone creates restrictions that should be properly solved and clarified. Moreover, the social field is lacking legitimacy. The perplexity of social rights is their vague status, which is often correlated with the deprivation of judicial protection (see Part I, Chapter 3). Hence, a radical solution would be to adopt a legal document in order to advance the protection of social rights. Instead, the EU lanced an initiative with an unclear legal nature that reinforced the vulnerabilities of social rights. The implementation of the EPSR seems to be problematic as well, since once again Member States have the responsibility of the actions. Regarding economic governance, one may think that the Pillar has more of a potential to address the structural problems. After all, we have seen that part of the Pillar's implementation is through the European Semester, and precisely aimed at improving the social dimension of Economic and Monetary Union.[399]

Nevertheless, the EPSR can be considered as an opportunity to set the EU back on track. It unravels the necessity for a new political consensus in relation to the most

[399] S. Garben, (2018).

appropriate “type of Europe” in which EU citizens wish to live in. It has also been claimed that EPSR emphasizes on the fact that social dimension is not an academic decision but could fundamentally make an impact on people’s life. The European Economic and Social Committee (EESC) denotes that “a realistic future for the European Union can only be based on marrying a sound economic basis with a strong social dimension”. Despite the unclear legal nature of the EPSR, the Committee understands that it still provides a clear ‘road map’ for fostering convergence among the Member States. Reaching a consensus on who should do what regarding social policy, and notably in which areas the EU should act and how, would offer more transparency and accountability in the context of Social Policy.

6.2 Social justice as a sustainable development goal

Nowadays, facing the cataclysmic consequences of the economic-financial crisis, European institutions must overcome the growing inequalities in Europe, the numerous socio-economic challenges along with the depletion of natural resources. There is urgent need of addressing the root of the problem. It has been proven, that social problems generate environmental devastation, as much as environmental problems lead to injustice and affect the most vulnerable. The one crisis feeds the other and vice versa. The definition of the term 'sustainability' has been described as [a] moral commitment of sustaining the conditions in which human well-being can be achieved not only now and in the near future but also into the more distant future and for the next generations as well.[400] It is essential to further elaborate on the definition of 'sustainable development'.[401] Based on the aforementioned notion, a strong linkage between current social issues related to human well-being and social equality with sustaining environments for future is delineated. 'Sustainable development' entails three dimensions, the economic, the social and the environmental. These three dimensions must be balanced in order to fulfill economic growth, social justice and proper management of natural resources.

Social justice and sustainable equality display a 'mission' to develop a new progressive vision which encloses the concept of sustainable development. In particular, the aim of this 'mission' is to tackle the severe inequalities by decreasing poverty and social exclusion. It is inspired by the '2030 Sustainable Development Goals' adopted by all European Member States and the other countries in the United Nations in the year 2015. Policies and actions focused at re-empowering people and re-shaping our economies in conjunction with a wave of policies that specifically tackle poverty and inequality problems seem to be rather essential. Actions that would ensure good work, equal payment, full gender equality, social mobility must be taken as soon as possible. Taking these severe issues into serious consideration, and react through measures, Europe could reduce by more than half the number of people living at risk

[400] N. Dower, (2004). Global economy, justice and sustainability. *Ethical Theory and Moral Practice*, 7(4), 399–415. doi: 10.1007/s10677-004- and J. Rawls, (1971). *A Theory of Juctice. Oxford*: Oxford University Press.

[401] There are many definitions of sustainability and sustainable development. The most commonly is the one by the United Nations Environment and Development Council 1987 (The Brundtland Commission -WCED).

of-poverty or in poverty over the next three decades, and could lastingly end poverty during the course of this century. Since the risk is high, firm action is the only way forward. Aspects such as disruptive technologies, untamed income and wealth concentration, and increasing environmental devastation turn poverty and social exclusion much worse. The human boundaries must equally be respected and protected by economies, besides the social ones should never be crossed. Imposing poverty on millions of people, dispossessing them of employment, providing basic benefits or ensuring educational provisions and catering for accessible health services. Without handling the problem from its root, democratic societies will not be sustainable. Fundamental human and social rights should be respected in order to reduce inequalities. It is quite apparent that our societies have need of economic, social and ecological transformation. This change is already considerably inserted in the United Sustainable Development Goals for 2030.

6.2.1 The 2030 Agenda. Rethinking economic progress in the light of social and ecological needs

"All of this reflects an emerging awareness of the fact that something about our economic system has gone terribly awry – that the mandatory pursuit of endless industrial growth is chewing through our living planet, producing poverty at a rapid rate, and threatening the basis of our existence"[402]

Jason Hickel

In September 2015, the United Nations General Assembly adopted 17 goals, which are separated into 169 targets, aimed to promote policy towards a sustainable development agenda that contains social, economic and ecological dimensions. This accepted framework is intended to accompany governments, civil society and transnational structures in a common effort up to 2030. This Agenda is considered to be a radical protection plan for the people, our planet and the achievement of prosperity. The 17 Sustainable Development Goals (SDGs) and 169 targets display the scale and ambition of this new universal Agenda. They are seeking to promote human rights, to diminish gender inequality, to succeed at empowering all women and to ensure a constant protection for our planet and its natural resources. What drives the attention is the fact that the three dimensions of sustainable development: the economic, social and environmental[403] are integrated and balanced. It is important to note that the 2030 Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is also grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome. Moreover, it is informed by other

[402] J. Hickel, (2015). The Problem with Saving the World. Jacobin. Retrieved from: https://www.jacobinmag.com/2015/08/global-poverty-climate-change-sdgs/?utm_content=buffer9c605&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer

[403] United Nations. Transforming our world: the 2030 Agenda for Sustainable Development. Available at: https://sustainabledevelopment.un.org/post2015/transformingourworld

instruments such as the Declaration on the Right to Development. [404] The 2030 Agenda came into effect on January 1st of 2016 and called for a global action for the next 15 years. The crucial priority is to "*ensure a future for all people, in which they would enjoy a decent, dignified and rewarding life in order to achieve their full human potential*".

