The European Pillar of Social Rights: Transforming Promises into Reality

Olivier De Schutter

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Institute for Interdisciplinary Research in Legal sciences (JUR-I)
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1. Introduction

The European Pillar of Social Rights (EPSR), initially announced on 9 September 2015 by the President of the Commission in his State of the Union address,[1] was formally presented by the Commission in a communication of 8 March 2016.[2] It was endorsed by the European Parliament, the Council and the Commission on 17 November 2017, at the Social Summit for Fair Jobs and Growth held in Gothenburg, and approved the following month by the European Council. On 13 March 2018, in response to the request of the European Council, a communication from the Commission described how implementation of the EPSR would be monitored. [3] This monitoring includes a regular assessment of the employment and social performances of the EU Member States on the basis of a so-called 'Social Scoreboard', comprising 35 social, educational and employment indicators, broken down by age, gender and education. These are grouped into three dimensions corresponding to the broad areas covered by the EPSR (equal opportunities and access to the labour market; dynamic labour markets and fair working conditions; and public support, social protection and inclusion). The Social Scoreboard is supposed to influence, in particular, the annual Joint Employment Report and the Country Reports presented as part of the European Semester, which seeks to promote macroeconomic convergence in the EU.[4] Finally, the EPSR was complemented by an Action Plan for its implementation, endorsed in March 2021 at the Porto Social Summit.[5] The Action Plan lists a number of initiatives the Commission proposes to take, or actions it recommends to other EU institutions or to the Member States, in order to make further progress. Three headline targets are stipulated: to increase the employment rate of the adult population in the EU to 78 per cent by 2030 (as compared with 73.1 per cent in 2019); to ensure that 60 per cent of adults

[1] See also European Commission, *Commission Work Programme 2016*, COM(2015) 610 final of 27.10.2015 (in which, under the heading 'A deeper and fairer Economic and Monetary Union', the Commission announces its intention to contribute to the development of a 'European pillar of social rights', both by 'modernising and addressing gaps in existing social policy legislation' and by 'identifying social benchmarks, notably as concerns the flexicurity concept, built on best practices in the Member States with a view to upwards convergence, in particular in the euro area, as regards the functioning of the labour market, skills and social protection', 9).

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Launching a consultation on a European Pillar of Social Rights*, COM(2016) 127final, 8 March 2016.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018.

[4] See Proposal for a Council Decision on guidelines for the employment policies of the Member States, COM(2017) 677 final of 22.11.2017.

[5] COM(2021)102 final, 4.3.2021.

participate in training every year (up from 37 per cent in 2016); and to reduce the number of people at risk of poverty or social exclusion (AROPE) by 15 million by 2020 (down from around 91 million AROPE in 2019).

The professed ambition of the Commission in presenting this proposal was to encourage a move towards a 'deeper and fairer economic and monetary union',[6] and to complement macroeconomic convergence with greater convergence in the three broad areas it covers, encompassing in total 20 principles formulated as rights. This chapter examines the extent to which the European Pillar of Social Rights and its Action Plan help to realise social rights in the European Union.[7] In order to answer this question, it is necessary, first, to recall the framework for the protection of fundamental social rights in the European Union's legal order. Section 2 of this contribution offers such a diagnosis. It identifies four major deficits in this regard, the most significant of which is that the new social and economic governance established in the EU following the public debt crisis of 2009–2012 did not take into account until recently the impacts of fiscal and budgetary measures on social rights: it is to this deficit, indeed, that the adoption of the EPSR sought to respond. Section 3 of this study recalls the background of the initiative; it describes the contribution of the EPSR to the protection of social rights in the economic and social governance of the EU; and it identifies certain limitations. Section 4 offers a brief conclusion.

2. Protection of Fundamental Rights: Social Rights in the European Union Legal Order

The Court of Justice of the European Union (CJEU) has incorporated fundamental rights in its case-law since the early 1970s, in response to concerns expressed by domestic constitutional courts that the supremacy of European law might otherwise undermine the protection of fundamental rights under national constitutions.[8] That case-law was later endorsed by the other institutions, and it was gradually incorporated in the European treaties. This process culminated in the proclamation of the Charter of Fundamental Rights (CFREU) at the Nice Summit of December 2000,[9] and in the inclusion of the Charter as part of the constitutional *acquis* of the European Union in the Treaty of Lisbon.[10] In the area of social rights, however, a number of

[6] Id, para 2.1.

[7] This chapter therefore is complementary to the companion chapter by Mélanie Schmitt and Marco Rocca in the volume in which this contribution appears (Zane Rasnaca, Aristea Koukiadaki, Niklas Bruun and Klaus Lörcher (eds), *Effective Enforcement of EU Law* (London: Bloomsbury/Hart, 2022)). Whereas that chapter relates the EPSR to the legislative acquis of the EU, assessing the overlaps and potential competition between the two, I focus here on the EPSR as a tool to stimulate further legislative action, and on its role in strengthening the position of social rights in the socio-economic governance of the EU.

[8] Case 4/73, *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, para 13 (emphasis added).

[9] OJ C 364 of 18.12.2000, 1.

[10] Article 6(1) of the Treaty on the European Union provides that: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.' For an extensive assessment of the contribution of the CFREU to the employment relationship, see F Dorssemont, K Lörcher, S Clauwaert and M Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Oxford-London-New York-New Delhi-Sydney, Hart, 2019).

deficits remain. Three are well known and can be recalled briefly. The fourth deficit is most relevant to the adoption of the European Pillar of Social Rights, and deserves more emphasis.

2.1 Gaps in the Protection of Social Rights in the EU Constitutional Order

First, the CFREU has provided the main reference point for the protection of fundamental rights in the EU's legal order since it was proclaimed in 2000. While certainly a major improvement in comparison to the earlier situation, the Charter however essentially presents the *acquis* of fundamental rights in the European Union. As such, it is selective and remains provisional. In particular, a number of social rights (guaranteed either by the European Social Charter [ESC][11] or by UN human rights treaties[12]) have been omitted from the Charter of Fundamental Rights, despite the references to the ESC in other parts of EU constitutional law.[13] The drafters of the Charter were instructed not to include social rights that were considered to be merely 'programmatic', that is, setting political objectives rather than guaranteeing claimable entitlements.[14] The result was, however, that some major gaps remain in the catalogue of rights they adopted.

The most notorious example is the right to work. The EU Treaty lists 'full employment' as part of the objectives of the Union (Article 3(3)), and Article 9 TFEU provides that 'the Union shall take into account requirements linked to the promotion of a high level of employment' in defining and implementing its policies and activities. Nevertheless, whereas Article 1(1) ESC commits States Parties to achieve and maintain 'as high and stable a level of employment as possible, with a view to the attainment of full employment', the equivalent provision in the CFREU refers only to the freedom of all to engage in work (replicating Article 1(2) ESC), without implying a duty of the State to aim to provide employment to all. Although other provisions of the EU Charter refer to the right of access to placement services free of charge (Article 29) or to the right to protection against unjustified dismissal (Article 31), these are only specific dimensions of the broader set of duties that correspond to the fulfilment of the right to work as a human right.[15]

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[11] The original instrument was signed by 13 Member States of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965 (CETS No 35; 529 UNTS 89). The Revised European Social Charter (CETS No 163) was opened for signature in Strasbourg on 3 May 1996, and entered in force on 1 July 1999. The Revised Charter does not bring changes to the control mechanism of the original Charter but enriches the list of the rights protected. In this chapter, the expression 'European Social Charter' refers to the 1996 version; where reference is made to the earlier instrument, the expression '1961 European Social Charter' is used.

[12] For a systematic comparison, see O De Schutter, *Future of Europe: International Human Rights in European Integration* (UN Office of the High Commissioner for Human Rights, 2020).

[13] For a more detailed examination, see O De Schutter, 'The European Social Charter as the Social Constitution of Europe' in N Bruun, K Lörcher, I Schömann and S Clauwaert (eds), *The European Social Charter and the Employment Relation* (Oxford, Hart, 2017) 11–51.

[14] Conclusions of the Cologne European Council, 3–4 June 1999, Annex IV.

[15] The right of access to placement services free of charge reflects Art 1(3) ESC, which commits States Parties to 'establish or maintain free employment services for all workers'. Article 24 of the European Social Charter recognises the right of workers to protection in cases of termination of employment; and protection against unjustified dismissal is considered by the UN Committee on Economic, Social and Cultural Rights as part of the right to work mentioned in Article 6 of the International Covenant on Economic, Social and Cultural Rights (see General Comment No 18: The right to work (Art 6 of the Covenant), UN doc E/C.12/GC/18 (6 February 2006), paras 34–35).

