EuSocialCit

European Social Citizenship

Working Paper on the potential and limits for social policy in the current EU framework

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Summary

The overarching goal of EuSocialCit is to provide a scientific analysis and examine the alternative policy scenarios that support EU social citizenship. To this end it will present a conceptual framework for the selection of priorities in the development and implementation of European social rights and European social citizenship. In this context, the current working paper examines the limitations and potential of social policy in the existing EU legal constellation upon which the abovementioned priorities can be based. It does so by studying first the competences of the EU in social policy and exploring the power resources on the basis of the resource-based understanding provided in the deliverable 2.1 (Vandenbroucke et al, 2021).

The regulatory policy framework of the EU is highly fragmented and, as a result, so are the power resources that the EU offers to individuals. While piecing together the puzzle of these power resources is no easy task, the working paper shows that there are diverse power resources at the EU level that entitle individuals to, *inter alia*, claim-rights, access to information, and the possibility to be heard as well as to be advised on complex situations. These power resources come with a number of limitations, not the least that much of what comprises social rights is still dealt with by national authorities. To the end of delineating the contours of what we understand as the social dimension of the EU, this Working Paper first analyses the social competences (part I) and then breaks down the power resources offered by the EU (part II).

Part I explores alternative competence scenarios under the current legal framework that allow the EU to adopt social instruments in a number of broad areas. In doing so, Part I also examines the limitations that exist in the current constitutional framework.

Part II, instead, discusses the different power resources that currently exist in this constitutional framework. This part is divided in the tripod of power resources identified in a previous Working Paper and it discusses, accordingly, normative, instrumental and enforcement power resources.

Overall, the Working Paper finds that there are abundant power resources available at the EU, and that a number of these can be key in empowering individuals to effectively enjoy social rights. Whereas this certainly adds to the plethora of resources available to reach an enhanced standard of living, the abundancy of resources is paired with increased complexity. As a consequence, it is not always clear how these instruments interact with each other and what the hierarchy between them is —perhaps with the exception of the binding instruments. In this vein, there is room for improvement, both in terms of exercising existing competences and providing individuals with effective power resources.

Working Paper on the potential and limits for social policy in the current EU framework

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Web address	For more information about the EuSocialCit project, please visit www.eusocialcit.eu. EuSocialCit's output can also be found in its community on Zenodo: https://zenodo.org/communities/eusocialcit.

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Introduction

EuSocialCit has the overarching goal to provide scientific analysis and examine alternative policy scenarios that support the strengthening of EU social citizenship. To the end of 'dissecting' the constitutive elements of social rights and understanding the specific role of the EU in the realm of social rights, a previous working paper proposed a novel, resource-based and multi-level understanding of social rights. This initial paper is complemented by a report on the state of European social rights and European social citizenship. Building on these two papers, EuSocialCit will present a conceptual framework for the selection of priorities in the development and implementation of European social rights and European social citizenship. Developing such conceptual framework, however, needs to be coupled with an examination of the limitations and potential of social policy in the existing EU legal constellation. This paper aims at providing precisely that. It does so by studying first the competences of the EU in social policy and exploring the power resources on the basis of the resource-based understanding provided in the deliverable 2.1 (Vandenbroucke et al, 2021).

Even though social policy was not necessarily what the founding fathers of the European Community had in mind when putting together the economic community, it quickly became obvious that an economic community was not feasible without developing at least certain aspects of social policy as well. As early as 1957, with the Treaty of Rome, the basis for the European Social Fund (ESF, now under Title XI TFEU) were provided in order to improve employment opportunities and to contribute to raising the standard of living. The Treaty also included the right to free movement of workers and the abolition of discrimination on the basis of nationality as regards to employment, remuneration and other working conditions (now Article 45 TFEU). With a particular focus on gender, Article 119 TEEC (now Article 157 TFEU) also enshrined the principle of equal pay between men and women. It was also around this time, in 1958, that secondary legislation on social security coordination was enacted as a necessary step to ensure free movement of workers, forming the basis of what is now Regulation 883/2004 and its implementing legislation Regulation 987/2009.

Because at the time the European Community lacked competences on the social field, a significant corpus of what is considered now the social acquis of the Union developed under the auspices of other competences, most notoriously, under the general harmonisation competence for the establishment and functioning of the internal market (now 114 and 115 TFEU - e.g. Directive 75/324/EEC). With the Single European Act, however, Member States conferred competences to adopt minimum requirements in the field of work and safety. Later on, the Treaty of Maastricht (1992) expanded the fields of competences on social policy with the introduction of the Social Protocol, which was

subsequently integrated in the Treaty of Amsterdam (1998) forming the basis of what is now Title X of the TFEU, namely, the Social Policy title of the TFEU.

In parallel, (social) fundamental rights also developed. Regarding social rights in the EU, we could take the Community Charter of the Fundamental Social Rights of Workers (1989) as an initial point of reference, which, although not legally binding, has relatively often been used as a point of reference by the CJEU (C-173/99, *BECTU*; C-397/01 - *Pfeiffer and Others*; C-684/16 - *Max-Planck-Gesellschaft*). Many of these social rights were later incorporated in the EU Charter of Fundamental Rights (CFR, 2000) which became legally binding with the Lisbon Treaty (2009). More recently, in 2017, the Commission launched the European Pillar of Social Rights (EPSR) which was interinstitutionally proclaimed by the EU institutions and the Member States in the same year. While not legally binding in itself, the later instrument has in its short life served as a gear for a number of initiatives (both binding and not) for a better delivery and effectiveness of social rights in the EU.

Because of this progressive evolution over the years, the parameters of what we now understand as EU social policy are not always clear and, as a consequence, neither are the power resources that the EU offers to individuals. The main aim of this working paper is to clarify these boundaries and explore the potential and limitations of social policy in the current EU (legal) framework. To this end, this working paper first analyses the social competences of the Union, both *stricto sensu* and *sensu lato*, to later elaborate on the specific power resources where we explore normative, instrumental and enforcement power resources.

The reason to differentiate between competences and power resources lies on the definition of how social rights are defined in this project: as a guaranteed *subjective* power to obtain a certain benefit/service which, in turn, is constituted by three distinctive power resources: Normative, instrumental and enforcement (Vandenbroucke, Keune, Corti, & Ferrera, 2021). It follows from this definition that individuals and their rights should lie at the centre of the discussion on power resources. Before discussing power resources at the EU level, however, a necessarily clarification ought to be made regarding the powers of the Union. As such, the first part discusses the limitations to EU power resources by examining the power constraints of the Union as regards social rights in the first place. Once this has been clarified, the next three sections explore the potential and limitations of the different power resources within the parameters of the conferred Union competences. To this end, part two analyses the normative power resources at the Union level, including both binding and non-binding resources, the instrumental resources and enforcement resources. Lastly, we provide a number of concluding remarks.

PART I: SOCIAL COMPETENCES

Inevitably, the first question in delimiting the potential of social policy in the current EU framework lies on the competences that the Union has in the social policy field. Note that while competences can be seen as a 'limitation' to the EU powers, they are also an opportunity to the extent that they have been conferred. The latter is something to consider regarding future initiatives and the quest for *lege ferenda* in EU social policy, especially in the current political context of the EPSR.

Competences are governed by the principle of conferral, meaning that the Union has powers only when these have been attributed by the Member States in the Treaties (Article 5 TEU). These competences are conferred for the purpose of attaining an objective, which is equally set in primary law. This is what we call 'functional competences' in the EU, which refers to the idea that the Union may only use its powers insofar as this is necessary for attaining a pre-agreed-upon objective. Among the objectives we can differentiate between general and specific objectives. In the case of the former, the general objectives of the Union are enshrined in Article 3 TEU and envisage, *inter alia*, that the Union aims at becoming a highly competitive 'social market economy'. As regards the specific objective, it refers to the aims enshrined in the Treaties that delimit a given competence. In the case of the social competences, this is most clearly the case of Article 151 TFEU, which sets the objective to be attained when exercising the powers in the Social Policy Title X. These provisions are specifically discussed later in the Working Paper (part 2.1.1.1.), but for now let the following be clear: The EU can only intervene when the Member States have conferred the Union the powers to act on a certain policy area for the purposes of attaining a common goal. Those competences that have not been conferred remain with the Member States.

When competences are conferred, the competences can be exclusive, shared or supplementary, meaning either that only the Union has powers to legislate and adopt legally binding acts (exclusive competence), that the Member States may only legislate to the extent that the EU has not (shared competence) or that the EU may coordinate, support or supplement actions of the Member States but by no means can this lead to legal harmonisation of Member States' laws or regulations (Article 2 TFEU). As for social policy, the competences of the EU are mostly shared (Art. 4(2) TFEU), although some areas of social policy are only supplementary, such as, employment (Art. 5 TFEU) education and vocational training (Article 6 TFEU).

Before moving on to the discussion on social competences, an important disclaimer of the following pages is applicable. Because the goal of this Working Paper is to delimit the potential and limits of social policy in the current framework from the point of view of power resources, it does not consider

how other powers of the EU have had a negative impact and limited social policy in the past. Accordingly, this Working Paper leaves out an important part of the recent history of the EU, were macroeconomic governance –including employment policy–, resulted in a major driver of deregulation of social policy both at the EU and at the national level. Hence, what follows takes a more 'proactive' role of social policy, including some positive or neutral aspects of the social displacement of Europe, but does not address equally important – if not more-, threats of such displacement (Kilpatrick, 2018; Dawson M. , 2018). [1]

1 SOCIAL POLICY: A SHARED COMPETENCE?

According to Article 4(2) TFEU, social policy is a shared competence, that is, for the aspects defined in the Treaty. In principle, this entails that in those areas attributed to the EU, both the EU and the Member States may legislate. In the case of the Member States they may only legislate in that area to the extent that the EU has not or has ceased to do so.

However, this is not the case for all areas of social policy. In fact, this is not even the case for those areas covered under the social policy title (Title X), which is understood as social policy *stricto sensu.* A number of areas exclude harmonisation either by explicit reference in the provision itself (Article 153(1)(j) and (k) TFEU) or by being catalogued as a competence of support, coordination, or supplement (Article 156 TFEU). Similarly, other areas that are not strictly speaking social policy but are part of the social acquis of the Union, also fall under this category of supplementary competences, such as employment policy. This does not exclude the possibility of the Union adopting a binding instrument, but harmonisation. This means that even in those areas limited to support, coordination and supplement, the EU can still adopt binding legislation to contribute to attain a specific goal, as long as this is not done through harmonisation.

Sections two and three will discuss the specific areas or fields in which the EU has social competences, including social competences *stricto sensu* but also a number of other areas where a significant corpus of the social acquis has developed (social competences *sensu lato*). Before that it is crucial to note that where the Union does not have exclusive competences, such as in the social domain, it must act in compliance with the principles of subsidiarity and proportionality (Article 5(3) and (4) TEU). These principles create a bridge between the existence of competences and the exercise of these.

[1] Note that some of these concerns are addressed in other Working Papers of EuSocialCit. See, for example deliverable 3.3 (Alcidi & Corti, 2022)

1.1 Subsidiarity

Subsidiarity can be understood as a mediating principle between having competences and using them and it responds to the query of **when** should the EU exercise its conferred powers. In this sense, subsidiarity embodies the fundamental concern of federalism regarding the balance of powers between the Member States and the EU (Fabrini, 2018). For an action to comply with the principle of proportionality, firstly, the objective sought can only be sufficiently achieved through supranational action and secondly, whether for reason of scale of effects, EU action if considered to be better placed to achieve such action (Scharpf, 1994).

There is also a procedural component to the principle of subsidiarity, clearly embodied in the Subsidiarity Protocol, which can be broken down in two steps. *Ex-ante*, that is before an action is taken, the Commission must consult widely and provide a written and accessible statement of the compliance of the given action with the principles of subsidiarity and proportionality, including an impact assessment (Article 5 of the Protocol). *Ex-post*, the CJEU has the jurisdiction to consider possible infringements of the principles of subsidiarity and proportionality, although, in practice, much of the assessment is limited to the impact assessment.

While the Protocol was already in place before the Lisbon Treaty, it was not until then that the role of national parliaments was enhanced. Accordingly, the Commission must send all legislative proposals simultaneously to the national parliaments and the EU institutions. National parliaments may then send a reasoned opinion within eight weeks if they deem that the proposal does not comply with the principle of subsidiarity. Each national parliament is allocated two votes, one for each chamber (or two votes for a Member State's unicameral parliament). The effect of a reasoned opinion will ultimately depend on the number of national parliaments reacting to the legislative draft and the number of votes. If the reasoned opinion exceeds one third of the total of votes,[2] the Commission must review the initiative, but in any case, it may decide to maintain, change or withdraw the proposal. This process, is known as the yellow card procedure. If the Commission decides to maintain the proposal, it will need to present a justification for such a decision before the European Parliament and the Council. Where a simple majority of the European Parliament and the Council of the EU decides against such proposal, it will not be given further consideration. This is the so-called orange-card procedure (Articles 5-7 of the Protocol).

[2] Some areas such as freedom and security and justice require a lower threshold: one quarter.

Up until now, the yellow card procedure has been triggered three times (Granat & Fabrini, 2013). One in 2012 with regard to a proposed regulation on the exercise to collective action, also known as the Monti II Regulation (Commission, 2012), another in 2013 with regard to a proposal for a regulation establishing the European Public Prosecutor's Office (Commission, 2013a) and the most recent one in 2016 in relation to the proposal to review the Posting of Workers Directive (Commission, 2016a). The Commission did not find a breach of the principle of subsidiarity in any of the proposals, however, in the case of the Monti II Regulation it decided to withdraw the proposal anticipating the lack of support for its adoption. By contrast, in the other two cases the Commission decided to maintain the proposals and provided reasons for its opinion accordingly (Commission, 2013; Commission, 2016). Note, however, that the concerns regarding the Posting of Workers Directive, led later to two actions for annulment before the CJEU, which were subsequently dismissed by the Court (C-626/18 - *Poland v Parliament and Council*; C-620/18 - *Hungary v Parliament*). Some Member States, such as Denmark or Sweden, have sent reasoned opinions against the recent Directive on adequate minimum wages, in which they argue that wages are best regulated according to national practices and that regulating wages goes beyond the EU's supervisory powers. However, the threshold to trigger the yellow-card procedure has not been met (The Swedish Parliament, 2020; The Danish Parliament, 2020).

As regards infringement procedures (see Part 2, section 6) of the principle of subsidiarity, the position of the CJEU is a complicated one, considering that if the Court finds a breach it comes in direct disagreement with the conclusions of the EU institutions (Davies G. , 2006, pp. 72-74). Nevertheless, this has not precluded the Court from delivering substantial content interpreting compliance with subsidiarity. For instance, the Court has ruled in the past that when an action has the objective of harmonising, it is difficult to sustain that Member States alone can achieve that goal, and subsequently, a supranational action is necessary (C-426/93 – *Germany v Council*, §42; Opinion AG Léger in C-84/94 - *United Kingdom v Council*, §126- 130). The Court has also established that when an action fulfils two interdependent objectives and one of these could be better achieved at the national level, if the twofold objective can be better attained supranationally, then there is no violation (C-508/13 - *Estonia v Parliament and Council*, §46-48). In the same case, the CJEU established that 'the principle of subsidiarity cannot have the effect of rendering an EU measure invalid because of the particular situation of a Member State, even if it is more advanced than others in terms of an objective pursued by the EU legislature, where […] the legislature has concluded on the basis of detailed evidence and without committing any error of assessment that the general interests of the European Union could be better served by action at that level'(§46-48 and §54). More recently, the Court also held that when dealing with the principle of subsidiarity the reasoning of the proposal must be

evaluated both by reference to the wording of the legislative act and by reference to the particular context of the case (C-547/14 - *Philip Morris,* §225-226).

Beyond, the protocol also dictates that the Commission reports yearly on subsidiarity and proportionality and the relations with national parliaments as mandated by the Better Regulation Agenda (Commission, 2017; Commission, 2020a). In addition, in 2017 the Commission officially established the Task Force on subsidiarity and proportionality that makes recommendation for a better application of both principles. (Task Force on Subsidiarity, 2018).

1.2 Proportionality

Proportionality is the last necessary principle to consider before exercising Union competences. Whereas subsidiarity responds to the idea of 'when' should the Union exercise its powers, the principle of proportionality deals with the question of '**to what extent'**. Thus, the principle of proportionality in this context is used to measure the intrusiveness of the EU, requiring that a Union act does not go beyond what is necessary to achieve a given objective (Ellis, 1999).

In EU law, the principle of proportionality is composed by two balancing acts. On the one hand, the principle of proportionality is used to establish an equilibrium between the means and the ends to determine whether or not the means employed are suitable for the objectives that are to be reached. The second form of balancing, on the other hand, relates to the necessity of the measure and refers to whether or not the effect of the measure is excessive on other interests. The latter balancing process is the one used to bring some coherence to otherwise conflicting values and principles. The first use, is the one key for determining to what extent the Union may exercise its powers.

Similar to the principle of subsidiarity, the compliance with the principle of proportionality is in practice assessed *ex-ante* by the executive and *ex-post* by the judiciary. Unlike subsidiarity, however, the principle of proportionality does not have an early alarm mechanism enhancing the role of national parliaments or an equivalent to the yellow/orange-card procedures. (Article 5 of the Subsidiarity Protocol TFEU) (Hettne, 2017; Öberg, 2018, p. 700). There is a requirement to ensure the constant respect of the principle of proportionality, which is manifested in a detailed assessment that the Commission must present accompanying all legislative drafts, also known as the impact assessment (Article 9 of the Subsidiarity Protocol TFEU). Impact assessments are necessary to the process of delivering ambitious policies in the simplest and least costly way while avoiding unnecessary bureaucratic steps, it is therefore integral to the Better Regulation Agenda (Commission, 2018a). In these, the Commission focuses on the administrative and financial impact of a given measure, which will have to be proportionate with the policy objective that is being pursued. In order

to comply with a rigorous impact assessment, the Directorate General in charge has to gather information, open a consultation process and apply a cost-benefit, cost-effectiveness and multicriteria analysis. (Commission, 2017) (Meuwese, 2008) As such, impact assessments are instruments to identify the strengths and limitations of a potential policy. When it is considered 'necessary' then the Commission puts the initiative forward. Since 2016, moreover, the Council and the European Parliament must take the impact assessment into full consideration during the legislative decision-making process (Agreement Better Law-Making, 2016).

Just as with the principle of subsidiarity, the role of the CJEU in analysing the compliance with the principle of proportionality as a means to an end principle remains rather controversial because the judicial review of EU legislation in vertical disputes requires the Court to assess quasi-political and empirical issues that the legislator is better suited to deal with (Öberg, 2017). Policy assessments that involve the balancing of complex factors like these are understood to be left to the legislator as a substantive analysis by the Court would raise issues of legitimacy and concerns regarding the separation of powers. Accordingly, the legislator must enjoy a broad discretion in this regard (C-626/18 - *Poland v Parliament and Council,* §95; C-620/18 - *Hungary v Parliament,* §112). As a consequence, the role of the Court when reviewing the principle of proportionality is rather marginal and limited to a situation where a measure is manifestly inappropriate in relation to the pursued objective (Bradley, 2016, p. 116). The broad discretion of the legislator was specifically acknowledged in *Philip Morris* (C-547/14, §63 and §166-177), which concerned the revision of the tobacco advertising Directive. The Court held that the legality of the Directive would only be affected if it were 'manifestly inappropriate' *vis-à-vis* the objective it attempts to pursue or where the legislator has exceeded the limits of discretion leading to a misuse of power (see also C-84/94 - *UK v Council*, §58*)*. It follows from *Philip Morris* that for the Court to find a violation of the principle of proportionality, a party will have to demonstrate that either the objective being pursued by the measure at the case is not one that can be pursued by the legislature under the premises of the Treaty or that less intrusive means could have been used to achieve the same objective (C-491/01 - *British American Tobacco*). For example, in *Spain v Council* (C-310/04) the Court concluded that the legislator had failed to take into consideration the labour costs of cotton production. Since in order to achieve the objectives of the act in question (Regulation 1782/2003) all relevant factors needed to be considered, the Court decided that the Council had not complied with the principle of proportionality. Notably, AG Sharpston stressed that the legislator had breached the principle of proportionality because no impact assessment had been carried out (§82-96).