The SDGs will turn to be an essential instrument to support the European Member States – as simultaneously Members of the United Nations- , especially, in particular those SDGs which focus to *no poverty, zero hunger, good health and well-being, quality education, gender equality, affordable and clean energy, decent work and economic growth, reduced inequalities, sustainable communities, and more*. Specifically, the Goal 1 of the SDGs is to: "*end poverty in all its forms everywhere*". Unquestionably, expanding lack of equality in societies grows poverty risk and the amount of people in danger of or in poverty. Endeavour to achieve poverty reduction, inequality should be scrutinized. Goal 2 "*end hunger, achieve food security and improved nutrition and promote sustainable agriculture*" in the SDGs is linked with the elimination of hunger. It is obvious that ending hunger is associated with the right to social protection. Moreover, Goal 3 "e*nsure healthy lives and promote well-being for all at all ages*" referred to good health and well-being for everyone and without age discrimination. Outcomes such as the undervaluation of good health and well-being could be considered unacceptable. Hence, Goal 3 aims to implement these rights and bridge the gap that has been worsening by inequality issues. As far as Goal 4 is concerned it attempts to "*ensure inclusive and equitable quality education and promote lifelong learning opportunities for all*". The quality of education in relation with the right to life-long learning reassures the significant right to education. Goal 5 "*achieve gender equality and empower all women and girls*" promotes gender equality and the enforcement of all women and girls. It is widely recognized that gender equality and all forms of discrimination are linked to poverty and social exclusion. Finally, Goal 10 "*reduce inequality within and among countries*" relates to lowering inequalities, both within and among the countries of Europe, and aims to ensure that the income of the bottom 40% in all counties increases faster than the income of the whole population.

[404] See in detail the 2030 Agenda. Available at: https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf

Goal 16 "*promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*" concerns also the development of peaceful and inclusive societies, providing justice for all with effective, accountable and inclusive institutions. According to these principles, equitable societies have a tendency to have fewer social issues.

Table 8. The 17 Sustainable Development Goals

Sustainable Development Goals
Goal 1. End poverty in all its forms everywhere
Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture
Goal 3. Ensure healthy lives and promote well-being for all at all ages
Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
Goal 5. Achieve gender equality and empower all women and girls
Goal 6. Ensure availability and sustainable management of water and sanitation for all
Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all
Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
Goal 10. Reduce inequality within and among countries
Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable
Goal 12. Ensure sustainable consumption and production patterns

Goal 13. Take urgent action to combat climate change and its impacts*

Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development

Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss

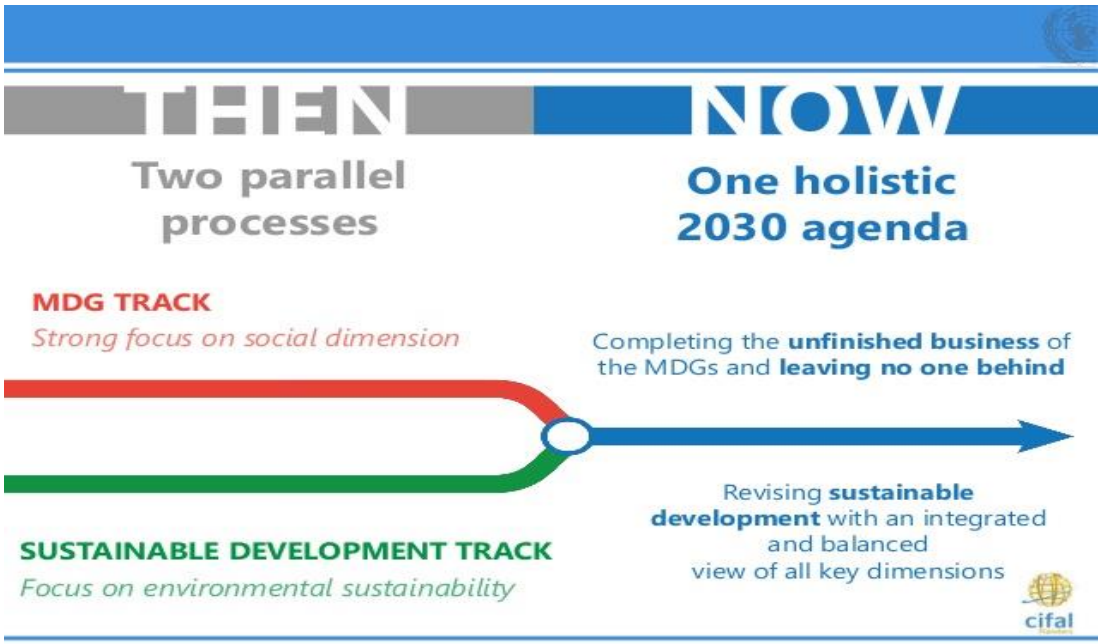
Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

Goal 17. Strengthen the means of implementation and revitalize the global partnership for sustainable development

* Acknowledging that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change.

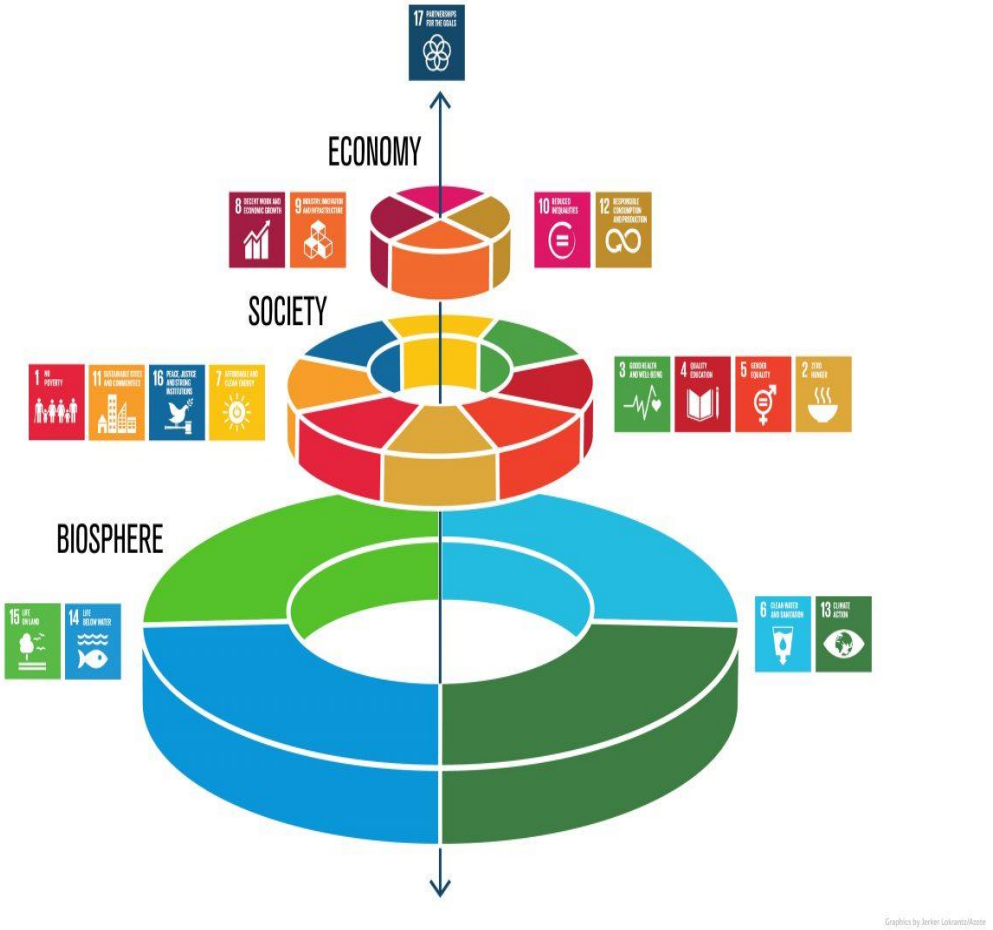
Source: United Nations, 2019.