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

This later led to the drawing of a distinction between social guarantees that constitute 'rights', when others are considered to be mere 'principles'. This distinction was reinforced when, in 2007, the horizontal provisions of the Charter were revised in order to allow for the integration of the Charter in the European treaties. [18] The distinction between 'rights' and 'principles' may explain some of the hesitations in the case-law of the CJEU.[19] It sometimes may have discouraged the Court from imposing on the EU institutions positive duties to promote the guarantees listed in the Charter, or provided the Court with a justification for refusing to assess the validity of EU secondary legislation against the requirements of the Charter.[20] This is of course regrettable, because it deprives the Charter of its full enforceability through courts.[21]

Thirdly, the EU has been highly selective in defining its relationship to international human rights instruments ratified by the EU Member States, and this selectivity has particularly problematic consequences for the status of fundamental social rights. The EU recognises a 'special significance' to the European Convention on Human Rights (ECHR). The CJEU has also sought inspiration, in developing the general principles of Union law which it ensures respect for, from the International Covenant on Civil and Political Rights[22] and from the Convention on the Rights of the Child. [23] In contrast, the provisions of the ESC that do not

[16] CBI submission to the Convention on the Charter (12 April 2000), CHARTE 4226/00 CONTRIB 101.
[17] See the contributions of Guy Braibant, the representative of the French executive to the Convention, presented in May 2000 (CHARTE 4280/00, CONTRIB 153 (2 May 2000), CHARTE 4322/00, CONTRIB 188 (19 May 2000)).
[18] Article 52(3) of the Charter of Fundamental Rights.
[19] For an illustration, see Case C-176/12, *Association de mediation sociale*, judgment of 15 January 2014 (EU:C:2014:2), paras 45 and 47.
[20] See, for instance, Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern*, judgment of 22 May 2014 (EU:C:2014:350), para 74.
[21] This infirmity may be compensated in part, however, by reference to the right to an effective judicial remedy, as stipulated in Article 47 CFREU: see eg, Case C-414/16 *Egenberger*, judgment of 17 April 2018 (EU:C:2018:257).
[22] See, eg, Case 374/87 *Orkem v Commission* [1989] ECR 3283, para 31, and Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] ECR I-3763, para 68.
[23] Case C-540/03 *European Parliament v Council of the European Union*, judgment of 27 June 2006, para 37.

correspond to guarantees listed in the CFREU are not considered to constitute an authoritative reference point[24]: the use of expressions such as 'particularly important principle of European Union social law' to designate social rights listed in the ESC betrays the hesitation of the Court in this regard.[25] Moreover, in contrast to the status of the jurisprudence of the European Court of Human Rights (which the Court of Justice of the European Union in general treats as authoritative), the interpretation by the European Committee of Social Rights (ECSR) of the ESC is not considered binding or even persuasive. This unbalanced approach persists despite the fact that a number of provisions of the Charter of Fundamental Rights have been inspired by (and replicate some of the wording of) provisions of the ESC.

2.2 Social Rights in the Socio-economic Governance of the EU

The limitations listed above are too well known to bear repeating here. The more significant limitation, however, and the most relevant to understanding the intentions underlying the adoption of the EPSR, results from the failure to take into account social rights in the new architecture of the Economic and Monetary Union ('EMU'). This new architecture was established following the financial and economic crisis of 2009–2010, which was followed by the public debt crisis of 2010–2013. These episodes brought to light the many structural deficiencies of economic governance in the EU, and they led to the introduction of fundamental reforms. Social rights, however, were for the most part ignored in that reform process.

The general diagnosis following the critical months of 2010–2011, during which the single currency was put to the test, was that fiscal discipline was too weak, and tools to ensure macroeconomic convergence too few, in the euro zone, leading to an imbalance between monetary and economic integration. What was called for therefore was a profound revision of the Stability and Growth Pact (SGP) and of the mechanism of fiscal and socio-economic surveillance and coordination. This is now ensured mainly by the so-called *Two-Pack* and the establishment of the European Semester (a). In parallel, the Member States' internalisation of the Union's new budgetary discipline was achieved by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), known colloquially as the 'Fiscal Compact' (b). On top of the European Semester, a special, 'enhanced surveillance' procedure was also established for States facing, or threatened, by serious economic and budgetary difficulties (c). Finally, the lack of a permanent firewall for the euro zone, which would be able to provide swift financial assistance to Member States in need, was made up for through the setting up of the European Stability Mechanism (d). The following paragraphs describe the main components of the new architecture of socio-economic and fiscal governance of the European Union, systematically examining the extent to which fundamental social rights play a role in their design or implementation.[26]

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[24] Case C-116/06 *Sari Kiiski*, judgment of 20 September 2007; Case C-268/06 *Impact*, judgment of 15 April 2008.
[25] See, eg, Case C-579/12 RX-II *European Commission v Strack*, judgment of 19 September 2013, para 26. For a more systematic review, see S Robin-Olivier, 'The contribution of the Charter of Fundamental Rights to the protection of social rights in the European Union: a first assessment after Lisbon' (2013) *European Journal of Human Rights* 1, 109–134 (in French).
[26] For extensive analyses of the new governance framework of the EMU, see, among others, F Allemand and F Martucci, 'La nouvelle gouvernance économique européenne' (2012) 48 *CDE* 1, 17–99 ; F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Oxford, Hart,

2.2.1 European Semester

At the core of the new socio-economic governance of the EU now lies the European Semester,[27] designed to enhance macroeconomic and systemic convergence across the euro zone and the Union.[28] The European Semester is intended to strengthen the ability of European institutions to 'monitor, coordinate and sanction the economic and budgetary policies of Member States',[29] thus fixing the structural deficiencies of the initial European system of economic and monetary governance. It brings under one regulatory and institutional umbrella various policy coordination mechanisms: the Europe 2020 Strategy,[30] the Stability and Growth Pact,[31] the EuroPlus Pact,[32] the Macroeconomic Imbalance Procedure[33] and the requirement (introduced in May 2013) imposed on the Member States of the euro zone to submit draft budgetary plans for review by the Commission. [34]

The Semester is in essence a timeline, which provides for both *ex ante* orientation and *ex post* correction and assessment. While there is no space here to describe its stages in any detail, it is fair to summarise the process as one that strengthens the policy-steering capacity of the European institutions (and mainly that of the European Commission[35]), enabling them to supervise and monitor, with various levels of constraint, a very wide set of national policies—from social security to health care and from taxation to education, to name but the most significant—all in the name of macroeconomic and budgetary convergence.

Neither EU primary law (Articles 121, 126 and 148 TFEU, Protocol No 12 on the Excessive Deficit Procedure), however, nor secondary legislation (Regulation No 1466/97, Regulation No 1173/2011, Regulation No 1176/2011, Regulation No 1174/2011 and Regulation No 473/2013)

2015); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford, OUP, 2015) 15–50; P De Grauwe, *Economics of Monetary Union* (Oxford, OUP, 2012) 105–118 ; see also, for a critical description of the basic assumptions of the Maastricht macroeconomic constitution, K Tuori and K Tuori, *The Eurozone Crisis – A Constitutional Analysis* (Cambridge, CUP, 2014) 105–116.

[27] The European Semester is established under Article 2a(2) of Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 (*OJ* L 306, 23 November 2011, 12).

[28] For an extended overview of the working of the European Semester, see K Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 *European Law Review*, 601ff.

[29] B Van Hercke and J Zeitlin, 'Socializing the European Semester ? Economic Governance and Social Policy Coordination in Europe 2020', *SIEPS*, Report No 2014 :7, 23.

[30] A soft law coordination cycle, centred on growth and competitiveness.

[31] Both in its preventive (soft law reporting through Stability or Convergence programmes) and corrective (the Excessive Deficit Procedure) arms, as amended and strengthened by the *Six-Pack* (in this regard, see K Tuori and K Tuori, n 26 above, at 105–111).

[32] A new coordination mechanism launched in 2011 as an international agreement among Member States, mainly focusing on competitiveness, financial stability and fiscal strength. See Conclusions of the European Council of 24–25 March 2011, EUCO 10/1/11, 20 April 2011.

[33] A coordination cycle initiated by the Six-Pack in 2011 designed to prevent and correct dangerous macroeconomic developments: see Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (*OJ* L 306 of 23.11.2011, 25).

[34] This is one of the elements of the 'Two-Pack': Regulation (EU) No 473/2013 of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (*OJ* L 140 of 27.5.2013, 11).