From the caselaw of the CJEU, it appears that the Court limits the judicial review of EU legislation to a procedural review whereby the Court considers primarily the reasoning and evidence put forward by the EU legislator (See also: C-84/94 - *UK v Council*, §58; C-151/17 - *Swedish Match*, §36-57; C-176/09 - *Luxembourg v Parliament and Council,* §62-72; C-58/08 – *Vodafone,* §52; C-92 and 93/09 *Volker*, §87-88; C-482/17 - *Czech Republic v Parliament and Council*, §77-90). Accordingly, impact assessments become pivotal, not only for the *ex-ante* but also for the *ex-post* review, as they substantiate whether the EU legislator has complied with the necessary procedural steps. (Alemanno, 2011; Lenaerts, 2012; Craig, 2012, pp. 595-639; Öberg, 2017).

2 Social policy competences: Art 153 TFEU

Once we have established the general foundations for the exercise of Union competences, this section will dive into the specific social competences of the EU. As such, it breaks down Article 153 TFEU and analyses the competences under this provision as well as the procedural requirements and limitations. In other words, this section defines the limits (and possibilities) within the specific social competences of the EU.

2.1 Scope (Article 153 (1) TFEU)

Article 153 TFEU provides for European institutions, generally by joined action of the Council and the European Parliament, to act on a wide range of matters of social character:

> 'With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:
> (a) improvement in particular of the working environment to protect workers' health and safety;
> (b) working conditions;
> (c) social security and social protection of workers;
> (d) protection of workers where their employment contract is terminated;
> (e) the information and consultation of workers;
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
> (g) conditions of employment for third-country nationals legally residing in Community territory;
> (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
> (i) equality between men and women with regard to labour market opportunities and treatment at work;
> (j) the combating of social exclusion;
> (k) the modernisation of social protection systems without prejudice to point (c).'
> (Art. 153(1) TFEU)

From the above it is clear that the EU has competences in a vast number of fields, eleven only within this single provision. However, the exact definition and parameters of each field is not clear and so

far, the Court has only interpreted a few of these fields, mostly in the context of the employment directives on health and safety and working conditions (Garben, 2019). There are, moreover, a number of areas that are likely to overlap, such as working conditions and working environment. This is not necessarily a problem, but one will have to bear in mind that the legal consequences of each field varies greatly. A clear example of this is a possible initiative on minimum income. Whereas some may see this evidently as a measure to combat social exclusion (field j), a minimum income instrument could also be seen as a way to integrate persons excluded from the labour market (field h). The exact field to be utilised will ultimately depend on the formulation and exact content of the instrument, but something important to consider is that while the former is limited to measures of coordination, the latter is a shared competence where the Union has the power to harmonise (See figure 1) and as such, the level of intrusiveness of EU law can vary significantly (Van Lancker, Aranguiz, & Verschueren, 2020). As a consequence, the legislator can be expected to consider the different procedures, voting rules and type of competence before engaging into action.

Until now, the Court has also not had the opportunity to rule over the interrelationship between these fields. In cases of overlap it may be argued that the more specific provision (*lex specialis*) should apply, a line of interpretation confirmed by the Court in other contexts (C-252/05 - *Thames Water Utilities*, §51-57; C-444/00 - *Mayer Parry Recycling*, §51-57). However, the CJEU has also allowed to use a more indirect legal basis, provided that the conditions to use those competences are fulfilled, specially, when the specific legal base excludes a certain action. A clear example relates to the Tobacco advertising legislation, that was adopted under the general internal market bases (Article 114 TFEU) because the legal basis on public health exclude harmonisation (see above).

More problematic is the issue of gaps. While it is understandable that in social policy, being an area of high political sensitivity, the primary role is reserved for the national authorities, there are important gaps that ought to be addressed. This is perhaps mostly clearly the case of the self-employed. While a couple of fields in Article 153 TFEU refer directly or indirectly to workers, there is no ground for action in the case of the self-employed. Traditionally the argument could run to regulate this under 'services', but as the lines between what is considered an employment relationship blur, it becomes increasingly important to address this gap in the social competences as well. This is clearly exemplified by the recent Recommendation on access to social protection for workers and the self-employed. In this case, the legal basis (Article 153(1)(c)) TFEU) refer only to the social security and social protection or workers. The absence of social legal basis to regulate access to social protection for the self-employed pushed the legislator to expand the personal scope using the flexibility clause under Article 352 TFEU (see more on this provision below).

2.2 Legal Consequences: Article 153 (2) TFEU: Coordination and minimum standard directives

The next indent of Article 153 clarifies the differences regarding the legal consequences of exercising competences under each field. Figure 1 illustrates that, with the exception of the last two fields (on combating social exclusion and modernization of the social protection systems), all the fields under Article 153(1) TFEU allow for harmonisation, although some require the ordinary legislative procedure and other fields the special legislative procedure. The procedure of some of them, moreover, may change from the special to the ordinary legislative procedure (see below on the *passerelle* clause). Noteworthy, after the Treaty of Amsterdam, the order of powers shifted from minimum standards being the first option under paragraph (a) and the cooperation under paragraph (b), to the opposite order in the Treaty of Nice. This may suggest that cooperation became the preferred path to achieve the objectives set for social policy (Barnard, 2012, p. 55).

SOCIAL COMPETENCES ART 153 TFEU		
SHARED COMPETENCES		**COORDINATION (no harmonisation)**
Ordinary legislative procedure	***Special legislative procedure***	
(a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (h) the integration of persons excluded from the labour market, (i) equality between men and women with regard to labour market opportunities and treatment at work; (e) the information and consultation of workers	c) social security and social protection of workers. (d) protection of workers where their employment contract is terminated (*) (f) representation and collective defence of the interests of workers and employers, including co-determination (*) (g) conditions of employment for third-country nationals legally residing in Union territory (*)	j) the combating of social exclusion; (k) the modernisation of social protection systems
EXCLUDED AREAS: Pay, the right of association, the right to strike & the right to impose lock-outs		

Table 1: Social Competences of the EU (Art 153 TFEU). Areas marked with (*) can be rendered to the ordinary legislative procedure through the passerelle clause, see below.

3.2.2. Measures of cooperation (Art. 153(2)(a) TFEU) and Article 156 TFEU

Some areas of social policy, namely, the combating of social exclusion and the modernization of social security systems, exclude the possibility of harmonisation and are limited to coordination actions such as 'initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences'. The same applies to the coordination of other social policy areas under Article 156 TFEU. Together, they form the basis for the Open Method of Coordination for Social Protection and Social Inclusion (Social OMC, Part 2, Section 2.2.) in the area of Title X TFEU. The Social OMC is a voluntary process of cooperation between Member States at the EU level and its key element is based on policy exchange and the establishment of commonly agreed indicators and benchmarks aiming at upward convergence. This process is seemingly carried out by the Member States, leaving the Commission solely the coordinating part of the process. This might dwell well with the idea of subsidiarity in these areas where national authorities are deemed to be better suited for action. However, the Social OMC has been criticised for not delivering sufficient progress (Frazer & Marlier, 2008; Borras & Radaello, 2010), its lack of transparency and poor democratic legitimacy as it is often the executive taking charge of this process with no parliamentary accountability (Vassilis, 2007; European Parliament, 2007; Garben, 2019a).

While it is clear that in areas of cooperation and coordination the EU does not have the power to harmonise, it can still pass legally binding acts, provided that the act does not entail harmonisation. However, the very meaning of what harmonisation constitutes is not clear. The line of what a genuine legally binding action to advance the objective and an illegitimate harmonisation of national laws might be a fine one in some cases. In such cases, it will be the role of the CJEU to decide whether or not there is an abuse of power (See recently in relation to the posting of workers Directive: C-620/18 - *Hungary v Parliament and Council*, §48).

3.2.2. Minimum Standard Directives (Art. 153(2)(b) TFEU)

With the exception of fields (j) and (k), all other fields in Article 153(1) TFEU allow for minimum standard harmonisation of national rules. In this vein, the Court has previously held that the concept of minimum standards is in no way meant to be understood as the lowest common denominator or the lowest level of protection offered by the Member States. This was clarified in the *Working Time* case (C-84/94, §56), where the Court held that '[this] provision does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but means that Member States are free to provide a level of protection more

stringent than that resulting from Community law, high as it may be.' According to this, the EU is free to set is own minimum requirements, provided that these comply with the principles of conferral, subsidiarity and proportionality. Complementing this, the Court has also held that Member States remain free, and even encouraged, to adopt more stringent measures (C-2/97 – *IP*, §36) which was recently confirmed in the *TSM* case (C-609/17, §47-48).

The Court's interpretation goes in line with the **non-regression clause** under Article 153(4) TFEU, which establishes that measures under Article 153 TFEU shall not prevent Member States from maintaining of introducing more stringent national standards as long as this is done in compliance with EU law (C-194/08 – *Gassmayr*, §89-90). It follows, that directives setting minimum standards in the field of social policy should not preclude Member States from offering further protection. If anything, following the wording of Article 3 TEU, Member States should be encouraged or 'geared' towards attaining a harmonious development and the high level of employment and social objective that are part of the common objectives of the EU (Barnard, 2012, p. 56).

Besides the above, when setting minimum standards, the specific legal and factual circumstances of the EU should be considered as to not set unrealistic or impossible standards for (some) Member States. These minimum standards, moreover, are subject to a gradual implementation, meaning that the increase in protection is expected to rise progressively over the years following the implementation of the minimum standards (Geiger, Khan, & Kotzur, 2015, p. 645).

2.3 Legislative procedures:

3.2.2. Community method

Within those fields of the social policy title that allow for harmonisation (fields a-i), there remain also different legal consequences, in this case, regarding the procedural requirements for their adoption. A legal act can only qualify as an EU legislative act when it has been adopted according to the required legislative procedure established in each specific provision (C- 647/15 – *Slovak Republic and Hungary v Council*, §62; also part 2, section 1.2.3*)*. According to this provision, the European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting with the Economic and Social Committee and the Committee of the Regions. This is with the exception of fields (c), (d), (f) and (g) where the Council shall act unanimously in accordance with the special legislative procedure, after consultation with the European Parliament.

The **ordinary legislative procedure** is set out in Article 294 TFEU which dictates that the European Parliament and the Council must act as co-legislators. Given that the European Parliament, contrary to the Council, is a democratically accountable institution, this procedure increases the legitimacy and

democratic character of a directive. Moreover, in this case, the Council voting requires Qualified Majority Voting (QMV) for adoption, 55% of the member of the Council, at least 15 of them comprising 65% of the EU population (Article 238 TFEU). Compared to unanimity, this procedure offers greater political feasibility.

The **special legislative procedure**, differently, is enshrined in Article 289(2) TFEU and it requires either the Council to adopt a measure unanimously after consulting with the European Parliament, the Economic and Social Committee and the Committee of the Regions. What 'consultation' entails has been clarified by the CJEU and requires the Council to not adopt a measure until it has received the opinion of the European Parliament. Where the Council adopts a measure without an opinion, the act in question is vulnerable to be annulled (C-138/79 - *Roquette v Council*). If there are important changes to the measure that are not prompted by the European Parliament, the Parliament will have to be consulted again (C-331/88 - *The Queen v Ministry of Agriculture*; C-388/92 - *Parliament v Council*). However, this is all that the consultation roll demands and the Council is not bound further to adopt the Parliament's opinion (Craig & de Búrca, 2020, pp. 164-165).

The last indent of Article 153(2) TFEU prescribes that, in some of the areas that require the special legislative procedure and unanimity, the Council, acting unanimously after a proposal of the European Commission, may render the decision-making process to the ordinary legislative procedure. This is known as a ***passerelle* clause** and there are a number of these clauses in the treaties.[3] These are part of a series of 'flexibility mechanisms' introduced by the Lisbon Treaty that aim at rendering the decision-making process at the EU level more efficient where a special legislative procedure and unanimity are required. Notably, on 16 April 2019 the Commission made a proposal to activate the *passerelle* clause under the Social Policy title (Commission, 2019b). If the *passerelle* clause were indeed activated, not only could this have an impact on the efficiency in adopting instruments by QMV for social policy but it would also put the European Parliament on an equal footing with the Council. By promoting co-decision and not subordinating the role of the European Parliament to a mere

[3] A passerelle clause refers to a clause in the Treaties that allows the alteration of the given legislative procedure without a formal amendment of the treaties. It is an option enshrined throughout the TFEU to allow moving from the special to the ordinary legislative procedure and it requires unanimity in order to be triggered.The Lisbon Treaty provides for a general passerelle clause enshrined in Article 48(7) TEU that is applicable to all policy areas -with the exception of military or defense-related decisions-, as well as specific passerelle clauses that apply only in certain policy areas, namely, Article 32(3) TEU on Common Foreign and Security Policy, Article 82(3) TFEU on judicial cooperation in civil matters, Article 153(2) TFEU on social policy, Article 192(2) TFEU on environmental policy and Article 312(2) TFEU on the Multiannual Financial Framework.

consultant as it is the case with the special legislative procedure, it emphasizes the democratic deficit of the EU (Aranguiz, 2019).

3.2.2. Social Method (Article 155 TFEU)

Title X offers, beyond the traditional community method for adopting legislation in which it is up to the EU institutions enact a legal instrument, an alternative law-making process in the EU order governed by the social partners. This procedure is captured in Article 155 TFEU and it outlines the procedure for social partners to regulate themselves areas covered by Article 153 TFEU, including binding agreements. In this unique method in the EU legal order, therefore, it is not the Commission who has the monopoly to propose new legislative initiatives (Garben, 2019b).

The Commission has previously recognised three different types of dialogue outcomes: Agreements, which are implemented either by directives or according to national procedures; process-oriented texts that provide guidelines, codes of conducts, policy orientation or framework for action; and lastly, joined opinions and tools such as handbooks or guides (Commission, 2004).

The second paragraph of the provision elaborates further on the agreements concluded between the social partners. Accordingly, agreements might be implemented either autonomously according to the national procedures and practices specific to management and labour — e.g. telework (2002), work-related stress (2004), harassment and violence at work (2007) and on inclusive labour markets (2010) — or by a Council decision on a proposal from the Commission. The latter option is only possible in those areas covered by Article 153 TFEU and has been used to conclude a number of directives.[4] It

[4] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work [1997] OJ L 14; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175; Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) - Annex: European Agreement on the organisation of working time of seafarers [1999]OJ L 167; Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (Text with EEA relevance) [2000] OJ L 302; Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (Text with EEA relevance) [2000] OJ L 302; Directive 2005/47/CE du Conseil du 18 juillet 2005 concernant l'accord entre la Communauté européenne du rail (CER) et la Fédération européenne des travailleurs des transports (ETF) sur certains aspects des conditions d'utilisation des travailleurs mobiles effectuant des services d'interopérabilité transfrontalière dans le secteur ferroviaire [2005]OJ L 195; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and

is not very clear what the role of the Commission is in these cases. From the mandatory wording of the provision, it does not seem to have the discretion as to whether or not present the proposal to the Council. In *UEAPME* (T-135/96, §85-89), however, the General Court seemingly granted the Commission the choice to submit the proposal, particularly, with regard to assessing the representativeness of the organisations that had reached the agreement. Whereas this case may suggest that the discretion of the Commission is limited to ensuring that the procedural requirements for a valid social dialogue are being respected, a recent case (T-310/18- *EPSU*,) suggests a much broader discretion. *Inter alia*, the General Court argued that the Commission also has the task of promoting the general interests of the EU and that this task cannot be fulfilled by management and labour since they only represent one part of multiple interests that must be taken into account in the development of social policy in the EU. The ECJ recently agreed with the General Court in the appeal (C-928/19 P, *EPSU*) In both cases, however, the General Court emphasised the Commission's obligation to act in conformity with Article 154 TFEU to promote the consultation of management and labour. These cases have been rather critically assessed in view of their 'chilling' effect for an already slow social dialogue at the European level (Rainone, 2020; EPSU, 2020).

The last paragraph of Article 155 TFEU, in turn, ensures that the unanimity requirement is not circumvented by using the alternative law-making path. According to the General Court in *UEAPME* (§89), the weak role of the European Parliament when following the Social Model is justified by the participation of management and labour. This is another reason why, ensuring a valid social dialogue becomes an essential criterion before reaching an agreement, as it guarantees the democratic legitimacy of the social dialogue agreement.

2.4 Limitations and excluded areas

On top of the diverse fields and legal effects of Article 153 TFEU, there are also a number of limitations enshrined in the Treaties that ought to be considered before engaging into action. The first limitation, is the fact that some of the fields exclude harmonisation and that even those that do not, only allow for minimum harmonisation by means of directives. From a subsidiarity point of view and given the national sensitivity regarding social policy, it is perhaps unsurprising that EU competence is limited to minimum harmonisation and that it is left to the Member States to transpose these minimum requirements. In this sense, while directives have a binding nature, compared to regulations, Member States have a much broader margin as it is up to them to transpose the obligations. A different

repealing Directive 96/34/EC (Text with EEA relevance); [2010] OJ L 68, [which is replaced by the Work-Life balance directive]

limitation of a directive is that they do not have a direct horizontal effect, meaning that breaches to the obligations in a directive can only be invoked against the state but not between individuals or third parties (C-144/04 – *Mangold*) (see, however: Barnard, 2020 and part 2, section, 1.2.3).

Added to the outset of Article 153(2) TFEU, which suggests that the adoption of legal measures was not necessarily the preferred choice, these additional limitations show the reluctance towards EU intrusion in social policy. Many of these work as constitutional saving clauses that limit the powers of the EU into national competences (Schültze, 2015). The following sections discuss the limitations in the Social Policy Title concerning impact on SMEs (Article 153(2)(b) TFEU), the fundamental principles of social security and significant alteration to their financial equilibrium (Article 153(4) TFEU) and the explicitly excluded areas (Article 153(5) TFEU).

The Treaties are careful to recognise the vulnerable position of SMEs to regulatory changes in the labour market. As such, whereas Article 153(2)(b) TFEU recognises the powers of the union to adopt minimum standards directives, the exercise of this powers is bound to not imposing administrative, financial and legal **constraints to SME**, as to not hold them back. A similar limitation can be found in the EPSR (preamble 19). This was interpreted by the Court in *Kirsammer-Hack* (C-189/91, §33-34), where it held that small and medium-sized undertakings may be subject to special economic measures to ensure that they can keep playing a major role in the economic development of the Union and the creation of employment. This decision was taken in spite of the fact that the series of measures ruled in the case —national legislation that excluded part-time workers from accessing social protection—, justified indirect discrimination on grounds of sex. Accordingly, differentiations that favour SMEs are permitted, but when this differentiation leads to a lower protective threshold for the employees of the SME, this will have to be justified on an objective reason (Geiger, Khan, & Kotzur, 2015, p. 645).