Figure 12. The confluence of the United Nations Millennium Development and Environmental Sustainability Goals



Source: UNITAR, 2019.

Figure 13. The three dimensions of the 2030 Agenda



Source: United Nations, 2019.

Figure 13 of the three dimensions of the 2030 Agenda accurately depicts the new approach that has been developed in terms of the hierarchy and balance between economy, society and biosphere. In general, during past decades, economic growth was often seen as the absolute solution for any obstacle. Modern society has been shaped by the notion of continuously striving for economic growth, measured through the GDP indicator.[405] Although, this 'economic dogma' helped building the economy and

[405] Economic growth is traditionally measured in GDP rather than in social welfare, the focus of economic theory. Only under unrealistic conditions can GDP approximate social welfare (Weitzman, 1976).

providing welfare for the people,[406] it has been criticized[407] as rather 'sclerotic'.[408] Not much of the economics theories give straight attention in a world of human control, and over and above that on the implication of quality of life. Moreover, nowadays prosperity has turned out to be more and more unfair, and has also failed to positively contribute to the improvement of the citizens' well-being. Therefore, it is claimed that in order to reduce poverty and inequality, the existing current power relationships between different societal and economic actors as well as between states should be transformed.[409] According to the principles of the 2030 Agenda, economy does not play the imperative role. Since, the boundaries are so fragile and social and environmental issues are at their peak, the hierarchy needs to be altered. In other words, resolving economic, social and environmental crisis urges to current, robust strategy to tame those market forces which affect prices, demands, and availability of commodities which are crucial for the economy. As stated before reliable policies which modulate markets could constructively support and reconcile the variance of powers in product, capital and labour market, moreover in our societies. Social states should be prevented from crashing due to the markets' stress, in reverse they should be framed effectively so that to back up well-being. Furthermore, it demands the private sector to be strong and responsible and actively increase the social and solidarity economy. Certainly, limitations to economic development are to be effective, far from it, a biosphere teamwork is the aim with decreased physical growth. This is apparent considering the relation between the added population while poor measures, such as GDP, are yet the factors to estimate economic growth.

[406] Obviously, new approaches and measures of social welfare (e.g. Inclusive Wealth, Dasgupta et al., 2000; Arrow et al., 2003, happiness index, Human Development Index) and institutions that can redirect economic growth from quantity to quality and into active collaborations with the biosphere are urgently needed (Walker et al., 2009; Folke et al., 2011).
[407] Despite a steady GDP growth in rich countries between 1950 and 1980, some happiness or subjective well-being studies point to a stagnating or even decreasing level of welfare (Layard, 2005; Costanza et al., 2013; Raudsepp-Hearne et al., 2010b).
[408] Gadrey, 2011.
[409] Ibid.

6.2.2 The European Union's action in the 2030 Agenda

As mentioned above, what is rather innovative in 2030 Agenda is the attempt of the United Nations to develop an integrated approach to sustainable development, including the three dimensions- economic, social and environmental. The main aspect is the relationship among them in a balanced interconnection, so that each goal and target must be reinforced. As for the implementation of the 2030 Agenda, Policy Coherence for Sustainable Development (PCSD) has been formally recognized and agreed as a Means of Implementation in Target 17 of the 2030 Agenda and underlines the integrated policy making and thinking of what the Agenda advocates.[410] The Organization for Economic Co-operation and Development (OECD) defines PCSD as a new "*approach and policy tool to integrate the economic, social, environmental and governance dimensions of sustainable development at all stages of domestic and international policy making. It aims to increase governments' capacities to:*

i) *foster synergies across economic, social and environmental policy areas;*

ii) *identify trade-offs and reconcile domestic policy objectives with internationally agreed objectives; and*

iii) *address the spillovers of domestic policies*"[411]

a) Implementing the SDGs in the EU

It is important to note that implementation of the Sustainable Development Goals (SDGs) has been introduced during a severe turbulence in Europe. Hence, the current political and economic circumstances seriously affected the implementation of the 2030 Agenda. However, this action as it is described above, is a welcome evolution within the European Union and may offer various benefits. It is a significant challenge of domestic European action, both in the EU's internal as well as external policy frameworks. The European Commission has committed itself to the United Nations Agenda 2030 and the Sustainable Development Goals (SDG's). For the first time this

[410] The Sustainable Development Goals (SDGs) include an internationally agreed target (SDG 17.14) that calls on all countries to enhance policy coherence for sustainable development (PCSD) as a means of implementation that applies to all SDGs. See in detail: Policy Coherence For Sustainable Development 2018, OECD (2018).