[35] In this regard, see M Bauer and S Becker, 'The unexpected winner of the crisis: the European Commission's strengthened role in economic governance' (2014) 36 *Journal of European Integration* 3, 213–229.

organising the European Semester refer explicitly to a duty to take into account fundamental rights. This is not to say that fundamental rights (and social rights in particular) are irrelevant to the European Semester's workings. Regulation (EU) No 1176/2011 and Regulation (EU) No 473/2013, part respectively of the 'Six-Pack' and of the 'Two-Pack' packages, adopted under Article 126 TFEU in order to monitor macroeconomic imbalances or to strengthen the surveillance of budgetary and economic policies in Euro Area Member States—with closer monitoring of Member States that are subject to an excessive deficit procedures—provide that '[i]n accordance with Article 28 of the Charter of Fundamental Rights of the European Union, [they] shall not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice'.[36] Many instruments also encourage a strong involvement of all relevant stakeholders, with a specific emphasis on the social partners, and civil society organisations.[37] Some instruments also explicitly refer to Article 152 TFEU (which recognises and promotes the role of social partners at EU level) or emphasise the need for the European Semester to respect national practice and institutions for wage formation.[38] Regulation No 473/2011 specifies, in its Recital 8 and Article 2(3), that the budgetary monitoring mechanisms it sets up should be applied without prejudice to Article 9 TFEU, the so-called 'horizontal social clause', which provides that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'. Moreover, when acting in the framework of the European Semester, EU institutions remain bound not only by the horizontal social clause of article 9 TFEU,[39] but also by the CFREU.

If, however, there indeed exists such a duty to comply with fundamental rights in the new socio-economic governance architecture, and in the framework of the European Semester, on the part of the EU institutions, it appears to be 'more honoured in the breach than in the observance' (to borrow from Shakespeare's phrase).[40] First, despite increased attention being paid in recent

[36] Preamble, Recital No 7, and Article 1(2) of Regulation No 473/2013; Preamble, Recital No 20, and Article 1(3) and 6(3) of Regulation No 1176/2011.
[37] Article 2a Regulation No 1466/97.
[38] See, for example, Article 1(2) of Regulation No 473/2013.
[39] From a constitutional perspective, this clause has a crucial function: it seeks to rebalance the relationship between the 'social' and the 'economic' in the European Union. It has been described as 'a potentially strong anchor that can induce and support all EU institutions … in the task of finding an adequate (and more stable) balance between economic and social objectives' (M Ferrera, 'Modest Beginnings, Timid Progresses: What's Next for Social Europe?' in B Cantillon, H Verschueren and P Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Cambridge, Intersentia, 2012) 29).
[40] See for detailed examinations of this point, B Van Hercke and J Zeitlin, 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', n 29 above; F Costamagna, 'The European Semester in Action: Strengthening Economic Policy Coordination while Weakening the Social Dimension?', Centro Einaudi Working Papers, 2013/5; S Bekker, 'The EU's stricter economic governance: a step towards more binding coordination of social policies?', WZB Discussion Papers, No 2013-501, January 2013; R Coman and F Ponjaert, 'From One Semester to the Next: Towards the Hybridization of New Modes of Governance in EU Policy', CEVIPOL Brussels Working Papers, 5/2016, 32–57; S Bekker and I Palinkas, 'The Impact of the Financial Crisis on EU Economic Governance: A Struggle between Hard and Soft Law and Expansion of the EU Competences?' (2012) 17 *Tilburg Law Review* 2, 360–366; D Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 5, 667–693; M Dawson, 'The Legal and Political Accountability Structure of Post-Crisis EU Economic Governance', *Journal of Common Market Studies*, vol. 53, n° 5, 976–993.

years to employment, social fairness and inclusion issues,[41] the European Semester remains focused primarily on fiscal consolidation and budgetary discipline. Insofar as social considerations enter into the picture, they appear as side constraints, rather than as ends that macroeconomic governance should pursue for their own sake. Second, the involvement of the European Parliament and its national counterparts, the social partners and civil society is still kept to a strict minimum. Rather, what emerged is what observers labelled a 'new intergovernmentalism'.[42] The only serious 'external' partner the EU institutions rely on when acting within the framework of the Semester seems so far to be the national executives, with which they regularly engage in bilateral dialogues. The European Parliament[43] and the European Trade Union Confederation (ETUC) have voiced concerns in that regard.[44] Thirdly, at the supranational level, the Commission mainly has the upper hand: in practice, the Council of the EU generally defers to the assessments of the Commission, particularly as regards the country-specific recommendations.[45]

Because of the lack of transparency of the Commission's methodology in the framework of the European Semester, particularly in the preparation of the AGS or the CSRs, it is difficult to assess the extent to which such assessments take into account fundamental rights. Until the adoption of the EPSR, however, nowhere did the methodology used by the Commission to produce the key instruments of the Semester—such as the Annual Growth Surveys or the CSRs—refer to fundamental rights concerns. And the procedural guarantees included in the instruments organising the European Semester (such as the duty to involve the social partners or civil society representatives in the process, or the promotion of an active role of the European Parliament and of national parliaments) could not be seen as a substitute for ensuring that fundamental rights be taken into account in the design of national reform programmes or of convergence/stability programmes, in part because of their poor implementation, which is highly uneven across EU Member States.

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[41] In that regard, see B Van Hercke and J Zeitlin, 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', n 29 above. More generally, on the political will of the EU institutions to strengthen the social dimension of the EMU, see Conclusions of the European Council from 13–14 December 2012, EUCO 205:12; Conclusions of the European Council from 27–28 June 2013, EUCO 104/2/13; European Parliament Report with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the ECB and the Eurogroup, 'Towards a genuine Economic and Monetary Union', 24 October 2012 (2012/2151 INI); Communication from the Commission to the European Parliament and the Council, 'Strengthening the Social Dimension of the EMU', COM(2013)690.

[42] See, among others, U Puetter, 'Europe's Deliberative Intergovernmentalism – The Role of the Council and European Council in EU Economic Governance' (2012) 2 *Journal of European Public Policy* 19, 161–178; U Puetter, New Intergovernmentalism: The European Council and its President in E Ballin, F Fabbrini and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Oxford, Hart Publishing, 2015) 253ff; C Bickerton, D Hodson and U Puetter, *The New Intergovernmentalism* (Oxford, OUP, 2015); S Fabbrini, 'From Consensus to Domination: The Intergovernmental Union in a Crisis Situation' (2016) 38 *Journal of European Integration* 5, 587–599.

[43] European Parliament, 'Country-Specific Recommendations need national owners and social partners', Press Release, 23.06.2015.

[44] See, for example, ETUC Statement on the 2014 CSR's concerning wages and collective bargaining systems, 4 June 2014.

[45] This is because of the combined effect of the reverse qualified majority voting procedure (which has become common for the Council in the field of economic governance) and the 'comply or explain' rule. As a result, the ability of the Council to exercise its discretion is very much reduced.

2.2.2 Fiscal Compact

Although the initial reaction to the public debt crisis of 2009–2010 led to the revision of the Stability and Growth Pact, as well as to the adoption of a set of regulations and directives (the 'Six-Pack') that significantly strengthened the coordination of national budgetary and macroeconomic policies within the EMU, it was considered desirable to enshrine the new budgetary discipline within the European Treaties themselves. Because this proposal faced the opposition of the British government, soon to be joined by the Czech government, an intergovernmental agreement was concluded formally outside the Treaties.[46] On 2 March 2012, the Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) was thus signed by the representatives of 25 EU Member States (all Member States with the exceptions of the United Kingdom and the Czech Republic[47]) in the margins of the European Council convened in Brussels. The TSCG entered into force on 1 January 2013.

The general purpose of the TSCG is to 'strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of [the] economic policies [of the EU Member States] and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion' (Article 1). The TSCG has a number of provisions on the coordination and convergence of economic policies in its Title IV, and on the governance of the euro area in its Title V. But its most crucial provisions are certainly to be found in its Title III, entitled 'Fiscal Compact'.[48] The 22 States bound by this part of the TSCG (the 19 euro area States plus Bulgaria, Denmark and Romania) commit to seek to maintain 'balanced budgets', or even to strive for a 'surplus' (Article 3(1) a)). To this end, they must ensure swift convergence towards their country-specific medium-term objective (Article 3(1), b) and c)), from which they may deviate only if faced with exceptional circumstances. Finally, in case of significant deviations from the medium-term objective or the adjustment path towards it, a correction mechanism, managed by a national independent authority, will be triggered automatically (Article 3(1), e)). The main innovation of the TSCG certainly lies in the requirement Article 3(2) imposes on the States Parties to internalise the rules of the Fiscal Compact (including the balanced-budget rule and the automatic correction mechanism) in rules of constitutional rank in the domestic legal order.[49] Such internalisation was considered by the Treaty makers as locking-in budgetary discipline.