The fourth indent of Article 153 TFEU imposes further constraints to the exercise of Union competences. Accordingly, the measures adopted under Article 153 must **not affect the fundamental principles of Member States' social security systems and/or alter the financial equilibrium thereof**. This limitation can therefore be broken down in two parts, on the one hand not interfering with the fundamental principles of social security and, on the other, to not cause a disproportionate financial impact. But what constitutes fundamental principles and when the financial equilibrium of social security systems is 'significantly altered' remains to be discussed.

As regards the fundamental principles, this constitutional saving clause symbolises the protection awarded to the diverse welfare designs in the EU. Repasi (2017) argues that in this provision, the notion of fundamental principles is limited to what he calls 'ordering rules', which define the fundamental design of the social security system. These 'ordering rules', hence, define distinctive

features of different welfare designs that represent the limit to EU powers. 'Ordering rules' include, *inter alia,* the manner in which welfare states are financed (whether by contributions or taxes), or the definition of fundamental eligibility criteria. Rules that relate to the control of the overall expense of the welfare system, differently, might be subject to an EU legal act. A different interpretation would not be coherent as the same provision foresees that a certain degree of financial impact is allowed, as long as this is not 'significant' as to alter the financial equilibrium of the social security system'. Eligibility criteria that regulate a matter of principle (those matters that define the distinctive feature of the different welfare states) such as including the self-employed or not within the coverage, would arguably be contrary to the limitation of Article 153(4) TFEU. However, eligibility criteria that regulate entitlement on the basis of a minimum required contribution or timeframe could arguably be regulated under an EU legal act.[5] The lines of what eligibility criteria are a matter of fundamental principles remain blurry. While the limits of what constitutes a fundamental principle are yet to be clarified by the EJC, it must be recalled that at all times EU legislation in the field of social security remains bound to an unanimity requirement. Accordingly, if an EU act were to regulate a 'fundamental principle' Member States would still retain their right to veto. (Repasi, 2017, pp. 17-18)

On the other hand, a measure adopted under the social policy title shall not compromise the financial stability of the social security system of Member States. The fact that the provision refers to the financial equilibrium assumes that a certain financial impact is to be expected. It follows that the legislator may adopt instruments with financial consequences insofar as these do not imbalance the social security systems in a disproportionate manner. From a legal point of view, the role of proportionality here is rather ambiguous. It could be argued that a measure will significantly affect the financial equilibrium of social security systems when a system cannot finance its legal commitments *vis-à-vis* the eligible people without permanently increasing the level of contributions

[5] See in this regard how the CJEU and the respective AGs argued that Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision did not require Member States infringe the right to define the fundamental principles of, in this case, the design of national pensions in Poland and the Czech Republic. AG BOT argued that Member States remain free to determine the role of each of the three pillars of their retirement system as long as they comply with the Treaties.While the directive does not require Member States to install an occupational pension pillar, it does require Member States to change the rules that limit the role of occupational pensions. In his words: 'Member States must introduce the legal framework for which the provisions of Directive 2003/41 concerned provide, if need be by lifting the prohibition against institutions for occupational retirement provision establishing themselves within its territory, without however having to alter the role and the functions which it wishes to see those institutions perform in its national retirement system or calling into question the fact that that system rests on the first and third pillars. The Czech Republic would thus be able to lay down the extent to which and under what conditions national undertakings could become members of such institutions. Opinion AG BOT C-343/08 - *Commission v Czech Republic*, ECLI:EU:C:2010:28; §53-68. See also: C-343/08 - *Commission v Czech Republic*, ECLI:EU:C:2010:14; C-271/09 - *Commission v Poland*, ECLI:EU:C:2011:855, §43 ff.

in more than a modest manner (Repasi, 2017). A narrower interpretation could be to interpreted proportionality along the lines of the 'unreasonable burden' on the social security system that is enshrined in the Citizens Directive 2004/38. However, the case law of the CJEU has not helped clarify what this really entails (Jesse & Carter, 2020). In any case, modest increases in contributions or taxes seem to be possible under this provision, otherwise, the wording of the provision would have been stricter by not suggesting that a certain financial impact is foreseen (C-515/14 – *Commission v Cyprus*, §53-54).

On top of the above, the fifth paragraph of Article 153 TFEU prohibits EU action on several areas, namely**, pay, the right to association, the right to strike and the right to impose lockouts**. While the exact content of what each of these areas entails is up for discussion, the Court has held in the past that they should be interpreted narrowly as to not deprive other provisions of its content. In the case of the exclusion of pay, this has been interpreted strictly as setting the level of wages or the constituent parts of wages but working conditions related to pay, such as equal treatment, do not fall within this exclusion (C-395/08 - *Bruno and Others*, §137; C-268/06 – *Impact*, §125). Therefore, only interventions that directly interfere with the way in which pay is determined are excluded from EU competences. A similar narrow interpretation should apply on the other excluded areas (Aranguiz & Garben, 2021).

2.5 The Role of Social Partners (Arts. 152, 153(3),154 &155 TFEU)

Because of the subject matter, the role of social partners is emphasised in several provisions of the Social Policy title. Above, it has already been discussed how there is an alternative legislative procedure that allows social partners to self-regulate in areas of social policy. Besides this, other provisions too show the commitment to social dialogue in the EU. This general commitment is enshrined in Article 152 TFEU where the role of social partners at the EU level is 'recognised' and 'promoted'. It also refers to the principle of autonomy of the social partners which requires the involvement of social partners in this social policy area and that can eventually lead to the adoption of binding agreements implemented through EU law (see above). The autonomy of social partners at the EU level manifests, for example, in the fact that social partners are not bound to the Commission's consultation for a prospective proposal. (Obradovic, 2001). This does not mean, however, that the autonomy of social partners is without limits. The CJEU has previously held in this sense that the autonomy of social partners has to comply with EU law (C-447/09 – *Prigge*; §47; C-172/11 – *Erny*, §50).

The second indent of Article 152 TFEU, implicitly recognises the difference between the bipartite, dialogue between the social partners alone, and tripartite, with the involvement of European

institutions. As regards the latter it refers to the Tripartite Social Forum that serves as a discussion platform between the institutions, usually the Commission and the Council, the trade unions and the employers' associations (Council Decision 2016/1859).

This provision is moreover supported by Article 153(3) TFEU allowing Member States to entrust the implementation of directives adopted on the basis of Article 153 TFEU to national management and labour, the obligation to consult the social partners before submitting a proposal on social policy and, of course, the social method under Article 155 TFEU.

3 ALTERNATIVE OR COMPLEMENTARY COMPETENCES

From the above, it should be clear that the EU has vast competences on social policy. These, however, are often undermined by the limitations and complexities of utilising the social competences. It can be argued that these limitations are an expression of the principle of subsidiarity and the national autonomy on social issues. However, many argue that these limitations, particularly considering the negative intrusion of the EU in national social protection structures through the internal market and macroeconomic governance, lead to a dangerous social deficit in EU law and policymaking (Garben, 2019c, p. 1387). This has been argued to cause an asymmetry serving neo-liberal purposes at the expense of social interests (Scharpf, 2010; Garben, 2017). A way to partly tackle this asymmetry is to develop the (legal) social acquis of the Union. In view of the limitations of social policy explained above it is worth contemplating other competences of the Union, most of which, have already in the past served to develop a significant corpus of the social dimension in the EU. Note, importantly, that this section cannot dwell into

3.1 Social cohesion: Article 175 TFEU

An attractive and to a large extent unexplored alternative lies in Article 175 TFEU on economic, social and territorial cohesion. This provision establishes specific instruments available at the EU level to attain the objective of cohesion policy (Article 174 TFEU), such as the Structural Funds. It also establishes an obligation for EU institutions to monitor the progress made towards these objectives and in its third paragraph it provides the legal basis for the adoption of instruments outside the Funds.

The primary obligation to reach the objectives of cohesion in the EU lies within Member States, while the EU provides instruments, mostly in the form of Funds, to support their actions. However, the third indent of the provisions undoubtedly recognises the powers of the Union beyond this supporting role providing for the legal basis to adopt specific actions outside the funds according to the ordinary legislative procedure. This is supported by Article 4 TFEU that lists economic, social and territorial

cohesion among the shared competences of the Union, suggesting that while the primary role of attaining the objectives may lie within the Member States, the Union may complement these actions also by means of harmonisation.

In order to exercise these competences, the measure will have to seek the objective to reduce socio-economic disparities across the EU by promoting upward convergence and an 'overall' harmonious development in the EU. Hence, a measure under this competence would have to significantly contribute to social cohesion of the EU. It is however not clear what the idea of social cohesion really entails. AG Bot has in the past interpreted social cohesion as 'a broad and overall concept with imprecise contours' that are difficult to define (Opinion AG BOT C-166/07, *Parliament v Council, §82)*. This is probably why the CJEU has given an extensive discretion to the legislator when acting under these premises (C-166/07, *Parliament v Council, §53;* C-420/16*, Izsák,* §68*;* C-149/96 - *Portugal v Council,* §86*)*. It has accordingly understood that economic and social progress are part of the objective of Article 174 TFEU and, therefore, the legislator may use Article 175 TFEU for this purpose. In fact, two earlier instruments that were adopted under this premises have social progress at heart as they were conceived to fight social exclusion, namely, the FEAD and EPAP (Commission, 2010a, Regulation No 223/2014). This interpretation is strengthened by the general objective of the Union which puts together the fundamental value of solidarity and the objective of attaining social cohesion in the EU (Article 3 TEU, discussed below).

If social cohesion is to be understood as a way of decreasing inequalities when there become politically and socially intolerable (Molle, 2007), then the EU shall act where Member States are unable to tackle these discrepancies by themselves. *A contrario*, this puts a burden of proof on the Commission to substantiate, through an impact assessment, that such an instrument can in fact decrease inequalities across the EU. Elsewhere we have argued that this legal basis could for example be suitable to serve as a basis for a minimum wage (Aranguiz & Garben, 2021) and a minimum income directive (Van Lancker, Aranguiz, & Verschueren, 2020).

Measures under Article 175 TFEU are to be adopted through the ordinary legislative procedure and by QMV. As such, where other provisions of the EU, arguably more specific, such as Article 153 TFEU require the same legislative procedure, there is no argument to be made that Article 175 TFEU is being used to circumvent stricter legislative procedures there. However, if other more specific basis require unanimity and the special legislative procedure, using Article 175 TFEU would make the act vulnerable to be challenged under the premise that a more stringent procedure is being purposefully avoided.

3.2 Free movement

It has been mentioned in the introduction that a significant part of what we now consider the social dimension of the EU developed under other competences. This is clearly the case of integration through free movement. For one, a successful economic integration is likely to improve employment rates and social progress while the possibility and freedom to improve the employment situation elsewhere in the EU might also lead to a higher standard of living (Gestenberg, 2014). Differently, free movement may also entitle individuals to a higher standard of living. This section discusses three deferent competences to this end: Social security coordination, citizenship and free movement of services.

3.2.2. Social security coordination

One of the earlier impacts of free movement on the social dimension of Europe is that of social security coordination. While it falls outside the social competences *stricto sensu*, it has served as a powerful engine to advance social rights at the EU level. Long before the establishment of European citizenship, social security coordination already played an important role by ensuring that workers would not lose their social security rights when moving to a different Member State. For over 60 years, social security coordination has created bridges between the difference social security systems so workers can exercise their right to free movement without losing their social security entitlements. In *Petroni* (Case 24-75, §12), the CJEU held for the first time, that if a person would lose social security advantages as a consequence of exercising his right to free movement, the aims of what are now Articles 45 and 48 TFEU would not be achieved. Thus, to the extent that the coordination of social security benefits ensures that individuals are not left in a disadvantaged position when choosing to exercise their right to free movement, it has an enormous impact on the social dimension of Europe.

As far as competences in this area, Article 48 TFEU confers the European legislator the obligation to adopt measures aiming at the coordination of social security benefits, the main function being the determination of the applicable social security legislation in cross-border situations. This provision does not lay down the principles of social security but instead establishes an obligation for the Council to adopt measures in the field of social security that ensure the free movement of workers and the self-employed. It also includes the two specific tasks to be carried out at all times, namely, the aggregation of periods and the payment of benefits, which are further complemented by the principle of non-discrimination on the grounds of nationality (Article 45 TFEU). The other important principle of social security, exclusive effect, which regulates that only one legislation can be applicable at the time, is conspicuously absent from Article 48 TFEU, but is laid down in Article 11(1) of Regulation

883/2004 (C-393/99 – *Hervein;* C-611/10 and C-612/10 - *Hudzinski and Wawrzyniak*) (Pennings, 2015).The main purpose of coordination is thus the determination of the applicable legislation.

According paragraph 1 of Article 48 TFEU, the European Parliament and the Council shall adopt measures in this field following the ordinary legislative procedure. This forms the legal basis for the legislation on social security coordination that has been in place since 1958 and are currently to be found under Regulation 883/2004 and the implementing Regulation 987/2009. This is extended to third-country nationals in Regulation 1231/2010.

Even though this legal basis has a great impact on social rights insofar as they prevent mobile workers from falling between two stools and remain insured in one single Member States while not losing their previous entitlements, its scope is limited. As regards the material scope, these rules only coordinate different systems, and cannot harmonise social security benefits. This means that the level and adequacy of these benefits remain under the competences of Member States and Union rules and, thus, neutral. From a personal scope point of view, Article 48 TFEU applies only to employed and self-employed migrant workers. Now, in the past, this scope has been extended to inactive mobile citizens by virtue of the flexibility clause (now Article 352 TFEU, discussed below).[6] The regulations apply to all persons who are or have been subject to the legislation of one or more Member States (Article 2 Regulation 883/2004). Hence, coordination can also apply to economically inactive persons, but only when they are subject to the social security legislation of a Member State, for instance because of residence.

3.2.2. European citizenship (Article 21 TFEU)

With the Treaty of Maastricht, the approach shifted from economic integration to political integration too, most clearly expressed with the establishment of EU citizenship that allows every EU citizen to move and reside freely within the territory of the Member States regardless of their economic status, albeit subject to limitations (Verschueren, 2015). The citizenship-based powers of the Union can be found in Article 21 TFEU and according to this provision the European Parliament and the Council may adopt measures following the ordinary legislative procedure with the objective to achieve the right to

[6] In the more recent proposal to amend the rules of social security coordination, however, there is no reference to Article 352 TFEU, even though the proposal contains provisions regarding economically inactive citizens. This is puzzling, since Article 48 TFEU is clearly limited to free movement of workers. This is probably due to the difference between Article 308 TEC and Article 352 TFEU and the limitations of the latter (see below), Article 4(2) (European Commission, 2016). The proposal could have been based on Article 21(3) instead. Regarding the amendments, a provisional agreement was reached in the trialogue on the Commission's proposal, but it was not endorsed by the Council and the European Parliament. There has not been further progress since. (Council, 2019)

move freely within the territory of Member States. Where measures on matters of social protection and social security are necessary in order to ensure the right to move and reside, alternatively, the Council may adopt measures following the special legislative procedure.

Citizenship has in the past served to advance social rights, particularly, as regards minimum income subsistence benefits. Already in *Martinez-Sala* (C-85/96), the CJEU applied the notion of non-discrimination to social security, as an essential component of EU citizenship. From this reasoning it follows that Member States are not allowed to discriminate citizens from a different Member State when they access social security benefits, which later expanded to other welfare benefits (C-184/99 – *Grzelczyk*; C-456/02 – *Trojani*; C-138/02 – *Collins*). Whereas the interpretation regarding access to benefits for economically inactive citizens has been constraint since (C-333/13, *Dano*; C-67/14, *Alimanovic*; C-308/14 - *Commission v UK*) (Jesse & Carter, 2020),[7] it is irrefutable that economic and political integration has led to social advancements. For this, it could be argued that the legal basis for citizenship could be used in the future for advancing social rights, by for example adopting legal instruments on minimum subsistence benefits, although the scope beyond mobile citizens is rather questionable.

Together with Article 48 TFEU, Article 21 TFEU is consider the basis for social security coordination of EU citizens and yet, there are a number of significant differences between the two provisions. For one, on a procedural note Article 21 TFEU is more restrictive since it requires unanimity and reduces the role of the European Parliament from co-legislator to a mere consultant. The procedural difference is probably a result of the broader substantial scope by Article 21 TFEU, which is applicable to all citizens, irrespective of whether or not they pursue an economic activity. It could even be argued that third-country nationals to whom free movement instruments already apply —e.g. third country nationals are covered by Regulation 883/2004 and the only requirement is to be legally resident in the EU (C477-17- *Balandin*)— could also be protected by a measure based on citizenship competences. This could be the case of those third-country nationals protected by the residence directive as family members of an EU citizen (e.g. Article 7(2), 12, 13 and 16 Directive 2004/38; C-34/09 - *Ruiz Zambrano*).

Moreover, Article 21 TFEU may go beyond the scope of social security benefits, which apply mostly to economically active people, and cover social assistance too. In theory, Article 21 TFEU could be used as the basis to adopt measure regarding social assistance for example. Article 21 TFEU is also an

[7] Recently, the ECJ has taken a different – albeit somewhat inconsistent- approach: C-709/20 - *The Department for Communities in Northern Ireland,* ECLI:EU:C:2021:602.

attractive option because, unlike Article 48 TFEU, is not limited to measures of coordination. Thus arguably, citizenship could be used as the engine to harmonise some minimum social protection standards as long as this are conceived as necessary to attain the rights adhered to citizenship, for instance, in areas where social protection varies greatly among Member States and hence, coordination is not sufficient. Differently, it could be argued (rather speculatively) that a minimum harmonisation of anti-poverty schemes such as minimum income is necessary to ensure the 'genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' (C-34/09 - *Ruiz Zambrano*) (Börner, 2020) and that conditions such as having sufficient resources do not impede the exercise of free movement.

On whether measures would apply to EU citizens who do not exercise their right to free movement, namely to the 'stayers', Article 21 TFEU explicitly refers to the right to move and reside freely within the territory of the Member States. Some authors have argued that this right is not limited to moving to another Member State but also to have the freedom to reside within the Union, which potentially includes the home Member State of the citizen as well, therefore avoiding reverse discrimination (Verschueren, 2012, p. 224; Schoukens, 2013, p. 37).

Nevertheless, exercising the powers conferred for citizenship for the purpose of developing certain social rights would at all times require a link with free movement, or at the very least, the possibility of its 'genuine enjoyment'. While it is possible to argue that non-mobile citizens should also be covered, as their right to free movement may potentially be limited or rendered less attractive, using competences intended to ensure free movement to cover those who are not mobile would not be free from criticism. This, in turn, could substantiate claims for challenging a legal action. Added to the unanimity requirement for the adoption of instruments on social protection and social security, this makes Article 21 TFEU a less than optimal choice for advancing social rights (more than it already does) in the EU even if it is possible to do so.