[411] Policy Coherence for Sustainable Development in the SDG Framework Shaping Targets and Monitoring Progress, OECD (2015).

is a truly global agenda with the SDG's being a basis for global action and development in the Global North as well as the Global South. Therefore, the European Commission has been discussing how to both implement and measure progress on the SDG's in the Member States of the European Union.[412] In particular the European Commission published a mapping communication on SDG implementation in 2016, a year after the SDGs were agreed. In the 'Commission Communication' accompanying a staff working document,[413] the Commission has confirmed its commitment to sustainable development and its intention to further mainstreaming it into its policy-making. To achieve this, the EU will need to put its enabling policies and funds into practice and showcase concrete results on the ground. For that - as indicated in the Commission Communication accompanying this staff working document – governance instruments including better regulation tools will be used to ensure that EU policies continue to be fit for purpose. Effective implementation of existing EU policies, of which many are linked to sustainability objectives in the long term, is also needed to continue progress towards the Sustainable Development Goals within the EU and globally, including in developing countries. The achievement of many Sustainable Development Goals will also depend largely on action taken in Member States, as in many areas the EU supports, coordinates and complements Member States' policies or has a shared responsibility. In line with the principle of subsidiarity, the EU can, in areas outside its exclusive competence, only act if the objectives of the proposed action cannot be sufficiently achieved by the Member States at central, regional or local level but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[414] More than three years after they were signed by all EU Member States in New York, there is as yet no collective plan or strategy for their implementation - notwithstanding that in all policy areas concerned, the European dimension is real, and sometimes even critical. Most regrettably, it represents a missed opportunity to revive the whole European project by injecting new purpose, one that would be relevant to so many aspects of people's daily lives and which would show that the European Union actually

[412] The Multi-Stakeholder Platform on the implementation of the Sustainable Development Goals in the European Union – the "EU SDG multi-stakeholder platform" – was established in May 2017 to support and advise the European Commission and all stakeholders involved on the implementation of the SDGs at EU level.

[413] See in detail Commission Staff Working Document. Key European action supporting the 2030 Agenda and the Sustainable Development Goals (2016).

[414] Implementation of the 2030 Agenda in the European Union: Constructing an EU approach to Policy Coherence for Sustainable Development.

has a master plan to improve their lives today and tomorrow. A sustainable future in the European Union can only be realised if all work together - the Commission, the European Parliament, the Council of the European Union, the Member States, businesses, civil society organisations and citizens. EU action is also to be coordinated with our external partners bilaterally and at global level, especially to achieve further progress in developing countries, where many challenges to meet the Sustainable Development Goals are persisting.[415]

b) Joining Forces: The EPSR and the SDGs

While implementing stringent national austerity measures, the EU government – somewhat paradoxically- committed to fighting poverty and social exclusion and promoting equality and solidarity at EU level [Europe 2020 Strategy].[416] While the EU continues to face challenges on its march towards achieving socio-economic justice for all its 500 million plus inhabitants, new windows of opportunity have opened that could lead to the realization of a truly social and economical Europe: reinvigorated political will, public opinion swinging in favor of social equality and solidarity and the new tool the so-called European Pillar of Social Rights, that can bring about the necessary policy changes. The Commission considers the EPSR a key tool for attaining the SDGs. It has been argued that by bringing both frameworks together the EPSR would gain the sustainability element, while ensuring that the social aspects of the SDGs, applicable to the EU's internal policies, are not overlooked. Therefore, when considered together, those two elements have the potential to form a coherent and comprehensive post 2020 strategy for the EU.[417] Indeed, several goals of the SDGs coincide at least partially with the principles of the EPSR and it therefore seems to suggest itself that both policy frameworks should be dealt with together and in a well-coordinated manner. These two initiatives provide an opportunity to bridge the thinking and policy action on environmental and economic sustainability and well-functioning social welfare

[415] See in detail Commission Staff Working Document. Key European action supporting the 2030 Agenda and the Sustainable Development Goals (2016).
[416] As the Europe 2020 Strategy is coming to an end, the EPSR and SDGs could feed into an overarching single framework or strategy guiding the EU's work for the period after 2020.
[417] Joining forces for social justice and sustainability. Eurodiaconia, 2018, *Towards a Social, Sustainable, and Equitable Europe: Integrating and Implementing the European Pillar of Social Rights and the Sustainable Development Goals*. Available at: https://www.eurodiaconia.org/wordpress/wp-content/uploads/2018/05/Pub-2018-Towards-a-Social-Sustainable-and-Equitable-Europe.pdf

systems, which are effectively protecting people from poverty and social exclusion. While the EPSR is defining rights, the SDGs are formulated as targets. These approaches are not contradictory, but can build on and complement each other. Both frameworks, the EPSR and the SDGs, are accompanied by different sets of indicators which are aiming at monitoring implementation. These sets of indicators are adding up to other already existing monitoring tools and indicators, such as the Social Protection Performance Monitor (SPPM) and Employment Performance Monitor (EPM).

The SDGs are accompanied by an internationally agreed set of indicators to monitor their achievement. However, the EU has also developed its own set of 100 indicators to monitor the SDGs, based on already available data. In addition, the EPSR, has been published together with the Social Scoreboard, aiming at monitoring its implementation in Member States. Surprisingly, the Social Scoreboard uses much less indicators which don't cover all 20 principles, even though other and more precise indicators already existing and are used at EU level, as mentioned above. All these different, already existing sets of indicators are overlapping to a significant extent and risk to create more confusion than clarity. A strong and coherent EU policy needs a single monitoring system based on a single set of indicators.

European Semester process is another aspect that EU should take into consideration. European Semester as the EU's current central annual economic and social governance coordination cycle has been emphasized as an essential key tool for the cooperation of the EPSR and SDGs. In accordance to the European Semester purposes, these two "instruments" could ensure that the social dimension of the EU and social rights are in the heart of the European integration progress.[418]

In a nutshell, there are numerous cross-cutting synergies between both the SDG and Pillar frameworks, not least: [419]

- Quality and inclusive education, training and life-long learning;
- Gender equality, equal opportunities, and fighting discrimination in all its forms;

[418] Joining forces for social justice and sustainability, ibid.
[419] Equality, Justice, Inclusion and Decent Work: How can the European Pillar of Social Rights support the achievement of the 2030 Sustainable Development Goals? Recommendations, 18th June 2018.

- Promoting inclusive societies through the economic and social inclusion of migrants, ethnic minorities, persons with disabilities, and other marginalised groups;
- Ensure smooth and quality transitions from education to work, support labour market integration and make sure that young people have access to quality opportunities, and are not discriminated in the labour market;
- Inclusion of persons with disabilities in line with the implementation of the UN Convention on the Rights of Persons with Disabilities, ratified by the EU and all of its Member States;
- Protection and investment in children in line with the UN Convention on the Rights of the Child, ratified by all EU Member States, promoting their health and well-being;
- Quality employment, tackling precariousness and in-work poverty by ensuring fair working conditions and access to social protection for all workers, and ensuring that the right framework exists for employers to make this a reality;
- The crucial role of social partners and civil society in reaching the goals and principles outlined in both frameworks.
- The importance of the SDGs and the Pillar of Social Rights as key channels for the implementation of international human rights treaty obligations.