The TSCG pays little heed to fundamental rights and their preservation within the framework of applying the rules set out in the Fiscal Compact, although here again the social partners' role

[46] However, consistency and connection with EU law are guaranteed in the Treaty (Article 2).
[47] In the meantime, the Czech Republic decided to join the Treaty in March 2014. Since its accession to the EU on 1 July 2013, Croatia has been eligible to become part to the Treaty but has so far failed to do so.
[48] For more comprehensive analyses of the TSCG, see, among others, P Craig, 'The Stability, Coordination and Governance Treaty: Principles, Politics and Pragmatism' (2012) 37 *European Law Review* 3, 231–248 ; F Martucci, 'Traité sur la stabilité, la coordination et la Gouvernance, Traité instituant le mécanisme européen de stabilité. Le droit international au secours de l'UEM' (2012) *Revue d'Affaires Européennes* 4, 716–731.
[49] Such internalisation is to be carried out, following Article 3(2), 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'.

is acknowledged in its Preamble. In particular, although Article 3(3)(b) of the TSCG allows for certain deviations from budgetary commitments in the presence of 'exceptional circumstances … provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term', an 'exceptional circumstance' is defined as 'an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact'. The notion of 'exceptional circumstance' thus does not encompass a situation in which the requirement to balance public budgets might be incompatible with the fulfilment of economic and social rights.

2.2.3 Enhanced Budgetary and Economic Surveillance Framework

Formally located outside the European Semester, the second branch of the Two-Pack, Regulation No 472/2013,[50] sets up an 'enhanced surveillance' mechanism for countries of the euro zone facing, or threatened by, serious financial and budgetary difficulties. The mechanism applies automatically to those that requested or received financial assistance.[51] Regulation No 472/2013 places such countries under closer macroeconomic and budgetary scrutiny than that normally applied to Member States within the framework of the European Semester,[52] in order to ensure that the macroeconomic structural adjustment programmes, imposed as a condition for the provision of financial assistance, are implemented effectively.[53] The objective, as stated in the Regulation, is to allow for the 'swift return to a normal situation' and to '[protect] the other euro area Member States against potential adverse spill-over effects' (Recital 5).

The decision to subject a Member State to enhanced surveillance falls to the Commission, which is supposed to reassess its decision every six months (Article 2). The country under scrutiny is subject to a general duty to adopt structural measures 'aimed at addressing the sources or potential sources of difficulties' its economy and public finances may encounter (Article 3(1)). The procedure includes, *inter alia*, intensive information exchanges with, and review missions by, the Commission. The Council (acting with a qualified majority) may also recommend to the Member State concerned the adoption of precautionary corrective measures or the preparation of a draft macroeconomic adjustment programme,[54] if no such programme

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

[51] For an extensive analysis of Regulation No 472/2013, see M Ioannidis, 'EU Financial Assistance Conditionality after the Two Pack' (2014) 74 *ZaöRV*, 61–104.

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

[53] In that regard, Regulation No 472/2013 helps to clarify the relationship between EU law and ESM/EFSF/EFSM assistance following the adoption of Memoranda of Understanding with the borrowing State (A Hinarejos, n 26 above, at 32, 135 and 162). Indeed, by requiring of the State requesting financial assistance that it prepare a macroeconomic adjustment programme, to be later approved through a Council implementing decision (Article 7), Regulation No 472/2103 brings the conditionalities linked to such assistance back within the EU legal order, thus lifting the ambiguity that used to exist around the status of such agreements and the attached conditionalities under EU law. It remains to be seen, however, whether this will make a difference in terms of judicial review. We return to this point below.

[54] The macroeconomic adjustment programme 'shall address the specific risks emanating from that Member State for the financial stability in the euro area and shall aim at rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets' (Article 7(1)). The programme is prepared by the relevant Member State, proposed by the Commission and

has yet been adopted (Article 3(7)). Article 18 also specifies that the European Parliament may seek to trigger an informative dialogue with the Council and the Commission on the application of enhanced surveillance.[55]

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

An examination of the macroeconomic adjustment programmes adopted under Regulation No 472/2013 confirms that fundamental social rights are barely considered in the design and implementation of such programmes. This is illustrated for instance by the third Greek Rescue Package[56] adopted in the Summer of 2015, and the 2013 Cyprus bail-out programme.[57] Some reference is made, of course, to the need to minimise harmful social impacts of adjustment programmes (Article 1(3) of Decision 2013/463, Article 1(3) of Decision 2015/1411), especially as regards impacts on disadvantaged people and vulnerable groups (Article 2(2) of Decision 2013/463, Article 2(2) of Decision 2015/1411). The third rescue package for Greece also emphasises its ambition to promote growth, employment and social fairness (Recital 7 of Decision 2015/1411), as well as to involve social partners and civil society in all the phases of the adoption and implementation of the adjustment programme (Recital 16 of Decision 2015/1411). Analysis of the political background against which these programmes were adopted, however, especially the resistance they encountered from workers' unions and from public opinion in both Cyprus and Greece, brings to light the limited 'inclusiveness' of the processes by means of which such programmes were designed. More fundamentally, the policy reforms required under those programmes in the sectors of health care, education, social security, pensions or public administration, have barely taken into account fundamental social rights; on the contrary, measures adopted within the framework of Regulation No 472/2013 seem to have been driven mainly by financial consolidation and competitiveness concerns.

approved by the Council (Article 7(2)). Its implementation is monitored by the Commission, acting in liaison with the ECB and, where appropriate, with the IMF (Article 7(4)). Significant deviations from the programme may lead to more thorough monitoring and supervision (Article 7(7)). A system of post-programme surveillance is also provided for (Article 14).

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

[56] See Council Implementing Decision (EU) No 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece (*OJ* L 219, 20 August 2015, 12).

[57] See Council Implementing Decision (EU) No 2013/463 of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU (*OJ* L 250, 20 September 2013, 40).

Fundamental social rights have not been relied on as a tool to guide budgetary choices. Instead, on issues such as the reform of public administrations, health care or the energy sector, policy choices reflected through the conditionalities rest almost exclusively on considerations of cost-effectiveness and long-term financial sustainability, at the expense of other 'non-efficiency' factors, such as the guarantee of a certain level of quality, accessibility and equity in the provision of public services. Moreover, whether on the expenditure or the revenue side, most of the burden falls on the middle class (which are the main beneficiaries of the social programmes affected), an unfair allocation that is particularly blatant in the case of Cyprus.[58]

2.2.4 European Stability Mechanism

As the sovereign debt crisis initially unfolded, threatening the stability of the euro zone, two emergency mechanisms were set up to provide financial assistance to Member States facing serious difficulties financing themselves on the capital markets: the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). They were conceived as temporary tools, and their lending capacities remained limited. They were later replaced by the more ambitious European Stability Mechanism (ESM), a permanent financial assistance mechanism, tasked with preserving financial stability within the EU, and endowed with a maximum lending capacity of 500 billion euros (€). The ESM is sometimes described as the 'IMF of the EU'. Its design relies extensively on IMF practice, and it is intended to cooperate closely with the IMF.[59] The ESM was not established as an EU institution, but as a distinct international organisation, with its own legal personality, headquartered in Luxemburg. As a consequence, its founding act was not adopted within the framework of the EU Treaties, but has the status of an international treaty.[60] As the creation of this more stable and effective arrangement raised doubts concerning its compatibility with the Treaties, and more specifically with the so-called 'no bail-out' clause (Article 125 TFEU) which prohibits the debts of the EU Member States from being assumed either by the Union itself or by any other Member State,[61] it was deemed wise and necessary to explicitly affirm in the EU Treaties the Member States' power to establish a permanent crisis management mechanism that would safeguard the euro area's stability. The European Council thus revised Article 136 TFEU, adding a new paragraph 3 that created such an explicit basis,[62] following the simplified

[58] See Decision No 2013/463, Article 2(8) to 2(14).
[59] See Recitals 8, 12, 13 of the ESM Treaty, Article 13 and 38.
[60] The ESM Treaty was signed on 2 March 2012, and entered into force on 1 May 2013.
[61] Article 125(1) TFEU reads: 'The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.' For commentary, see J-V Louis, 'The No-Bailout Clause and Rescue Packages' (2010) 47 *Common Market Law Review* 4, 971-986.
[62] Article 136(3) is worded as follows: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'

amendment procedure provided for in Article 48(6) TEU.[63] The validity of this much contested amendment was later confirmed by the Court of Justice in the *Pringle* case.[64]

The general purpose of the ESM is 'to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[65] The granting of stability support follows a four-step procedure (Article 13): (i) a request from the ESM Member; (ii) a principled decision of the ESM on the granting of stability support; (iii) the negotiation and signature by the European Commission, on behalf of the ESM, of a Memorandum of Understanding detailing the conditionalities attached to the financial assistance facility; and (iv) compliance monitoring by the Commission.[66] ESM financial assistance can be granted through various stability support instruments: loans (Article 16), purchase of bonds on the primary market (Article 17), interventions on the secondary market (Article 18), precautionary financial assistance (Article 14) or bank recapitalisation programmes (Article 15). Like any other financial institution, the ESM has its own pricing policy, which includes achieving an appropriate profit margin (Article 20). For the performance of its purpose, it borrows on capital markets (Article 21), and in order to guarantee its creditworthiness, it designs its own investment policy (Article 22). When the capital stock exceeds its maximum lending capacity, the ESM distributes dividends to its members (Article 23).