3.2.2. Freedom of services

Services too have led to certain social protection for individuals, particularly, regarding the posting of workers. In this vein, Article 56 TFEU, which requires the ordinary legislative procedure, confers the European Parliament and the Council the power to adopt measures for the purposes of addressing restrictions on the freedom to provide services. Freedom of services allows workers to be sent by their employer to carry out a service in another Member State on a temporary basis. Because of this temporariness, posted workers are not entitled to equal treatment with national in access to employment working conditions and all other social and tax conditions. There is, because of this freedom to provide services and the possibility to post workers, a risk of unfair competition and social

dumping where service providers abuse this freedom to undercut local workers because of the lower labour standards in other Member States. This practice has understandably been condemned by employment experts, particularly where the CJEU has interpreted the freedom to provide services over national social protection (C-341/05 – *Laval*; C-346/06 – *Rüffert*) (Picard & Pochet, 2018). To the end of avoiding this and ensure a level-playing field, EU law defines a set of mandatory rules regarding the conditions of employment that apply to posted workers. According to these rules, posted workers are entitled to a set of rights in the host Member States even though they are officially employed in the sending Member State, unless the conditions of the sending member State are more favourable. There rights comprise, *inter alia,* entitlement to the mandatory elements of remuneration to all, maximum work periods, minimum rest periods, minimum annual leave, health and safety at work, accommodation and allowances or reimbursement of expenses during the posting assignment, and equal treatment between men and women. These rights are enshrined in Directive 96/71 which is recently amended by Directive 2018/957, complemented by the enforcement Directive 2014/67 that tackles fraud, *inter alia*, inspections, monitoring and exchange of information (Van Nuffel, Afanasjeva, & Vincenzo, 2019; Arnholtz & Lillie, 2019; Rennuy, 2020).

These competences are therefore not social, they have however allowed to regulate a social minimum that applies to posted in order to combat abuses of the freedom to provide services. In a recent plea for annulling the amendments to Directive 96/71 by Directive 2018/957, Hungary and Poland argued that the Directive sought a social objective and that, consequently, it had to be adopted under the social competences and not under the freedom to provide services. The Court rejected these cases and held that the legislator may take a reassessment of the interests of undertakings exercising their freedom to provide services and the interests of the workers in order to ensure that there is a level playing fields among the Member States (C-620/18 - *Hungary v Parliament and Council*; C-626/18 - *Poland v Parliament and Council*)

It is therefore possible to use these bases to guarantee the employment rights of posted workers and to protect the misuse of posting of workers. Yet, these social rights are protected only insofar as freedom of services may interfere with national employment and social protection standards.

3.3 The European Social Fund

The Treaties also grant the Union the competence to establish and implement regulations regarding the European Social Fund (ESF, Article 164 TFEU) which has the purpose to improve employment opportunities for workers in the internal market and thereby contribute to the living standards in the EU (Article 162 TFEU).

The fund is administered by the Commission which is assisted by a Committee presided by a Member of the Commission and composed by the representatives of governments, trade unions and employers' associations. (Article 163 TFEU). The European Parliament and the Commission, in turn, have the power to adopt implementing regulations regarding the ESF in accordance with the ordinary legislative procedure after consultation with the Economic and Social Committee and the Committee of Regions. (Article 164 TFEU)

The ESF promotes employment and social inclusion by investing in people and their skills to fund programmes to get a (better) job, integrating disadvantage people into society and ensuring equal opportunities. To this end, each Member State, together with the Commission, agree on one or more Operational Programmes (OPs) for ESF funding for the period of seven years. The OPs identify priorities and objectives for employment related projects that are then manages by public and private organisations. These projects are for the benefit of their participants, usually involving individuals, companies or organisations. The ESF is governed by three principles: Partnership, co-financing and shared management. The former requires the ESF to be designed, implemented and monitored in cooperation between the Commission, regional authorities and other partners like NGOs and trade unions. Co-financing requires national and regional authorities to take ownership of the programme by funding part of it. Shared management requires guidelines to be adopted at the European level and implementation on the ground to be managed by national authorities.

In 2018, the Commission proposed a regulation for the ESF+ which was subsequently amended in May 2020 to address the economic and social damage brought by the coronavirus pandemic (Commission, 2020). In January 2021, the European Parliament and the Council reached a political agreement for a regulation on the basis of this proposal that will be adopted in the upcoming months. The ESF+ provides a total budget of 88 billion euro to implement the EPSR, particularly to invest in young people support those in a vulnerable situation after the loss of job or income, provide food and basic material assistance to the most deprived (therefor integrating Fund of European Aid for the most Deprived (FEAD) in the ESF+), invest in children and support social innovation and entrepreneurship through the new Employment and Social Innovation (EaSI) funds.

In terms of competences and legal bases, the ESF+ is an interesting example of how the EU can combine different powers and unify them under a single umbrella instrument. In this vein, the proposal of the Commission explains that the power of the Union to adopt this instrument is a combination of provisions which can be divided in two strands. On the one hand there are the shared management objectives covering former ESF (Article 162 and 164 TFEU), and the basic material assistance for the post deprived (Article 175 TFEU) which is extended to the specificities of the

outermost regions via Article 349 TFEU. On the other hand, there are the areas of direct and indirect management, conveying actions promoting social innovation (EaSI, Articles 46 (d), 149 and 153(2)(a) TFEU). It therefore combines powers regarding free movement of workers, employment, social policy, the ESF and social cohesion for the purpose of targeting different social objectives through funding in a somewhat comprehensive manner.

3.4 Non-discrimination (Article 19 TFEU)

From the above it is clear that non-discrimination on the basis of nationality has led to considerable advancements in social field by the hand of free movement. Likewise, equality, more generally, has also furthered the social acquis of the EU (Muir, 2018), most notably, by prohibiting discrimination in employment and social security benefits. Anti-discrimination law in the EU flourished with the insertion of what is now Article 19 TFEU, which provides for the competence of non-discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This is complemented by Article 157 TFEU that enshrines the principle of equal treatment between men and women. These provisions have led to the adoption of a number of important directives that together guarantee that individuals are not discriminated against (e.g. Directive 2000/43; Directive 2000/78; Directive 2004/113; Directive 2006/54). Equality is an essential principle for the advancement of social rights, particularly when it involves acutely disadvantaged or vulnerable groups that are likely to be heavily discriminated against. Similar to the instruments on free movement, however, the impact of equality instruments is for the most part limited to accessing opportunities on an equal footing. There are some important exceptions to this, such as the right to not be harassed at work, although mostly anti-discrimination law does not get into the quality of social rights, but rather the fairness of it. In this sense, equality instruments tend to be more 'neutral' so to speak. Accordingly, while the Union has competences to adopt anti-discrimination instruments in the EU this do not necessarily create positive obligations but rather the negative obligation to no treat individuals differently without an objective justification. It could be argued, however, that Article 19 TFEU could be used to also install positive obligation to target disadvantaged groups when seen as necessary to put them on an equal footing. At the moment, legislation and the Charter (Article 23 CFR) allow for Member States to have positive action rules where necessary and justified, but EU law does not install an obligation to do so. The proposal for a Directive for improving gender balance among non-executive directors, which has been stranded in negotiations since 2012, differently, sets a minimum of women representation to be achieved (Commission, 2012a).

As far as the procedural requirements go, Article 19 TFEU requires the Council to adopt measures following the special legislative procedure an in unanimity. As a way of derogation, the Council and

the European Parliament may adopt measure to incentivize anti-discrimination following the ordinary legislative procedure, but these measures cannot lead to harmonisation. In other words, as regards equality, measure that require harmonisation require a high consensus and can be vetoed by one Member State alone, but those aiming at supporting Member States are more flexible. However, as regards the competences to ensure the application of the principle of equal opportunities and equal treatment of men and women (Article 157 TFEU), 'only' the ordinary legislative procedure is required. This suggests a higher consensus on the prohibition on discrimination in employment (as well as a historical evolution), particularly regarding pay. This is further reinforced by the recent proposal on pay transparency (Commission, 2021)

3.5 Approximation of laws (Article 114 and 115 TFEU)

In addition to specific bases, the Union also has a couple of general legal basis. In the case of the internal market, Article 114 TFEU and Article 115 TFEU provide the competence to harmonise rules to overcome obstructions between different national laws, regulations, or administrative provisions with the goal to contribute to the functioning of the internal market (C-547/14 - *Philip Morris*, §58; C-477/14 – *Pillbox*, §123*)*. In words of the Court, it is also possible to use Article 114 TFEU preventively, to avoid future obstacles to the internal market as a result of divergences among national laws (C-358/14 - *Poland v Parliament and Council*, §33; C-491/01- *British American*, §31; C-210/03, *Swedish Match*, §30; C-58/08, *Vodafone and Others*, §33). A necessary requirement in order to use these provisions, however, it that the measure aims at improving the condition of the establishment and functioning of the internal market (C-376/98 - *Germany v Parliament and Council*, §80). Article 114 TFEU does not apply to 'fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons', which limits the possibility of adopting instruments on social rights considerably. Its twin, Article 115 TFEU, however, does not exclude measures affect the right and interests of employed persons but, in turn, requires a higher threshold for adopting measures, namely, unanimity and the special legislative procedure.

Therefore, whereas it requires a high procedural threshold, Article 115 TFEU could be used for the adoption of social instruments so long as these have the objective to enhance the functioning of the internal market. Nevertheless, the very same objective that the provision requires is a reason to be cautious around using this legal basis (De Baere & Gutman, 2017, p. 384). This is because under this competence the priority lies in improving the functioning of the internal market and not the social objectives of the EU. As such, where there is a conflict between the two, the interest of the internal market will prevail. Taking history as precedent, particularly the *Laval* series, suggests that using the internal market legal base would matter-of-factly backlash against the social objective. Had the

Posting of Workers Directive been based on a different basis with a social objective instead, the subordination of social rights to the economic interests of the internal market would not have been possible.[8] Accordingly, it is preferable that social interests develop under social competences or, failing this, under the general competences of the Union, discussed below (Article 352 TFEU). Moreover, since Article 115 TFEU requires as much unanimity as Article 352 TFEU, there is no strategic advance in using it and unnecessarily linking social instruments to the internal market (Gutman, 2014, pp. 325-358). In the absence of more concrete basis, however, this legal base was used in the past for a number of 'social' directives.

3.6 Residual Powers Article 352 TFEU

The residual powers of the Union, also known as the flexibility clause, can be found in Article 352 TFEU and it allows the Council, acting unanimously on a proposal of the Commission and after obtaining consent from the European Parliament to adopt measures where no express legislative power has been given of when the competences are insufficient. The flexibility clause, however, may only be used when it is necessary to attain the general objectives of the Union (C-8/73 – Hauptzollamt), including the combating of social exclusion and to become a social market economy. The Council must determine when a measure is truly necessary (C-22/70 - *European Commission v Council*, §95), but its discretion is not limitless. On the one hand, this power shall be used according to the principle of conferral an on the other, no other provision can give sufficient competence to adopt a given measure (C-51/89 - UK v Council, §36). It can also not be used to harmonise laws where other provisions specifically exclude this option, for example, in the field of combating social exclusion under Article 153 TFEU (see above). What is more, since the introduction of the 'better competence monitoring' with the Treaty of Lisbon, any measure adopted on the basis of Article 352 TFEU must be brought to the attention of national parliaments. In this vein, it is important to recall the cautionary tale of the Monti II Regulation fiasco, that aimed at addressing a gap between the social law of Member States and the single market created by the Laval saga, and was dropped after a heavy national opposition through the yellow-card procedure (The Adoptive Parents, 2014; Feenstra, 2017).

In addition, some constitutions might impose an additional burden to the potential of the clause by, for example, requiring additional steps to adopt the measure internally. This is the case of the

[8] It is important to note that the revised Directive has arguably weakened the internal market logic in favour of social objectives. See for example Article 1(1): This Directive shall ensure the protection of posted workers during their posting in relation to the freedom to provide services, by laying down mandatory provisions regarding working conditions and the protection of workers' health and safety that must be respected.

Bundesverfassungericht that requires the ratification by the German *Bundestag* to approve a measure adopted under the flexibility clause (Van Der Schyff, 2017).[9]

While it has its limitations, rejecting the adoption of legal measures under this provision has not always been the case. In fact, this provision has often been used to broaden existing competences often in combination with other competences. The Treaty of Rome did not contain EU competences in the field of social policy, and yet, social policy was dealt by the Union for a long time before the EU officially acquired explicit competences in the social field. Before the Treaty of Amsterdam, these measures were adopted by virtue of the flexibility clause. Examples of this can be found in equal treatment Directive 79/7 in relation to statutory social security; Regulation 1408/71 to extend the protection to students and to the self-employed; Regulation 883/2004 where the Council extended the Union's powers to cover the self-employed; or also setting the legal grounds for the 1992 Council Recommendation (1992) on sufficient resources. Recently, the Commission also used the flexibility clause for the Council Recommendation (2019) on access to social protection for workers and the self-employed. It is possible that by mixing Article 352 TFEU with different procedures, the procedural threshold is lowered to only require QMV (C-166/07 - *Parliament v Council*, §69), this is for example the case of Regulation 883/2004. According to De Baere (2013) this is because the usual high threshold required in the flexibility clause directly correlates to the opennes of the clause. When Article 352 TFEU is used to extend a given competence —and not to single-handedly regulate an area where the Treaties do not confer specific powers—, and this other competence requires a lower threshold for the adoption, the Article 352 TFEU should not interfere with the agreement reached between the institutions and the Member States in the Treaties for that competence by requiring a higher threshold or undermining the co-decision role of the European Parliament.

Up until now the CJEU has not found that the EU has acted *ultra vires* in the field of social security, probably because the social objectives on which the use of provision 352 TFEU is based are broad enough.

[9] German Constitutional Court, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, ECLI:DE:BVerfG:2009:es20090630.2bve000208, §417: "In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law". This has been codified in Article 8 of the *Integrationsverantwortungsgesetz* of 22 September 2009. For such cases, the German Constitution requires a two third majority in both the Bundestag and the Bundesrat. See European Commission, The role of the Flexibility clause: Article 352, https://ec.europa.eu/European Commission/sites/beta-political/files/role-flexibility-clause_en.pdf.

3.7 Using dual legal basis

Under EU law it is possible, as a matter of exception, to use two legal bases when these complement each other. It has been mentioned above that several instruments have used the flexibility clause with the purpose of expanding the scope of other legal basis, for example, Regulation 883/2004 or the recent Recommendation on access to social protection to extend the competences usually directed to 'workers' (either in Article 48 TFEU Article 153(1) (c) TFEU) to the self-employed. The flexibility clause is, however, an exception when it comes to combining different legal bases since it allows to 'level up' its procedure to that of the other legal base when this requires different procedural requirements therefore essentially allowing to lower the procedural threshold (C-166/07 - *Parliament v Council*). Commentators have argued that this exception exist precisely because Article 352 TFEU does not entail a specific competence and as such, the reason for the high threshold reflects on the broadness of the legal base. When it is combined with other basis, however, this is narrowed down to a specific objective that has already been conferred to the Union (De Baere, 2013).

But the CJEU has confirmed (C-130/10 - *Parliament v Council*), beyond that, that the principles outlined in *Titanium Dioxide* (C-300/89) for the use of dual legal basis still apply. Accordingly, there are a number of substantial and procedural limitations to be fulfilled in order to use double legal bases. On the one hand, there should not be a hierarchy between the competences being used, nor should there be a separable aim. This means that when a measure is adopted using two different competences, it would have to seek a single prominent aim that combines the objectives being pursued by both bases equally. From a procedural standpoint, on the other hand, the procedures of the dual basis shall not be contradictory. It follows that both bases shall entail the same procedure (whether ordinary of special) and the same majority threshold. To use the abovementioned competences as means of example, while the Articles 153(1)(h) TFEU and 175 TFEU could in theory be combined (so long as the pursue a single prominent aim), this would not be possible with Articles 153(1)(c) TFEU and Article 175 TFEU, since they require different legislative procedures. In this sense the case-law of the CJEU requires both the same majority threshold and not undermining the role of any of the institutions.

PART II: POWER RESOURCES AT THE EU LEVEL

Drawing on Part I as well and on the classification of resources provided for in WP 2.1 this part will attempt to map the different power resources in the EU. According to WP 2.1, individual power resources can be split in a tripod: Normative, instrumental and enforcement power resources. Accordingly, normative resources are codified principles that express commonly agreed and shared aspirations that confer relevance and validity to these principles. Depending on their form, these principles can also convey legal subjective rights for individuals. Instrumental resources, differently, have the goal of enabling right-holders to overcome obstacles when accessing their rights and take different forms including quality of information and awareness, guidance or counselling. Lastly, enforcement power resources provide an additional guarantee to social rights that typically consists of judicial procedures and channels to ensure that legal obligations are complied with.

The EU is a highly fragmented regulatory policy framework. It follows that delineating power resources in the EU is a complex task as the lines between some of these power resources are rather blurred. The following sections attempt to capture the different power resources available at the EU as well as their (legal) value with a particular focus on individuals. Because of its fragmentation and width, the following power resources should not be understood to be exhaustive, but rather, show the reader a compilation of the vast amount of different social power resources and their distinct effects that form what we understand as the social dimension of Europe.

1. NORMATIVE POWER RESOURCES

This section provides for an overview of the different normative power resources available at the EU including, deontic instruments, legally binding primary and secondary legislation as well as soft-law instruments. It also provides a number of clarifications regarding their (legal) value.

1.1. Deontic power resources

Among the normative power resources, we find first a number of instruments or provisions that that are authoritative and provide principles to guide the actions of the EU but that are not directly enforceable at the EU, which means that they do not directly entitle individuals to legal claims before the EU institutions.

1.1.1. Values and objectives of the EU (Art. 2 & 3 TEU Art. 9 &151 TFEU)

Starting with the Treaties, there are a number of provisions that directly frame the social dimension of the EU, but are not directly applicable. These are most notably the values and objectives of the EU (Article 2, 3 TEU and 151 TFEU) as well as the horizontal social clause (Article 9 TFEU).

As regards the **values** of the EU (Article 2 TEU), they symbolise the fundamental premise upon which the EU is founded, which is shared among the Member States (Opinion 2/13, *Accession to the ECHR*, §168). The content of this provision, which is also known as the homogeneity clause, constitutes a set of principles common to all Member States and implicitly assists in defining what constitutes a European State, both when accessing the EU (Article 49 TEU) and regarding the sanction mechanisms (Article 7 TEU). The CJEU has in the past point out that the protection of fundamental rights represents a milestone upon which the legitimacy of the EU is based (C-402/05 P – *Kadi*, §285). As for its substantive scope, the provision offers two levels of values. On the one hand, those aiming at a free democracy —human dignity, democracy, freedom, equality, the rule of law, and the respect for human rights— and on the other, values characteristic of a free society —pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women. These two levels are interdependent but it is unclear whether they have a different status (Klamert & Kochenov, 2019). The role of fundamental rights is a very distinctive feature of the Lisbon Treaty, which is further complemented by the legally binding CFR, through Article 6(1) TEU. Human dignity, in particular, is given a rather prominent role, further reinforced by Article 1 CFR, according to which human dignity is an absolute inviolable right. Just as in the CFR (see below), human dignity in the TEU represents the baseline for the rest of the values enshrined in Article 2 TEU. Proof of this is that human dignity was referred to as 'the mother basic right' when drafting the CFR and it entails the respect to the integrity of a human being, including both physical and mental integrity.

Regarding the value of this provision, it seems to be mostly rhetorical as it is not specifically fleshed out elsewhere in the Treaties (Dawson & De Witte, 2012). However, values are considered decisive in framing the activities and overall tasks of the EU. As a matter of fact, the literature has argued that these values must be considered as principles of EU law because not only do they represent the ethical essence upon which the EU is constructed but also stand as a primary and constitutive legal norm (Von Bogndandy, 2010). In fact, in some of the cases, the CJEU has interpreted the values as general principles. But the decisive importance of the values enshrined in Article 2 TEU follows from the objectives set in Article 3 TEU and the institutional framework set in Article 13(1) TEU which establishes that it is the overall task of the institutional framework to enforce these values. In theory, membership can only be acquired by respecting and promoting the values of the EU (Article 49 TEU)

and similarly, all Member States are bound by the Treaty to respect and promote such values (Sargentini & Dimitrovs, 2016). A persistent failure to do so may result in sanctions –which includes losing some rights linked to their membership (Article 7 TEU). However, up until this point it has not fully been activated, although proceedings have started against Poland and Hungary (Commission, 2017c; Toggenburg & Grimheden, 2016, European Parliament Resoludion of 12 September 2018).