Table 9. EU social standards in relation to the principles of the European Pillar of Social Rights (EPSR) and to the Sustainable Development Goals (SDGs)

Social standards	EPSR principles	SDGs	Implementation tools
Quality employment	2. Gender equality 3. Equal opportunities 4. Active support to employment 5. Secure and adaptable 6. Wages 7. Information about employment conditions and protection in case of dismissals 8. Social dialogue and involvement of workers 9. Work-life balance 10. Healthy, safe and well-adapted work environment and data protection 17. Inclusion of people with disabilities	SDG5: gender equality SDG8: decent work and economic growth SDG10: reduced inequalities	Legislation: a. Work-life balance directive b. Framework directive on fair working conditions Governance: a. Adequacy and coverage of minimum wages
Adequate income support	2. Gender equality 3. Equal opportunities 12. Social protection 13. Unemployment benefits 14. Minimum income 15. Old age income and pensions 17. Inclusion of people with disabilities	SDG1: no poverty SDG5: gender equality SDG10: reduced inequalities SDG11: sustainable cities and communities	Legislation: a. Framework directive on fair working conditions b. Framework directive on adequate minimum income Governance:

			b. Adequacy, coverage and accessibility of benefits, starting from minimum income
			Funding: adequate funding allocated at EU and national level
Quality, accessible and affordable services	1. Education, training and life-long learning 9. Work-life balance 11. Childcare and support to children 16. Health care 17. Inclusion of people with disabilities 18. Long-term care 19. Housing and assistance for the homeless 20. Access to essential services	SDG3: good health and well-being SDG4: quality education SDG5: gender equality SDG10: reduced inequalities SDG11: sustainable cities and communities	Governance: c. Quality, accessibility and affordability of services Funding: adequate funding allocated at EU and national level

Source: Social Platform Campaign, 2019.

According to the recommendation of the subgroup[420] 'Multi-Stakeholder Platform'[421] to the European Commission there are essential conditions for the European Pillar of Social Rights to become a trans-formative ecosystem for implementation of the SDGs**.**

"The Pillar needs to be firmly placed as a key framework for implementation of the SDGs, in post-2020 policy and legal frameworks, underpinned by the following:

- ***The EU Charter of Fundamental Rights and the EU Treaties****, and namely Article 3 of the Treaty on European Union on the aims of the Union being inter alia to 'promote the well-being of its peoples and to 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. The Union shall combat social exclusion and discrimination, promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.'*
- ***Legislative action must be taken in line with EU competences****, in consultation with the EU social partners and civil society, in order to enshrine social and human rights in law where appropriate. The Pillar of Social Rights already includes several proposals for legislative measures to ensure minimum standards across Europe while respecting the principle of subsidiarity and the national specificities of Member States.*
- ***Transparent, inclusive and participatory methods that guarantee civic space and involve all stakeholders in equal weight****, as shapers and implementers of change. The Partnership Principle in the current EU budget regulations is an example to follow. It calls for close cooperation between public authorities, economic and social partners and bodies*

[420]For further details relating to the platform and its members see https://ec.europa.eu/info/strategy/international-strategies/global-topics/sustainable-development-goals/multi-stakeholder-platform-sdgs_en. The recommendations were adopted by the subgroup on 15th June 2018.

[421] How can the European Pillar of Social Rights support the achievement of the 2030 Sustainable Development Goals? Recommendations to the European Commission by the subgroup on "Equality, Justice, Inclusion and Decent work" of the Multi-Stakeholder Platform on the Implementation of the Sustainable Development Goals in the EU, June 2018.

rep-resenting civil society at national, regional and local levels throughout the whole programme cycle consisting of preparation, implementation, monitoring and evaluation. The implementation of such a principle must be strengthened and must apply to both implementation of the SDGs and the Pillar of Social Rights, whilst recognizing the competences of the different actors concerned.

- ***Directing EU financial investments*** *and setting clear objectives where sustainability is mainstreamed to drive long-lasting change for Europeans. Heads of State and Government are at a crossroads to decide on the priorities of the future EU budget post-2020. Taking into account the effects of migration flows, the forthcoming Brexit, digitalisation and new forms of work, globalisation and business reorganisation, the security crisis, the growing ageing population, and the need to update and develop quality and inclusive European education systems, now is the time to invest in transformative actions for systems change where EU money can have "added value" and support initiatives that otherwise would or could not happen at local level. The European Pillar of Social Rights must be at the heart of the future EU budget, with a view to building sustainable and inclusive societies.*
- ***Space for transnational exchanges to drive innovation locally*** *must be provided in order to allow for the systems change needed to achieve the SDGs by 2030. Local leaders, including youth leaders, should be empowered to go beyond their comfort zone through appropriate ecosystems which allow them to test new ways of working, and upscale successful innovations through different channels of knowledge transfer (e.g. European civil society networks). This applies to all fields related to the Pillar principles, and should target all key players including civil society organisations, local services, social economy players, social partners, and policy-makers alike with a view to driving a mix of business, service and policy innovation. The local business community is also key in driving innovation.*
- ***Leadership and guidance must be provided by the EU*** *in particular through the European Semester, which allows for monitoring, benchmarking and evaluation of national actions to drive reforms, as*

well as key policy frameworks and initiatives, including the EU Skills agenda, the European Youth Guarantee, which can contribute to EU implementation of the SDGs. It is essential to use existing tools such as the Social Scoreboard (which includes a number of indicators which can support monitoring of progress on different SDGs through the work of Eurostat), as well as other existing mechanisms like the Employment Performance Monitor (EPM) and the Social Protection Performance Monitor (SPPM). Existing and new indicators need to work in harmony, for effective monitoring and measuring progress on the Pillar of Social Rights and the SDGs."