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

The ESM Treaty does not make any reference to fundamental social rights. However, although the Court of Justice of the European Union took the view in its *Pringle* ruling of 27 November 2012 that EU Member States, when they *established* the ESM as a separate international organisation,[67] were not implementing EU law, within the meaning of Article 51(1) CFREU,

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[63] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro (*OJ* L 91, 6 April 2011, 1).

[64] Judgment of 27 November 2012, C-370/12 *Thomas Pringle v Government of Ireland*, EU:C:2012:756. On this decision, see, among others, P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 *Maastricht Journal of European and Comparative Law* 1, 3–11.

[65] Article 3 of the ESM Treaty.

[66] The ESM being an international organisation as such, the MoUs negotiated and concluded by the European Commission on behalf of the ESM lie outside the scope of EU law. A clear connection is established with the existing EU law framework, however, and more specifically with Regulation No 472/2013, in Article 13(3): the Commission must guarantee the consistency of the MoU's it negotiates and concludes within the framework of the ESM Treaty, with the macroeconomic adjustment programme adopted under Regulation No 472/2013. While not an act of EU law, the MoU's content is to be reflected in the macroeconomic adjustment programme adopted under Regulation No 472/2013, and subsequently endorsed in a decision of the Council (see *supra*).

[67] *Thomas Pringle v Government of Ireland*, cited in n 109 above, para 180. The Court, answering the argument that the establishment of the ESM is not accompanied by effective judicial protection, and thus potentially in

the Court later confirmed that the institutions of the EU acting within the framework of the ESM remained bound to comply with EU law, including with the CFREU. In a judgment of 20 September 2016 delivered in Joined Cases C-8/15 P to C-10/15 P—which concerned the impacts of measures adopted following the conclusion of the Memorandum of Understanding between Cyprus and the ESM and the possibility for the persons affected to file claims for compensation of alleged violations of the right to property—the Court considered that 'the tasks allocated to the Commission by the ESM Treaty oblige it, as provided in Article 13(3) and (4) thereof, to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law',[68] and that the Commission 'retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts'.[69] The EU institutions, the Court noted, remain at all times under a duty to comply with the Charter of Fundamental Rights. The Charter, the Court noted,

> is addressed to the EU institutions, including [...] when they act outside the EU legal framework. Moreover, in the context of the adoption of a memorandum of understanding such as that of 26 April 2013 [signed by the Minister for Finance of the Republic of Cyprus, the Governor of the Central Bank of Cyprus and the Commission, before being approved on 8 May 2013 by the ESM Board of Directors], the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 163 and 164), to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter.[70]

Thus, if a Memorandum deprives a State of its ability to uphold the right to education (Article 14 of the Charter) or the right to social security (Article 34), or to maintain high levels of health care provision (Article 35) or access to services of general interest (Article 36), the non-contractual liability of the Commission could in principle be engaged.[71] The CJEU moreover takes into account, when assessing measures adopted to remove excessive budget deficits, whether the sacrifices imposed on the population are shared equally.[72] It is therefore disappointing that, although the ESM Treaty was recently revised, neither the ESM, nor the Commission itself, have adopted the tools that would allow them to effectively discharge the

violation of Article 47 of the Charter, states that: 'the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where ... the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism'.

[68] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd et al*, EU:C:2016:701, para 58. On this decision, see P Dermine, 'ESM and Protection of Fundamental Rights: Towards the End of Impunity?', *Verfassungsblog*, 21 September 2016; A Hinarejos, 'Bail-outs, Borrowed Institutions and Judicial Review: Ledra Advertising', *EU Law Analysis*, 25 September 2016.

[69] Ibid, para 59.

[70] Ibid, para 67.

[71] Actions for annulment of the actions taken by the Commission within the framework of the ESM, however, remain excluded, because these actions fall outside the EU legal order: see *Ledra Advertising*, judgment of 20 September 2016, para 54.

[72] Case C-49/18 *Escribano Vindel v Ministerio de Justicia*, judgment of 7 February 2019, para 67.

duties to ensure that reforms will further not undermine social rights and contribute to the reduction of inequalities.

2.2.5 Conclusion

These various components of the new economic and social governance of the EU are entirely blind to the requirements of fundamental social rights in general and of the ESC in particular. This explains why, in the case of Greece, the first wave of fiscal consolidation measures, adopted following the conclusion of the 2010 Memorandum of Understanding between Greece and its creditors,[73] led to a number of ECSR decisions identifying various instances of non-conformity with the ESC.[74] These decisions illustrate the problems associated with the failure to take into account the ESC's requirements in the design and implementation of adjustment programmes adopted within the framework of the 'enhanced surveillance' mechanism provided for under Regulation No 472/2013, which places countries receiving financial support under closer macroeconomic and budgetary scrutiny. A preventive approach, in which any impacts on social rights are assessed before the adoption of fiscal consolidation measures, would be the only effective means of avoiding potential conflicts between the disciplines imposed on the euro zone Member States and the requirements of the ESC. The Political Guidelines for the next European Commission presented in July 2014 by President Juncker included a commitment to ensure that future support and reform programmes would be subjected to social impact assessments to feed into the public discussion.[75] As a follow-up to this commitment, in October 2015 the European Commission announced its intention to pay greater attention to 'the social fairness of new macroeconomic adjustment programmes to ensure that the adjustment is spread equitably and to protect the most vulnerable in society'.[76] But 'social fairness' is not quite as powerful as a reference to binding fundamental social rights, and the promise to bring about further improvements has not been kept.

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[73] For an excellent summary of the background, see L Papadopoulou, 'Can Constitutional Rules, even if "Golden", Tame Greek Public Debt?' in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budget Constraints* (Hart Publishing, 2014) 223–247.

[74] European Committee of Social Rights, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece, Complaint No 65/2011, decision on the merits of 23 May 2012; European Committee of Social Rights, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece, Complaint No 66/2011, decision on the merits of 23 May 2012; and four decisions adopted on 7 December 2012 concerning pensioners' rights: European Committee of Social Rights, Federation of employed pensioners of Greece (IKA-ETAM) v Greece, Complaint No 76/2012; Panhellenic Federation of Public Service Pensioners v Greece, Complaint No 77/2012; Pensioners' Union of the Athen-Piraeus Electric Railways (ISAP) v Greece, Complaint No 78/2012; Panhellenic Federation of pensioners of the public electricity corporation (PAS-DEI) v Greece, Complaint No 79/2012; Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece, Complaint No 80/2012.

[75] A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission, 15 July 2014.

[76] European Commission, Communication from the Commission to the European Parliament, the Council and the European Central Bank: On Steps Towards Completing Economic and Monetary Union, COM(2015) 600 final of 21.10.2015, 5.

3. The European Pillar of Social Rights

3.1 Contribution of the European Pillar of Social Rights

The EPSR is ostensibly based on the need to ensure that, in addition to being monitored for budgetary discipline, the performances of the euro area Member States in the employment and social domains are assessed, with a view to ensuring a greater degree of convergence within the EMU. Indeed, as explained by the International Labour Office in an early contribution on the future EPSR, the EU27 (then EU28) have been either diverging, or converging towards lower standards of protection in a number of areas (or sliding towards higher poverty levels) since the economic and financial crisis of 2009–2010. The implication is that unless affirmative action is taken to improve convergence towards improved standards, the macroeconomic disciplines imposed on the EU Member States may threatened part of the social *acquis* within the EU.[77] Referring to the 'soft' mechanisms put in place in the EU since the European Employment Strategy was launched in 1997 to favour convergence in social policies (now streamlined under the Europe 2020 strategy), the ILO noted that the 'disappointing results (at least in terms of convergence in social and employment outcomes) seem to indicate that divergence cannot be addressed by assuming individual policies will converge towards common goals. Soft convergence might not be effective unless it is built upon a social floor applicable in all Member States.'[78]

The Pillar, the Commission explained early on, should provide a safeguard against these risks of divergence in social standards or of a race to the bottom across the EU. The Pillar thus 'should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area'.[79] It therefore could contribute to a rebalancing between the economic and the social in the constitution of the European Union. In particular, in the European Semester of policy coordination, described above, the EPSR should lead the Commission to put greater focus on social priorities and put them on a par with economic objectives at the core of the annual cycle of economic governance.[80] Thus, in its March 2018 Communication assessing progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews,[81] the Commission notes, referring to the adoption of the EPSR, that:

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[77] See ILO, *Building a Social Pillar for European Convergence* (Geneva, 2016) 23 (noting that 'an examination of the trends over time indicates that there has been either considerable divergence between countries (eg unemployment) or, worse, convergence towards undesirable outcomes (eg higher income inequality). [...] [While] these developments are very much a function of national policies and country-specific circumstances [...], the distributional consequences of policy inaction at national and EU-wide levels could be large').