In this vein, the EU must exercise its competences according to these values only to the extent that is necessary to attain a **general objective** of the Union (Article 3 TEU). This provision sets overarching objectives of the EU, including the idea of 'social market economy', the goal to fight discrimination and social exclusion and to strive for social cohesion, but these do not have an independent function. Essentially, what the objectives do is lay down a programme (C-149/96 - *Portugal v Council*, §86) that is to be achieved through the policies and actions of the EU through a series of entrusted fundamental provisions, such as those competences discussed in Part 1. In this sense, these competences are understood to be functional, meaning that all EU actions must aim at attaining goals set in this provision (Article 1(1) TFEU). In other words, competences are limited by the content of this provision. As such, objectives are key for a subsidiarity assessment when evaluating a proper use of competences. In the case of the general objectives, this is specially the case of the flexibility clause (Article 352 TFEU) that, as explained above, can only be exercised when an action is deemed necessary to attain the general objective of the Union (Declaration 41 of the Lisbon Treaty, §7). In this sense, Article 3 TEU is considered legally binding (Case 6/72 - *Continental Can Company*, §23*)*, but the broad formulation of these objectives allows EU institutions to enjoy a certain margin of appreciation to decide on the concrete scope. Because of this, only an evident failure to comply with the objectives would be acceptable to claim a breach of the Treaty. Given that it is easier to identify a contradiction to a clearly defined objective of the EU, the more concrete the formulation, the stronger binding effect it will have (Sommerman, 2013). The same argument applies when there are conflicting objectives: the more concrete elements an objective has, the higher the degree of determination and hence, the lower the degree of flexibility (Case 29/77 – *Roquette*, §30; Case 203/86 - *Spain v Council*, §10; C-280/93 - *Germany v Council*, §18).

Objectives have been a part of the Treaties since the foundation of the then European Communities, although originally goals where only economic in nature whereas political aspirations were set in the preamble. Now, general objectives combine a number of different concerns including economic, yes, but also political and social and they are said to represent a common European interest (Opinion AG Kokkot C-358/14 - *Poland v EP and Council*, §164). Regarding the social objective, this is most clearly depicted in the objective to become a social market economy, to combat social exclusion and

discrimination, the promotion of social justice, equality between men and women and solidarity among generations, and the promotion of economic, social and territorial cohesion and solidarity between the Member States. Most of these objectives are connected to other provisions in the treaties, such as social exclusion and discrimination to Article 153(1)(j) TFEU or Article 34 CFR on the right to social security and social protection. Accordingly, these will have to be interpreted or exercised in accordance with the objectives.

The **social objective** of the Union is further specified in Article 151 TFEU, which frames the social competences of the EU. According to this, the Union 'shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.' It follows from this provision that the social market economy is not only an approach to policy-making but also a constitutional guiding principle in itself (Geiger, Khan, & Kotzur, 2015).

Markedly, the provision also refers to the fundamental social rights enshrined both in the European Social Charter (ESC) and the Community Charter of the Fundamental Social Rights of Workers (see next section). Together with the preamble, the principles and values of the Treaty and the social rights in the CFR, Article 151 TFEU inspires and guides EU law's interpretation. Needs to be noted, however, that this provision does not establish individual social rights, as it is not enforceable neither does it generate competences. Yet, this provision may play a crucial role in the development of new (legal) social measures because it provides the specific framework in which a concrete competence can be applied. As such, this Article makes a reference to a concrete functional competence, meaning that the EU has the competence to take action in social policy matter only to fulfil this social objective.

The social components of the provisions above align with Article 9 TFEU, the so-called **horizontal social clause** which enshrines, *inter alia,* the aim of the Union to achieve a high level of employment and to guarantee adequate social protection and fight against social exclusion when defining and implementing its policies and objectives. Article 9 TFEU aims at ensuring full consideration of the social dimension in all EU activities within the scope of its responsibilities (Opinion EESC of 28 January 2012). What this provision entails is that the social implications of any sort of legislation, policy or programme are assessed in all areas and on all levels. Hence, at the very least, Article 9 TFEU should guarantee that in every major policy initiative undertaken by the Commission, which needs to be accompanied by an integrated impact assessment, the potential impact this policy is likely to have on all fields, including the social one, is duly analysed. In fact, the CJEU has specifically acknowledged the obligation

of the EU legislator to apply Article 9 TFEU when enacting new rules (C-616/17 – *Blaise*, §42). Similar to the above provisions, Article 9 TFEU is binding, but not directly enforceable. Instead, the provision is formulated in the form of a balancing clause that demands for the procedural integration of social policy issues at the EU level. As such, it can be referred to as a binding provision from the procedural point of view, but not on a substantive level. Essentially, the horizontal clause provides for an imperative method of good governance for the EU institutions that are commended to ensure that Article 9 TFEU is satisfactorily applied and fully considered in all relevant texts. Accordingly, even if the horizontal social clause does not *per se* add to the social dimension of the EU, it mainstreams social values into all other initiatives (Vandenbroucke & Vanhercke, 2014).

3.2.2. Charters, proclamations and declarations

Over the years, the EU has also adopted a number of instruments in the form of declarations or proclamations that assemble and codify social rights.

In 1989, all Member States, with the exception of the United Kingdom, signed the **Community Charter of the Fundamental Social Rights of Workers** (the Community Charter) which established the basic principles in which the European labour model is based and shaped the development of the European social model of the following years. From a substantive point of view, the Community Charter covers a vast array of areas, including free movement, employment and remuneration, living and working conditions, social protection, freedom of association and collective bargaining, vocational training, equal treatment, information and consultation, health and safety, protection of children, elderly people and disabled people. Some of these were later taken aboard the CFR, discussed below, making these legally binding (Article 6 TEU).

The legal status of the declaration, however, is not binding and should be seen as more of a political declaration. While declarations are not prescribed as a form of legal instrument of EU law, the Treaties do refer to the Community Charter. This is the case of the preamble which confirms the attachment of the Member States to fundamental social rights as defined in the Community Charter and Article 151 TFEU which frames the social competences of the EU. As such, even if it is not enforceable, the Community Charter can be used by the CJEU as an aid of interpretation, which has often been the case (C-119/19 P - *Carreras Sequeros*, §112).

While not legally binding, the Community Charter had important ramifications in the decade that followed its adoption. In order to fulfil the objectives set out in it, the Commission adopted a Social Action Programme (Commission, 1989), which was fundamental in the launching of subsequent initiatives in employment and industrial relations including a series of directives —on pregnancy and

maternity (Directive 92/85), on working time (Directive, 93/104, now replaced by Directive 2003/88), European Works Council (Directive 94/45, now replaced by Directive 2009/38), the framework agreement on parental leave (Directive 96/34 now replaced by Directive 2010/18), part-time work (Directive 97/81) and fixed-term work (Directive 1999/70)—, all of which are binding and created enforceable rights.

Quite similarly, in 2017 the Commission launched the **EPSR**, which was presented first in the form of a Commission Recommendation (Article 292 TFEU) and subsequently endorsed by the Member States. However solemn (Garben, 2019c), the EPSR is also not legally binding, meaning that the twenty principles therein are not enforceable against neither the European Institutions nor against the Member States (Rasnača, 2017). Yet, many of these principles, or parts of them, are binding either through other EU measures, the CFR, of other international instruments to which Member States are signatory outside the context of the EU. In this vein, the EPSR reaffirms already existing rights and it complements these 'to take account of new realities'

> "By putting together rights and principles which were set at different times, in different ways and in different forms, it seeks to render them more visible, more understandable and more explicit for citizens and for actors at all levels. In so doing, the Pillar establishes a framework for guiding future action by the participating Member States." (Commission, 2017b)

The content of the EPSR is distributed in three chapters that tackle respectively equal opportunities, fair working conditions and social protection and inclusion. Whereas it is true that many of the instruments above are not new to the European realm, what is original from the EPSR in terms of content is that it identifies very clear independent rights from others that had traditionally been framed more broadly. For example, where the CFR (Article 31) refers to 'fair working conditions' the EPSR identifies the self-standing right to a fair minimum wage, or where the CFR (Article 34) refers to social assistance, the EPSR identifies the independent right to a minimum income. Moreover, the accompanying documents to the EPSR make important connections between each right and the existing measures both within and outside the EU (Commission, 2018).

In spite of its lack of legal force, in a very similar fashion to the 1989 Charter, it seems that EPSR is being instrumental in the development of new social initiatives, some of which are binding, including, the work-life balance directive (Directive 2019/1158), the establishment of the European Labour Authority (Regulation 2019/1149) and the directive on transparent and predictable working conditions (Directive 2019/1152). Other important initiatives include the Recommendation on access to social protection (8 November 2019), the proposal for a directive on minimum wages (Commission,

2020c) and the ongoing consultation on an instrument on improving the working conditions of platform workers (Commission, 2021a). The Action Plan for the implementation of the EPSR that was presented in March 2021, brings more clarity onto the future initiatives (Commission, 2021). In this vein, the accompanying documents to the EPSR and, particularly, the Social Scoreboard— a set of composite indicators that track trends and performances across EU countries in 12 areas (soon to be 15 (Commission, 2021))—, are essential to understand the extent to which these rights ought to be protected and in monitoring Member States' implementation and performance. Where systematic flaws or gaps are detected, thus, it is possible identify and address these.

Moreover, even if the EPSR does not create legal obligations, it does provide a sense of direction for institutions, especially for the policymaker and the legislator, on how to interpret social rights when presenting new initiatives. Equally, both the CJEU and national courts could use the EPSR as a source of interpretation when interpreting social rights, particularly when the EPSR is mentioned in the measure at stake (Garben, 2019c).

3.2.2. International instruments

In addition to the above, there are also a number of international instruments that the Treaties, either directly or indirectly, internalise. Most notably, this is the case of the main instruments of the Council of Europe, the European Convention of Human Rights and the European Social Charter, a number of ILO Conventions and relevant UN instruments such as the UN Declaration of Human Rights or the International Covenant on Economic and Social Rights. It needs to be noted that these instruments are not necessarily deontic since the rights therein can be enforced in so far as the respective instruments have been ratified by the Member States. With the exception of the ECHR and a number of conventions that the EU has explicitly ratified (such as the UN Convention on the rights of the persons with disabilities), however, there are not legally binding in the context of the EU. Many Member States, however, have ratified these instruments independently. This does not equate to them not playing a role in the EU framework. In fact, the relationship between the EU and international instruments is clear from a number of provisions in primary and secondary law. The most marked relationship is between the EU and the ECHR, which is clearly enshrined in Article 6 (2) and (3) TEU, the second part establishing the promise to accede the ECHR and the third one recognising the content of it as general principles of EU law (Opinion 2/13, *Accession to the ECHR*; Editorial Comments, 2015; Kokkot & Sobotta, 2015; Douglas-Scott, 2015). The CFR too, specifically protects the content of the ECHR both by establishing a presumption of legal synergy (Article 52(3) CFR) and by explicitly including it in a general non-regression clause (Article 53 CFR). From this, it is clear that the ECHR is part of the fundamental rights landscape of the EU, however, this is a complex relationship,

particularly when trying to sketch its legal nature in the contexts of the EU. Until the EU activates Article 6(2) TEU and accedes the ECHR (if ever), the ECHR remains not directly enforceable in the EU which means that the Union and its institutions cannot be held accountable for ECHR violations. However, Article 6(3) TEU speaks of the ECHR as part of the general principles of EU law. This means that while not technically enforceable for the EU (although yes for the Member States individually, but outside the EU framework) the content of the ECHR is indirectly enforceable through general principles of EU law, which is discussed below under 'legal' power resources.

Article 53 CFR also conveys a general reference to international law instruments which should guarantee, in principle, that the social rights standards as seen, *inter alia*, under the ESC and the ILO Conventions are being respected. In contrast to the ECHR, Article 6 TEU does not speak of other international instruments, nor is there another provision that clarifies the relationship between the EU and other sources of social law. However, the existence of this relationship, albeit unclarified, can be traced elsewhere. In general terms, the TEU refers to the 'attachment to fundamental social rights as defined by the ESC' (preamble TEU). All the more evident is the relationship between the ESC and the CFR as some of its provisions, particularly those in the solidarity title, are modelled after the ESC (Explanation to the CFR). In addition, it has been mentioned above, Article 151 TFEU explicitly acknowledges that the EU and the Member States ought to 'have in mind' fundamental social rights as enshrined in the ESC (and the Community Charter). This suggests that the Union should respect and promote social rights, at the very least, respecting the ESC. This is vital, for at least two reasons. First, because it can act as a non-regression clause where the protection offered by the ESC shall be protected at all costs. This is reinforced by the non-regression clause under Article 153(4) TFEU which states that any provisions adopted pursuant to this legal basis shall not prevent Member States from maintaining or introducing more stringent protective measures as long as they are compatible with the Treaties. Secondly, but closely connected, because the ESC is a far more ripened instrument and the European Committee of Social Rights (ECSR) has done a tremendous work in the development of its provisions, monitoring State Parties and compiling all this information through the reporting system and the complaint procedure. This knowledge base should be used by the Member States and the EU alike, both at the legislative and judicial levels (Świątkowsky & Wujczyk, 2018). Differently, the fact that a number of EU law provisions model after the ESC, should encourage the EU legislator to adopt new initiatives in light of the ESC and its case law and the national legislator when transposing it, as well as the respective judiciaries when interpreting such provisions (Schlachter, 2013).

It is important to note, that while other instruments of international law are not specifically accommodated in the Treaties, the lists offered by Article 53 CFR and 151 TFEU are not exhaustive,[10] which implies that other resources of international law should also be considered. In fact, the CJEU has referred to the ESC and the ILO and the respective commitment of Member States as signatory parties to it —at least to the original ESC or the specific ILO Conventions— (C-684/16 - *Max-Planck*, §70; C-350/06 - *Schultz-Hoff*, §37-38; C-579/12 RX-II - *Commission v Strack*, §27-28). In *Impact* (C-268/06, §112), the Court referred to the ESC and decided that the legislation at stake should be interpreted as expressing a principle of EU social law which could not be interpreted restrictively (also in C-116/06 – *Kiiski*) C-119/19- *Carreras Sequeros,* §113).

Because most Member States are party to the ESC and many to the ILO Conventions, such non-regression clause could also be understood to instruct any provision adopted under the Social Policy title or the interpretation of fundamental rights in the context of the CFR to respect the level of protection granted by such international instruments. A coherent and harmonious relationship between different sources of fundamental social rights, in turn, seems essential in exploiting (and respecting) the horizontal social clause under Article 9 TFEU.

Avoiding a disruption in the international rule of law is an important reason for the EU to embed these international law instruments into their framework. In fact, the compatibility of the EU with international instruments is rather controversial, which became apparent in the aftermath of the *Viking* and *Laval* case-law and the imposition of austerity measures (particularly in the case of the Greek bailout). These where refuted by both the ECSR and the ILO (Rocca, 2016; Garben, 2018a).

In light of the above, it is crucial that international rules are respected and promoted within the EU. The EPSR is a living proof that these instruments are all considered part of the same social *acquis.* In fact, very principle in it is clearly linked to other instruments of international law and EU instruments and, accordingly, these principles should be used and interpreted considering all the different

[10] Article 53 CFR refers to the non-regression clause of the CFR, and it states that: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and *international law and by international agreements to which the Union or all the Member States are party, including* (emphasis added) the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'. Similarly, Article 151 TFEU reads as follows: 'The Union and the Member States, having in mind fundamental social rights *such as those* (emphasis added) set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

provisions. The staff working document accompanying the EPSR is indispensable to understand the interrelations between different instruments (Commission, 2018).

1.2. Binding Legal power resources

This section looks into a number of different legal power resources. Before jumping into the specific power resources there are a number of clarifications worth making, which are essential for the exercise of these power resources particularly for those seeking remedy.

In the first place, it shall be noted that the EU legal order offers a number of different norms. These follow a **hierarchy or norms**. In the first place we have **primary law** of the EU, which is composed by the Treaties (TEU and TFEU), and since Lisbon, and CFR. These symbolise a binding agreement between the Member States and set out objectives, rules for the institutions, scope and how decisions are made between the EU and its members. As such they represent the starting point of EU law. The body of law that emanates from these foundations is known as secondary law

The **general principles of EU law** are the second tier of the hierarchy of norms and they sit below the treaties but before secondary legislation (Tridimas, 2006). They can be used to interpret treaty Articles and secondary legislation but also to invalidate the latter. General principles have been developed by the CJEU that has recognised, *inter alia*, the principles of proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle and procedural justice. Most developed legal systems have some sort of principles of judicial review that provide the basis to challenge action. The EU is no exception to this, and the foundation for judicial review is granted in Article 263 TFEU.

As regards **secondary law**, there is a distinction between legislative and non-legislative instruments. The former are to be adopted following one of the legislative procedures set out in the Treaties (ordinary or special) whereas the non-legislative acts do not follow this procedures and, instead, they can be adopted by EU institutions according to specific rules: These are known as delegated and implementing acts.

In terms of instruments, the EU recognises a vast number of legal and non-legal (discussed in the following section) instruments that are used to attain the general objectives of the Union. The principal legal instruments are regulations, directives and decisions.

All the instruments and provisions that are discussed under this umbrella of 'legal power resources" are considered to be **binding**, meaning that EU institutions and the Member States have a general obligation to respect these provisions. For horizontally applicable provisions also third parties (e.g. individuals and companies) have to respect these resources. However, not all have the same legal

consequences. Since the purpose of this Working Paper is to discern individual power resources, it is important to note that while binding, not all of these provisions have **direct effect**, which provides for the possibility to invoke EU law directly before national courts. Direct effect provides rights that generate a full set of entitlements against parties and that impose an obligation on the administration and the courts to protect and realise the rights of individuals. In terms of individuals seeking remedy for their rights or entitlements, thus, there is a considerable difference between those rules that have direct effect and those that do not. This means that some provisions can be invoked against the Member States (vertical direct effect) and against third parties (horizontal direct effect) and others cannot. The following sections reflect individually on the direct effect (or lack thereof) of these instruments and provisions (Chalmers, Davies, & Monti, 2014).

Having clarified this, the following sections offer an analysis of the legal resources of the EU in the social field by paying attention to the above norms and instruments. The discussion continues where we left off with deontic instruments, by complementing the landscape on fundamental rights, but this time from the perspective of legal power resources.

1.2.1. Fundamental rights

From the previous section it should become evident that the fundamental rights landscape in the EU is a complex one that combines different instruments from both within and outside the EU while the interaction between these or their legal status is not always well-defined.

This confusing interaction is a natural consequence of the historical evolution of the EU. The original Treaties did not contain fundamental rights provisions and, therefore, offered little opportunities to face possible conflicts between the economic interests of the then Community and the fundamental rights protection of the national constitutions. But not protecting fundamental rights at all would have undermined the authority of the Community before national constitutional authorities and put in question its legitimacy. Consequently, fundamental rights were originally incorporated in the realm of the EU on the basis of common constitutional values and through the general principles of EU law. Later in *Nold* (C-4/73), the CJEU held that international treaties were also a source of fundamental rights law and *Rutili* (C-36/75), specifically referred to the ECHR. Fast-forward to 2000, the Member States declared the CFR, which codified most of the fundamental rights developed through the general principles in a single and ambitious bill or rights which was given the status of primary law, thus binding, with the Treaty of Lisbon.