The ongoing discussions on the future of Europe have developed a new direction after the ESPR 'project'. The timing that this instrument has appeared was a strategic moment. The economic-financial crisis brought upside down at the European Union. Euroscepticism has altered in comparison with the past and became more dangerous in the sense that criticism was not anymore about proposal of resolving issues such as the democratic deficit, the legitimacy problems, the undermining of national sovereignty. The 'new wave' of Euroscepticism does not include the notion of 'doubt' or 'a sceptical attitude' but has been transformed to a belief of rejection. It has been seriously enforced by the major migrant crisis, the political turbulence that created incidents like the so-called Brexit. The European edifice faced its biggest shock. Political and economic instability gave the chance to populism and right-wing parties to rise and create pessimism for the European future. Thus, actions such as the ESPR, the next annual financial framework, and the adoption of the 2030 Agenda for Sustainable Development are just three areas where the argument for a broader EU social agenda can gain real traction, beyond employment. [422] It is really significant the fact that at the 60th anniversary of the Rome Treaties, EU leaders agreed that the social dimension is equally important to the economic one for the European Integration. The acceptance of a problem is the first step to find the solution. It is positive that there was a clear reference to the need to strengthen the social character of Europe. President of the European Commission, Jean-Claude Juncker through his actions (initiative of the ESPR) and his statements concluded his belief that: "*It is up to us to ensure that the*

[422] European Commission, Social Summit for Fair Jobs and Growth, Gothenburg, 17 November 2017.

handwriting of the European Social Model is clearly visible in everything we do. Because Europe is the protective shield for all of us who can call this magnificent continent their home".[423]

Europe's social dimension is ever-changing, influenced by personal choice, economic reality, global trends and political decisions. Economic and social dimensions should be at the same direction, since they are aspects that through cooperation will succeed more. Europe shall no longer be Janus-faced. A European Union that operates for its people should focus on fair and sustainable employment and social policies across all European Union Member States and inclusive European labour markets.

[423] European Commission President Jean-Claude Juncker, Speech before the European Parliament, 22 October 2014.

6.3 Strengthening the European Social Charter through the "Turin process"

In the light of this evident need for action the Council of Europe (CoE) attempted to enhance the implementation of social and economic rights in the Council of Europe Member States in conjunction with the civil and political rights guaranteed by the European Convention on Human Rights. The current financial circumstances led to a deeper cooperation between the EU and the CoE.[424] On the basis of shared values of human rights, democracy and the rule of law, the Council of Europe launched the "Turin Process"[425] in October 2014. Its aim is to reinforce the normative system of the European Social Charter within the CoE, in parallel to the European Law. As mentioned in Part I of the present thesis, the European Social Charter of 1961 and the Revised European Social Charter of 1996 guarantee a wide range of fundamental rights, concerning to health, housing, social protection, working conditions, freedom to organize, and protection against poverty and social exclusion (see Part I, Chapter 2.2). The "Turin process" aims at giving a new dynamic to the European Social Charter, to ensure that the Charter is a lively instrument for upholding and promoting social rights. The Parliamentary Assembly has always supported the promotion of the European Social Charter with a view to extending ratifications and effectively implementing various provisions of the Charter. In the framework of the "Turin process" it wishes to stimulate further progress through parliamentary dialogue at various levels, concerning social and economic rights, such as:

- Strengthen cooperation with a view to improving the implementation of fundamental social and economic rights and advance Business and Human Rights' issues in CoE member countries.
- Reinforce regular dialogue and cooperation with CoE on the interaction between the European Social Charter and the laws and policies of the

[424] The complementarity, coherence and added value of this multi-faceted cooperation have become apparent since the signature of the Memorandum of Understanding (MoU) between the EU and the CoE in 2007.
Available at:
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044e437b

[425] Launched at the High-level conference on the European Social Charter in Turin (Italy) on 17-18 October 2014 where the Assembly was represented by its Sub-Committee on the European Social Charter, see in more detail at: http://www.coe.int/en/web/turin-process/

European Union, taking into account the respective legal and political architectures and competences of the EU and CoE.

- Fostering the education of disadvantaged children and young people, by ensuring that education and training systems address their needs.

The "Turin process" is a political process which promises to strengthen the implementation of the ESC and the Charter of Fundamental Rights of the European Union, to unify its foundations through better cooperation between the EU law and the ESC.[426] In the final document on the 2014 Turin Conference, presented by the conference's General Rapporteur Mr Michele Nicoletti (also Vice-President of the Parliamentary Assembly), these objectives are completed by an Action Plan addressed to the Council of Europe, the European Union, national governments and civil society as the main stakeholders. The Action Plan linked to the "Turin process" proposes priority action in the following areas:

- The ratification of the revised European Social Charter and the Protocol on Collective Complaints by all member States of the Council of Europe and the European Union;
- A better implementation of the Charter at national level, taking into account the decisions and conclusions adopted by the ECSR in the framework of the monitoring mechanisms; - the enhancement of the collective complaints procedure, which allows the direct involvement of social partners and civil society in monitoring activities regarding the application of the Charter and represents a more transparent and democratic system as compared to the one on national reports;
- The strengthening of the position, status and composition of the ECSR within the Council of Europe, also through the election of its members by the Parliamentary Assembly as already set forth in the Turin Protocol of 1991 (which has not yet entered into force);
- The reinforcement of the dialogue and exchanges - which the "Turin Process" has already made possible - with competent bodies of the

[426] See also European Parliament, DG Internal Policies: The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights, study for the AFCO Committee by Prof. Olivier De Schutter, University of Louvain, January 2016.

European Union and to do so in view of the full consideration of the Charter and ECSR decisions within European Union law;

- The implementation by the Council of Europe of a communication policy capable of sending a clear message on the legal nature of the Charter and on the scope of ECSR decisions.

Not much later, the first Turin conference's scheme was deliberated and illustrated in the "Turin II" framework events occurred on 17 and 18 March 2016, particularly an Interparliamentary Conference on the European Social Charter and in Turin Forum on Social Rights in Europe, a gathering event for both academics and politicians unofficially. In Turin debates, a big number of Members of the Parliamentary Assembly, the European Parliament and the national Parliaments admitted that the most crucial social rights tests should be practiced on the fight against social exclusion and poverty, the protection of, and support to the population which is the most "defenseless" (including refugees and immigrants, any type of minorities, the elderly and the children and so on). The empowering of the social security system in a number of countries was also discussed, despite a considerable social acquis in Europe. Briefly, the aim is a further alignment of the MS and their citizens so that the values of the European Social Charter are celebrated. The advancement of this movement was towards a total consolidation in Europe, performing within the framework of acting as Europe's Social Constitution.

6.4 A synergy between the European Charter of Fundamental Rights and the European Social Charter ?

The option of succeeding a 'synergy' between the European Charter of Fundamental Rights and the European Social Charter gains more attention, as it comes in a moment that the ESC has already matured significantly. As described above (see Chapter 6.3), CoE via the Turin Process made crucial progress at social protection. Especially, in comparison with the Charter of Fundamental Rights that has not greatly evolved despite the added legitimacy (recognized as Primary EU law) gained from the Lisbon Treaty. The fact that the social rights are mentioned more often as principles rather than rights (Title IV of the Charter 'Solidarity') do not allow to extend the applicability of the rights. In addition, the unwillingness of the drafters of the Charter of Fundamental Rights to comprehensively align its status with that of the European Social Charter poses another serious limitation.