[78] ILO, Building a Social Pillar for European Convergence, n 77, at 31. On this issue, see already O De Schutter and S Deakin (eds), *Social Rights and Market Forces. Is the open method of coordination of social and employment policies the future of social Europe?* (Brussels, Bruylant, 2005).

[79] First preliminary outline for a European Pillar of Social Rights, Annex to the Communication from the Commission, *Launching a consultation on a European Pillar of Social Rights*, cited above.

[80] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018, 3.

[81] Communication on the assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews (COM(2018) 120 of 7.3.2018).

> A key message of the 2018 Annual Growth Survey is the need to implement the Pillar for a renewed convergence towards better working and living conditions across the EU. This requires fair and well-functioning labour markets, as well as modern education and training systems that equip people with skills that match labour market needs. This should be supported by sustainable and adequate social protection systems. The country reports published [in March 2018] look at how Member States deliver on the three dimensions of the Pillar: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. The provision of adequate skills and persistent gender employment gap, high labour market segmentation and the risk of in-work poverty, the low impact of social transfers on poverty reduction, sluggish wage growth, and ineffective social dialogue are areas of particular concern in some Member States. In order to analyse Member States' performances in a comparative perspective, the country reports also build on the benchmarking exercises conducted on unemployment benefits and active labour market policies and on minimum income.[82]

An examination of both the 2018 AGS and the assessment provided by the Commission of the country reports demonstrates the strong influence of the EPSR on the analysis proposed. The Commission thus seeks to ensure that 'convergence towards better socio-economic outcomes, social resilience and fairness, as promoted by the European Pillar of Social Rights, [shall become] an essential part of the efforts to strengthen and complete the Economic and Monetary Union'.[83] If this effort is pursued further, the Pillar could gradually lead the EU to set binding targets for the reduction of poverty and inequality, to be enforced through mechanisms similar to those already agreed to enforce macroeconomic prescriptions concerning annual deficits and the size of the public debt.

In addition, the EPSR could result in the identification of necessary new legislative initiatives for the European Union. Indeed, this was one of the professed intentions of the Action Plan adopted at the Porto Social Summit. The EPSR is limited in what it can achieve in this regard within the EU's current constitutional framework, however. The debate on minimum income schemes in the EU is typical in this regard. Minimum income schemes across the Union are woefully inadequate, almost all of them proving to be ineffective in lifting people out of poverty. They also vary wildly among the Member States. The Council of the EU itself deplored their stark discrepancies in terms of adequacy and coverage, as well as beneficiaries' access to enabling services, and requested that the Commission make proposals to 'effectively support and complement the policies of Member States on national minimum income protection'.[84] Providing support to families is also consistent with the pledge made in Principle 14 of the Pillar, on minimum income. Regrettably, the Action Plan relegates action on minimum income to a Council recommendation, instead of the framework directive advocated by the European Parliament, national governments including Germany and Portugal, and numerous civil society

[82] Ibid, 3.
[83] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018, 5.
[84] Council Conclusions on Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond, 9 October 2020, para 22.

organisations. Such a framework directive on minimum income schemes in the EU[85] could establish a set of common human rights principles referring to the adequacy, universal unlimited access and coverage, and enabling character of minimum income schemes.[86] Relying on a human rights framework could help, because the criteria following from the International Covenant on Economic, Social and Cultural Rights,[87] the ILO Social Security (Minimum Standards) Convention, 1952 (No 102), and ILO Recommendation (No 202) on Social Protection Floors, could be taken as minimum requirements. The choice for a recommendation rather than a new legislative instrument is based on institutional and legal considerations. These are perhaps understandable, but they do show clearly that, without a reassessment of the background constitutional structure of the EU, which still condones social competition between the EU Member States, the impacts of proclaiming social rights at EU level will remain limited.

This is not to say that the EPSR is purely cosmetic. In some cases, the consensus it has led to on the need to strengthen the social dimension of the EU's socio-economic governance has encouraged the Commission to take bold action to encourage reform. The definition of the conditions under which the level of the statutory minimum wage should be set provides an example: implicitly acknowledging that the failure of certain Member States (particularly Germany) to raise wages in line with productivity increases has been a major cause of macroeconomic imbalances within the EU—and the risks implicit in divergences between the EU Member States[88]—the Commission proposed that one of the principles of the Pillar should be that:

> All employment shall be fairly remunerated, enabling a decent standard of living. Minimum wages shall be set through a transparent and predictable mechanism in a way that safeguards access to employment and the motivation to seek work. Wages shall evolve in line with productivity developments, in consultation with the social partners and in accordance with national practices.[89]

In the EPSR, Principle 6 (Wages) reflects this concern:

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

[85] Based on a combination of Articles 153(1)(c) (social security and social protection for workers), 153(1)(h) (integration of people excluded from the labour market) and 175 (strengthening of economic, social and territorial cohesion) TFEU.
[86] The ILO noted that, while an adequate level of minimum income guarantee should at least protect beneficiaries from being at risk of poverty, in some Member States—such as Bulgaria, Latvia, Poland and Romania—'the minimum income guarantee for a single person amounts to less than 30 per cent of the national median income, far below the at-risk-of-poverty threshold [defined in the EU as 60 per cent of the national median income]' (ILO, *Building a Social Pillar for European Convergence*, see n 77 above, at 41).
[87] Committee on Economic, Social and Cultural Rights, *General Comment No 19 (2008): The right to social security (Art 9)* (E/C.12/GC/19).
[88] ILO, *Building a Social Pillar for European Convergence*, see n 77 above, at 35–39.
[89] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Launching a consultation on a European Pillar of Social Rights*, COM(2016) 127final, 8 March 2016.

In order to implement this Principle, the Commission proposed in October 2020 a new directive on adequate minimum wages in the EU, requiring that Member States set minimum wages 'guided by criteria set to promote adequacy with the aim of achieving decent working and living conditions, social cohesion and upward convergence'.[90]

These are important benefits associated with the adoption of the European Pillar of Social Rights. However, further progress could be made in three areas. First, the EPSR could be incorporated in a revised version of the impact assessments that are currently being prepared by the European Commission, while ensuring that such strengthened impact assessments are also prepared to assess the impacts of structural reform measures prescribed to EU Member States receiving financial support. Secondly, the implementation of the EPSR could be more explicitly rights-based, and take into account the ESC. Thirdly, to further affirm the need to promote upward social convergence, social imbalances in the internal market and in the EMU should be scrutinised with the same care as are macroeconomic imbalances. These three areas are explored in turn.

3.2 Moving Forward

3.2.1 The Role of Fundamental Social Rights in Impact Assessments

In 2011–2015, there was no systematic assessment of the impacts on social rights of the various measures adopted in response to the so-called 'sovereign debt crisis'. In fact, the guidance published by the European Commission concerning Impact Assessments (IAs) still suggests that in the field of economic governance, including 'recommendations, opinions and adjustment programmes', impact assessments are not a priori necessary, because (it is said) such 'specific processes are supported by country specific analyses'.[91] This is a mistake. In the future, the EPSR should provide a framework to assess the impacts of Stability or Convergence Programmes presented by the EU Member States and of the country-specific recommendations addressed to States (both adopted under the European Semester framework), as well as the impacts of adjustment programmes negotiated with countries that have been provided with financial support. The political consensus on a set of objectives identified as desirable in the EPSR could allow such impact assessments to be prepared, in order to ensure that these measures support the attainment of such objectives. While impact assessments are not an end in themselves, they can favour accountability and ensure that greater attention will be paid to social rights in the adoption of such measures.