Currently, Article 6 TEU maps the contours of fundamental rights in the EU. Rather than one single bill of rights there are three different legal sources: the CFR, the ECHR and the national constitutional traditions, the latter two in the form of general principles of EU law.

1.2.1.1. The Charter of Fundamental rights

The **content** of the CFR is probably one of the most ambitious ones among fundamental rights instruments in that it presents civil, political, socioeconomic and collective rights altogether. In this sense, the content supports the indivisibility of human rights. The substantial part of the CFR is grouped in six chapters: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and Justice. *A priori,* it might seem that only the chapter on solidarity, which contains a number of labour and social rights — information and consultation, collective bargaining, access to placement services, protection against unjustified dismissal, fair and working conditions, prohibition of child labour, family and professional life, social security and social assistance, health care, access to services of general interest and the right to environmental and consumer protection (Articles 27- 38 CFR respectively)— is relevant for the social *acquis* of the EU. However, all chapters contribute to the social *acquis* in one way or another. Chapter one on dignity enshrines the right to human dignity (Article 1 CFR), which cannot be attained without social rights, such as education or fair working conditions. Chapter two, on freedoms contains basic civil and political rights, which can also be found in the ECHR, but some social rights such as the right to education and the right to engage in work are also part of this chapter (Articles 14 and 15 CFR). Similarly, the third Chapter on equality warrants equality before the law making a special acknowledgement to positive action in the field of gender equality. Importantly, chapter six on justice conveys the right to remedy (Article 47 CFR) which embodies the idea that where there is a right, there should be remedy (*ubi just, ibi remedium*), and is therefore essential to enforce these rights.

For all its substantial ambitions, however, the **applicability** of the CFR is contained in the horizontal clauses of the Charter in its seventh chapter, most notably in Article 51 and 52 CFR. The former provisions enshrine three important limitations. First, the Charter applies to EU institutions at all times but to Member States only when they are implementing EU law. In this sense, there is a lot of discrepancy regarding what implementing EU law means. It is generally understood, that 'implementing EU law' covers all situations in which Member States fulfil their obligations under primary and secondary law (Koukiadaki, 2019; De Vries, 2017). In this sense, three scenarios can be discerned: when a Member State is directly implementing EU law, such as a directive (C-617/10 – *Åkerberg*, §27), when it is derogating from EU law (C-112/00 – *Schmidberger*, §29), and when the subject matter is covered by EU law even in cases where such instrument is not directly applicable (C-555/07 – *Kücükdeveci*). Whereas the first two are generally accepted, the third one is very much

contested, particularly, since this could potentially extend the competences of the field of application of EU law and, therefore, be contrary to Article 51(2) CFR. This is in fact the second limitation of the article which establishes that the CFR does not apply beyond the powers of the Union or establish any new power task for the EU. The third limitation of Article 51 CFR refers to the distinction between rights and principles, where the former shall be 'respected' and the latter simply 'observed'. These would put those in the latter grouping closer to the deontic power resources discussed above. Unlike rights, principles are only justiciable as long as they have been implemented by either a legislative or an executive action (Kornezov, 2017). Rights, by juxtaposition, give rise to positive enforceable actions that are directly applicable. Thus, whether a provision is catalogued as a right or a principle is crucial to define the entitlement that gives to the right/principle holder (Ward, 2014). The CFREU, however, does not clarify which provisions are deemed to be classified as rights or principles. This distinction, that seems to draw the line on the direct applicability of a provision, is strongly driven by the balance of powers between the EU and the Member States. This separation is, in turn, mostly motivated by the requirement to engage into positive action, concerns over politicisation of the judiciary or of separation of powers. As for the former, socioeconomic and cultural rights have largely been deemed to require more positive action as opposed to civil and political rights which require mere refrainment from interfering. While disputable (Gerstenberg, 2014; Lock, 2019), many used this reasoning to argue that the provisions under the solidarity title ought to be considered principles, and therefore, not directly applicable. The *Bauer* (C-570/16) saga put these concerns to rest by recognising the right to fair working conditions under the solidarity chapter as rights, and therefore directly applicable (Frantziou, 2019; Ciacchi, 2018; Ciacchi, 2019). More recently, in *Department for Communities v. Northern Ireland*, for instance, the Court recognised that Article 1 CFR on human dignity should ensure that a citizen who has used his or her right to freedom of movement, who has de right to reside under national law and who is in a vulnerable situation may live in dignified conditions (C-799/20, §89-90)

To sum it up, rights under the CFREU, which can quite ambiguously refer to provisions with a 'mandatory nature', have a horizontal direct effect and accordingly, right holders are entitled to a remedy before national courts. Principles, alternatively, create duties or objective obligations (Lock, 2019), but their justiciability is dependent on an implementing act, which is also ambiguous. Yet, there remains the matter of what exactly constitutes 'to act within the scope of EU law' (Dougan, 2015; Lenaerts & Gutiérrez-Fons, 2017; Barnard, 2020).

All in all, the CFR offers extensive protection from a material point of view. However, this protection is often trumped by the limitations of Article 51 CFR. Moreover, even when a provision is considered applicable, the possibility still exists to limit this protection further when this is necessary to meet the

objective of general interest recognised in the EU (Article 52 CFR) (Koukiadaki, 2019). A relatively common conflict in the past refers to the protection of social rights and the economic freedoms of the Union. While the Court has not always favoured economic interest (C-112/00 – *Schmidberger*, §78; C-36/02 – *Omega*), often the CJEU offered an interpretation to the detriment of social rights. Perhaps the best-known examples concern the infamous cases of *Viking* (C-438/05) and *Laval* (C-341/05). In these two cases the Court recognised for the first time the right to collective action —including the right to strike— as a fundamental right integral to the general principles of EU law. The Court even stressed that beyond its economic purpose, the EU also has a social purpose and that the four fundamental freedoms must be balanced against the Union's social objectives. It also recognised that the protection of workers is an overriding reason of public interest. And yet, the Court concluded that there was room for limiting the collective rights insofar as the burden placed on the freedom of establishment and freedom to provide services had been disproportionate.[11] These cases, and many after, showcased that fundamental rights can be – and are according to the ECJ– subordinated to the market freedoms of the EU, making thus, fundamental rights comply with the conditions necessary to limit fundamental freedoms. Similarly, the right of freedom to conduct business (Article 16 CFR) has also limited worker's rights in the past. (C-426/11 - *Alemo-Herron*; C-201/15 - *AGET*; Garben, 2020)

1.2.1.2. The general principles of EU law

As far as the **general principles of EU law** in the context of fundamental rights goes, they were introduced rather early on, when the Court recognised fundamental rights as binding for the Community institutions (Case 11/70 - *Internationale Handelsgesellschaft*; Case 4/73 – *Nold*; Case 44/79 – *Hauer*). Originally, they were largely utilised to fill a vacuum in the protection of fundamental rights when there was no specific instrument for it. Most of the case-law of the CJEU on fundamental rights through the general principles, however, was codified in the CFR. This raises the question of what the role of general principles in the context of fundamental rights is now that the EU has a specific instrument on fundamental rights, or whether the CFR really brought anything new to the fundamental rights landscape (Knook, 2005). Regarding the latter, some authors argue that contrary to the general principles, the CFR has a broader material scope, which may significantly contribute to

[11] In the case of *Viking,* the Court said that the measures taken to protect their employment rights (in this case striking) could be disproportionate since the national court had to decide if it had gone beyond what was necessary to protect such rights since FSU had other less restrictive means at their disposal. In *Laval*, the Court concluded that it was a disproportionate measure because Sweden's collective bargaining system was not sufficiently precise and accessible. For more on these and following cases see for example: (Bücker & Warneck, 2010, The Adoptive Parents, 2014; Barnard, 2008; Davies , 2008; De Vries, 2013).

the discovery of general principles (Lenaerts & Gutierrez-Fons, 2010). Supporting this, the CJEU has in the past held that the CFR is not a merely codifying instrument (C-92/09 and C-93/09- *Volker*). Moreover, it provides an authoritative stand to fundamental rights (Bell, 2011) and brings a mandatory requirement that general principles lack (De Vries, 2013). In practice, however, both judges and advocate generals tend to align fundamental rights protection to the provisions of the CFR (Bell, 2011). Whereas this practice adds legal certainty to the application of fundamental rights, it also abolishes the dynamism and development capacity of fundamental rights, thus, risking their evolution altogether. However, in theory, general principles could be used as a gap-filling source of law (Semmelmann, 2013; Lenaerts & Gutierrez-Fons, 2010) or fulfil an interpretative role. In this vein, general principles could be used to keep fundamental rights up-to-date (C-402/07 and C-432/07 *Sturgeon*, §29). When applying general principles, the CJEU will have to draw from the ECHR and national constitutional traditions as established by Article 6 TEU. It could also, though in a less authoritative way, refer to some of the instruments mentioned above, such as the ESC or the ILO conventions, which would not be without precedent (C-43/75 – *Defrenne*). A clear example of this would be to recognise the independent right to a fair remuneration within the more general right to fair working conditions (Article 31 CFR).

Differently, general principles are not as constraint in their application as the CFR, particularly, in the separation between rights and principles. As such, theoretically, they could be used to breach this dichotomy and apply a provision of the CFR considered to be a principle, regardless of whether the provision in question is being implemented. In this vein, even if principles do not generate claim-rights under the CFR, the possibility still exists that general principles consider 'rights' what the CFR understands as 'principles' and that as such, they gain justiciability.

1.2.2. Treaty provisions

The constituent treaties (TEU and TFEU), next to the CFR, sit at the top of the hierarchy of norms. In this sense, much of the individual power resources emanate from the Treaties, but are mostly made tangible to individuals through actions taken on the competences provided therein (see Part 1). There are, however, a number of provisions that are directly applicable without them having to be operationalised through secondary legislation. For a treaty provision to be directly applicable in national courts, thus to have direct effect, the content of it needs to be sufficiently precise and unconditional. In this sense, the provisions shall not be qualified or constraint by other provisions and it should be 'unequivocal', which means that the provision has to set clear entitlements for the benefit of individuals and impose direct obligations on national authorities to protect such entitlements. *Defrenne II* (C-43/75) is considered the landmark case, and interesting enough, it concerns a provision

on the social policy title, namely, the obligation for Member States to ensure the principle of equal pay for equal work or work of equal value between men and women (now Article 157 TFEU). This case concerned a Belgian air stewardess that, unlike her male counterparts, was forced into retirement at the age of 40 under Belgian law. The Court found a violation of now Article 157 TFEU. The Belgian government argued, that the discrimination was not perpetrated by the government but by Sabena, the employer. The Court then applied the doctrine of horizontal direct effect by arguing that 'the fact that certain provisions in the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down'. Hence the CJEU confirmed the mandatory nature of now Article 157 TFEU that applied not only to public authorities but also to agreements which are intended to regulate paid labour collectively as well as contracts between individuals' (§30-39). Consequently, as long as a provision in the treaties is precise, clear, unconditional and does not call for additional measures at the national of supranational level, they are directly applicable, both vertically and horizontally. This means that individuals can invoke these rights before their national courts and seek remedy for their entitlements.

Most of the social provisions in the treaty, as it is exemplified in the parts on competences of deontic instruments on values and objective, are either vague, or reliant on other provisions and as such, they lack direct effect. However, a number of provisions on free movement, such as Article 45 TFEU which entitles individuals, *inter alia*, to equal treatment as regards employment remuneration and other conditions of work and employment, can be invoked directly.

1.2.3. Legal acts: Regulations, Directives and Decisions

Article 288 TFEU is the foundation for the main instruments in the EU and it foresees: Regulations, directives, decisions, recommendations and opinions. Out of these instruments, the first three are legally binding and are therefore analysed in this section. The remaining two are considered part of the soft-law instruments and are therefore considered in the following section.

Before discussing each of these instruments, there are a number of general remarks to be noted. First, there is no formal hierarchy between these instruments. However, these instruments can either be presented in the form of legislative, delegated or implementing acts and while the form does not alter their nature, they give them a different place in the hierarchy of norms, and those legislative stand at the top of secondary law instruments. Second, the Treaties sometimes leave open the option of which instruments to apply, and when they do, the institutions may select it on case-by-case basis. In choosing an instrument, institutions will have to reason their opinion (Article 296 TFEU). Other times, the competences will be limited to a certain instrument. For example, it has been discussed in Part I,

in the case of the social competences (*stricto sensu*) the legislator is limited to minimum harmonisation directives.

Regulations are binding instruments of general application that directly apply in all Member States. This has a twofold meaning. First, that they apply automatically and uniformly to all Member States as soon as they enter into force. Thus, contrary to directives, they do not need to be transposed. Whereas some Member States may need to either modify their law in order to comply with the regulation or require a measure to transform it to national law, the regulation itself has legal effects independent from these national acts. Secondly, it means that regulations can invoked before national courts directly, both against the State and third parties.

Probably because of the great diversity of the employment and social systems and regulations, the principle of subsidiarity and the limitations of Article 153 TFEU, regulations are not a common instrument in the EU social dimension. The exceptions to the rule are a couple of instruments on free movement such as Regulation 492/2011 on migrant workers or the coordination of social security systems Regulation 883/2004. The latter rules, however, do not harmonise the social security systems of Member States but instead, they create bridges between the different national systems to lift possible obstacles of free movement. Regulation in the social field have also been used to establish authoritative bodies or agencies or to install funding systems (e.g. Regulation 492/2011 which also established two committees, ELA Regulation 2019/1149; FEAD in Regulation 223/2014; or more recently SURE in Regulation 2020/672).

Unlike regulations, **directives** require Member States to attain a certain goal, but it is left to them how to do so. To this end, Member States need to transpose a directive by incorporating it into national law within a deadline (usually 2 years) and the measures for these transpositions needs to be communicated to the Commission accordingly. If a Member States does not transpose a directive, the Commission may initiate an infringement procedure and bring the Member State before the CJEU (see more on this below). Compared to regulations, hence, directives offer a valuable flexibility. Because Member States have a certain discretion as to how to transpose directives, they are particularly useful as an instrument aiming for harmonisation in areas of complex legislative change, such as social policy. This does not mean, however, that directives are vague instruments, in fact, they are often rather detailed.

Because of the need to transpose them, the direct effect of directives has been put into question. It is clear that the transposition of directives is enforceable before national laws, and in principle the directive takes effect once it has been transposed, but the question is whether the directive itself can be enforced before national courts. The answer to this is twofold. Directives can be invoked directly

against the Member State if the directive has not been transposed or has been transposed incorrectly, the terms of the directive are sufficiently clear and unconditional and the directive provides rights to individuals (C-41/74 - *Van Duyn*). In some cases, the Court has even allowed for the possibility of obtaining compensation when a directive was transposed incorrectly or its transposition was considerably delayed (C-6/90 - *Francovich*). This is known as state liability.

However, directives lack horizontal direct effect, which means that they cannot directly be invoked against third parties (C-91/92 - *Faccini*; C-148/78 - *Ratti*). The reasoning behind this is relatively simple, Member States are the ones who have the obligation to transpose the directive and not third parties. While this is pretty straightforward, it has generated a number of questions including, what kind of entities are to be understood as public authorities and which not or whether the CFR or general principles can be invoked for when a directive is not applicable (before it enters into force or in conflicts between third parties) (C-144/04 - *Mangold*; C-555/07 – *Kücükdeveci;* C-570/16 – *Bauer;* C-414/16 - *Egenberger*) (Lenaerts & Gutierrez-Fons, 2010).

As for the content, a directive can require **minimum** or **maximum harmonisation**. Minimum harmonisation requires a directive to set minimum standards and it recognises the fact that some national legal systems have already set higher standards. Minimum harmonisation gives, and even encourages, Member States the freedom to set higher standards than those provided for in the directive. By contrast, maximum harmonisation established that Member States may not introduce stricter rules than those set in the directive. In the social dimension, directives may be adopted only for minimum harmonisation (Article 153(2)(b) TFEU).

European social law has mostly relied on directives that regulate a number of areas including health and safety at work (by far, the most expansive one), equality, working conditions, work-life balance, information and consultation. A list can be found in table 2. From this is evident that social law is rather fragmented in the EU. A good example of this refers to the equality directives targeting discrimination in a number of areas including housing, welfare, services, education and access to employment. A more all-encompassing initiative was put forward by the Commission in 2008, the so-called Horizontal Equal Treatment Directive but has ever since been stranded at the Council (Commission, 2008a; Council, 2019). This is a good example of the problems of gathering sufficient consensus in areas of high sensitivity.

Lastly, **decisions** are also binding instruments, but different from regulations and directives they are only binding upon those to whom they are addressed. A well-known decision related to social rights

is that of the Employment Guidelines.[12] The Treaties give the Council the power to adopt employment guidelines (Article 148 TFEU) that must be consistent with the broad economic policy guidelines (Article 121 TFEU). Because of this, the guidelines are since 2010 adopted together as 'integrated guidelines' which was underpinned by the Europe 2020 Strategy and were later revised in 2015 and in 2018 as to integrate them with the EPSR (Council Decision 2018/1215). These guidelines set the policy priorities in employment, frame the scope and direction of policy coordination for the Member States and establish the basis for country specific recommendations in the context of the European Semester (see below). These guidelines include four different priorities: 1) boosting the demand for labour enhancing labour supply and improving access to employment, skills and competences; 2) enhancing the functioning of labour markets and the effectiveness of social dialogue; 3) promoting equal opportunities for all and; 4) fostering social inclusion and fighting poverty (Guidelines 5-8 respectively).

Another example of a decision, is that one establishing the Social Protection Committee (Council decision 2015/773), whose role has become essential in developing, monitoring and analysing social rights in the EU.

In order to be considered **legislative instruments**, and thus be above in the hierarchy of norms of secondary legislation, these legal instruments will have to be adopted according to a legislative procedure, be it the ordinary or the special legislative procedure, which were discussed above (Article 289 TFEU). In other words, legal acts can be adopted in different ways and this is what it will ultimately define them as legislative, delegated and implementing which affects their hierarchy. Besides the above, legal acts also include recommendations and opinions, although the latter two are not binding and thus are covered below. Note, however, that while the provision only refers to the binding instruments of the EU as legislative instruments (regulations, directives and decisions), recommendations too have been adopted by a legislative procedure thereby opening the possibility to having non-binding legislative acts. A recent example of this was the recommendation on access to social protection for all. This formalistic approach to what is considered a legislative act can cause problems because according to the hierarchy of norms, a recommendation that is not binding but has been adopted through a legislative procedure would sit higher than a binding instrument that takes the form of a delegated or implementing act. Moreover, some provisions do not refer to any legislative

[12] Note that while decisions are binding, this instrument uses a rather soft-language beginning with the title that refers to 'guidelines. The text of the guidelines mostly uses the word "should", which is rather soft in comparison with more mandatory language such as "shall"), This suggests that the guidelines are not enforceable.

procedure (such as Article 103 and 109 TFEU) which could suggest that legislative acts are not possible under these bases, even though measures adopted under these bases prior to the Lisbon Treaty were legislative in nature. (Craig & De Búrca, 2020, pp. 144-145)

1.3. Legal complements: Delegated and implementing acts

The Lisbon Treaty refers to two categories of acts that sit below the legislative ones: Delegated and implementing acts (Article 290 and 291TFEU) and in some way they complement basic legislative acts by either supplement or amending them (delegating acts) or setting rules for their implementation (implementing acts). Delegated acts fulfil in this sense a more legislative role, while implementing acts fulfil a more executive role. Both are legally binding.