Since Europe is in need of reorientation by tangible measures it is worth discussing EU accession to the European Social Charter. In that sense, why the EU and the Council of Europe do not combine their potential efforts to address the legitimacy weakness of "Social Europe"? The EU could accede to the European Social Charter on the basis of Article 216 (1) TFEU. The idea of accession was also mentioned in 1984, when the European Parliament adopted the Draft Treaty Establishing the European Union, widely referred to as the "Spinelli Treaty". Chapter 1 (Article 4. 2) refers to "*economic social and cultural rights derived from the Constitutions of the Member States and from the European Social Charter*". Initiatives taken during the political run-up to embracing accession may play positively within European public opinion, as these would undoubtedly indicate that the EU is equally committed to the establishment of the internal market, and the creation of an area of freedom, security and justice, including social justice, where egalitarianism prevails in terms of civil, political, economic and social rights.[427]

The incomplete project of invigorating of social rights shall make a progress. The European commitment to social rights is essentially rhetorical in nature, being through the years the Achilles heel of "Social Europe". Taking this into serious

[427]M. Bafaloukou. (2018). Retooling Social Europe via Charter of Rights. *Social Europe*. Available at: https://www.socialeurope.eu/retooling-social-europe-via-charters-rights

consideration, the political and economic conditions may be fruitful to drive-back the decline of the social rights.[428]

[428] M. Bafaloukou, ibid.

Final Conclusions

The present thesis examines the status of the Social State within the European Integration. The use of the term Social is deliberate in order to emphasize on the perception of the European Union as a political entity to be.

The critical juncture of the recent economic crisis of 2007-2008 is used as "magnifying glass" to see whether and in what extent the EU is meant to have a social dimension. The question of whether the European Union should play an active role in social policy has been debated for over fifty years.[429] However, the consequences of the crisis could shed more light in the discourse of the economic prioritization over the sustainability of the social state. During the crisis millions of people lost their jobs, wages declined, and poverty increased, and some Member States are still dealing with the effects of the crisis. The fact that the living conditions are deteriorating for many MS, and solidarity and various social benefits are decreasing rapidly, led us to explore the following questions: is Social State a part of the EU, or it is a tool that facilitates the single market's operation? If it is more than a safety net at the market failures, how could it be reborn after a severe shock such as a recession? In order to answer, it was crucial to examine the European Social State's evolution before the crisis. Hence, in Part I it is made clear that economic integration was the primary motivation for the expansion of the EU's action in adopting social measures, leaving to the MS the main responsibility in the social field.

The initial conclusions confirm our research hypothesis that the social dimension of the EU is subsidiary to the market dimension. This is related to several factors such as: i) the history of the Social State in European Constitution Culture and the step-by-step evolution of the EU starting as an economic cooperation, emerging in issues such as the repartition of competences between the Union and the Member States, ii) the imperfect juridical nature of social rights, iii) the social policy instruments which are mainly soft-law, and the conciliatory role of the jurisprudence which is yet prioritizing the fundamental freedoms. Regardless, the scope of the research was to reveal the role of these factors and their consequences on the social profile of the EU and not to exhaustively analyze each one of them individually: the current study

[429] F. Vandenbroucke, (2013). Why we need a European Social Union. Reflets et perspectives de la vie économique, LII (2), 97.

remains methodologically in the field of political science.

The field of social policy in the EU rests mainly within the national sphere. The Treaties leave social policy to the national concern,[430] as the main mission of the EU was to remove barriers to trade and to create successful market integration (Chapter 1.1). Breaking down barriers toward greater social integration has been stagnant as it is considered a national matter.[431] Studying the Treaties and the significant tools (Chapter 1.2) it made apparent that the enforcement of social rights served actions that focused at the economic integration. The nature of most of the instruments as 'soft-law' do not allow the interpretation that EU wanted to advance the status of the social rights and resolve the legitimacy issues. The dominant philosophy of the Treaty of Rome was that economic growth based on the liberalization of the European market would provide improvements in welfare of the citizens.[432] However, it is worth mentioning that efforts regarding 'technical coordination of social security rights for mobile workers, standards for health and safety in the workplace', are examples of the 'social acquis' (Chapter 3.1) which has been built during the existence of the EU.[433] In addition, progress in relation to the protection of fundamental rights has been sealed by bringing the Charter of Fundamental Rights into a legally binding text of the same magnitude as the Treaties. All in all, the research question of Part I focused on the attempt to illustrate that the path of integration followed by the EU has prioritized economic integration and believed that the wealth this created would 'trickle-down', hereby improving the welfare of EU citizens. Nevertheless, the outcome was quite the opposite; a severe 'social deficit' has arisen, and the European Court of Justice called numerous times to resolve it or even worst to ignore it (Chapter 3.3). Scharpf argues that "there is a disproportionate amount of focus on the role of actors and their preferences instead of the structures within the EU framework. The apparent existing asymmetry between legislative and judicial policy was established to avoid political stagnation due to the increasing diversity caused by enlargement and the European Court of Justice (ECJ)

[430] G. Falkner, (2016). The European Union's Social Dimension. In: M. Cini and N. Borragán, ed., *European Union Politics*, 5th ed. Oxford University Press, 269-280.
[431] M. Ferrera, (2017a). Mission impossible? Reconciling economic and social Europe after the euro crisis and Brexit. European Journal of Political Research, 56(1), 3-22.
[432] G. Falkner, (2016), ibid.
[433] F. Vandenbroucke, (2017b). The Idea of a European Social Union: A Normative Introduction. In: F. Vandenbroucke, C. Barnard and G. De Baere, ed., *A European Social Union after the Crisis*. [online] Cambridge University Press, 3-46. Retrieved from: https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108235174

was therefore given the mandate to interpret EU law to further the process of integration".[434] This 'supremacy of European legal order' has impeded agreements to be reached through political legislation.[435] Since the 70's, ECJ rulings regarding barriers to the creation of a common market have widened greatly to a state where 'any national rules and practices could be constructed as non-tariff barriers'. This process of 'integration through law' is repeated not only in matters of free trade, but also in "free service delivery, free establishment, free capital movement and the free mobility of workers". [436] An example where such interpretations threatens the social dimension are the *Laval* and *Viking* case rulings which challenged the protection of workers thus, no national domain is untouched by the forces of European liberalization and deregulation. The ECJ has come to favor cases that promote liberalization and deregulation.