The role of impact assessments in the EU law- and policy-making process has regularly been strengthened since they became systematic in 2002 for legislative measures,[92] and they were generalised for other initiatives with the 'Better Regulation' agenda. Since 2015, the quality of impact assessments has been examined by an independent body, the Regulatory Scrutiny Board, which includes members external to the EU institutions, and whose role it is to 'check major

[90] COM(2020)682 final, 28.10.2020 (Art 5(1)).
[91] See the Better Regulation Toolbox, Tool #5: When is an IA necessary?; http://ec.europa.eu/smart-regulation/guidelines/tool_5_en.htm
[92] European Commission, Communication on Impact Assessment, 5 June 2002, COM(2002)276final.

evaluations and "fitness checks" of existing legislation' by delivering an 'impartial opinion on the basis of comprehensive know-how of the relevant analytical methods'.[93]

Fundamental rights have gradually played a greater role in such impact assessments. The guidelines for the preparation of impact assessments presented in 2005 already referred to the potential effects of different policy options on the guarantees listed in the Charter.[94] In 2009 and 2011, successive Staff Working Papers of the Commission made the role of fundamental rights in impact assessments increasingly more explicit.[95] The guidance these documents provided to Commission Services applies only to legislative proposals submitted by the Commission. In contrast, the tools developed as part of the 'Better Regulation' agenda apply to all initiatives, whether legislative or regulatory or whether they consist of the introduction of new policies or amendments to existing policies. Fundamental rights and (for the external dimension of EU action) human rights are now better integrated in these tools.

Despite this significant progress, a number of deficiencies remain, as well as a gap between the shift towards the inclusion of 'social fairness' considerations in reform programmes, and a *social rights-based* assessment of their impact. First, the inclusion of fundamental rights in impact assessments has not led to modification of the basic structure of such assessments, which still rely on a division between economic, social and environmental impacts. Despite requests from the Parliament,[96] the Commission has repeatedly stated that it was unwilling to perform *separate* human rights impact assessments, distinct from the assessment of economic, social and environmental impacts. This so-called 'integrated' approach allows fundamental rights impacts to be factored into a broader set of considerations. This makes it possible to compensate certain negative impacts (such as a curtailing of civil liberties or of the provision of certain public services) by means of positive impacts at other levels (including on economic growth and social cohesion), in the overall assessment presented to decision-makers.[97]

Secondly, impact assessments as they are currently performed still insufficiently provide that the fundamental rights concerned are mainstreamed in the EU's decision-making process. An empirical study assessing how impact assessments serve the various horizontal 'mainstreaming agendas' concluded that they were not giving equal attention to the six mainstreaming

[93] Replies of the European Union to the list of issues raised in regard to the initial report submitted in accordance with Article 35 of the Convention on the Rights of Persons with Disabilities (CRPD/C/EU/Q/1/Add 1, 8 July 2015), para 26.
[94] See SEC(2005)791, 15.6.2005.
[95] See, respectively, SEC(2009) 92 of 15.1.2009 and SEC(2011) 567 final of 6.5.2011.
[96] European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring (2005/2169(INI)), OP 11 (where the Parliament 'Calls on the Commission to think over its decision to divide its considerations on fundamental rights into the current three categories in its impact assessment - economic, social and environmental effects - and to create a specific category entitled 'Effects on fundamental rights', to ensure that all aspects of fundamental rights are considered').
[97] This is a defensible position, but also represents a strong argument for not allowing impact assessments, thus understood, to become a substitute for rigorous compatibility checks based on legal analysis. The Commission notes in this regard—correctly, in the view of this author—that an 'Impact Assessment does not, and cannot, operate as the fundamental rights check. It cannot be a substitute for legal control. In the end result, fundamental rights proofing can only be performed via a legal assessment based on a crystallised draft legislative text. However, while not being, in itself, the legal control for fundamental rights compliance, the Commission recognises that the Impact Assessment can do some of the groundwork to prepare for the fundamental rights proofing of legislative proposals' (Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights*, cited above, p 6).

objectives referred to by the TFEU.[98] 'While social and environmental concerns are primary objectives of assessment of the IIA system', this study notes, 'fundamental rights constitute a more ad hoc horizontal category'.[99] Of the 35 impact assessments examined (covering the period 2011–2014), fundamental rights were taken into account in 19 cases. In the cases in which they were ignored, no justification was provided. The relatively marginal role of fundamental rights in impact assessments (certainly compared with economic considerations about regulatory burdens on businesses, but also compared with the other 'mainstreaming objectives' listed in the TFEU, with the exception of gender and non-discrimination) is further illustrated by the findings of the Impact Assessment Board (IAB), which since 2007 has been tracking which issues are addressed in impact assessments and adopts recommendations to improve the process. It would appear that, whereas 80 per cent of IAB reports included comments on the consideration of economic impacts in an average year, recommendations related to fundamental rights were found in only 10 per cent.[100]

Thirdly, the Guidance provided to Commission Services concerning the preparation of the fundamental rights component of impact assessments[101] refers almost exclusively to the CFREU, as if the rights, freedoms and principles codified in the Charter were the only fundamental rights recognised in the EU legal order. In the future, impact assessments should move beyond references to the CFREU alone, to integrate the full range of social rights guaranteed in international human rights law, including in particular the ESC.[102] The preparation of such social rights impact assessments taking into account the ESC would also appear to be in line with the position of the European Commission, according to which (as stated by Commissioner M Thijssen on its behalf in response to a parliamentary question) it is

[98] In addition to fundamental rights, these objectives are: gender equality (Article 8 TFEU); the promotion of a high level of employment, adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health (as stipulated in the so-called 'horizontal social clause' of Article 9 TFEU); non-discrimination on the basis of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10 TFEU); environmental policy integration for sustainable development (Article 11 TFEU); and consumer protection (Article 12 TFEU).

[99] S Smismans and R Minto, 'Are integrated impact assessments the way forward for mainstreaming in the European Union?' (2017) 11 *Regulation & Governance* 3, 2. The study also notes that 'while the six mainstreaming objectives receive attention in the IIA [integrated impact assessments] institutional set-up, other objectives receive at least as much attention. Indeed, both the assessment of economic impacts and of regulatory burdens are predominant in the set-up of the IIA system, although neither of these are set out in the treaties as constitutional horizontal objectives' (ibid).

[100] Ibid, 15. The authors of this study attribute this state of affairs to the fact that 'the EU's fundamental rights regime is mainly conceived as a negative guarantee, intended to ensure that the EU should not negatively impact on fundamental rights, rather than as a positive regime promoting these values in a proactive way at policy level. The operational guidelines on fundamental rights in the IA are, thus, steered to set off a warning light whenever policy intervention would negatively impact on fundamental rights, while failing to use IAs actively to define the objectives of new policy initiatives that positively promote fundamental rights': ibid, 13 (citing O De Schutter, 'Mainstreaming Human Rights in the European Union", in P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford, Hart, 2005) 37–72).

[101] Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final of 6.5.2011.

[102] See, for a detailed analysis, O De Schutter, *The European Social Charter in the context of the implementation of the Charter of Fundamental Rights of the EU*. Study prepared at the request of the European Parliament's Committee on Constitutional Affairs (AFCO) (PE 536.488, 2016).

'important that Member States comply with the European Social Charter also when implementing reform measures'.[103]

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

The Action Plan for the implementation of the EPSR endorsed in May 2021 at the Porto Social Summit provides that '[in] planning the allocation of financial resources, Member States should make greater use of distributional impact assessments in order to better take account of the impact of reforms and investments on the income of different groups and to increase transparency on the social impact of budgets and policies'. The European Commission pledges to '[p]resent in 2022 guidance to enhance Member States' use of ex-ante distributional impact assessments in budgeting and planning of reforms'.[104] This would be an important step forward. It would only partly fill the gap, however, because even if the EPSR were taken as a departure point to provide the analytical grid for the preparation of social impact assessments, this still would not lead to a genuinely rights-based approach in the area of impact assessments.

3.2.2 The European Pillar of Social Rights and Social 'Rights'

For the most part, the EPSR develops existing rights, that are already part of the EU *acquis*, in order to further clarify their implications (and thus increase their relevance) in the current economic context, or in order to define as a 'principle' a guarantee already stipulated in secondary EU legislation. The updating of existing rights, or the attempt to define new principles for a changing economy, are generally progressive. For some of the principles of the EPSR, moreover, Member State ratification of relevant international instruments features among the tools that the Commission considers for the implementation of the principles of the European Pillar of Social Rights.[105]

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[103] Statement made by Commissioner M Thijssen on behalf of the European Commission on 30 April 2015, in response to a parliamentary question on the social rights impacts of reform programmes (more specifically, on wage decline in Spain) (question from P Iglesias (GUE/NGL) of 6 March 2015, P-003762-15).

[104] Action Plan, 35.