Delegated acts entitle the Commission to supplement or amend parts of EU legislative acts that are non-essential (C-696/15 P – *Czech Republic v Commission, §78*).[13] The basic legislative act will lay down the limits of the Commission's power by defining the objective, content, scope and duration of the conferral of power to the Commission and it will enter into force as long as the Parliament and the Council do not have objections.

Delegated acts are adopted after consultation with an expert group that is usually comprised by representatives of each Member State and meets on regular basis. The better regulation agenda allows citizens and stakeholders to provide feedback on their draft texts for which they usually have four months, and the Commission will have to adopt an 'explanatory memorandum' explaining how this feedback was used (Chapter IV, Better Regulation Toolbox, p. 40). Since 2017, moreover, anyone can search and receive updates regarding delegated acts from the official registry, which makes it considerably simpler for citizens to have their say.[14]

In the social field, there are several delegated acts in relation to European funds (most notably the ESF and the FEAD) and often relate to technical issues such as reimbursement, definition of scales or lump sums. Article 92 of Regulation 987/2009 on the implementation of the social security

[13] "An element is essential within the meaning of the second sentence of the second subparagraph of Article 290(1) TFEU in particular if, in order to be adopted, it requires political choices falling within the responsibilities of the EU legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments, or if it means that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required".

[14] A list of expert groups can be found here: https://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2 The Interinstitutional Register of Delegated acts can be accessed here: https://webgate.ec.europa.eu/regdel/#/home [last accessed 29.01.2022]

coordination also empower the Commission to amend certain Annexes of social security coordination at the request of the Administrative Commission.

Implementing acts, differently, enable the Commission to set conditions for the uniform application of EU laws under the supervision of committees consisting of Member States' representatives. This committee, usually composed of national experts and known as comitology, allows EU countries to supervise the role of the Commission in implementing the act.

The adoption of implementing acts can require either an examination procedure, which is used for measures of general application or measures with a potential significant impact, or the advisory procedure for any other implementing acts. In both, the committee needs to provide a formal opinion in the form of a vote on the proposal of the Commission for the implementing act. The difference is that with the examination procedure, the Commission is bound to enact or drop the act (if a QMV is in favour of against) and in the advisory procedure it is free to decide whether or not do adopt the measure but must 'take the utmost account' for the committee's opinion (Regulation (EU) No 182/2011; Commission, 2017). The Parliament and the Council have the right to be informed about these decisions and to scrutinise whether the act exceeds the powers of the Commission. Similar to delegated acts, implementing acts too allow for feedback by citizens and stakeholders, which has to be included in the summary record.[15]

Example of these in the social field include implementing Directives in health and safety such as, Directives 2000/39, 2006/15, 2009/161/EU, 2017/164, 2019/1831 providing lists of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC. There also a number of comitologies, such as EURES (European cooperation network for employment services), EaSI (EU programme for Employment and Social Innovation), the Committee for the FEAD, or the committee for safety and health of workers at work.

1.4. Soft-Law

1.4.1. Formal instruments: Recommendations and opinions

According to Article 288 TFEU, besides the above, the EU has also recognised recommendations and opinions as non-binding instruments of EU law. **Recommendations** intend to suggest a line of action without imposing a legal obligation. Similar to directives they set an objective for Member States but

[15] These records can be found in the comitology register. https://ec.europa.eu/transparency/comitology-register/screen/home. A register of all comitologies can be found here: https://ec.europa.eu/transparency/comitology-register/screen/home?lang=en [last accessed 29.01.2022]

it is left to them how to reach that objective. **Opinions**, on the other hand, are instruments used to make an institutional statement without imposing an obligation on the addressee. Note that even though these instruments are not legally binding, they are not necessarily except from the judicial process and national courts may refer a question to the CJEU concerning the interpretation or validity of a recommendation (Article 267 TFEU; C-322/88 – *Grimaldi*). The CJEU may not, however, review their legality (Article 263 TFEU)

Soft law has traditionally been the preferred choice to regulate on the social domain in the EU. Examples throughout the years include 1992 Recommendation on sufficient resources, the 2008 Active inclusion Recommendation or the 2019 Recommendation on access to social protection for workers and the self-employed.

Recommendations can sometimes install monitoring systems that, while not strictly binding, impose an obligation on Member States to report on the issue at stake. This is for example the case of the recommendation on access to social protection. This monitoring system serves as a platform for the Member States and the Commission to monitor their performance on the basis of agreed common quantitative and qualitative indicators to assess the implementation of the Recommendation. In this vein, Member States should implement the principles set out in the Recommendation and submit a plan regarding the national measures. The progress made in implementing these plans is later discussed in the context of a multilateral surveillance such as the European Semester or the OMC. Three years after its adoption, the progress made will be evaluated by the Council in consultation with the Member States, the Council and stakeholders to decide upon further action.

1.4.2. Informal instruments

In addition to the formal instruments, the EU also has a number of informal instruments that are not officially prescribed by the Treaties. The combination between formal and informal instruments is usual in any legal system, but inevitably leads to uncertainties regarding their nature and validity. The EU is no exception in this domain. Unsurprisingly, the blurred lines of soft-law mechanisms also complicate making a clear separation between soft-law instruments and some of the instrumental resources considered below. There are, on the one hand, institutional instruments such as Council conclusions, Parliament resolutions or Commission's green papers. These are similar to opinions in that they are often used to express the political position of an institution to set political commitments. These are not formally incorporated in the Treaties as instruments and as such, they lack binding force. These instruments do not intend to have a legal effect, however, they are often programmatic in nature and might encourage other institutions to adopt initiatives. Recently, for example, the Council adopted its Conclusions on strengthening minimum income support in the context of Covid-19 where

it called Member States and the Commission to adopt new initiatives (Council, 2020). The Action Plan on the implementation of the EPSR, presented just a few months later, has planned for a new proposal on a recommendation for adequate minimum income (Commission, 2021).

1.4.3. Programmes, strategies and Initiatives

Much of the work of the EU is structured in strategies or programmes that steer the policies for the upcoming years towards a common agenda by addressing priorities, setting objectives and bring together different areas and methods for achieving these.

Clearly, the **Europe 2020 Strategy** for smart, sustainable and inclusive growth, had an important social component. It consisted of five headline targets including an employment target (that 75% of the population aged 20 to 64 years were in employment by 2020), and a poverty and social exclusion target (that at least 20 million fewer people were at risk of poverty or social exclusion by 2020, compared to 2008) (Commission, 2010). The headline targets were complemented by seven flagship initiatives, including the European Platform Against Poverty. The strategy also included the Integrated Guidelines mentioned above, which included for the first time a guideline to fight poverty and social exclusion. Key to this strategy was that for the first time they EU set a quantified poverty target and that the progress towards achieving the Europe 2020 targets was evaluated along with other policy frameworks in the supranational monitoring process of the European Semester which triggered a multi stakeholder engagement at different levels (Armstrong, 2010). Even though the strategy was warmly welcomed by academics and policy-makers alike it soon became clear that the strategy was not fit for purpose (Pochet, 2010; de la Porte & Heins, 2014; Copeland & Daly, 2014), and that consequently, could not live up to it expectations. (Commission, 2014; Commission, 2019)

Europe 2020 was preceded by the **Lisbon Strategy**, which established the basis for both the OMC and the **European Employment Strategy**, that is composed by the employment guidelines, the yearly reporting through the joint employment report (Commission, 2019a) and is now monitored through the European Semester.

More recently, the Commission has presented the much-awaited **Action Plan for the Implementation of the EPSR** (Commission, 2021). From a social point of view, this is perhaps the most expected programme of the EU since its 1989 Social Action programme in the context of the Community Charter. This action plan sets the social agenda for the upcoming years and makes a number of clear policy commitments. Among these, the Commission sets three headline targets to be achieved by 2013: that at least 78% of the EU Population aged 20-64 is employed, that at least 60% of all adults participate in training every year and that the number of people at risk of poverty and social exclusion

decreases by 15 million, among which 5 should be children. The last two are reminiscent of the Europe 2020 Strategy headline targets, although this time in a less ambitious, though perhaps more realistic approach.

With the objective of achieving these goals, the Commission lays down clear initiatives (which take a variety of forms) to be adopted in the following years. Among these there are a number of promising initiatives such as the legislative proposal to improve the working conditions for platform workers, the recommendation on effective and active support for employment, a reform of EU competition law to protect collective agreements of the self-employed, the affordable housing initiative, the recommendation on minimum income and the European social security pass. There are, in addition, a number of evaluations on existing instruments for the upcoming years such as an evaluation of the employment equality directive, a first evaluation of the ELA and a review of the EPSR itself. Markedly, the European Unemployment Reinsurance Scheme, as important as it might be in the context of the Covid-19 crisis, has not been included in the Action Plan, even though it was previously on the plans of the Commission. These planned initiatives, if effectively implemented, will undoubtedly have a positive impact on the social rights of individuals. It is worth noting that the Action Plan itself was adopted after various debates and consultations with the social partners and other stakeholders. Most of the initiatives, moreover, also foresee the involvement of social partners and stakeholders. Worth noting, these initiatives are supported by the NGEU and the Multiannual Financial Framework, mainly through the European Social Fund Plus (ESF+) with support from the Recovery and Resilience Facility for eligible measures.

1.4.4. Governance and monitoring

Many of the instruments above are characterised for being monitored through new forms of governance that depart from the hierarchical governing seen in the formal legal instruments to more flexible forms of governance where institutions share the policy making platform with other actors such as stakeholders, national and regional representatives, private actors and non-governmental organisations. In the social and employment dimension, this emphasises the role of social partners beyond the more formal methods seen in the first part of this Working Paper. Regarding the governance of social rights, there are at least two methods worth mentioning: The Social OMC and the European Semester.

The **Social OMC**, on the one hand, is a voluntary self-evaluating policy-making process launched by the Lisbon European Council that aims to spread best practices and to achieve convergence towards

EU objectives. It is a method of soft governance, that relies mostly in best practices and peer pressure to ensure its implementation (Commission, 2008). The Social OMC takes advantage of a variety of mechanisms including guidelines, indicators, reports and targets for assessing performance of Member States in three fields: poverty and social exclusion, pensions, and healthcare and long-term care. This is supported by periodic evaluations and peer reviews that intend to exchange experiences and mutual learning (Vanhercke, 2016). This process is periodically reviewed by the SPC in cooperation with representatives of civil societies and the social partners. Currently, it fulfils a twofold role, one as an integral component in the European Semester and second, as an independent process with its own agenda, methods, tools and objectives. In practice, however, much of what remains of the Social OMC is reduced the role of the SPC, both in generating exchangeable knowledge and voicing its concerns in the monitoring process, and in the system of peer reviews. (Jessoula & Madama, 2018)

The **European Semester**, on the other hand, is not at all focussed on social policies and provides an umbrella policy coordination framework for a wide variety of policy areas. Originally, it was introduced in 2011 as an economic monitoring process, but it soon opened up to include also the priorities of Europe 2020. Because of its meta-coordination nature, the European Semester envisages both hard and soft law instruments (De Schutter & Dermine, 2016). This is an interactive process that starts in late autumn every year[16] with the Annual Growth Survey (AGS) where Commission identifies priorities and challenges for the EU and suggests a number of strategies and objectives to achieve or overcome. The conclusion of the AGS is then discussed and adopted by the Council after which Member States prepare their national reform programmes translating these challenges and priorities at the national level. The cycle ends in June when the Commission reviews the National Reform Programmes and provides suggestions through the Country Specific Recommendations to Member States.[17] Because it is a continuous process, the European Semester allows for a regular monitoring of different instruments as well as a continuous dialogue with stakeholders, Member States and civil society organizations. However, in spite of its increasing socialization (Zeitlin & Vanhercke, 2018), economic interests remain the key priority of the monitoring process, which has in the past led to marginal monitoring of the social instruments in the EU (EAPN, 2014). At times, the economic and budget interests have undermined the existing social standards by, for example, pushing for cuts in public expenditure (De Schutter & Dermine, 2016; Menegatti, 2017).

[16] Note that because of the Covid-19 pandemic, the current European Semester is somewhat exceptional to coordinate with the Recovery and Resilience Facility.

[17] Note that since 2015, in February the Commission publishes Country Reports, which are important insofar as only issues reported in these reports can later be addressed in the CSR.

To the end of quarantining social interests and boosting an equilateral triangle some have proposed a Social Imbalance Procedure which would aim at tackling asymmetries between the economic and the social dimension of the EU by identifying and targeting excessive social imbalances (Sabato, Corti, Spasova, & Vanhercke, 2019).

2. Instrumental Power Resources

Complementing the normative resources there are a number of instrumental resources that are meant to empower right-holders to overcome obstacles to access their rights. Among the commonest and more effective instrumental resources facilitating access to rights we find: Quality information and awareness raising, user- friendly application procedures, practical help in filling forms and engaging in direct contacts with pertinent administrations, guidance, counselling, mentoring (Vandenbroucke, et al. 2020). These instruments are not binding but they offer important guidance to different actors including individuals, provide funding or create a common platform for exchange and dialogue between public authorities and stakeholders and compile and assess important developments in the social dimension of Europe. In what follows, we will discuss a number of bodies and agencies that collect information and research and increase awareness regarding social rights in Europe; a number of bodies that provide advice, guidance and at times forms of redress (equality bodies and ELA); forms of funding opportunities; and lastly individual complaint and targeted advice mechanisms.

There are a number of EU bodies, that play an important advisory role in the development of social Europe, gather important information and offer authoritative opinions. This is the case, for example, of the European, Economic, and Social Committee or the Social Protection Committee. Whereas these have a decisive impact on the legal design of new instruments and the monitoring of existing tools, the do not, however, generate individual power resources.

2.1. Agencies: Data collection, training, research.

There are, moreover, a number of decentralised agencies that are distinct legal entities from the EU institutions and are set up to perform specific tasks and support cooperation between the EU and national governments by pooling technical and specialist expertise from the EU and national authorities. Quality of information, guidance and mentoring can play an essential role in raising awareness among different players, including individuals. As such, these agencies can be understood

as a key instrumental resource. In the field of social and employment affairs we find six of these:[18] The European Centre for the Development of Vocational training (**Cedefop**), which helps develop and implement vocational training policies by monitoring labour market policies to assist the Commission, Member States employers' and workers to match training provisions tailored to labour market needs (Regulation 2019/128); The European Agency for Safety and Health at Work (**EU-OSHA**) which provides research on new risks, statistics, tools for management, education and strategic network for the purpose of making European workplaces safer, healthier and more productive (Regulation 2019/126); The European Foundation for the Improvement of Working and Living Conditions (**Eurofound**) that provides evidence-based research for policy on working conditions, quality of life and employment practices (Regulation 2019/127) whose reports have been key for initiatives like the Work/life Balance Directive; the European Insurance and Occupational Pensions Authority (**EIOPA**) that promotes a round regulatory framework and consistent supervisions of insurance and occupational sectors in Europe for the benefit of policyholders, pension scheme members and beneficiaries (Regulation 1094/2010); the European Training Foundation (**ETF**) that, in the context of external action, assists neighbouring countries (a total of 29 partner countries) to strengthen their people's abilities and skills by enhancing vocational educational training (Regulation No 1339/2008); and, lastly, the European Labour Authority (**ELA**). The Role of ELA, goes beyond collecting information and research and as such, it is discussed in the following section.

2.2. Other bodies with powers beyond research

The ELA is the most recent agency and it is an interesting example of instrumental power resource because it is arguably more closely linked to individuals. The mission of ELA includes to facilitate information for individuals and cooperation and exchange of information between Member States, to coordinate and support concerted and joint inspections, to support Member States in tackling undeclared work and mediate disputes between Member States in the application of EU rules on labour mobility and social security coordination (Regulation 2019/1149). As such, the ELA goes beyond an advisory body that assists with the collection of information and training but also serves as a platform for cooperation which may be used as mediation where necessary. Regarding the joint inspections, social partner organisations can bring matters to ELA's attention and consequently, it may suggest Member States to concert a joint inspection. As for mediation, where a dispute cannot be solved by direct contact or dialogue between the Member States party to the dispute, the ELA shall

[18] More about these agencies can be found: https://europa.eu/european-union/about-eu/agencies_en [last accessed 29.01.2022]

launch a mediation procedure upon request of one or more of the parties or at its own initiative, but only with the agreement of all Member States that are party to the dispute. As a resolution, the ELA shall adopt a non-binding opinion (Article 13 of Regulation 2019/1149). In December 2020, ELA established a Working Group on Mediation with experts from the Member States, the Commission, the Administrative Commission and the social partners to establish working methods of the mediation task so that it can be operational by 2022.

Soon the ELA will be in charge also of the **EURES**'s (Regulation 2016/589) European Coordination office which is a different example of instrumental resources that is designed to facilitate free movement of workers through a European cooperation network. This network helps jobseekers find employment and employers recruit from all over the EU. The EURES services include a portal to match job vacancies and CVs, information and guidance, specific support for frontier workers and employers in cross-border regions and support specific groups through the EURES Targeted mobility Scheme.

There are other agencies or authoritative bodies beyond the employment agencies that might be instrumental in the exercise of power resources. Markedly, national authorities have an obligation to establish **equality bodies** according to EU anti-discrimination law, specifically, Directive 2000/43 (Article 13) on racial and ethnic origin discrimination and, Directives 2004/113 (Article 12), 2006/54 (Article 20), 2010/41 (Article 11), Directive 2014/54 on the enforcement of free movement rights, and recently 2019/1158 (Article 15) on gender discrimination. According to these instruments, Member States shall designate a body for the promotion of equal treatment of all persons without discrimination on the basis of sex, race or ethnic origin. These bodies shall provide independent assistance to victims of discrimination in the pursue of their complaint in addition to conducting independent surveys on discrimination, publishing independent reports and making recommendations on issues regarding discrimination. They shall, moreover, exchange the available information with the corresponding European body.

Equality bodies, therefore, allow individuals to raise claims regarding discrimination in all areas (including employment and access to social entitlements) and have the power to give independent assistance to victims by trained and experienced professionals in cases of discrimination. The exact powers of the equality body ultimately depend on the national legislation but they can: provide legal advice and consultation, assist or represent victims of discrimination in court, mediate and negotiate settlements, bring cases before the court on their own name and in some instances, even act as a court itself with the power to deliver legally binding decisions in cases of discrimination (Commission

Recommendation of 22 June 2018).[19] Where equality bodies have the legal capacity to take binding decisions, the Member State should also grant them the capacity to issue adequate, effective and proportionate sanctions. Regarding the material scope, whereas the Directives cover race and gender discrimination alone, the recommendation encourages Member States to also extend the protection of equality bodies to discrimination on the grounds of religion or belief, disability, age and sex orientation.

2.3. Funding opportunities

There are, moreover, a number of civil organisations and stakeholders that receive EU funding for their activities and are indispensable advocates of social rights in the EU. Particularly, this is the case of the EU Programme for Employment and Social Innovation (EaSI, Regulation 1296/2013) which is a financing instrument to promote high-level of quality and sustainable employment that guarantees adequate access to social protection, combats social exclusion and poverty and improves working conditions. EaSi has since 2021 (and at least until 2031) become a strand under the ESF+ discusses above (Par 1, section 3.3.)

Examples of organisations that benefit from this funding include the European Anti-Poverty Network (EAPN), the European Trade Union Confederation (ETUC) or FEANTSA. Some of these have in the past led successful litigations before international bodies to defend their victims (ECSR, *Feantsa v. NL*). However, European funding does not cover these costs.