What is more, is the role of the Council of Europe (Chapter 2) which through the European Convention on Human Rights and the European Social Charter guarantees human rights. The European Convention on Human Rights obtains a crucial role in the EU legal system as a source of fundamental rights in the form of general principles, as well as on the ground of Articles 52 par.3 and 53 of the Charter. The Lisbon Treaty tried to enhance the relation of the EU and the ECHR via the Article 6 which provides the accession of the EU to the ECHR. However, in December 2014 the European Court of Justice ruled that the Draft Accession Agreement did not provide for enough protection of the EU's legal arrangements and the ECJ exclusive jurisdiction.

Finally, another aspect that 'demands' an answer is the status of the social rights (Chapter 3.2). The conceptual division of rights in three separate categories, civil, political and social has been associated with the notion that the latter held an inferior status. Their inevitable dependency upon external factors such as social conflict, economic growth, political and ideological trends weakens their judicial enforcement. In other words, it is not possible for social rights to be fulfilled by the courts in the same way as civil rights (status negativus). Hence, the narrative of social rights as a 'wish list' without substantial consequences and no commitment leads to a weaker form of constitutional protection. The EU's principles and rights need to be activated more

[434] F. Scharpf, (2009). The asymmetry of European integration, or why the EU cannot be a 'social market economy'. *Socio-Economic Review*, 8(2), 211-250.
[435] Ibid.
[436] Ibid.

forcefully, through existing and new policies, and through legally enshrined rights. In this context, the question is whether the functioning of the social state should be re-examined so as to investigate whether it is possible to transform the economy and state relationship within the liberal system.[437] However, the willingness to change the existing hierarchy of economic and social policy is questionable as there is no consensus on enhancing positive integration as it would infringe on national sovereignty.[438]

This 'consensus' seems to be slightly made its appearance after the effects of the crisis, but it is still under question as argued in Part II. More specifically, the 'Great Recession' revealed that not only the social dimension of the EU was vague, but also that the predominant economic integration was not able to absorb the multiple crisis in the Eurozone. Crisis management brought severe austerity measures (Chapter 4), the repercussions of which jeopardized the already fragile European Social State (Chapter 5) and led to discussions and actions concerning the ambivalent Future of Europe via promotion of tools enhancing EU's social dimension (Chapter 6). In the aftermath of the crisis EU leaders seem to agree at the belief that achieving a 'social triple A' through the European Pillar of Social Rights, aims at a higher level of social integration to bring about a deeper and fairer economic union (Chapter 6.1). The perception that economic measures alone are not enough to overcome the effects of the crisis opens a new opportunity for seeing the importance of the social state within the European integration process. In this direction, the possible synergies offered by the Council of Europe (Chapter 6.3 and 6.4) and the adding value of the 2030 Agenda of the United Nations (Chapter 6.2) might help. Europe's social dimension is ever-changing, influenced by personal choice, economic reality, global trends and political decisions. Economic and social dimensions should be going hand in hand, since success requires cooperation. A European Union that operates for its people should focus on fair and sustainable employment and social policies across all European Union Member States and inclusive European labour markets.

The final conclusion of this research is that is that a new perception on the

[437] M. Bafaloukou, (2016). Κοινωνικό Κράτος: από την επικουρική, στη ρυθμιστική λειτουργία. Retrieved from: https://www.constitutionalism.gr/

[438] B. Hacker, (2015). Under Pressure of Budgetary Commitments: The New Economic Governance Framework Hamstrings Europe's Social Dimension. In: A. Lechevalier and J. Wielgohs, ed., *Social Europe: A Dead End. What the Eurozone crisis is doing to Europe's social dimension*, 1st ed. Copenhagen: Djøf Publishing, 133-159.

existing relations between the Social State and market economy is necessary. Not only in order to implement social fairness, but mainly aiming at securing and reinforcing the market itself. A radical action that should reassure that European social state is valuable to the EU's future shall be the judicial enforcement, through 'constitutional' empowerment of the social rights.[439] Social rights should have equal justiciability with individual and political rights as well. At the same time, European social state should be reformed in order to become a primitive component within the core of European integration process, giving real meaning to the term "social market economy" as it referred to the Treaties. The Agenda 2030 which underlines the relation between social and economic dimension might be a useful tool for the EU. To this purpose, the necessary instruments as well as the efficient method of application still remain to be conceived. For instance, the EU should rethink the repartition of competences between MS and the EU in the social field, even though this action could generate deep reforms such as redefining the European budget.[440] Furthermore, the implementation of the European Public Service at the EU level and not merely at the MS level could prove to be rather beneficial and productive. Strengthening the social dimension is a vital step for a Europe active in the future.[441] The new President of the European Commission Ursula von der Leyen in her opening statement in the European Parliament Plenary Session emphasized the need of enhancing the social dimension and combating the new social risks.[442] A comprehensive review about the future of Social Europe is required: all possible options should be examined to re-established reliability and confidence in a common Europe and beyond, for the development of the European social state.

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[439] See among others, V. Fabbrizi, (2018). Do Social Rights Deserve a Special Constitutional Protection? *Jura Gentium*, XV (1), 46-75. Retrieved from: http://www.juragentium.org; A. Ferrara, (2011). Ferrajoli's Argument for Structural Entrenchment, *Res Publica*, 17 (4), 377-383; F. Michelman, (2015). Legitimacy, the Social Turn and Constitutional Review: What Political Liberalism Suggests, *Critical Quarterly for Legislation and Law*, 3, 3-4.

[440] The discussion on a joint Eurozone budget might eventually be a remedy in that direction. France and Germany are describing it as a "major political breakthrough". The budget would be linked to the EU framework and be part of the next EU long-term budget – ready to enter into force by 2021.

[441] A. Gracer, (2008). *Approaching the 'Social Union'?* at *Law, Democracy and Solidarity in a Post-national Union*, edited by E. Eriksen, et all, Routledge, London and New York, 132-151.

[442] "*I want Europe to become the first climate-neutral continent in the world by 2050…", "…will propose a Sustainable Europe Investment Plan and turn parts of the European Investment Bank into a Climate Bank… Therefore I will refocus our European Semester to make sure we stay on track with our Sustainable Development Goals". "In a Social Market Economy, every person that is working full time should earn a minimum wage that pays for a decent living…", "…This is part of my action plan to bring our Pillar of Social Rights to life".* See in more detail Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission. Available in: https://ec.europa.eu/commission/presscorner/detail/en/speech_19_4230

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Last access on:14/05/2019

List of Judgments (as appeared in the present thesis)

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