[105] As regards Principle 6 for instance, it refers to ILO Convention No 131 on minimum-wage fixing and to ILO Convention No 154 on the promotion of collective bargaining (SWD(2018) 67 final of 13.3.2018, 33). Similarly, while Principle 7 refers to the protection of workers in case of dismissal (including the right to be informed of the reasons and be granted a reasonable period of notice), reference is made to the fact that EU Member States are encouraged to ratify relevant ILO conventions, such as Convention No 122 on Employment Policy, Convention No 144 on Tripartite Consultations, Convention No 135 on Workers' Representatives, or Convention No 154 on Promotion of Collective Bargaining. While most references in this regard are to ILO conventions, the commentary of Principle 12 of the EPSR (Social Protection) includes a reference to the contribution to EPSR implementation

It is important, however, that the proclamation of the European Pillar of Social Rights be seen as a means of supporting, and not as a substitute for, the recognition of social rights. The March 2016 communication formally announcing the initiative referred to 'common values and principles' that 'feature prominently in reference documents', such as the CFREU or international instruments such as the ESC adopted within the Council of Europe and recommendations from the ILO.[106] The Pillar, the communication suggested, should support the further implementation of social rights that are part of the *acquis* of the European Union: the principles that shall be attached to the 20 policy domains concerned by the initiative, it is said, 'take as a starting point a number of rights already inscribed in EU and other relevant sources of law, and set out in greater detail possible ways to operationalise them'.[107]

The EPSR should therefore not be confused with a new catalogue of rights, complementing the rights of the CFREU in the areas insufficiently covered by this instrument. As stated again in March 2018 in the Commission Staff Working Document accompanying the Communication 'Monitoring the Implementation of the European Pillar of Social Rights', '[g]iven the legal nature of the Pillar, for these principles and rights [listed in the EPSR] to be legally enforceable, they first require dedicated measures or legislation to be adopted at the appropriate level.'[108]

It is therefore incorrect to state, as the Commission does in its presentation of the Principles included in the EPSR, that the added value of the Pillar is to define as a right what was merely an advantage granted, in the absence of any legal obligation, to the individual.[109] The Pillar remains for now a policy instrument: it provides useful guidance, but does not create legal guarantees enforceable before courts of other independent bodies. Efforts developed within the EU legal order to strengthen the protection of social rights as enforceable entitlements should therefore be pursued, and this concerns in particular the strengthening of the relationship with the ESC.[110]

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that could result from the ratification of the European Social Charter and from the extension of the list of accepted provisions by Member States (SWD(2018) 67 final of 13.3.2018, 60).

[106] Communication from the Commission, *Launching a consultation on a European Pillar of Social Rights*, see n 2 above, para 2.4.

[107] *Ibid*, para 3.1.

[108] SWD(2018) 67 final of 13.3.2018, 4.

[109] For instance, the Commission notes, concerning Principle 11, that 'the Pillar establishes that *all* children *have the right to* good quality early childhood education and care (ECEC)' (SWD(2018) 67 final of 13.3.2018, 55). As regards Principle 12 (Social Protection), the Commission states: 'The Pillar transforms the call for a replacement income which will maintain the workers' standard of living in [Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies, OJ L 245 of 26.8.1992, 49] *into a right*.' But such statements are incorrect, or purely rhetorical, as long as the guarantees listed in the Pillar are enforceable in the absence of further legislative action, at EU or Member State level. It would be more accurate to state that the reference to such 'rights' in the Pillar expresses an intention to transform such objectives into claimable entitlements.

[110] A number of proposals have been made elsewhere concerning how to strengthen such synergies with the European Social Charter. There is therefore no need to repeat this exercise here: see O De Schutter, *The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order* (Council of Europe, November 2018), available at: <https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132>

3.2.3 The 'Social Imbalances' Procedure

In advance of the Porto Social Summit, the Belgian and Spanish governments submitted a proposal (in the form of a 'non-paper') to establish, alongside the Macroeconomic Imbalances Procedure (MIP) set up in 2011, a 'Social Imbalances Procedure (SIP)' 'to identify, prevent and address the emergence of potentially harmful social imbalances that could adversely affect the employment situation and living conditions in a particular EU Member State, the euro area, or the EU as a whole'.[111] This would enhance the role of the EPSCO Council position in the European Semester process. It would also clarify the role of the indicators in the Social Scoreboard, as revised following the adoption of the EPSR: rather than these social indicators being included in the MIP, as what appears to be a rather artificial 'add-on', the social indicators would feed into a specific and parallel procedure, making visible the need for a balanced approach across both macroeconomic and social convergence processes.

An additional benefit is that, when implementing the country-specific recommendations addressed to them, which focus on fiscal sustainability (and avoiding the increase of public deficits), the Member States would be made fully aware that they cannot do so at the expense of social rights. This is key, considering the role that CSRs have played in the past. A study commissioned in 2019 by a Member of the European Parliament calculated that between 2011 and 2018 there were 63 CSRs recommending cuts in or privatisation of health care, 50 recommending suppression of wage growth, 38 reducing job security, and 45 reducing support for unemployed, vulnerable or people with disabilities.[112] Trade unions have also found many instances of CSRs recommending reforms of health systems to increase fiscal sustainability and cost-efficiency, with no references to allocating further investments in this sector.[113] Academics have made similar findings.[114] The introduction of the SIP would be a powerful antidote to this.

The 'non-paper' does not take a position on the precise criteria or indicators that should feed into the 'alert mechanism' to be put in place. It suggests, however, that such a mechanism should present two characteristics. First, rather than addressing failures to fully uphold social rights as such (which could lead the least wealthy Member States to be targeted disproportionately), the mechanism should focus on trends, taking into account Member States' different starting positions. What the mechanism should alert us to is a lack of progress, or regression, rather than simply a failure to conform to certain floors. The consequences of this approach are rather ambiguous. On one hand, it encourages further progress in the implementation of social rights, to the maximum available resources of each State, in line with the status of economic and social rights in international human rights law. This implies that even the wealthiest countries, boasting the most advanced systems of social protection, should pursue their efforts, in particular by adopting fiscal policies and public budgets in line with the

[111] Introducing a 'Social Imbalances Alert Mechanism' in the European Semester, Non-paper presented by the Belgian and Spanish governments in advance of the Porto Social Summit, May 2021.
[112] E Clancy, 'Discipline and Punish' (February 2020), 28; <https://emmaclancy.files.wordpress.com/2020/02/discipline-and-punish-eu-stability-and-growth-pact.pdf>
[113] ETUC, 'COVID19: the impact of health care cuts' (May 2020); <https://www.etuc.org/en/document/covid19-impact-health-care-cuts>
[114] N Azzopardi-Muscat et al, 'EU Country Specific Recommendations for health systems in the European Semester process: Trends, discourse and predictors' (2015) 119 *Health Policy* 3; <https://www.sciencedirect.com/science/article/pii/S016885101500010X>

objective of the progressive realisation of rights.[115] On the other hand, it may perpetuate the idea that social rights are not 'real rights' after all, but rather policy objectives that each State should be allowed to pursue at its own pace. This may underestimate the importance of 'treating economic and social rights as human rights, rather than as desirable goals, development challenges, social justice concerns or any of the other formulations that are invariably preferred', as expressed in a report of the former UN Special Rapporteur on extreme poverty and human rights, which provides a strong plea for taking social rights more seriously. This implies legal recognition, institutionalisation and accountability.[116]

Secondly, beyond the focus on specific States, the 'non-paper' from the Belgian and Spanish governments suggests that the mechanism should make it possible to identify diverging trends across States, which could tilt the economic and monetary union off balance, or lead to unfair competition within the internal market. As such, the alert mechanism could provide an impetus to the further deepening of European integration in the area of social rights by identifying the need for new legislative initiatives.

4. Conclusion

The European Pillar of Social Rights has created new momentum. If the opportunity is to be seized, however, it is important to move beyond the current tools that were designed to ensure its implementation. Neither the revised Social Scoreboard, nor the Action Plan implementing the EPSR, are truly transformative. This contribution has proposed three directions forward. It has suggested the need to strengthen the role of social rights in impact assessments, whether these concern EU policy or legislative initiatives, or whether they accompany the use of EU funds at domestic level. It has emphasised the need to recognise the specificity of social rights as human rights: rather than being degraded to the rank of principles guiding policy, they should be firmly linked to existing human rights standards, such as those listed in the European Social Charter. Finally, it has referred to the proposal to establish a 'Social Imbalances Procedure' alongside the 'Macroeconomic Imbalances Procedure', to ensure that social convergence makes progress as effectively as macroeconomic convergence. What is at stake, ultimately, is the EU's ability to deliver to its population, and thus to reignite enthusiasm for the European integration project.

[115] See O De Schutter, *The rights-based welfare state: Public budgets and economic and social rights* (Geneva, Friedrich-Ebert-Stiftung, November 2018).
[116] Report of the Special Rapporteur on extreme poverty and human rights to the thirty-second session of the Human Rights Council (A/HRC/32/31 (28 April 2016)), para 8.