As explained above, the ESF+ also supports initiatives associated with the implementation of the EPSR such as the recently adopted child guarantee,[20] which aims ate preventing and combatting social exclusion by guaranteeing the access of children in need to a set of key services, including, early childhood education and care, education (including school-based activities), healthcare, nutrition and housing.This is not funding that individuals can directly apply to, but rather it finances programmes that assist individuals in the realisation of their social rights. Other examples of funding include **SURE** (Regulation 2020/672), in the form of a loan system, and the **FEAD** (Regulation 223/2014) that finance, respectively, unemployment benefit schemes and programmes or actions to provide food and basic material assistance to the most deprived.

[19] A directory of national equality bodies can be found here: https://equineteurope.org/what-are-equality-bodies/european-directory-of-equality-bodies/ [last accessed 29.01.2022]

[20] Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee [2021] OJ *L 223.*

More recently, in the context of Covid-19, the EU adopted NextGenerationEU (**NGEU**),[21] which is also something to welcome from a social Europe point of view. Not only does the general framework aim at 'solidarity and unity', provide a variety of funds for Recovery *and* Resilience – therefore leaving room for improving, updating and strengthening current and future structural challenges- but the Action Plan of the EPSR explicitly refers to using the EU's long-term budget and the NGEU to finance actions to implement the EPSR. In fact, a total of 1,8 trillion euro (in 2018 money) is destined explicitly for sharing solidarity to overcome the crisis and building the next generation EU. There are, however, a couple of sore points to be cautious about, mostly relating to the governance of these instruments through the European Semester. In this vein, it is important to note that the European Semester has temporarily been adapted to coordinate the Recovery and Resilience Facility. Accordingly, Member States have recently presented their Recovery and Resilience Plans which are evaluated by the Commission and who drafts the Country Specific Recommendations on the basis of these. The Multiannual Financial Framework 2021-2017 make access to European Structural Funds conditional upon the respect of macroeconomic priorities. This means that the Commission may ask Member States to re-programme their Operational Programmes (needed to access the funds) when they are not in line with the economic and employment challenges identified in the context of the European Semester and that payment of the Funds to a Member States can be paused when this Member States is not complying with the Macroeconomic Imbalance Procedure and the Stability and Growth Pact.[48] This conditionality was already in place with the previous Multiannual Financial Framework, but the present plans for 2021-2017 reinforce this conditionality. The Recovery and Resilience Facility is no exception to this and its use is conditional to both Country Specific Recommendations and a specific conditionality to ensure a proper investments intended to achieve specific goals. (Corti & Nuñez-Ferrer, 2021))

[21] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2020] OJ L 57; Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative [2020] OJ L 99; Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433I; Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433.

2.4. Problem-solving services

With the exception of the ELA and the equality bodies, the agencies above do not provide individual targeted services or complaint mechanisms. For that purpose, however, the EU also foresees a number of problem-solving services such as SOLVIT and Your Europe Advice. The former, **SOLVIT** (Commission Recommendation of 17 September 2013) is nationally-administered free of charge and mostly online service that deals with problems arising from cross-border situations in which EU law is potentially misapplied by the national authorities. SOLVIT offers a quick and simple procedure to see individual claims resolved. The process is as follows: Individuals submit a problem through the SOLVIT platform and within a week the home centre —there is one centre in each Member State, as well as Norway, Iceland and Lichtenstein— will check whether the problem falls within SOLVIT's remit and will confirm whether or not they accept the case and contact the lead centre (of the country where the problem occurred) and get back with a potential solution within 10 weeks.

Your Europe Advice (Regulation (EU) 2018/1724), works closely with the SOLVIT network, but different from SOLVIT it provides targeted information, rather than solutions, and is not limited to cross border situations. Instead, Your Europe Advice provides free and personalised advice in any EU official language within a week, clarifies the application of EU law and explains how individuals can exercise their rights. This service is provided by the European Citizen Action Service and consists of 65 lawyers who cover not only all EU official languages but that they are familiar with both EU law and national laws. Where the advice provided is considered insufficient, Your Europe Advice may refer the case to SOLVIT, as a means to finding a solution. Any European citizen or citizen from the EEA as well as family members of citizens or residents in an EU country may request these services. Businesses in the EU may also access Your Europe Advice.

These services, thus, are essential for individuals to access their rights in as far as they provide personalised information and guidance about particular situations and may even provide solutions to specific problems through a network of cooperation between Member States.

3. Enforcement Power Resources

The third and final individual power resource identified by the deliverable WP 2.1. refers to enforcement. In this vein, enforcement power resources seek to guarantee the compliance of legal obligations and they typically manifest in the form of judicial procedures and channels for dispute settlements. Without these safeguards, rights are not justiciable, which is a necessary condition for the existence of fully-fledged entitlements (Vandenbroucke, Keune, Corti, & Ferrera, 2021).

Enforcement of EU law is based on a system of cooperation between the Member States and the EU institutions. In this vein, most of the legal regulatory framework in the EU is implemented at the national level through general and specialist bodies such as ministries and inspectorates. Where the implementation of these rights fails, individuals may seek to see their rights enforced. There are on the one hand, non-judicial forms to see their rights fulfilled, such as the equality bodies or SOLVIT discussed above. Alternatively, individuals can also file a complaint before a court when their rights are not respected.

The judicial enforcement of norms allows individuals to bring matters in front of a court and it is thus an important part of enforcement. Concerning the judicial enforcement of EU law, it is important to reiterate that only those rules with direct effect can be invoked before national courts, that is, directly applicable treaty provisions, regulations, directives and decisions. In matters of social and employment law, most rights are enshrined in directives and, as such, most claims surrounding these will relate to the transposition rules and not the directive itself. However, in cases where the directive has not been transposed or it has not been properly transposed, the directive can also have direct effect, though only vertically against the national public authorities and not against third parties. In this vein, the primary responsibility of judicial enforcement is up to the courts of the Member States, which are considered EU courts and have the obligation to implement EU law (Article 19 TEU). EU law shall in fact take precedence over national law because of the principle of **supremacy** (C-43/75 – *Defrenne*). It is also in the best interest of the applicants to bring their complaints before a national court since national courts are the ones with the power to annul or disregard national decisions and compensate individuals for losses as a consequence of breaches of EU law. If, when implementing EU law, the national court has questions regarding the validity or interpretation of EU law, Article 267 TFEU establishes the **preliminary ruling** procedure, which allows national courts to refer questions to the CJEU for the purpose of ensuring a uniform application of EU law. Upon receiving the preliminary ruling, the national court decides on the case on the basis of the preliminary ruling. Because preliminary rulings leave the final application to national courts, how EU law is ultimately applied can vary considerably from case to case depending on the discretion granted to the national courts. For instance, the CJEU has laid down the principle that indirect discrimination is justifiable on objective grounds, which must, however, comply with the general principle of proportionality.

Similarly, issues regarding EU law arise in all Member States, but not all national courts use the preliminary procedure equally, which may raise problems of an uneven application of EU law and that not all individuals are protected equally.

When Member States are not implementing EU law adequately there are some other enforcement mechanisms that involve (judicial) proceedings against Member States. In this vein, it is the prerogative of the Commission to oversee a proper implementation of EU law, and when Member States fail to implement EU law appropriately, it may launch an **infringement procedure**. Article 258 TFEU gives the Commission broad powers to bring infringement proceedings against Member States when there is a presumption that the Member State is breaching its obligations under EU law. Whereas the Commission has the dominant role in detecting, monitoring and initiating infringements procedures, it shall be noted that the ultimate authority in most aspects remains the CJEU, that will decide whether there is a violation, what the penalty should be or whether the infringement has been terminated.

The Commission initiates proceeding on its own on the basis of information received by various sources such as press, questions of the European Parliament, databases or complaints raised by individuals or other complainants. Note that while the Commission has often acknowledged that citizens' complaints are an important source to initiate proceedings, and that the complaint system is an important instrument of a participatory Union, this complaint mechanism should not be seen as the primary form of redress since the Commission has the discretion to initiate proceedings. The Commission also monitors the implementation of directives in national legislation and it can launch an infringement proceeding against a Member State when this has not (correctly) implemented a directive into its legislation.

The infringement procedure builds on several steps. First, there is an initial pre-contentious stage that allows Member States to explain their position and reach an accommodation with the Commission. Second, if the matter is not sufficiently clarified informally, the Commission formally notifies the Member State with a letter about the specific infringement. Usually, Member States have two months to reply to this letter and within a year, the Commission ought to decide whether to close the case or to proceed. If it decides to proceed, the Commission will issue a reasoned opinion setting out the grounds for infringement. This reasoned opinion marks the beginning of the period for a Member State to comply with the necessary changes if it wants to avoid judicial proceedings. This is the last step. When Member States have not complied sufficiently with the reasoned opinion, the Commission may refer the matters to the CJEU.

The Commission may also initiate proceedings against a Member State for lack of compliance with a previous ruling of the CJEU pursuant to Article 260 TFEU. This provision also allows the CJEU to impose a penalty payment for those Member States who have failed to comply with a previous judgment.

In 2019, the Commission had a number of ongoing proceedings for infringements on free movement of workers, social security coordination and/or posting of workers against Austria, Cyprus, France, Ireland and Romania. In the case of Austria, the Commission initiated proceedings because Austrian legislation makes family benefits and family tax reductions paid for children residing in another state dependant on the cost of living of that Member State which, according to the Commission, is discriminatory. The rest of the proceedings concerned the failure to transpose the obligations of Directive 2014/50 on supplementary pension rights. However, after being notified, the Member States complied with the obligations and thus the Commission closed the proceedings after conducting an assessment (Commission, 2020b).

Far less commonly, Member States may also bring another Member State before the CJEU (Article 259 TFEU). In this case, the procedure is quite similar to the above, with the difference that the Member State does not have to contact the Member States subject to the complaint, although the matter needs to be brought before the Commission. After that the procedure is relatively the same, although both states must be heard and have the opportunity to make submissions for the reasoned opinion. In this case, the complainant state may bring the case before the CJEU regardless of whether the Commission considers that there is a violation This use of the infringement procedure is rare, undoubtedly because Member States usually prefer to resolve conflicts amicably and in a diplomatic way. There have, however, been past instances (C-145/04 - *Spain v UK*; C-457/18 - *Slovenia v Croatia*).

A relatively big constraint of this procedure is that the decision of the CJEU is limited to deciding whether there is a violation of EU law or not and cannot, as a consequence, order the adoption of specific measures or dictate the consequences of the judgment. The Court may, however, establish interim measures although only when the circumstances give rise to urgency (279 TFEU). Recently, the Court has even allowed to install sanctions when the interim measures are not being implemented (C-441/17 - *Commission v Poland*).

A different source of direct complaints concerns **reviewing the legality of EU law** (Article 263 TFEU). According to these, in order to challenge a certain act, five conditions need to be fulfilled. First, the relevant body must be amenable to judicial review, which includes the Council, the Commission, the Central Bank, the Parliament, the European Council or EU bodies, offices or agencies intended to produce legal effects against third parties. Second, the act has to be of a kind which is open to challenges. This includes regulations, decisions and directives. Third, the institution or person must have the standing to challenge an act. Here, a distinction needs to be drawn between privileged, quasi-privileged and non-privileged applicants. The former refers to the Member States, the Commission, the Parliament and the Council that may bring up a case at any time regardless of whether the given

act is addressed to them. Quasi-privileged applicants include the Central Bank, the Committee of Regions and Court of Auditors, that may challenge the act so that they can defend their prerogatives. Non-privileged applicants refer to any natural or legal person who can complain directly to the Court. This is seemingly a broad scope, but non-privileged applicants may only challenge acts under strict conditions that allow only those applicants who are affected by the decision

> 'by reason of certain attributed which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed' (C-25/62 – *Plaumann*)

This has considerably limited the possibility for individual applicants or organisations to directly challenge any act. Indirectly, individuals can still file a complaint before a national court, which has the obligation to refer a preliminary reference to the CJEU, inquiring about the compatibility of the secondary legislation with the primary legislation (C-314/85 – *Foto-Frost*). What would also be possible, for example, it that the social partners would use this procedure as a last resort when their role in the legislative process has not been respected, by for example, not consulting them prior to a Commission proposal based on the social competences (see Part I). Fourth, there must be an illegality of the type mentioned in Article 263(1) TFEU which establishes that an act might be challenged on the grounds of competence, infringement of an essential procedural requirement of the Treaties or any rule of law relating to their application or to the misuse of powers. And lastly, the challenge must be brought up before the time limit of two months from the date of publication or notification to the plaintiff.

Recently, Hungary and Poland challenged the revised posting of workers directive for annulment on the grounds of lack of competence. In these cases, the two Member States argued that the Parliament and the Council had adopted the directive on the wrong basis (Article 56 TFEU on the free movement of services) and that, instead, because of its social objective, the directive should have been adopted on the basis of Article 153 (1)(b) TFEU on working conditions. The Court, however, dismissed these actions for annulment and confirmed that the legislator may take a reassessment of the interests of undertakings exercising their freedom to provide services and the interests of the workers in order to ensure that there is a level playing field among the Member States (C-620/18 - *Hungary v Parliament and Council*; C-626/18 - *Poland v Parliament and Council*).

Over the years, the CJEU has delivered an immense amount of cases in social policy and aspects that affect social policy and thus, its impact on the interpretation and extend of social policy in the EU has been enormous. This Working Paper cannot, as has not the objective to, cover and evaluate the exact

impact of the case law of the CJEU on social policy. It suffices to say that overall, few would refute that the Court has been a guardian of social policy. This is particularly in areas of employment and discrimination and especially regarding working conditions and gender discrimination. However, the precise impact of its interpretation has varied greatly from contexts and areas of law as well as the timing of the judgment (Absenger & Blank, 2018). In most areas covered by EU law, the Court has traditionally been, and remains, rather proactive. Nevertheless, notwithstanding this bigger positive picture, there are a number of sore points for which the Court has been criticised in its interpretations *vis-à-vis* social policy. One of these, refers to the free movement and access to welfare of non-economically mobile citizens. Traditionally, the CJEU was perceived as a great ally to social rights as it provided a rather expansive interpretation of free movement and citizenship resulting in the entitlement of many citizens to welfare in another Member State (Verschueren, 2015; Mantu & Minderhoud, 2017). This expansive interpretation, however, has slowed down, if not completely overturned (O'Brien, 2017), in the last years (O'Brien, 2016; Phoa, 2018; Jesse & Carter, 2020). Some argue that this is strictly linked to the cases (Davies G. , 2018), others that it relates to the political context, the increased fear of social tourism (Blauberger, et al., 2018) and the influence of national authorities (Gago & Maiani, 2021).

Whereas most agree that, even if it has been slowed down over the years, the case-law on free movement of workers and citizenship has opened the doors to the welfare state of other Member States, other areas of the internal market have prevailed over social rights, often to the detriment of the later. Point and case are the cases of *Viking* and *Laval* (Davies A. , 2008; Bucker & Werner, 2010; De Vries, 2013; Freedland & Prassl, 2014) or *Alemmo Herron* and *AGET* in the context of the freedom to conduct business (Garben, 2020). In parallel, many have criticised the restrictive interpretations of the CJEU in the context of the austerity and ESM (Barnard, 2013; Koukidaki, 2014; Kilpatrick, 2015; Garben, 2018) while others have praised the protective role of the Court in areas where EU competence is scarce (Lenaerts & Gutiérrez-Fons, 2017). Differently, other authors have drawn positive social evolutions from other areas of law (Muir, 2018), such as non-discrimination, although some cases with regard to religious discrimination and the use of headscarves has been broadly condemned (C -157/15 -*Achbita*; C-188/15, *Bougnaoui*; Howard, 2017; Vickers, 2017).

What is indisputable is that the role of the CJEU in how it has interpreted different areas of EU law has a great impact on social rights, whether positive or negative. Some have even argued that the case law of the CJEU has influenced European politics and the role of the legislator in the EU (Martinsen, 2015). All in all, the role of the CJEU is an essential piece in the puzzle comprising EU social rights.

CONCLUSIONS

The regulatory policy framework of the EU is highly fragmented and, as a result, so are the power resources that the EU offers to individuals. While piecing together the puzzle of these power resources is no easy task, from the above it should be clear that at the EU level there are diverse power resources that entitle individuals to, *inter alia*, claim-rights, a seat at the table, information, and the possibility to be heard as well as to be advised on complex situations. These power resources come with a number of limitations, not the least that much of what comprises social rights is still dealt with by national authorities. To the end of delineating the contours of what we understand as the social dimension of the EU, this Working Paper has first analysed the social competences and then broken down the power resources offered by the EU.

As regards normative resources, we have first discussed deontic instruments that guide actions of the Union but that are not directly justiciable. We have also explored legally binding instruments and their application, procedures to be adopted and how they relate to social policy. This was followed by a section on soft-law instruments that fulfil different functions in the EU, some being programmatic, others providing guidance or assistance towards the achievement of a certain goal.

Normative instruments are complemented by instrumental resources that (partly) assist individuals in accessing their rights. At the EU, most of these instruments take the form of bodies or agencies that facilitate research and information, thereby raising awareness among individuals and national actors. Arguably the most functional of these bodies are those that also provide the opportunity for individuals to raise claims and initiate proceedings with the assistance of experts. This is most clearly the case of the equality bodies, which may even provide for binding opinions and have the power to resolve disputes. In addition, there are also problem-solving mechanisms for individuals to get tailored information and solutions to specific problems in cross-border situations. Funding too, can have an important impact on making rights accessible to individuals by either financing relevant organisations or programmes.

Lastly, when rights are not properly implemented, individuals can seek redress before national courts, which should enforce their rights in compliance with EU law and apply the directly applicable EU provisions. National courts must ask preliminary questions to CJEU in case of necessary clarifications to ensure consistency and a proper application of EU law. Individuals may also raise individual complaints before the Commission, which has the discretion to initiate infringement procedures against a Member State when EU law is not correctly implemented.

All in all, there are abundant power resources available at the EU. Whereas this certainly adds to the plethora of resources available to reach an enhanced standard of living, the more is not always the merrier, and the abundancy of resources is paired with increased complexity. As a consequence, it is not always clear how these instruments interact with each other and what the hierarchy between them is —perhaps with the exception of the binding instruments.

From a legal point of view, what is most daunting is that in spite of an ample social dimension in the EU that covers virtually every aspect of social policy, a relatively marginal part of it is translated into claim-rights. Those that are, refer mostly to instruments on safety and health at work and working hours. In other words, for the most part, the social dimension of the EU takes the form of either deontic instruments or soft-law (Alcidi & Corti, 2022), which makes most of the existing dimension non-justiciable for individuals. These sources play a different role of, *inter alia*, cooperation, cohesion and convergence, but they cannot be said to bring legally enforceable rights to individuals. From an individual-power-resource standpoint, this can be rather disappointing.

This is not to say that social rights are non-enforceable, but rather that this task is often left to the Member States and their national legislations. However, if 'citizenship constitutes a set of fundamentally equal civil rights and obligations *regardless* of one's social status or income' (Marshall, 1950), for individuals to fully take advantage of citizenship this needs to be paired with a proper set of social rights (Börner, 2020). EU citizenship should not be an exception in this regard.

Subsequently, it can be argued that to genuinely enjoy European citizenship, social rights must be more tangible to individuals, which supports the idea that more justiciable social rights are necessary also beyond the realm of cross-border and/or discriminatory situations. To this end, the first part of this working paper elaborates on the limitations, yes, but also possibilities of EU competences in social policy. Part 1 is illustrative of the possibility to keep expanding the current social acquis —though not in all areas of social policy— and ultimately provide for more power resources in the form of claim-rights in the years to come, by exploiting the current resources and further exercising the competences of the Union.

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